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April 11, 2012

VIA ELECTRONIC MAIL

Barcy McNeil, Secretary
180 East Broad Street, 11th fl.
Columbus, Ohio 43215

RE: Case No. 10-2929-EL-UNC; Correction to pleading

Dear Madame Secretary:

Attached is a corrected filing that will be served with this letter to all parties in the above referenced case. For clarity, Footnote 3 in the Memorandum supporting the Motion to Dismiss filed on April 10, 2012, is revised to reference the Reliability Assurance Agreement.

If you have any questions, please contact me at 614-719-2855.

Sincerely,

/s/ Frank P. Darr

McNEES WALLACE & NURICK LLC

/Attachment
cc: Parties of Record

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MOTION TO DISMISS OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Rule 4901-1-12, Ohio Administrative Code ("OAC"), Industrial Energy User-Ohio ("IEU-Ohio") moves to dismiss this proceeding by which Ohio Power Company ("OP")[1] seeks to set a formula based rate for capacity on the basis that the Public Utilities Commission of Ohio ("Commission") lacks statutory authority to set such a rate for generation capacity service sold to Competitive Retail Electric Service ("CRES") providers in OP's service territory. The reasons supporting this Motion are set out in the accompanying Memorandum.

Respectfully submitted,

/s/ Frank P. Darr

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[1] Columbus Southern Power Company ("CSP") was merged with OP after the start of this proceeding. For purposes of this Motion and Memorandum in Support, "OP" refers to the post-merger electric distribution utility ("EDU").

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REVISED MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

In this proceeding, OP seeks authorization to establish a formula based pricing method for generation capacity service sold to CRES providers within OP's service territory. The Commission's authority to authorize a utility to bill and collect rates is set by statute, and nothing in Ohio law authorizes the Commission to set a price for capacity as requested by OP in this proceeding.

I. BACKGROUND

Capacity transactions between OP and a CRES provider are sales for resale.[2] As a result, capacity pricing methods that OP seeks to impose are governed by the rules of PJM Interconnection, LLC ("PJM") under the federally approved Reliability Assurance Agreement ("RAA"). The rules create an organized capacity market generally referred to as the Reliability Pricing Model ("RPM") and are embodied in PJM's open access transmission tariff. The RPM rules require a load-serving entity ("LSE") to obtain or arrange for adequate capacity (in the form of qualifying generation or demand response resources) to meet PJM's forecasted peak demand, including a reserve margin. To price capacity resources, the RPM also features a centralized

[2] Tr. Vol. XII at 2184 (Cross-examination of Philip Nelson).

capacity auction in which generation and demand response resources are cleared or matched to forecasted load based upon prices offered by qualifying resources three years prior to a June to May delivery year.

An LSE such as an investor owned utility that can satisfy its unforced capacity obligation may elect to operate outside the RPM auction process through the Fixed Resource Requirement Alternative ("FRR Alternative"). An LSE electing the FRR Alternative is known as a Fixed Resource Requirement Entity ("FRR Entity"). To establish the compensation paid by CRES providers to the FRR Entity that elects the FRR Alternative, Section D.8 of Schedule 8.1 of the RAA provides, in relevant part:

> In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. 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 the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, 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, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.[3]

OP and CSP[4] elected to operate as FRR Entities for the 2007-2008 delivery year and thereafter. As FRR Entities, they charged CRES providers the RPM auction price.[5]

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[3] RAA, Schedule 8.1., Section D.8.

[4] Since the initiation of this proceeding, OP and CSP have merged. For purposes of this pleading, references are to the surviving legal entity, OP.

[5] Prefiled Testimony of Richard Munczinski at 5 (Aug.31, 2011).

In late 2010, however, American Electric Power Service Corp. ("AEPSC"), on behalf of OP, requested that the Federal Energy Regulatory Commission ("FERC") approve formula rates as the basis for establishing the capacity charges that would be levied upon CRES providers in Ohio.[6] The proposed move to a formula rate approach from an auction-based clearing price approach would have significantly increased capacity charges to CRES providers.[7]

In response to AEPSC's FERC filing, the Commission initiated this proceeding by an Entry, on December 8, 2010.[8] In that Entry, the Commission found that an investigation was necessary to determine the impact of the proposed change to capacity pricing contained in an Application AEPSC had made to FERC to implement a formula- or cost-based charge that CRES providers would be charged for capacity used to serve shopping customers in OP's service territory. In addition to calling for comments, the Commission also adopted the RPM pricing mechanism as the state compensation mechanism under Section D.8 of Schedule 8.1 of the RAA.[9]

Following a comment cycle, the Commission set this matter for hearing by Entry, on August 11, 2011. In that Entry, the Commission set a procedural schedule "in order to establish an evidentiary record on a state compensation mechanism."[10] The Entry further provided that "[i]nterested parties should develop an evidentiary record on the

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[6] *American Electric Power Service Corporation*, Case No. ER11-2183-000 (Nov. 24, 2010).

