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

JOINT POST HEARING BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION AND THE OHIO HOSPITAL ASSOCIATION

Lisa G. McAlister, Counsel of Record
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: lmcalister@bricker.com

On behalf of The Ohio Manufacturers' Association

Richard L. Sites
General Counsel and
Senior Director of Health Policy
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
Telephone: (614) 221-7614
E-mail: ricks@OHANET.org

and

Thomas J. O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2335
Facsimile: (614) 227-2390
E-mail: tobrien@bricker.com

On behalf of the Ohio Hospital Association

TABLE OF CONTENTS

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I. INTRODUCTION AND BACKGROUND

The purpose of this case is to determine the appropriate price that AEP-Ohio should be permitted to charge competitive retail electric service ("CRES") providers for the use of AEP-Ohio's capacity resources for a limited, interim period prior to AEP-Ohio moving to full competition and corporate separation in 2015. The Public Utilities Commission of Ohio ("Commission") has the difficult and unenviable job of balancing many competing interests to arrive at a just and reasonable rate that fairly compensates AEP-Ohio, promotes effective competition in the provision of retail electric service by avoiding anticompetitive subsidies, and, most importantly, ensures the availability to consumers of adequate, reliable, safe, efficient, *nondiscriminatory*, and *reasonably priced* retail electric service and ensures retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Section 4928.02, Revised Code (italics added).

This case has a long, complicated history at both the State and Federal levels. As the Commission is well aware, the Ohio Power Company ("OP") and its affiliate operating companies participate in the PJM capacity market under the Fixed Resource Requirement ("FRR") alternative to the otherwise applicable Reliability Pricing Model ("RPM"). Section D.8 of Schedule 8.1 of PJM's Reliability Assurance Agreement ("RAA") establishes the capacity obligations for load serving entities ("LSEs") in PJM, including OP. That section requires FRR entities to submit an FRR Capacity Plan that

includes all load, whether the load is being supplied by OP or a CRES provider. CRES providers must either pay OP for the capacity supplied to its shopping load, or, under certain circumstances, a CRES provider may self-supply capacity. The default rate at which CRES providers must compensate OP for capacity is the "capacity price in the unconstrained portions of the PJM Region."[1] However, if there is a state compensation mechanism in place, it will prevail. *Id.*

On November 1, 2010, AEP Electric Power Service Corporation, on behalf of OP [and, at the time, Columbus Southern Power Company ("CSP"), which has since merged with OP and will be collectively referred to as "AEP-Ohio" or "Companies"], filed an application before the Federal Energy Regulatory Commission ("FERC") in FERC Docket No. ER11-1995 et al., seeking authority to change the basis for compensation for capacity costs to a cost-based mechanism and included proposed formula rate templates under which the Companies would calculate their respective capacity costs under Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement. At the direction of FERC, AEP-Ohio refiled its application in FERC Docket No. ER11-2183 on November 24, 2010 (hereinafter, "*FERC Case*").

In reaction to AEP-Ohio's request in the FERC Case, on December 8, 2010, the Commission issued an Entry preventing AEP-Ohio from changing the mechanism by expressly adopting as the state compensation mechanism for the Companies the capacity charges established by the three-year capacity auction conducted by PJM during the pendency of the Commission's review. In other words, the Commission

[1] PJM Open Access Transmission Tariff, Attachment D, Schedule 8.1 ("Fixed Resource Requirement Alternative").

temporarily clarified the state mechanism upon which AEP-Ohio's FERC application relied.

In reaction to the Commission's Entry, on January 20, 2011, FERC issued an Entry holding, "We reject the AEP Ohio Companies' filing. Section D.8 of Schedule 8.1 of the RAA provides that a 'state compensation mechanism will prevail' in allocating capacity costs to retail LSEs [load serving entities]. In this case, the Ohio Commission has adopted such a state mechanism and we therefore reject the AEP Ohio Companies' filing." *FERC Case,* Docket No. ER11-2183, Order Rejecting Formula Rate Proposal at 4 (January 20, 2011).

As a result of the FERC's decision to reject its proposed cost-based capacity charge, AEP sought rehearing and, on March 24, 2011, FERC issued an Entry on Rehearing granting AEP's rehearing request only for the purpose of affording itself additional time for consideration of the matters raised. *FERC Case,* Docket No. ER11-2183, Order Granting Rehearing for Further Consideration (March 24, 2011).

