BEFORE THE
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

FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM IN OPPOSITION TO AEP OHIO'S APPLICATION FOR REHEARING

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I. INTRODUCTION

The Commission has granted AEP Ohio "cost based" capacity pricing that is more than double the applicable market rate.[1] Thus, the Commission contemplates that AEP Ohio will collect capacity charges well in excess of anything contemplated by the Reliability Assurance Agreement ("RAA") and well in excess of what is necessary to cover AEP Ohio's net avoidable costs. Yet AEP Ohio's sprawling sixty-six page Application for Rehearing (the "Application") complains the Commission's largesse is just not enough.[2] The Application quibbles with Staff's calculation of the energy credit while rehashing the same arguments which have already been considered and rejected by the Commission. While FES does not agree with the Commission's decision to impose above-market pricing, AEP Ohio certainly offers no justification for changing the impartial balancing of competing interests already done by the Commission in calculating the energy credit in this case.

AEP Ohio also "preserves" constitutional challenges to the Order under the confiscatory ratemaking doctrine and the Takings Clause. Under either theory, AEP Ohio alleges that a substantially above-market rate is not "just and reasonable" because it could result in a lower-than-desired return on equity in one year – 2013. Of course, AEP Ohio asks the Commission to focus only on 2013 because its actual returns prior to that year and its forecasted returns in 2014 and 2015 are more than adequate. Thus, there is no evidence that the "end result" of the rate

[1] July 2, 2012 Opinion and Order (the "Order"). The average delivered RPM market price for the 2012/13, 2013/14 and 2014/15 planning years is $69.22/MW-day. FES Ex. 103, Direct Testimony of Jonathan A. Lesser, p. 36.

[2] OAC 4901-1-31(B) requires that "All briefs or and memoranda which are greater than ten pages in length and which address more than one proposition or issue shall contain a table of contents which shall include the propositions or issues discussed within the brief or memorandum." Despite filing a 66 page brief, AEP Ohio failed to include a table of contents in violation of this requirement. The Commission would be justified in striking AEP Ohio's Application for Rehearing from the record on this basis alone.

order is confiscatory or would prevent AEP Ohio over the long term from attracting capital.[3] Indeed, providing AEP Ohio with a windfall in the form of an above-market rate is not confiscatory in any way, and AEP Ohio's threats should be ignored.

Finally, AEP Ohio raises a host of objections to the deferral created by the Order. Once again, there is a fatal flaw in each of these arguments. The Commission determined that it had the authority to create a cost-based state compensation mechanism. Regardless of the validity of this determination, if the Commission has the authority to create such a mechanism, then it certainly has the authority to follow the express guidance of Revised Code Chapter 4928 and encourage competition through the use of RPM market pricing.

II. ARGUMENT

A. AEP Ohio's Attacks On The Energy Credit Lack Merit.

In the Order, the Commission established a cost-based state compensation mechanism based on AEP Ohio's purported fully embedded costs.[4] AEP Ohio's Application attempts to increase the above-market capacity revenues it will receive by challenging the energy credit calculated by Staff. However, the Commission already considered -- and rejected -- each of these arguments, finding that the energy credit "will ensure that AEP-Ohio does not over recover its capacity costs."[5] AEP Ohio offers no basis for departing from that decision.[6] Although the

[3] *See* Tr. Vol. VI, pp. 1228-30 (OEG witness Kollen recognizing that AEP Ohio would not be prevented from attracting capital with an ROE of 10% in 2012, 6.8% in 2013 and 10% in 2014, and also agreeing that it is necessary to look at earnings over the long term when making a confiscation determination).

[4] Order, p. 22. The Commission's $188.88/MW-day price represents a modification of Staff's calculation, which, in turn, is based on AEP Ohio's purported embedded cost calculation. *See* Order, pp. 33-35. The Commission's (and Staff's) modifications of AEP Ohio's proposed calculation reflect, for the most part, the implementation of an energy credit and other adjustments that do not affect the nature of the cost calculation.

[5] Order p. 36.

[6] As explained in FES's Application for Rehearing, the Order is unreasonable and unlawful in guaranteeing AEP Ohio the right to recover its fully embedded costs in the amount of $188.88/MW-day.