[7] Comments of Industrial Energy Users-Ohio at 4 (Jan. 7, 2011).

[8] Entry at 1 (Dec. 8, 2010).

[9] *Id*. at 1-2.

[10] Entry at 2 (Aug. 11, 2011).

appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism."[11]

Before the hearing commenced, however, OP filed a Stipulation and Recommendation ("Stipulation") that proposed a two-tiered capacity pricing scheme.[12] Following extensive hearings, the Commission initially approved the pricing scheme with modifications.[13] In response to Applications for Rehearing, however, the Commission determined that the Stipulation was not in the public interest and rejected it in an Entry on Rehearing.[14] In the Entry on Rehearing, the Commission directed OP to implement "an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case."[15] OP, however, moved for a Commission order to establish the Pricing Scheme on an interim basis on February 27, 2012, and the Commission granted the Motion on March 7, 2012.[16]

On March 27, 2012, IEU-Ohio filed an Application for Rehearing of the March 7, 2012 Entry. In its Application for Rehearing, IEU-Ohio noted that the Commission does not have the state statutory authority to adopt a rate for capacity other than that resulting from market pricing under state law.[17] In its Memorandum Contra, OP apparently does not disagree with IEU-Ohio because OP does not raise any response

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[11] *Id.* at 2.

[12] Stipulation (Sept. 7, 2011).

[13] Opinion and Order at 54-55 (Dec. 14, 2011).

[14] Entry on Rehearing (Feb. 23, 2012).

[15] *Id*. at 12.

[16] Entry (Mar. 7, 2012).

[17] Industrial Energy Users-Ohio's Application for Rehearing of the March 7, 2012 Entry and Memorandum in Support at 10-15 (Mar. 27, 2012).

to IEU-Ohio's jurisdictional argument.[18] Before the Commission and the parties exhaust further resources on a proceeding outside the Commission's subject matter jurisdiction, the Commission should dismiss this matter.

II. ARGUMENT

The Commission's rate setting authority is governed by statute.[19] Although the Commission has recently asserted that it has authority to set generation capacity service prices,[20] state law authorizes the Commission to set rates for two types of retail electric services: non-competitive ones and the standard service offer ("SSO"). Under the applicable law, this case is not properly before the Commission whether the generation capacity service is treated as a noncompetitive or competitive service.

Chapter 4928, Revised Code, establishes that the provision of retail electric service is comprised of non-competitive and competitive services.[21] If the retail electric service is non-competitive, the Commission's authority is defined by Chapters 4901, 4909, 4933, 4935, and 4963, Revised Code.[22] Further, rate setting for noncompetitive

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[18] Memorandum Contra of Ohio Power Company to Industrial Energy Users-Ohio's March 27, 2112 Application for Rehearing (Apr. 6, 2012). In a separate filing, OP has once again indicated that it believes FERC has exclusive jurisdiction to set capacity rates. Testimony of Richard Munczinski at 3 (Mar. 23, 2012). The Commission need not reach this issue based on the argument presented by IEU-Ohio.

[19] *Lucas County Commissioners v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 347 (1997) ("The commission may exercise only that jurisdiction conferred by statute.").

[20] *American Electric Power Service Corporation*, Case No. ER11-2183-000, Motion for Leave to Answer and Limited Answer Submitted on Behalf of the Public Utilities Commission of Ohio to PJM Interconnection, L.L.C. Response to AEP Motion for Expedited Ruling at 3 (Mar. 22, 2012). A separate issue is raised regarding whether the Commission is preempted from setting a capacity rate. The Commission, however, need not address that issue if it determines that state law does not provide the necessary rate making authority to set the rate under the current legal and factual posture of this case.

[21] Section 4928.05(A), Revised Code.

[22] Section 4928.05(A)(2), Revised Code. Under Chapter 4909, Revised Code, a utility can make a "first filing" for a new service to establish a rate and the Commission may approve the application without a hearing. Section 4909.18, Revised Code. If the Commission determines that the application is an application to increase rates, the Commission must follow the rate base rate of return method to evaluate

services under Sections 4909.18 and 4909.19, Revised Code, entails extensive mandatory procedural requirements (*e.g.*, pre-filing notice, application, and staff report[23]) and a Commission determination that the resulting rates are just and reasonable.[24] Rates for any particular service would need to be addressed in the context of a total revenue requirement for non-competitive services that remain subject to the Commission's rate setting authority.[25]

Other retail electric services are defined as competitive. Under Section 4928.03, Revised Code,[26] retail electric generation,[27] aggregation, power marketing, and power brokering are "competitive services."[28] For competitive services, the Commission is without authority to set the prices by traditional economic regulation, and supervision of competitive retail electric services are not within the Commission's jurisdiction under

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the utility's revenue requirement (in total) and determine if additional compensation is warranted. Traditional ratemaking does not allow the Commission to adopt transition-to-market or glide path pricing.