Further, on April 4, 2011, American Electric Power Service Corporation filed a formal complaint against PJM alleging that Schedule 8.1, Section D.8 to the PJM RAA is unjust, unreasonable, and unduly discriminatory. Docket No. EL11-32, *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.,* Complaint (April 4, 2011). Both of these proceedings at FERC remain pending.

In the Commission's December 8, 2010 Entry, the Commission requested comments on three issues that will help the Commission determine what the state compensation mechanism should be: 1) what changes to the current state mechanism are appropriate to determine AEP-Ohio's FRR capacity charges to Ohio competitive

retail electric service ("CRES") providers; (2) the degree to which AEP-Ohio's capacity charges are currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charges upon CRES providers and retail competition in Ohio. Multiple parties filed comments.

On September 7, 2011, a Stipulation and Recommendation was filed by a wide range parties in AEP-Ohio electric security plan ("ESP") case (Case No. 11-346-EL-SSO, et al.), that included a compromise regarding AEP-Ohio's capacity pricing. However, on February 23, 2012, the Commission rejected the Stipulation and Recommendation, which had the effect of continuing PJM's RPM price as the state compensation mechanism, rather than the compromise proposed in the Stipulation. As a result, AEP-Ohio filed a motion for relief claiming that the state compensation mechanism would materially harm AEP-Ohio and was confiscatory. AEP-Ohio went so far as to threaten to relocate its corporate headquarters out of Ohio without some interim relief.

On March 7, 2012, the Commission granted AEP-Ohio's requested relief for an interim period only. The Commission held that without interim relief from recovering only the RPM price for capacity, it could risk an unjust and unreasonable result for AEP-Ohio. Accordingly, the Commission directed AEP-Ohio to charge CRES providers the RPM price for capacity for the first 21 percent of each customer class that shopped and all customers (including mercantile customers) who shop through a governmental aggregation program that was approved on or before November 8, 2011. For all other shopping customers, AEP-Ohio may charge the CRES provider $255/megawatt-day ("MW-day"). However, the Commission also determined that if there is not a

Commission resolution of this issue on June 1, 2012, the price that AEP-Ohio may charge CRES providers reverts back to the RPM price.

On March 30, 2012, AEP-Ohio filed a revised version of its ESP to be in effect through May 31, 2012. The plan includes a two-tiered capacity pricing scheme similar to the interim pricing put in place by the Commission except with a higher overall capacity price, less availability for the lower tier pricing and a provision to make AEP-Ohio whole, in part, for the discounted capacity.

Accordingly, the purpose of this case is to determine the state compensation mechanism for the period June 1, 2012 through May 31, 2015.

II. STANDARD OF REVIEW

Section 4905.22, Revised Code, requires all charges made or demanded for any service rendered, or to be rendered, to be just, reasonable, and not more than the charges allowed by law or by order of the Commission. Thus, the state compensation mechanism for capacity and the AEP-Ohio charges to CRES providers resulting therefrom must be just and reasonable.

AEP-Ohio claims that, at its projected shopping levels, the compensation provided by the PJM RPM auction price would be unjust, unreasonable, and confiscatory. Tr. Vol. III at 579-582. AEP-Ohio claims that anything other than its estimate of cost-based rates for capacity would be unacceptable to AEP-Ohio. *Id.* As a remedy, AEP-Ohio seeks authority to modify the state compensation mechanism so that it has authority to charge its fully embedded costs for capacity to CRES providers at $355/MW-day.

The question of whether a rate is just and reasonable does not equate with whether it produces little to no negative financial consequences to the utility authorized

to charge the rate. In fact, in the context of utility ratemaking, the definitions of “just and reasonable,” confiscation and challenges that must be met to sustain claims like AEP-Ohio’s are well defined. In *Dayton Power & Light Company v. Public Utilities Commission of Ohio et al.,* the Ohio Supreme Court described the fundamental elements of a confiscation claim:

> The first is that * * * he who would upset the rate order * * * carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. The second precept is that a challenged rate order must be viewed in its entirety to determine whether the rates set pursuant to the order fall within "the broad zone of reasonableness."