Commission has already reviewed each of these issues in detail, a brief review is appropriate to provide more context to AEP Ohio's misleading arguments.

AEP Ohio argues that the Commission should not adopt any energy credit whatsoever, a position which lacks any merit (and is directly contrary to all credible evidence).[7] As recognized by the Commission, the cost of capacity is offset by revenue from energy sales. Thus, an energy credit is necessary if a cost-based capacity price is awarded.[8]

In the alternative, AEP Ohio recommends that the Commission adopt its proposed energy credit through the testimony of AEP Ohio witness Pearce. AEP Ohio claims that the Commission erred in adopting Staff's methodology as opposed to its preferred formula rate.[9] However, as recognized by the Commission, there is no way to determine conclusively one way or another how high AEP Ohio's actual energy margins will be in future periods. Thus, Staff's adjustments to AEP Ohio's template, adopted by the Commission, were "reasonable."[10]

In any event, the flaws in AEP Ohio's template are readily apparent. Dr. Pearce's energy credit calculation prepared for this proceeding included errors that he could not explain.[11] Moreover, once the Pool is terminated and corporate separation is complete, Dr. Pearce proposes that AEP Ohio's FERC Form 1 costs pre-corporate separation be used to determine the

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Moreover, the recovery of embedded costs through capacity prices is improper based on PJM's tariff and Ohio law and policy.

[7] Application, p. 14. When a customer shops, AEP Ohio is then free to sell the energy freed up from that capacity resource. Lesser Direct, p. 45. AEP Ohio recovers a portion of its fixed costs when it makes energy-related sales for resale because revenues received from those sales that exceed AEP Ohio's variable O&M plus fuel costs recover a portion of its embedded capacity costs. *Id*.

[8] Order, p. 34.

[9] Application, p. 14.

[10] Order, p. 34

[11] *See* Tr. Vol. II, pp. 270-71 (Dr. Pearce unable to explain why monthly energy rates on page 21 of Exhibit KDP-4 do not match monthly energy rates on Exhibit KDP-5, page 1 of 2, which is the basis for his energy credit).

appropriate value for capacity sold by the AEP Generation to AEP Ohio post-corporate separation.[12] This makes no sense because, among other reasons,, these costs will include the Amos and Mitchell plants that won't even be owned by AEP Generation.[13] Plus, Dr. Pearce's energy credit will also apply the Member Load Ratio ("MLR") to reduce the credit by 60% despite the fact that for the last seventeen months of the bridge period the Pool will have terminated and the MLR will not exist. With these obvious errors, adjustments by Staff were necessary.

Leaving aside the flaws in AEP Ohio's proposal, which was appropriately rejected by the Commission, AEP Ohio's objections to the Staff energy credit all lack merit. By way of example, AEP Ohio claims that the Ohio Supreme Court's decision in *In re Application of Columbus Southern Power Co*., 128 Ohio St.3d 512 (2011), supports a downward adjustment to the energy credit due to flaws in the inputs used by Staff and the nature of Staff's calculation.[14] However, this mischaracterizes the decision. The Supreme Court reversed the Commission's decision not because the *inputs* used in the Black-Scholes model were wrong, but rather because this model was not intended to be used to calculate POLR risk and was misused by AEP Ohio in that case. As the Court explained:

> "this formula simply does not reveal 'the cost to the Companies to be the POLR and carry the risks associated therewith.' The record shows that the model does not even purport to estimate costs, but instead tries to quantify 'the value of the optionality [to shop for power] that is provided to customers under Senate Bill 221.' Value to customers (what the model shows) and cost to AEP (the purported basis of the order) are simply not the same thing."[15]

[12] Tr. Vol. II, pp. 278-79.

[13] Tr. Vol. II, p. 278.

[14] Application, pp. 15, 18.

[15] *In re Application of Columbus Southern Power Co*., 128 Ohio St.3d 512, 518 (2011).

As shown by this decision, when faced with a flawed proposal from AEP Ohio, the Commission may choose the energy credit calculated by Staff which is intended to calculate future energy margins.

Similarly, AEP Ohio again repeats its familiar refrain regarding zonal v. nodal pricing, claiming that the failure to account for differences in these structures constitutes a flaw in Staff's model.[16] As pointed out by FES in its Post-Hearing Reply Brief at p. 39, this distinction is irrelevant. AEP Ohio witness Meehan's gross margin estimates overlooked the fact that revenues from Pool off-system sales are accounted for after-the-fact.[17] AEP Ohio's repeated complaint regarding nodal vs. zonal modeling ignores that all energy margins from off-system sales under the Pool Agreement are allocated on a zonal basis, suggesting that a nodal approach is irrelevant.

As a final example of the flaws in AEP Ohio's positions, AEP Ohio attacks the projected market prices used by Staff for energy and fuel as not being consistent with market prices.[18] The irony should be apparent. AEP Ohio has proposed, and received, a formula rate for capacity pricing which bears no relationship to the market whatsoever. Indeed, AEP Ohio's proposed rate was more than four times higher than market pricing, and the rate approved by the Commission is more than twice market pricing. It is unreasonable for AEP Ohio to object to non-market inputs to Staff's model when it is proposing a formula rate that costs customers millions of dollars in extra, above-market capacity charges.

[16] Application, pp. 22-23.

[17] Tr. Vol. XII, p. 2691.

[18] Application, pp. 27-35.

B. AEP Ohio's Constitutional Claims Are Baseless.

AEP Ohio purports to preserve its constitutional arguments for appeal unless the Commission gives it (and AEP Generation, following corporate separation) fully embedded cost recovery.[19] This threat can be rejected without an extensive legal analysis.

This case does not involve traditional cost-based rate-of-return ratemaking. Instead, AEP Ohio was free to sell its capacity and it voluntarily made the FRR election for the relevant period. Now that AEP Ohio does not like the actual market pricing during two planning years, it seeks to use its monopoly power to force Competitive Retail Electric Service ("CRES") providers and its captive customers to pay substantially above-market prices due to its monopoly on capacity for the relevant period. There is no authority in AEP Ohio's brief suggesting that a utility can create a monopoly and then claim prejudice when the Commission fails to allow it to exploit its monopoly to charge more than four times market pricing instead of more than twice market pricing.

FERC has held that RPM market pricing is just and reasonable.[20] Thus, it is not confiscatory and not a "taking" of AEP Ohio's property without paying just compensation. Market pricing is just, even when markets do not generate revenues in the short-term sufficient to cover fully embedded costs. Indeed, in this case, capacity pricing under the RAA ensures reliability in PJM and is completely unrelated to AEP Ohio's fully embedded costs.[21] This is

[19] *See* Application, pp. 43-56.

[20] *See* FES Ex. 118 (121 FERC ¶ 61,173, FERC Docket No. ER05-1410-005 and EL05-148-005, Order Denying Rehearing, Nov. 15, 2007) at ¶ 24.

[21] FES Ex. 101, Direct Testimony of Robert B. Stoddard, filed Apr. 4, 2012 ("Stoddard Direct"), p. 7.

why FERC has questioned AEP's formula rate proposal – which generates a substantially above-market price based on fully embedded costs – as likely not just and reasonable.[22]

Moreover, contrary to AEP Ohio's claims, the U.S. Constitution does not guarantee AEP Ohio's profit margin. In *Hope*, the U.S. Supreme Court recognized that "regulation does not insure that the business shall produce net revenues" and furthermore that "the hazard that the [utility] will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."[23] The Ohio Supreme Court followed suit in *Dayton Power & Light*, stating: "Regulation is deemed no different from any other government action; it can 'limit stringently' the profitability of [a utility's] investment in endeavoring to balance the 'broad public interest entrusted to its protection.'"[24] As the Ohio Supreme Court concluded in *Dayton Power & Light*, "the commission may not benefit the investors by guaranteeing the full return of their capital *at the expense of the ratepayers*."[25] AEP Ohio's limited complaint regarding 2013 earnings simply does not implicate the constitutional standard.

Each of the cases cited by AEP Ohio shares a common theme. In each of these cases, the utility at issue was affirmatively prevented from earning a reasonable rate of return through a limitation on rates set by the governing authority. AEP Ohio cannot meet this standard, because nothing in the Order acts as a rate limit or prevents a reasonable return on equity. The Commission granted AEP Ohio a rate more than double the market price. While this is assuredly

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[22] FERC Docket No. ER12-1173-000, Order Accepting Formula Rate Proposal And Establishing Hearing And Settlement Judge Procedures, Apr. 30, 2012, at ¶ 21 (internal citations to *West Texas* omitted) (emphasis added).

[23] *FPC v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944) (quoting *Fed. Power Comm'n v. Natural Gas Pipeline Co*., 315 U.S. 575, 590 (1942)); *Market Street Ry. Co. v. RR. Comm'n. of California*, 324 U.S. 548 (1945) (regulation does not insure a utility's profit).

[24] *Dayton Power & Light Co. v. Pub. Util. Comm'n of Ohio*, 4 Ohio St.3d 91, 99 (1983) ("The fixing of prices, . . . may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid.").

[25] *Dayton Power & Light Co.*, 4 Ohio St.3d at 102 (emphasis added).

less revenue than AEP Ohio requested, it is not confiscatory. The Commission has done nothing to prevent AEP Ohio from earning a reasonable rate of return, and has gone out of its way to protect AEP Ohio's financial integrity.

There is no authority suggesting that failing to provide the maximum revenue requested by a party is confiscatory or amounts to a "taking" of property when a utility is authorized to collect a multiple of market pricing. AEP Ohio's constitutional claims are baseless.

C. The Deferral Established By The Commission Is An Appropriate Way To Encourage Competition During AEP Ohio's Transition To Market.

AEP Ohio's brief attacks the Commission's decision to establish the state compensation mechanism using RPM market-based capacity pricing (which is the default compensation mechanism under the RAA) plus a deferral of the difference between market pricing and $188.88/MW-day at the weighted average cost of capital.[26] As discussed in detail below, each of these objections lacks merit.

1. Deferring the above-market capacity charges proposed by AEP Ohio is an appropriate way to spur real, not artificial, competition.

As recognized by the Commission, "RPM-based capacity pricing will further the development of competition in the market."[27] This point seems beyond reasonable dispute: market prices send proper price signals to consumers. In contrast, capacity prices more than double market pricing would have a chilling effect on competition. However, AEP Ohio has objected to this deferral on the grounds that the competition created would be "artificial."[28] This argument is not new: it has already been extensively briefed in this proceeding.[29] The flaws in

[26] Application, pp. 56-64.

[27] Order, p. 23.

[28] Application, p. 60.

[29] *See, e.g.*, FES Post-Hearing Reply Brief, pp. 16-19.

AEP Ohio's position are obvious. It is not "artificial" to allow customers to purchase capacity from willing sellers at market rates. However, AEP Ohio's FRR election prevents the PJM market from facilitating this transaction. Therefore, it is appropriate for the Commission to allow market-based pricing during this transition period in order to prevent a chilling effect on shopping.

AEP Ohio's position is also flawed based on its own admissions. AEP Ohio claims that RPM pricing does not foster "durable, legitimate competition" and would not incentivize new construction.[30] AEP Ohio mooted this argument when it acknowledged that "AEP Ohio is not planning to build significant new generation prior to 2015," at which time it will be a participant in the PJM BRA process and subject to RPM prices.[31] Therefore above-market cost-based pricing is not needed to incentivize any new construction, and will only lead to increased costs for customers. Indeed, the only justification for above-market pricing is an increase to AEP Ohio's bottom line. Moreover, even AEP Ohio acknowledged that PJM's RPM construct is working well to incentivize the appropriate generation investments. AEP Ohio witness Meehan wrote that "price signals are more accurate within competitive markets, and can stimulate appropriate infrastructure investment" and that "competitive markets are widely held to produce the most efficient results in our economy, providing the lowest costs to customers."[32] AEP Ohio witness Graves testified that RPM has done a good job of incentivizing the construction of new capacity and that PJM (including the AEP Ohio zone) is currently long on capacity – with 13 GW of excess capacity currently and an additional 5-9 GW expected in the next few years.[33] His

[30] Application, p. 60.

[31] AEP Ohio Post-Hearing Brief, p. 22.

[32] IEU Ex. 125, p. 1, 6

[33] Tr. Vol. V, pp. 869-71.

Brattle Group also reported that, "[d]espite concerns by some stakeholders, RPM has been successful in attracting and retaining cost-effective capacity sufficient to meet resource adequacy requirements" and that RPM "has also facilitated decisions regarding the economic tradeoffs between investment in environmental retrofits on aging coal plants or their retirement."[34]

Based on the evidence presented at hearing, there can be no dispute that the RPM pricing established by the Commission is not "artificial, uneconomic, and subsidized,"[35] but is instead a reasonable mechanism to allow customers access to the competitive market. The additional deferral simply is a subsidy to AEP Ohio, not authorized by the RAA and in conflict with its reliability goals, that gives AEP Ohio a revenue windfall to protect it from its claims of "financial harm."

2. If the Commission has the authority to create a cost-based state compensation mechanism, then it certainly has the authority to follow the express guidance of R.C. Chapter 4928 and encourage competition through the use of market pricing.

AEP Ohio contests the Commission's authority to approve a deferral as a component of the state compensation mechanism in order to incentivize competition.[36] AEP Ohio is incorrect. If the Commission has the authority to establish a cost-based state compensation mechanism, then nothing in Ohio law prohibits it from tailoring that mechanism to accommodate the competitive goals identified in R.C. 4928.02. Indeed, there is nothing in R.C. Chapters 4905 or 4909 which limits the Commission's authority to create a deferral, by modifying accounting procedures, under R.C. 4905.13. Ohio has long recognized that the Commission's authority to approve deferrals under R.C. 4905.13 is distinct from, and not limited by, the ratemaking

[34] Stoddard Direct, Ex. RBS-6, p. I

[35] Application, p. 60.

[36] Application, p. 58.

provisions in R.C. Chapter 4905, including R.C. 4905.22.[37] Therefore, if the Commission has authority to create a state compensation mechanism, then it can implement that state compensation mechanism in any manner it sees fit.

3. There is no justification for discriminating against customers who are currently paying $255/MW-day to shop.

AEP Ohio proposes to discriminate against customers who were forced to shop under the "interim" state compensation mechanism authorized by the Commission at $255/MW-day by forcing them to continue to pay $255/MW-day for capacity.[38] AEP Ohio overlooks some basic facts. Under what authority would the Commission force customers to pay $255/MW-day, when it has determined that AEP Ohio's full embedded cost of capacity is $189/MW-day?[39] Under what authority would the Commission discriminate against similarly situated customers, so that one receives market pricing and the other receives substantially above-market pricing? Under what factual basis in the record would the Commission determine that customers chose to shop at $255/MW-day without the assumption that the state compensation mechanism would soon revert back to market-based pricing at the conclusion of this proceeding? How would affected customers be tracked to determine what small group of customers would be forced to pay above-market pricing while the rest of AEP Ohio's service territory pays market pricing? How would CRES providers determine what prices to offer customers without knowledge of what capacity price they were eligible for? AEP Ohio offers no answers to these basic questions, and there is

[37] *See Office of Consumers' Counsel v. Public Utilities Comm.*, 6 Ohio St.3d 377, 378-79, 453 N.E.2d 673, 675 (1983).

[38] Application, pp. 61-62.

[39] AEP Ohio's Application is unclear as to whether it is requesting these customers pay $255/MW-day, or whether they would pay $189/MW-day. *See* Application, p. 62. In either event, there is no justification for discriminating against this small subset of customers by denying them access to RPM priced capacity.

accordingly no justification for discriminating against customers formerly charged $255/MW-day for capacity by requiring them to pay anything higher than RPM market prices for capacity.

III. CONCLUSION

For the foregoing reasons, the Commission should deny AEP Ohio's Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FES Memorandum In Opposition to AEP Ohio's Application for Rehearing* was served this 30th day of July, 2012, via e-mail upon the parties below.

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Summary: Memorandum in Opposition to AEP Ohio's Application for Rehearing electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.