

FILE

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

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REPLY MEMORANDUM IN SUPPORT OF MOTION FOR EXTENSION

On April 30, 2012, Ohio Power Company (dba AEP Ohio) filed a motion to extend the interim capacity pricing period and freeze the current capacity charges. Specifically, AEP Ohio seeks to freeze current capacity prices being charged under the interim plan outlined in the Commission's March 7, 2012 Entry, whereby the first 21 percent of each Ohio Power Company customer class (as well as all customers of governmental aggregations approved on or before November 8, 2011) is entitled to tier-one pricing at \$146/MW-day and the second-tier charge for capacity is set at \$255/MW-day. The extension is necessary because it is likely that the Commission will not complete this proceeding in time and establish its ultimate capacity price mechanism by May 31st, when the RPM price for capacity will plunge well below AEP Ohio's capacity costs.

Notably, on May 8, 2012, the Ohio Energy Group filed a brief stating that it did not oppose AEP Ohio's requested extension for 60 days until the end of July. In its brief, OEG noted that "AEP Ohio's request is reasonable to the extent that implementing a different capacity

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pricing scheme for a short period of time may only exacerbate the current uncertainty and customer confusion surrounding AEP Ohio's capacity pricing."¹

FirstEnergy Solutions Corp. (FES), Industrial Energy Users-Ohio (IEU), The Ohio Manufacturers' Association (OMA), Duke Energy Commercial Asset Management, Inc. (DECAM), Duke Energy Retail Sales, LLC (DERS), Exelon Generation Company, LLC, Exelon Energy Company, Inc., Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., Ohio Consumers' Counsel ("OCC"), and the Retail Energy Supply Association ("RESA") (collectively, the opposing parties) filed memoranda contra AEP Ohio's motion for extension. To a great extent, the opposing parties advance the same arguments now that these parties made in opposition to AEP Ohio's February 27, 2012 motion for relief.

For example, FES and IEU repeat the following claims: the motion is an untimely application for rehearing²; AEP Ohio seeks emergency rate relief³; there is no credible evidence of confiscatory impact⁴; AEP Ohio had "banner" earnings and its "doomsday" projections if the Commission orders a flash cut to RPM are overstated⁵; there is no record support for an existing interim mechanism or RPM rate, let alone an extension⁶; and all other Ohio generators pay RPM, why shouldn't AEP Ohio⁷.

¹ (See OEG's May 8, 2012 memorandum in response at 1-2.)

² (See FES/IEU's May 3, 2012 memorandum contra at pp. 5-6; FES's February 29, 2012 memorandum contra at pp. 4-5.)

³ (See FES/IEU's May 3, 2012 memorandum contra at pp. 7-8; FES's February 29, 2012 memorandum contra at p. 5.)

⁴ (See FES/IEU's May 3, 2012 memorandum contra at pp. 5-6; FES's February 29, 2012 memorandum contra at pp. 4-5; IEU's March 3, 2012 memorandum contra at pp. 12-15.)

⁵ (See FES/IEU's May 3, 2012 memorandum contra at pp. 7-12; FES's February 29, 2012 memorandum contra at pp. 6-8; IEU's March 3, 2012 memorandum contra at p. 14.)

⁶ (See FES/IEU's May 3, 2012 memorandum contra at pp. 7-10; FES's February 29, 2012 memorandum contra at pp. 7; IEU's March 3, 2012 memorandum contra at p. 19.)

⁷ (See FES/IEU's May 3, 2012 memorandum contra at pp. 11-12.)

The Constellation/Exelon parties oppose AEP Ohio's requested extension by repeating verbatim the unsuccessful refrain from their March 5, 2012 memorandum contra that "AEP Ohio has been on notice since December 8, 2010 that it is required to charge RPM-based prices for capacity to competitive electric suppliers."⁸ The OCC repeats its previous (and equally unsuccessful) assertion that the Commission lacks jurisdiction to grant the requested relief, because AEP Ohio failed to file an application for rehearing.⁹ The Duke entities merely weigh in on the opposing side of AEP Ohio's requested extension without adding any substantive arguments. OMA largely does the same thing but adds a couple of misguided points, which will be further addressed below.

The Commission has already considered and rejected the opposing parties' arguments in its March 7th Entry as follows:

- "Our subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief." March 7th Entry at ¶22
- "[T]he Commission is [] vested with the authority to modify the state compensation mechanism established in our December 8, 2010, entry in this case." *Id.* at ¶23.
- "As we noted in the entry establishing the state compensation mechanism, the Commission approved retail rates for AEP-Ohio in its first ESP proceeding. These retail rates included the recovery of capacity costs through provider-of-last-resort (POLR) charges to certain retail shopping customers based upon the

⁸ (*Compare* Constellation/RESA March 5, 2012 memorandum contra at p. 6 with Exelon/Constellation May 7, memorandum contra at p.6.)

⁹ (*Compare* OCC's March 5, 2012 Memorandum Contra at p. 3 with OCC's May 7, 2012 Memorandum Contra at p. 6 (relying, in both instances, on a motion for clarification that AEP Ohio filed in Case No. 05-376-EL-UNC.)

continuation of the current capacity charges established by the three-year capacity auction conducted by PJM under the current FRR mechanism. Further, the Commission established, as the state compensation mechanism, the current RPM rate established by the PJM base residual auction.” *Id.* at ¶24 (citations omitted).

- “However, on remand from the Supreme Court, the Commission eliminated the POLR charges. *Therefore, AEP-Ohio is no longer receiving any contribution towards recovery of capacity costs from the POLR charges. Further, evidence presented in this proceeding in support of the ESP 2 Stipulation claimed that RPM rates for capacity are below AEP-Ohio’s costs to provide such capacity. As we have previously noted, the evidence in the record indicates a range of potential capacity costs from a low of \$57.35/MW-day (FES Ex. 2 at 5) to a high of \$355.72/MW-day, as a merged entity (AEP-Ohio Ex. 3 at 10). Moreover, when retail customers switch to competitive suppliers, AEP-Ohio cannot take full advantage of the opportunity to sell into the wholesale market as any margin on off-system sales much be shared with other AEP affiliate companies under its current Pool Agreement and in many instances is flowed through to customers of non-Ohio AEP utility affiliates. The Pool Agreement was last amended in 1980 and did not contemplate current circumstances. Until the Pool Agreement is modified, it places AEP-Ohio in a position different from other Ohio Utilities.*” *Id.* at ¶25 (citations omitted) (emphasis added).
- “Accordingly, we find support in the record that, as applied to AEP-Ohio for the interim period only, the state compensation mechanism could risk an unjust and

unreasonable result. Therefore, the Commission implements the two-tier capacity pricing.” Id. at ¶26 (emphasis added).

- “Our decision today temporarily modifying the state compensation mechanism will allow the Commission to fully develop the record to address the issues raised in this proceeding.” *Id.*

Nothing has changed to affect the Commission’s rejection of the arguments in the memoranda contra other than the fact that the opposing parties now recycle them to oppose an extension of the interim period. In fact, the “unjust and unreasonable result” the Commission sought to avoid when it established the interim period is further supported in the record. Since its March 7th Entry, AEP Ohio has submitted evidence in the record demonstrating that its capacity costs are \$355/MW-day, even though RPM capacity pricing will soon drop substantially (\$20/MW-day), and AEP Ohio will suffer dire financial impacts as a result of the confiscatory RPM pricing and likely shopping that will result from it. As the Commission noted in its March 7th Entry, “*the evidence in the record indicates a range of potential capacity costs from a low of \$57.35/MW-day (FES Ex. 2 at 5) to a high of \$355.72/MW-day, as a merged entity (AEP-Ohio Ex. 3 at 10).*” *Id.* at ¶25 (emphasis added). Neither FES nor any other party has either provided evidence that AEP Ohio’s capacity costs are lower than \$57.35/MW-day or that RPM pricing on June 1st will be above that point. In fact, even FES witness Lesser testified that AEP Ohio’s capacity costs are above \$20/MW-day. The reasons underlying the Commission’s decision to reject the arguments in the opposing parties’ memorandum contra AEP Ohio’s initial motion still exist, and those arguments similarly lack merit as applied to AEP Ohio’s motion for extension.

For example, the argument that AEP Ohio’s request for a price freeze amounts to an untimely rehearing request is no more valid here than when the opposing parties argued that AEP

Ohio's original motion for relief was an untimely rehearing request relating to the Commission's February 23 decision to reject the Stipulation. The fact that the Commission placed an expiration date on its interim relief does not in any way prevent the Commission from subsequently granting additional relief or extending the expiration date for the same interim relief. Again, the premise of the interim relief was to carry over until a merit decision was made. The Commission ordered an April evidentiary hearing in the same March 7 Entry that granted the interim relief, in an attempt to reach a merit decision before June 1. The Commission's May 3 Entry, however, recently acknowledged that "granting Staff's request [for delay] affects the schedule in this matter and the Commission's ability to issue a decision on the merits by May 31, 2012...." The fact that a May decision is now unlikely presents a valid and timely basis for the Company to seek to extend the current capacity pricing until a merit decision is made. In any event, the scope of the interim relief does not preclude the Commission from granting additional interim relief as circumstances warrant – without running afoul of the rehearing statute.

As a related matter, the opposing parties argue that the Commission affirmatively and permanently decided that RPM pricing would apply as of June 1. For example, FES, OMA, RESA, and the Duke entities argue that CRES providers were critically relying on RPM pricing as of June 1, based on the interim relief expiration provision. This line of argument collapses under its own weight. The whole notion that the interim pricing established by the Commission has already determined the post-interim pricing is absurd. Should the Commission issue its merit decision in May, the interim pricing would be superseded and the June 1 pricing would not necessarily be based on RPM. Consequently, it is implausible to suggest that the requested interim relief should not be granted because the Commission already determined that capacity pricing will be RPM-based starting June 1. This line of argument by opposing parties in fact

depends entirely on an assumption that the Commission ultimately will adopt RPM pricing and essentially is a request that the Commission predetermine the merits in opposing parties' favor. The Commission established the expiration date and can modify or extend the date it created when, as now, it becomes necessary to do so (especially given that the original expiration date for interim pricing was based on different circumstances where a May decision on the merits was deemed probable).¹⁰

FES makes a hollow claim that AEP Ohio simply wants to earn a greater benefit from its generating facilities than any other generation owner in the PJM market.¹¹ To the extent there are differences between AEP Ohio and other PJM generators, it is because AEP Ohio, at the Commission's encouragement, uniquely opted out of the RPM market and entered into a binding FRR plan, which remains in effect through mid-2015. AEP Ohio is indeed different from other generators because of the FRR and Pool Agreement, which the Commission recognized in its interim relief order.¹² Moreover, the false claim about AEP Ohio having the greatest benefit of any PJM generator is most ironic coming from FES – since FirstEnergy has received a nearly \$7 billion bailout from Ohio ratepayers that subsidized its current capability to earn a profit in the RPM environment. AEP Ohio did not receive a bailout from its ratepayers and has not participated in the PJM markets as an RPM entity.

FES's arguments about financial impact on AEP Ohio are internally conflicting, as it first complains (at 10-11) that AEP Ohio's financial impact claims are unsupported and then also complains (at 11-12) that the Company's attempt to support its claims through an affidavit

¹⁰ RESA's contention that it was "foreseeable" that this case might not be decided before June 1, 2012, (*see* RESA May 7, 2012 memorandum contra at p. 4), is unavailing, as RESA itself has previously acknowledged. (*See* Constellation/RESA March 5, 2012 memorandum contra at p. 7 ("Ninety days may be enough time to complete the review of the State Compensation Mechanism in this proceeding . . .").)

¹¹ (*See* FES/IEU's May 3, 2012 memorandum contra at p. 2.)

¹² (*See* March 7 Entry at ¶25) ("Until the Pool Agreement is modified, it places AEP-Ohio in a position different from other Ohio Utilities.")

amounts to bad behavior. The other opponents also judge that AEP Ohio's showing of financial harm is not persuasive or convincing. The reality is that the opponents simply disagree with the factual support provided by AEP Ohio and apparently with the Commission's reliance on similar information supporting the original motion for relief. But it is the Commission's job, not that of the opposing parties, to evaluate the facts and consider evidence. When the Commission considered the evidence in granting the interim relief, it found as follows:

AEP-Ohio is no longer receiving any contribution towards recovery of capacity costs from the POLR charges. Further, evidence presented in this proceeding in support of the ESP 2 Stipulation claimed that RPM rates for capacity are below AEP-Ohio's costs to provide such capacity.

Accordingly, we find support in the record that, as applied to AEP-Ohio for the interim period only, the state compensation mechanism could risk an unjust and unreasonable result. Therefore, the Commission implements the two-tier capacity pricing.

(March 7 Entry at ¶¶25-26.) The financial harm issue, while updated in the affidavit that was filed in support of AEP Ohio's motion for extension, is the same as when the Commission issued the March 7 Entry. In fact, the financial impact to AEP Ohio would only be exacerbated if the Commission allowed its interim order to expire when RPM prices precipitously decline to \$20/MW-day on June 1. While the opposing parties may disagree now, as they did before, that disagreement does not erase the financial harm to AEP Ohio – and it should not affect the Commission's realistic appraisal of the situation.

The opposing parties also fail to meaningfully address one of the primary arguments in support of the Company's motion for extension: avoiding customer confusion and an undue number of changes to capacity pricing prior to a merit decision in this case. RESA states only that "a single capacity price" is "clearly less confusing" than the temporary relief that is

presently in place,¹³ but does not provide any support for this contention and does not refute that a change now does not preclude yet another change in capacity pricing at the close of this case – a change which could *only* increase customer confusion. Presumably, the opposing parties’ failure to meaningfully address this issue is attributable to the strength of AEP Ohio’s position in this regard. It is beyond debate that changing the capacity pricing again prior to a merit decision would not only prejudice the outcome of this proceeding but would also result in unnecessary confusion and advance the probability of rate changes occurring, with the possibility of decreases followed by increases, over a short period of time. Further, the issues associated with “grandfathering” customers being supported by RPM-priced capacity would likely be magnified significantly and compound the potential difficulties associated with implementing the Commission’s merit decision. If the capacity prices are not frozen pending the Commission’s decision on the merits of this proceeding, the CRES providers will attempt to lure customers based on RPM pricing and then argue to the Commission (as they already have) that those customers are “grandfathered” and always entitled to RPM. By contrast, the Company’s proposal to freeze capacity prices pending a merit decision promotes stability by maintaining the *status quo* without prejudging the merits, and avoids the prospect of customer confusion.¹⁴

In a similar vein, OMA claims that the Company’s proposed price freeze can be characterized as “asking for a rate increase that will impact shopping customers immediately”

¹³ (RESA May 7, 2012 memorandum contra at p. 2.)

¹⁴ The OCC, in opposing AEP Ohio’s requested extension, contends that the company’s arguments based on “customer confusion” are “flawed” because customers and CRES providers “were put on notice as to the price for capacity post May 31, 2012, based upon the Commission’s March 7, 2012 Entry which stated that the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year.” (See OCC memorandum contra at p. 4.) But in the event that the Commission chooses to fix AEP Ohio’s capacity costs at any number other than RPM, and does so at some point in time after May 31, 2012 without granting AEP Ohio’s requested extension of the *status quo*, then these customers with “notice” will have to adapt to multiple capacity price changes in a relatively short period of time, instead of a single capacity price change based upon the Commission’s merit decision. Granting AEP Ohio’s requested extension would obviate this problem.

based on the existence of contractual provisions that permit CRES providers to pass through increased capacity charges.¹⁵ Of course, there is no possible way to characterize the Company's proposed rate freeze as an increase – that is simply a mischaracterization. But even assuming in this context that some CRES providers may have such provisions for some of their retail customers, a provision that allows a wholesale capacity price increase to be passed along to retail customers has no application to the Company's proposed rate freeze. The current tier one capacity rate is \$146/MW-day and under the Company's proposed extension it would continue to be \$146/MW-day pending a merit decision. OMA's argument is misleading and inaccurate.

OMA goes on to suggest that the Commission require a deposit and escrow for collections under the interim relief mechanism and “return the amount in escrow directly to customers who paid the increases from the RPM amount through their CRES agreements.”¹⁶ First, OMA's premise that there is an increase is inaccurate. Second, it would be improper to require AEP Ohio to transact refunds relating to CRES customers because the Commission does not regulate pricing for shopping customers. Third, OMA's escrow proposal presumes that the merit decision will order a capacity rate that is lower than the interim pricing without a similar provision for customer payment of any corresponding shortfalls created by the merit decision. Fourth, the escrow remedy is not something the Commission has statutory authority to require and the only example cited by OMA involved a mutual agreement to do so.¹⁷

In sum, most of the opposing parties' arguments simply rely on the presumption that they are entitled to RPM-priced capacity. AEP Ohio will refute that presumption during the merit stage of this proceeding. As the Company stated in its motion for extension, however, the key

¹⁵ (See OMA's May 4, 2012 memorandum contra at p. 6.)

¹⁶ (See *id.* at pp. 8-9.)

¹⁷ (See *id.* at p. 9, citing *In the Matter of the Complaints of Worthington Industries, et al. v. The Toledo Edison Company*, Case Nos. 08-67-EL-CSS, et al., Joint Stipulation of Facts (June 17, 2009).)

factors in granting its requested relief are avoiding customer confusion, prejudgment of the merits, and financial harm to the Company. All of those factors support an extension of the current two-tiered capacity prices pending the outcome of a merit decision. The Commission's March 7 Entry already took these matters into account when it adopted the interim rates – but now changed circumstances make it very unlikely that the Commission will issue a merit decision in May as earlier planned.

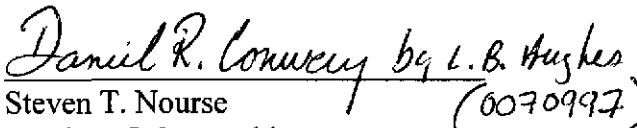
The Commission has worked hard to satisfy its objective to set a capacity price by May 31. Recognizing the critical time crunch, it ordered that the “matter be set for hearing no later than April 17, 2012.” March 7 Entry at ¶26. The attorney examiners, staff, and the parties have worked diligently to stay on this expedited track. It was not until the end of April – when AEP Ohio timely filed its motion for extension – that it became increasingly unlikely that the Commission would be able to render its decision before the interim pricing period and RPM rate end on May 31. This only became clear when the direct portion of the capacity case extended into the evening of Friday, April 27, after discovery disputes arose and related delays in the hearing schedule resulted. Despite the Commission's good intentions and the hard work of everyone involved, discovery disputes, corrections in Staff testimony, and the related need for rebuttal testimony, have created additional delay, with the goal of allowing the Commission to develop an accurate and complete record.

It is important to note, moreover, that several of the delays supporting an extension have been entirely out of AEP Ohio's control, as demonstrated by the May 3, 2012 Entry further extending the hearing schedule due to “significant, inadvertent errors” in the evidence presented by Staff witness Harter. (May 3, 2012 Entry at 2.) Even assuming that the hearing for AEP Ohio's rebuttal witnesses concludes on May 15, per the May 3 Entry, an expedited briefing

schedule and an allowance for a deliberative decision-making process by the Commission renders it difficult (if not impossible, as a practical matter) for the Commission to issue a merit decision by the Commission's May 30th meeting. Further, some key Commission personnel are working on both the ESP and capacity cases (*e.g.*, Attorney Examiner See is also set to serve on the bench in the modified ESP II proceeding beginning on May 14, 2012).

To preserve the *status quo* and address the issues that served as the basis for the Commission's March 7 Entry establishing the interim plan, the Commission should reject the rehashed arguments in the objectors' memorandum contra and grant AEP Ohio's motion to extend the interim plan and prices (tier-one pricing at \$146/MW-day and second-tier at \$255/MW-day) until the Commission issues its final decision in this proceeding. Without this extension, AEP Ohio will be severely prejudiced.

Respectfully submitted,


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On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the forgoing reply was served this 8th day of May, 2012, by electronic mail upon the persons listed below.

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