Dayton Power & Light Company v. Public Utilities Commission of Ohio et al., 4 Ohio St. 3d 91 at 97 (April 13, 1983) (hereinafter *"Dayton").*

In *Fed. Power Comm. v. Hope Natural Gas Co.,* 320 U.S. 591 (1944) (hereinafter *"Hope"),* the Court stated, "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end." *Id.;* see *also, Duquesne Light Co. v. Barasch,* 488 U.S. 299 (1989).

In *Permian Basin Area Rate Cases,* 390 U.S. 747 at 768-770 (1968) (hereinafter *"Permian Basin"),* the Court fleshed out the *Hope* Court's "total effect" test and described the balance that should be struck when examining the total effect of the rates on utilities:

> **No constitutional objection arises from the imposition of maximum prices merely because "high cost operators may be more seriously affected... than others," *Bowles v. Willingham, supra,* at 518, or because the value of regulated property is reduced as a consequence of regulation**. *FPC v. Hope Natural Gas Co., supra,* at 601. Regulation may, consistently with the Constitution, limit stringently

> the return recovered on investment, **for investors' interests provide only one of the variables in the constitutional calculus of reasonableness**. *Covington & Lexington Turnpike Co. v. Sandford,* 164 U.S. 578, 596.
>
> It is, however, plain that the "power to regulate is not a power to destroy," *Stone v. Farmers' Loan & Trust* Co., 116 U.S. 307, 331; *Covington & Lexington Turnpike* Co. v. *Sandford, supra,* at 593; and that maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations. Price control is "unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . ." *Nebbia v. New* York, 291 U.S. 502,539. Nonetheless, the just and reasonable standard… "coincides" with the applicable constitutional standards, *FPC v. Natural Gas Pipeline Co., supra,* at 586, and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory. Accordingly, there can be no constitutional objection if the Commission, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile. We do not suggest that maximum rates computed for a group or geographical area can never be confiscatory; we hold only that any such rates, determined in conformity with the Natural Gas Act, and intended to "balanc[e] . . . the investor and the consumer interests," are constitutionally permissible. Hope Natural *Gas* Co., *supra,* at 603.

Id. (emphasis added). Thus, the *Hope* decision calls for a balancing of investor and consumer interests. Rates that balance those interests are not confiscatory so long as they fall within the broad zone of reasonableness.

The Court, in *Washington Gas Light* Co. *v. Baker,* explained the broad zone of reasonableness:

> So long as the public interest — i.e., that of investors and consumers — is safeguarded, it seems that the Commission may formulate its own standards. But there are limits inherent in the statutory mandate that rates be "reasonable, just, and non-discriminatory." Among those limits are the minimal requirements for protection of investors outlined in the Hope case. And from the earliest cases, **the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates**. Thus, there is a zone of reasonableness within which rates may properly fall. It is bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates.

Washington Gas Light Co. *v. Baker,* 188 F.2d 11 at 14-15 (D.C. Cir. 1950) (internal citations omitted, emphasis added).

The Ohio Supreme Court has considered the cases described above in detail and has adopted a consistent position regarding Ohio utilities. Specifically, in *Dayton Power & Light Co. v. Pub. Util Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733 ("*DP&L*"), the Ohio Supreme Court noted that the Ohio General Assembly has adopted a consistent position in balancing investor and consumer interests in utility ratemaking. The Court concluded in *DP&L*, "To prevail, appellant must prove not only the unreasonableness of the [underlying determinations] but also the confiscatory effect [these determinations] had on the rates established by the commission, viewing the rate order 'in its entirety." *Dayton* (citing *Hope* at 602).

The Ohio Supreme Court reiterated the two prong *Dayton* test in *Ohio Edison Company v. Pub. Util Comm.*, 63 Ohio St. 3d 555 (1992) ("*Ohio Edison*"). The Court held:

> Even though Ohio Edison acknowledges that [*Dayton*] is controlling in this case, it argues that *Hope's* "end result" test requires the commission to consider the effects of its rate order on the company's financial integrity, irrespective of the appropriateness of the underlying statutory determinations. To accept the company's position, we would have to ignore the "broad public interests" recognized in *Permian Basin* and raise the investor concerns listed in *Hope* to a constitutional level. The federal constitutional cases do not support such a result. Rather, these cases recognize investor concerns as only one factor that the commission is to consider in setting just and reasonable (*i.e.*, constitutional) rates. Once these interests are appropriately balanced, the rates' effect on the company's financial integrity (*i.e.*, debt rating and dividend level) is but another of the risks which a utility, as any other unregulated enterprise, must bear.