[23] Section 4909.18, Revised Code.

[24] Section 4909.15(D), Revised Code.

[25] *Id*.

[26] This section also requires that consumers and suppliers to consumers be provided comparable and non-discriminatory access to non-competitive services. So even if generation capacity service was a non-competitive service, it would have to be available on a comparable and non-discriminatory basis to all consumers and suppliers to such consumers.

[27] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 16 (Jan. 11, 2012).

[28] The Commission has authority to declare more services, including ancillary services, competitive under Sections 4928.04 and 4928.06, Revised Code, and gives the Commission authority to make sure the services that it declares to be competitive are provided at just and reasonable rates once it determines that there has been a decline or loss of competition with regard to such services declared to be competitive by the Commission. The Commission has no such authority with regard to retail generation service, aggregation, power marketing or power brokering since these services are declared competitive by statute.

Chapter 4909, Revised Code[29] and other specified Chapters except as specifically identified in Section 4928.05, Revised Code.

The only exception that permits the Commission to authorize prices for a competitive service concerns the SSO. The SSO is defined to include "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."[30] The only time an electric distribution utility ("EDU") can directly supply retail generation service is when it is the default supplier (the customer is not served by a CRES provider including a governmental aggregator).[31] The only source of the Commission's authority to price default generation supply is provided by Sections 4928.141, 4928.142, and 4928.143, Revised Code. Further, an EDU must comply with various procedural requirements for approval of an SSO.[32]

The division of competitive and non-competitive services under state law also dictates how and when an EDU can offer to provide a competitive service. Section 4928.17, Revised Code, states that:

> [N]o electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the

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[29] Since the Commission has no jurisdiction under Chapter 4909, Revised Code, it is logical to argue that it has no authority to entertain a "cost-based" rate. AEP has previously argued and the Commission has previously held that Ohio's restructuring legislation made cost-based analysis irrelevant.

[30] Section 4928.141, Revised Code.

[31] Section 4928.05(A)(1), Revised Code, provides an exception to the finding that retail electric generation service is fully competitive.

[32] Sections 4928.142 and 4928.143, Revised Code.

> utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
>
> (1) **The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility,** and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
>
> (Emphasis added.)

The statutory scheme provided by Ohio law leads to two possible treatments of capacity sold to CRES providers if the Commission is not preempted from setting capacity prices applicable to CRES providers. If capacity service is a non-competitive service, then OP must initiate a rate case under Section 4909.18, Revised Code, and comply with the applicable filing requirements. The Commission, furthermore, cannot approve a rate increase for the service unless it finds that the rates are just and reasonable in relation to a total revenue requirement. OP, however, has satisfied none of the substantive or administrative requirements of Chapter 4909, Revised Code, to initiate a ratemaking process, and the Commission has not proceeded on the application to increase the capacity price in the manner required by law (*e.g.*, issuance of a staff report, an opportunity to file objections, hearing).

If capacity generation service is a competitive service, it must be provided by an appropriate affiliate under a corporate separation plan, and market pricing must prevail unless such service is provided as part of an SSO. Although capacity generation service is a component of retail generation service that may be a part of the SSO, it is

not by definition the default service.[33] Moreover, if capacity generation service could be sold by an EDU through an SSO, various procedural requirements would have to be satisfied before the Commission could approve the SSO. OP and the Commission, however, have not attempted to satisfy those requirements. Alternatively, if capacity generation service is not a default service subject to the provisions governing the SSO, then capacity rates are completely outside the rate setting authority of the Commission.

In summary, the Commission is without jurisdiction to act as requested by OP in this proceeding. If the capacity generation service is not a competitive retail electric service, OP and the Commission failed to comply with the detailed statutory requirements under Chapter 4909, Revised Code. If capacity generation service is a competitive retail electric service, the Commission has no basis to authorize a capacity price applicable to generation capacity sold for resale to a CRES supplier serving shopping customers in OP's service area to regulate the price under Chapter 4928, Revised Code. Because the Commission cannot legally authorize OP to bill and collect the capacity price for generation capacity service sold to a CRES supplier for resale to shopping customers in OP's service area under either Chapter 4909 or 4928, the Commission does not have subject matter to proceed, and this matter should be dismissed. As a result, the Commission must direct OP to immediately cease billing and collecting any price for capacity sold to a CRES supplier for resale to shopping customers in OP's service area except the capacity price established in accordance

[33] The SSO is defined as "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Section 4928.141(A), Revised Code.

with PJM's capacity rates and should return to the levels set by the RPM pricing mechanism.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Dismiss of Industrial Energy Users-Ohio and Memorandum In Support,* was served upon the following parties of record this 11th day of April 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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Summary: Letter of Notification regarding correction to Motion to Dismiss electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio