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Via E-file

July 26, 2012

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 10-2929-EL-UNC

Dear Sir/Madam:

Please find attached the APPLICATION FOR REHEARING OF THE OHIO ENERGY GROUP e-filed today in the above-referenced matter.

Please place this document of file. Copies have been served on all parties listed on the attached Certificate of Service.

Respectfully yours,



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Commissioner Lynn Slaby (via overnight mail)
Eric Weldele, PUCO Chief of Staff (via overnight mail)
Certificate of Service

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Commission Review of the :
Capacity Charges of Ohio Power Company and : **Case No. 10-2929-EL-UNC**
Columbus Southern Power Company :

**APPLICATION FOR REHEARING
OF THE OHIO ENERGY GROUP**

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**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**

**APPLICATION FOR REHEARING
OF THE OHIO ENERGY GROUP**

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Energy Group ("OEG") submits this Application for Rehearing of the July 2, 2012 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission"). OEG's members who are participating in this proceeding are: Aleris International, Inc., Amsted Rail Company, Inc., AK Steel Corporation, ArcelorMittal, USA, BP-Husky Refining, LLC, E.I. DuPont de Nemours & Company, Ford Motor Company, GE Aviation, Linde, Inc., O-I aka Owens-Brockway Glass Container, Inc., Praxair Inc., RG Steel, The Timken Company, and Worthington Industries. OEG submits that the Order is unreasonable and unlawful because the Commission has no legal authority to require future retail consumers to repay the wholesale capacity cost obligations that unregulated CRES providers owe to AEP-Ohio. A memorandum in support of this Application for Rehearing is attached.

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MEMORANDUM IN SUPPORT

A. The Commission Has No Legal Authority To Order Future Retail Consumers To Repay The Wholesale Capacity Cost Obligations That Unregulated CRES Providers Owe To AEP Ohio.

The Commission should modify the portion of the Order requiring AEP-Ohio to defer for later recovery from retail consumers the difference between the adjusted RPM rate and the wholesale cost-based rate of \$188.88 ("capacity cost differential").¹ Wholesale capacity costs are the responsibility of the unregulated competitive retail electric service ("CRES") providers and the Commission has no legal authority to transfer that payment obligation to retail consumers.

1. The Revised Code Allows The Commission To Defer A Utility's Costs Of Providing Retail Electric Service Only Under Limited Circumstances That Do Not Apply Here, And There Is No Legal Authority For The Commission To Require Future Retail Consumers To Repay The Wholesale Capacity Cost Obligations That Unregulated CRES Providers Owe To AEP-Ohio.

The Order authorizing a deferral of part of the wholesale cost-based capacity rate of \$188.88/MW-day rests on a fundamental misconception. What is being deferred is not money ratepayers owe the utility, but money the unregulated CRES providers owe the utility. The Commission has no legal authority to require retail consumers to repay the wholesale capacity cost obligations that the unregulated CRES providers owe to AEP-Ohio.

The Commission found that it had jurisdiction to establish a wholesale cost-based state compensation mechanism for AEP-Ohio pursuant to its general supervisory authority under R.C. 4905.04, 4905.05, and 4905.06 and under its regulatory authority under R.C. Chapters 4905 and 4909. Importantly, the Commission clarified that "[a]lthough Chapter 4928, Revised Code, provides for market-based pricing for retail electric generation service, those provisions do not apply because, as we

¹ Order at 33.

*noted earlier, capacity is a wholesale rather than a retail service.”*² Though R.C. 4928.144 grants deferral authority to the Commission in certain circumstances to allow a utility to recover its costs of providing retail electric service, Section 4928 is inapplicable here, as the Commission has already recognized. Moreover, the General Assembly’s decision that it was necessary to establish R.C. 4928.144 highlights the fact that the Commission lacks general deferral authority of utility costs of providing retail electric service elsewhere in the Revised Code. The Supreme Court of Ohio has already held that the Commission has no general ratemaking authority to order a deferral or phase-in of money which the utility is entitled to recover from retail consumers. *In Columbus Southern Power Company v. Pub. Util. Comm. Of Ohio*, 67 Ohio St. 3d 535, 620 N.E. 2d 835 (1993).

While the Commission has limited deferral authority over costs owed by consumers to a utility, what is being deferred here are costs that CRES providers owe the utility. There is no provision of the Revised Code that authorizes the Commission to force future retail consumers to repay the wholesale capacity payment obligations that unregulated CRES providers owe to AEP-Ohio. CRES providers’ costs are just that - costs which the CRES providers must bear. The Commission is not responsible for ensuring that CRES providers recover all of their costs. Rather, CRES providers operate in a competitive environment with no limit on their profits and no cost recovery guarantee. Just as nothing in the Revised Code authorizes the Commission to force retail consumers to pay the administrative and general or advertising costs of CRES providers, nothing in the Revised Code authorizes the forced recovery from retail consumers of the wholesale capacity costs that unregulated CRES providers owe to AEP-Ohio.

Going down the deferral path where retail consumers must fund the wholesale capacity costs that CRES providers owe to AEP-Ohio will likely create extended litigation and cause investor

² Order at 22.

uncertainty over AEP-Ohio's ability to recover what are expected to be hundreds of millions of dollars of deferred wholesale capacity costs. The proper solution is to charge CRES providers the full wholesale cost-based capacity rate of \$188.88/MW-day as AEP-Ohio incurs those costs during the Fixed Resource Requirement ("FRR") period. If the state compensation mechanism is a wholesale rate, then that rate must be recovered from CRES providers on a wholesale basis.

Nowhere in the Revised Code is there any authority for the proposition that retail consumers can be forced to repay the wholesale capacity obligations that unregulated CRES providers owe to the utility. The costs which the Commission ordered to be deferred are not costs ratepayers owe the utility for providing retail electric service, but costs which the CRES providers owe the utility for providing wholesale capacity. This case represents a payment dispute between AEP-Ohio and the CRES providers, and consumers cannot lawfully be required to foot the bill.

2. Permitting Deferred Recovery Of The \$188.88/MW-Day Wholesale Cost-Based Capacity Rate Will Result In Future Consumers Paying Hundreds Of Millions Of Dollars In Above-Market Rates.

Requiring consumers to repay the wholesale capacity obligations that unregulated CRES providers owe to AEP-Ohio will result in hundreds of millions of dollars of above-market capacity prices on future retail customers once the deferrals actually begin to be recovered. The effect of transferring the payment obligations of CRES providers on to ratepayers is that future retail customers will be required to pay above-market rates for capacity during the period after AEP-Ohio becomes an RPM market participant. Deferral of the recovery of the wholesale capacity cost differential would also result in customers paying significant interest on AEP-Ohio's deferred capacity costs. Because capacity costs are unusually low in the next two years and already show signs of rising in future years, it is

preferable for CRES providers to simply be charged the full capacity rate now rather than transferring the CRES capacity obligation to consumers in future years.

The Commission's stated rationale for deferring the capacity cost differential is "*to encourage the further development of retail competition in AEP-Ohio's service territory....*"³ We agree that this will be the result, but such a result would be achieved on borrowed money. Though requiring AEP-Ohio to charge current adjusted RPM-based prices to CRES providers is likely to promote retail competition in AEP-Ohio's service territory, the record does not indicate that charging CRES providers the wholesale cost-based capacity price of \$188.88/MW-day during the FRR period will hinder retail competition.⁴ In fact, the record indicates that CRES providers made offers to customers when the capacity price was set at \$255/MW-day.⁵ Further, as OEG already noted in this proceeding,⁶ retail competition actually increased in AEP-Ohio's territory when the RPM capacity price was set at \$145.79/MW-day in 2011, which is not that much less than the Commission's \$188.88/MW-day cost-based capacity price.⁷ Though promoting retail competition is one of the Commission's objectives, the Commission must balance this objective against its statutory obligation to provide just and reasonable rates to both current and future customers. Because competition in AEP-Ohio's service territory can still occur if the full \$188.88/MW-day cost-based wholesale capacity rate is charged to CRES providers, there is no compelling reason to transfer the wholesale capacity payment obligation of unregulated CRES providers to future retail consumers.