Ohio Edison at 564-565 (citations omitted). The *Ohio Edison* Court also stated that the Court has implicitly recognized that the Constitution no longer provides any special protection for the utility investor. *Id.* at 565, note 8.

Based on the case law described above, for the Commission to change the state compensation mechanism for AEP-Ohio from the RPM price to something else, AEP-Ohio must prove that the balance struck by using the RPM price is unreasonable and unlawful such that it produces a total effect that is outside the broad zone of reasonableness. It must also show by persuasive evidence that it is experiencing an actionable loss as a result of a RPM-priced state compensation mechanism, that its fully embedded costs of capacity are prudent and eligible for recovery and that the actionable loss was unavoidable. In other words, so long as the rate recovery mechanism selected by the Commission as the state compensation mechanism is within the broad zone of reasonableness and protects customers from exorbitant rates, while minimally protecting shareholders, even if the value of AEP-Ohio's capacity assets are reduced, it will be just and reasonable.

The Commission should rely on this test to determine whether the state compensation mechanism is just and reasonable and reaffirm the PJM RPM auction price as the state compensation mechanism.

III. AEP-OHIO HAS NOT MET ITS BURDEN OF PROVING THAT RPM PRICED CAPACITY IS UNJUST OR UNREASONABLE.

The Commission has already confirmed that the PJM RPM auction price shall be the state compensation mechanism. Entry at 2 (December 8, 2010). It is AEP-Ohio's burden as the entity challenging the state compensation mechanism to prove why the PJM RPM auction price is unjust and unreasonable. AEP-Ohio has not met that burden.

A. The PJM RPM auction price is a just, reasonable and lawful basis for setting the state recovery mechanism.

As AEP-Ohio witness Graves stated, both this Commission and the FERC are obligated to ensure that rates are just and reasonable. Tr. Vol. V at 857. Further, Mr. Graves acknowledged that the FERC has determined that PJM RPM-based prices are just and reasonable. *Id.* The Commission itself has already acknowledged that a state compensation mechanism based upon RPM prices is consistent with the PJM Reliability Assurance Agreement ("RAA"). OEG Ex. 101 at 4.[2] Further, until earlier this year, the state compensation mechanism and the price that AEP-Ohio charged CRES providers for capacity was the PJM RPM auction price. Tr. Vol. I at 24.

It follows that there is no argument that the PJM RPM prices for capacity are anything other than just and reasonable. AEP-Ohio instead argues that in all other circumstances, the PJM RPM auction price is just and reasonable except for the period June 1, 2012 through May 31, 2015, when there is a combination of PJM RPM auction results that produce capacity prices that are, by all accounts, low, and a desire and exercise by AEP-Ohio customers to shop for competitive generation service. While this combination produces a result for AEP-Ohio that is not as favorable as the one in which AEP-Ohio charges $355/MW-day for its capacity, AEP-Ohio has not and cannot prove that the state compensation mechanism based upon PJM RPM auction prices is unjust or unreasonable.

[2] The Commission stated, "Contrary to PJM's allegations, which intimate that the state determined capacity charge shall be set pursuant to cost, none of the Ohio Commission's actions regarding these matters have been inconsistent with the RAA FRR tariff provisions. Indeed, the Ohio Commission is unaware as to where in the PJM RAA FRR tariff a state established cost based requirement is set forth."

On the contrary, what *is* unlawful is the collection by AEP-Ohio of additional transition costs. AEP-Ohio argues that it is entitled to receive cost-based compensation for its capacity through May 31, 2015. After that transition period, in order to enter the competitive market, AEP-Ohio is willing to go to an RPM-based capacity price. Tr. Vol. I at 47. However, further collection of transition costs in the form of cost-based capacity that is above the RPM priced capacity is contrary to Ohio law and Commission precedent.

Section 4928.38, Revised Code, provides that a utility's receipt of transition revenues shall terminate at the end of the market development period. The market development period ended on December 31, 2005, or, at the very latest by any interpretation, December 31, 2010. Section 4928.40, Revised Code. Section 4928.38, Revised Code, states that "[w]ith the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or **any equivalent revenues** by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code." Emphasis added. Those referenced code sections govern electric transition plans ("ETPs"). As a means to implement the move to electric competition (or deregulation) embodied in Amended Substitute Senate Bill 3, ETPs were the intended vehicles for establishing transition costs like the above-market capacity costs that AEP-Ohio is now requesting, along with the rate mechanisms for the collection of those costs.

AEP-Ohio declined its opportunity to recover transition revenues in its ETP case as part of a settlement package. Tr. Vol. I at 49-50; FES Ex. 106 and 107.[3] AEP-Ohio may not now request or recover any additional transition revenue through an ESP either. Section 4928.141, Revised Code, provides that a "standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan."

Consequently, Ohio law prohibits the Commission from establishing a state recovery mechanism that would authorize the receipt of transition revenues or **any equivalent revenues** by AEP-Ohio to recover its above-market capacity costs.

Just as in *Ohio Edison,* once the Commission has determined that RPM priced capacity is just and reasonable, the inquiry should be over and the Commission should explicitly reaffirm the state compensation mechanism. Irrespective of this fact, the next step under *Dayton* and the case law described above, is to conduct an examination of the effect of the PJM RPM capacity prices on the interests of AEP-Ohio's shareholders and the public interest. This examination further demonstrates that the use of an RPM-based capacity recovery mechanism produces a result that is within the broad zone of reasonableness.

[3] AEP-Ohio witness Munczinski acknowledges that although AEP-Ohio initially calculated generation transition costs in its ETP case, as part of a stipulation package, AEP-Ohio dropped its pursuit of generation transition costs.

B. Using the PJM RPM auction price to set the state recovery mechanism is within the broad zone of reasonableness.

As noted above, the broad zone of reasonableness is bounded by the investor interest against confiscation on one side and the consumer interest against exorbitant rates on the other.

1. AEP-Ohio has not demonstrated by clear and convincing evidence that its interests will be substantially harmed under a RPM-based state recovery mechanism.

AEP-Ohio alleges that the financial impact to it resulting from using RPM-priced capacity would result in a return on equity ("ROE") of 7.6% in 2012 and 2.4% in 2013. AEP-Ohio Ex. 104 at WAA-1; Tr. Vol. III at 648-649, 696. However, the projections are based upon little other than unsubstantiated opinions of AEP-Ohio witness Allen. For example, Mr. Allen based the calculation on an estimate of shopping in 2012 with 65% of residential customers switching, 80% of commercial customers and 90% of industrial customers switching by the end of 2012. AEP Ex. 104 at 4. To reach these estimates, Mr. Allen reviewed the shopping percentages in other Ohio EDU service territories but made no investigation as to why the shopping levels in other service territories were reached. Tr. Vol. III at 570. Mr. Allen conducted no mathematical analysis of any correlation between capacity prices and levels of shopping, and did not do any elasticity studies with respect to quantifying the shift with respect to customers switching that he projected versus capacity prices. Tr. Vol. III at 572. Further, Mr. Allen used the highest end of the shopping range, and in some cases, higher than any other Ohio EDU shopping percentages, to determine his estimates of shopping in AEP-Ohio's service territory. Tr. Vol. III at 592-593.

There is no record evidence that demonstrates the reasonableness of the shopping estimates that Mr. Allen used to calculate AEP-Ohio's ROEs. In fact, the average shopping in all non-AEP-Ohio EDUs as of December 2011 was less than 50%. Tr. Vol. III at 592. While it is reasonable to expect increased shopping in 2012 given the decrease in the RPM prices, there is no evidence that the levels of shopping could or would reach the estimates of Mr. Allen. In reality, there are numerous other practical impediments to shopping in AEP-Ohio's service territory that prevent the levels of switching projected by Mr. Allen.

AEP-Ohio customers testified that they have been unable to enter into contracts with CRES providers because of the uncertainty created by AEP-Ohio's capacity cost proposal and its ESP proposal in Case No. 11-346-EL-UNC. OMA Ex. 101A at 4; Tr. Vol. VII at 1442-1443. Further, AEP-Ohio customers testified that even with resolution of this case, the customer must provide 90-days notice to AEP-Ohio of its intent to switch. Tr. Vol. VII at 1444. Finally, even with resolution of this case, customers will not know what the price to compare will be until there is resolution of the ESP case, which may not be until late summer. Given all of these hurdles to enter into competitive supply contracts, even sophisticated customers who are knowledgeable about the market will have difficulty switching. The shopping estimates provided by Mr. Allen are aggressive at best.

The Commission expressed interest in AEP-Ohio's ability to attract and invest capital if the state compensation mechanism is based upon the RPM capacity prices.