³ Order at 33.

⁴ Commission Roberto also states that she is "*not convinced on the record before [the Commission] that competition has suffered sufficiently or will suffer sufficiently during the remaining term of the Fixed Resource Requirement as a result of the state compensation method to warrant intervention in the market.*" Roberto Opinion at 4.

⁵ AEP-Ohio witness Allen noted that CRES providers made offers to customers when the capacity charge was \$255/MW-Day and the price of energy was \$10/MW-hour higher than it is now. Tr. Vol. XI (May 14, 2012) at 2406:4-7. Retail Electric Supply Association witness Ringenbach also confirmed that offers continued to be made generally at \$255/MW-day. Tr. IV (April 20, 2012) at 819:24-8:20:11.

⁶ OEG Post-Hearing Brief at 8.

⁷ Order at 10.

B. If The Commission Requires Future Retail Consumers To Repay The Wholesale Capacity Obligations That Unregulated CRES Providers Owe To AEP-Ohio, Then The Commission Should Make Several Important Clarifications.

The Commission cannot and should not adopt a deferral mechanism for purposes of transferring the unregulated CRES providers wholesale capacity cost obligations to future retail consumers. But if the Commission does adopt such a mechanism, the Commission should provide several important clarifications. Specifically, the Commission should clarify that: 1) AEP-Ohio customers with approved reasonable arrangements who certify that they did not shop during the three-year ESP period will be exempt from repayment of AEP-Ohio's deferred capacity costs; 2) any deferred capacity costs will be allocated and recovered on the same basis as if the CRES providers were charged the full capacity rate in the first place (i.e. on the basis of demand); and 3) AEP-Ohio is required to reduce any deferred capacity costs by the relevant accumulated deferred income tax so that the interest expense reflects the Company's actual carrying costs.

1. The Commission Should Clarify That Reasonable Arrangement Customers Who Do Not Purchase Competitive Generation During The ESP Period Are Exempt From Deferral Repayment.

Customers with approved reasonable arrangements who certify that they did not shop during the three-year ESP period should be exempt from repayment of AEP-Ohio's deferred wholesale capacity costs. Reasonable arrangement customers who do not shop during the ESP period will not have caused any of the deferred capacity costs associated with shopping. Those customers will receive no benefit from RPM-based capacity charges to CRES providers. Requiring such reasonable arrangement customers to pay for any deferred capacity costs would amount to an unjustified rate increase on those customers who choose not to or cannot shop. Additionally, deferral repayment

would effectively punish those customers for adhering to the terms of their carefully negotiated and Commission approved contracts with AEP-Ohio.

When it comes time to repay AEP-Ohio for the difference between its wholesale capacity cost of \$188.88/MW-day and the RPM price, such repayment should come from CRES providers or those customers who actually shopped. These are the entities who will have benefited from up-front RPM pricing. If the deferral repayment is made nonbypassable and reasonable arrangement customers who have not shopped are required to pay the deferred capacity costs, then those reasonable arrangement customers will be forced to directly subsidize CRES providers and/or their shopping customers.

Right now, there are at least three reasonable arrangement customers of AEP-Ohio: Ormet, Eramet and Timken. These three energy-intensive customers comprise more than 10% of AEP-Ohio's retail sales. Forcing them to repay 10% of a multi-hundred million deferral balance for which they are not responsible is unreasonable and would be economically devastating.

2. The Commission Should Clarify That Any Deferred Capacity Costs Will Be Allocated On The Same Basis As If CRES Providers Were Charged The Full Capacity Rate In The First Place (I.E. On The Basis Of Demand).

The cost allocation mechanism we recommend replicates how customers would have been billed if CRES providers were charged the full cost-based capacity rate of \$188.88/MW-day in the first place. Our proposal is also revenue-neutral to both AEP-Ohio and to the CRES providers.

Because the costs that AEP-Ohio is allowed to defer are capacity-related costs, the Commission should allocate and recover any deferred capacity costs on the basis of demand. Capacity obligations within the AEP-Ohio load zone are assigned to load-serving entities on the basis of their contributions to PJM's 5 coincident peaks, also known as a "5 CP" basis. Accordingly, it is appropriate for the Commission to require AEP-Ohio to first allocate any deferred capacity costs to rate schedules on the

basis of each rate class' contribution to the 5 PJM coincident peaks. The Commission should then require AEP-Ohio to allocate and recover the deferred capacity costs within demand-metered rate classes on the basis of demand and to allocate and recover the deferred capacity costs within the non-demand-metered rate classes on a kWh basis.

This allocation methodology would not be difficult for AEP-Ohio to administer. It would simply result in a different deferral repayment charge by rate schedule. This is the result that would have occurred had the \$188.88/MW-day been charged to CRES providers in the first place. Recreating that same result through the deferral collection methodology is therefore appropriate.

The Commission should reject any proposal that the deferred balance should be repaid by a uniform per kWh charge. While this would be simple, it would also be wrong. Such a methodology would improperly punish the high load factor customers, both large and small, in both the commercial and industrial rate classes. Such high load factor customers include most members of OEG and IEU-Ohio, many members of OMA Energy Group, Kroger, Wal-Mart, the Ohio hospitals and other intervenors in this case. The effective result of a uniform per kWh deferral repayment would be that, instead of all shopping customers being charged \$188.88/MW-day, the high load factor customers would be charged more and the low load factor customers less. The allocation method we propose avoids such unjustified cost shifts.

3. The Commission Should Clarify That AEP-Ohio Must Reduce Any Deferred Capacity Costs By The Relevant Accumulated Deferred Income Tax Amounts.

The Commission should clarify that AEP-Ohio must reduce any deferred capacity costs by the relevant accumulated deferred income tax ("ADIT") during the recovery period so that the carrying costs reflect the Company's actual financing costs.

ADIT represents a reduction in the income taxes paid by AEP-Ohio. During the deferral period, AEP-Ohio will deduct the capacity expenses as they are incurred for income tax purposes, but will not have any matching revenue (income) to be taxed because the Commission deferred the recovery of that revenue from AEP-Ohio's customers. Accordingly, the Company will receive income tax savings during the deferral period. These income tax savings will reduce the amount of the deferred capacity costs that have to be financed and thus, should reduce the carrying costs that must be recovered in order for the Company to be made whole. Conversely, during the recovery period, AEP-Ohio will receive revenue from recovery of the deferred capacity costs, but will have no deductions against that income. Hence, only during the recovery period will the Company pay the income taxes that they did not pay during the deferral period. In essence, the federal and state governments will have provided interest free loans during the deferral period that will only be paid back during the recovery period.

This means that the Company will not have to finance the entire amount of the deferred capacity costs. Instead, the Company will finance the amount of deferred capacity costs minus (or "net-of") the income tax savings gained during the deferral period. Consequently, the Commission should clarify that AEP-Ohio is required to reduce the deferred capacity costs by the relevant amount of ADIT during the recovery period when computing the carrying costs on the unamortized deferred capacity costs.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should modify or clarify the Order in accordance with OEG's recommendations and hold that there is no provision of the Revised Code that authorizes the Commission to force future retail consumers to repay the wholesale capacity payment obligations that unregulated CRES providers owe to AEP-Ohio.

Respectfully submitted,



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June 26, 2012

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I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 26th day of July, 2012 to the following:



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