OEG Ex. 101 at 4.[4] While this would be a concern in which the Commission should investigate to determine the impact of the state compensation mechanism on AEP-Ohio in other circumstances, it is irrelevant here. While AEP-Ohio alleges that it would be imprudent and irresponsible for AEP-Ohio to invest long-term capital in an unclear, unstable cost recovery environment without its requested cost of capacity, this is an over-statement at best. AEP Ex. 1 at 14.

First, the record demonstrates that AEP-Ohio continues to project long-term capital investments in Ohio irrespective of the Commission's decision regarding capacity cost recovery. IEU Ex. 104; Tr. Vol. I at 128-133. Second, AEP-Ohio has admitted that it has no plans to invest in additional capacity from 2012 through 2015 as AEP and PJM are capacity long. Tr. Vol. I at 36; Tr. Vol. V at 868.

Thus, AEP-Ohio both continues to invest capital irrespective of its capacity costs for shopping customers and has no need to (and has no plans to) attract or invest capital in additional capacity as it is capacity long.

Finally, AEP-Ohio's single investor (AEP, Inc.)[5] is not substantially and irrevocably harmed, and, even if it was, the harm does not outweigh the benefit in balancing interests.

In *Hope,* the U.S. Supreme Court reviewed the earnings history of Hope Natural Gas and its status as a wholly-owned subsidiary of Standard Oil Company on the way

[4] In the FERC Case, the Commission filed a Motion for Leave to Answer and Limited Answer Submitted on Behalf of the Public Utilities Commission of Ohio to PJM Interconnection, LLC Response to AEP Motion for Expedited Ruling. Therein, the Commission stated, "It is evident that the Ohio Commission is endeavoring to arrive at a CRES capacity rate that will promote alternative competitive supply and retail competition while simultaneously ensuring an incumbent electric utility provider's ability to attract capital investment to meet its FRR obligations. Arriving at this delicate balance is not a perfunctory endeavor."

[5] AEP-Ohio has one shareholder: AEP, Inc. Tr. Vol. III at 673.

to finding that the "end result" fashioned by the FPC (now FERC) was neither confiscatory nor unreasonable. 320 U.S. at 603. An examination of AEP-Ohio's earning history and its status as a wholly owned subsidiary of AEP, Inc., will produce the same conclusion as reached by the *Hope* Court.

First, while AEP Ohio has provided estimates of the economic harm it claims it will suffer under certain shopping scenarios if its capacity pricing proposal is not approved by the Commission, recent judicial and regulatory rulings have found that AEP-Ohio has actually over-collected from its customers in recent years. In 2011, the Ohio Supreme Court found that AEP-Ohio's rate plan for 2009-2011 included more than $500 million in charges not supported by the evidence presented to the Commission. Further, in 2009, CSP earned profits in excess of the Commission's significantly excessive earnings threshold of 17.6%, resulting in the utility being ordered to return $43 million to customers. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* PUCO Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011). It cannot escape notice that the *Hope* Court also took note of the fact that the company had been earning very generous returns in the years prior to the FPC's ratemaking action, at issue in that case.

AEP-Ohio simply has not provided any credible evidence that the economic harms it alleges it will suffer as a consequence of reduced revenues will in any way rise to the level of actually impairing the ongoing financial integrity of its Ohio utility operations. As the *Hope* Court summarized:

> Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called "fair value" rate base.

Hope, 320 U.S. 591, 605. This point must be kept in the fore when evaluating the impact of AEP-Ohio's request on customers.

2. Customer interests will be substantially harmed by AEP-Ohio's proposal.

The reasonable outcome in this proceeding *requires* balance of both investor and consumer interests, and the fact of the matter is that consumer interests have recently, as discussed above, been lost in the equation.

The Ohio General Assembly has set forth the policy of the state in Section 4928.02, Revised Code. As it pertains to this case, it is the policy of the state to:

A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

D) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service;

E) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

F) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

G) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power; and,

H) Facilitate the state's effectiveness in the global economy.

A broad base of AEP-Ohio's customers and competitors are represented in this proceeding and all[6] have opposed AEP-Ohio's request to charge $355/MW-day, based on the negative impact AEP-Ohio's proposal would have on both customers and CRES providers alike, along with the violation of the state policy that AEP's request represents.

First, AEP-Ohio's proposed capacity pricing would significantly restrict the ability of customers in its service territory to shop and save money. The RPM price for capacity is set to decrease on June 1, 2012. Most CRES agreements include a provision that permits the CRES providers to pass on costs that were increased as a result of regulatory action, like what would be required for AEP-Ohio to charge CRES providers an amount other than the RPM price. Tr. Vol. VII at 1483. Such a pass-through will likely offset most or all of the savings a competitive supplier can offer customers. Tr. Vol VII at 1456, 1483, 1496. The witnesses for OMA provided uncontroverted evidence that estimated the harm of AEP-Ohio's proposal by comparing their individual capacity costs based upon RPM rates to AEP-Ohio's $355/MW-day

[6] The OMA and OHA will not presume to speak for CRES providers in this case as they are more than capable of representing themselves. We note, however, that the AEP Retail, Inc., AEP-Ohio's affiliate, is not clear at this point.

proposal. OMA Ex 101-105. For some companies the difference exceeds $50 million over three years. The OMA members described how they and their CRES providers will be unable to absorb the difference and that the result is that they will have less capital to invest in Ohio, have less funds for capital investments, worker training, hiring of new employees, and retention of existing employees. OMA Ex. 101-105; Tr. Vol. VII at 1459.

By demanding artificially high prices for capacity – more than 20 times higher than the PJM RPM market rate in some cases – AEP-Ohio will, at the very least, chill shopping from a customer perspective as customers will not know for some time whether they will be able to save money with a CRES provider. Tr. Vol. VII at 1444. As a result, only a fraction of AEP-Ohio's customers likely will be able to shop and save money – and, in many cases, customers who already have shopped could see significant increases or the termination of existing contracts. Also, shopping will become more difficult, at best, which means customers will have fewer choices. This result is contrary to the state policy, public interest and the interests of customers (shopping and non-shopping alike) and CRES providers.

Second, AEP-Ohio's capacity cost proposal unfairly denies customers access to market rates for capacity when market rates are low, but subjects customers to market rates when they are high. In the past, AEP-Ohio has charged the PJM auction price for capacity. Tr. Vol. I at 24. Now, with the PJM auction prices about to reach historic lows over the next several years, AEP-Ohio proposes to charge what it claims are its actual, fully embedded costs, which are above the PJM auction prices for capacity. While AEP-Ohio's claims might have some legitimacy if AEP-Ohio planned to stick with cost-based rates under an FRR plan going forward, that is not AEP-Ohio's plan. Rather, AEP-Ohio

has already notified PJM of its termination of FRR status beginning June 1, 2015. Thus, for at least a five year period thereafter, AEP-Ohio will at least submit its Ohio load in the PJM RPM auction. The PJM RPM price for capacity will rise to $136/MW-D in 2015 and it is anticipated to continue to rise thereafter.

In other words, AEP-Ohio's proposal lacks balance and fairness. At a time when capacity charges are at historical lows, customers in AEP-Ohio's service territory would pay prices that are substantially higher than the PJM RPM prices readily available to customers in all other regions of Ohio. Every day that goes by without resolution of this case is another day that customers in AEP-Ohio's service territory lose out on the opportunity for significant savings presented by historic low market prices for capacity – savings that customers of the Dayton Power and Light Company, Duke Energy Ohio and FirstEnergy will enjoy. Access to low electricity rates should not be a function of where in the state customers live or their businesses are located.

Finally, this is not just a capacity cost issue – it's an economic development and economic recovery issue. The Commission has made clear its intention to continue to move the regulated electric utilities to fully competitive markets as quickly as is reasonable.[7] AEP-Ohio claims to be on board with the Commission's direction; however, AEP-Ohio's efforts in this case demonstrate that AEP-Ohio is willing to rely on PJM RPM auction prices only when they are high.

While the OMA and the OHA have not been strong supporters of a complete reliance on market rates, if it is the General Assembly's, the administration's and the

[7] *See PUCO Press Release, "*PUCO Revokes AEP-Ohio Electric Security Plan Settlement Agreement", available at: http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/puco-revokes-aep-ohio-electric-security-plan-settlement-agreement.

Commission's will to move quickly in that direction, the Commission should do so in a way that captures some value for customers while prices are low.

For many customers, and manufacturers in particular, electricity is a major cost driver. Tr. Vol. VII at 1462, 1472. It is both unlawful and fundamentally unfair to subject customers to above-market prices when the market price is low but make market prices the only option when market prices are high. This structure provides the worst of both worlds for customers and Ohio's economy. Ensuring that customers across Ohio can take advantage of historically low capacity prices and have access to the lowest possible competitive electricity rates will help stimulate and sustain economic growth.

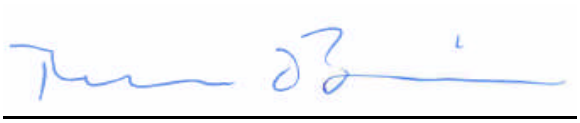
IV. CONCLUSION

For the reasons set forth above, the OMA and the OHA respectfully request that the Commission affirm the PJM RPM auction price as the state recovery mechanism for AEP-Ohio.

Respectfully submitted,

Lisa G. McAlister, Counsel of Record
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: lmcalister@bricker.com

On behalf of The Ohio Manufacturers' Association



Richard L. Sites
General Counsel and Senior Director of Health Policy
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
Telephone: (614) 221-7614
E-mail: ricks@OHANET.org

and

Thomas J. O'Brien
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2335
Facsimile: (614) 227-2390
E-mail: tobrien@bricker.com

On behalf of the Ohio Hospital Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Joint Post Hearing Brief of The Ohio Manufacturers' Association and The Ohio Hospital Association was served upon the parties of record listed below this 23rd day of May 2012 *via* email transmission or first class mail.

Lisa G. McAlister

stnourse@aep.com
mjsatterwhite@aep.com
dconway@porterwright.com
Daniel.Shields@puc.state.oh.us
Stephen.Reilly@puc.state.oh.us
Werner.Margard@puc.state.oh.us
William.Wright@puc.state.oh.us
Thomas.Lindgren@puc.state.oh.us
john.jones@puc.state.oh.us
dclark1@aep.com
grady@occ.state.oh.us
keith.nusbaum@snrdenton.com
kpkreider@kmklaw.com
ned.ford@fuse.net
pfox@hilliardohio.gov
ricks@ohanet.org
cathy@theoec.org
dsullivan@nrdc.org
aehaedt@jonesday.com
dakutik@jonesday.com
haydenm@firstenergycorp.com
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com
etter@occ.state.oh.us
gregory.dunn@icemiller.com
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com
bakahn@vorys.com
Gary.A.Jeffries@dom.com
Stephen.chriss@wal-mart.com
dmeyer@kmklaw.com
small@occ.state.oh.us
cynthia.a.fonner@constellation.com
David.fein@constellation.com
Dorothy.corbett@duke-energy.com
Amy.spiller@duke-energy.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
tobrien@bricker.com
myurick@taftlaw.com
zkravitz@taftlaw.com
cmoore@porterwright.com
jejadwin@aep.com
msmalz@ohiopovertylaw.org
jmaskovyak@ohiopovertylaw.org
todonnell@bricker.com
cmontgomery@bricker.com
gthomas@gtpowergroup.com
wmassey@cov.com
henryeckhart@aol.com
laurac@chappelleconsulting.net
whitt@whitt-sturtevant.com
thompson@whitt-sturtevant.com
sandy.grace@exeloncorp.com
christopher.miller@icemiller.com
asim.haque@icemiller.com
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com
jestes@skadden.com
paul.wight@skadden.com
dstahl@eimerstahl.com
aaragona@eimerstahl.com
ssolberg@eimerstahl.com
tsantarelli@elpc.org

holly@raysmithlaw.com
barthroyer@aol.com
philip.sineneng@thompsonhine.com
carolyn.flahive@thompsonhine.com
terrance.mebane@thompsonhine.com
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org
gpoulos@enernoc.com
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
clinton.vince@snrdenton.com
callwein@wamenergylaw.com
malina@wexlerwalker.com
jkooper@hess.com
kguerry@hess.com
afreifeld@viridityenergy.com
swolfe@viridityenergy.com
korenergy@insight.rr.com
sasloan@aep.com
Dane.Stinson@baileycavalieri.com
cendsley@ofbf.org
bpbarger@bcslawyers.com
OhioESP2@aep.com
kaelber@buckleyking.com
walter@buckleyking.com
trent@theoec.org
nolan@theoec.org

Summary: Brief electronically filed by Teresa Orahood on behalf of Ohio Manufacturers' Association and Ohio Hospital Association