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 OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, OHIO SCHOOLS COUNCIL, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, AND OHIO SCHOOL BOARD ASSOCIATION

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THE OHIO SCHOOLS' APPLICATION FOR REHEARING

The Ohio Schools,[1] by counsel and pursuant to Section 4903.10, Ohio Rev. Code, and Rule 4901-1-35, Ohio Admin. Code, hereby request rehearing of the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") in this proceeding on July 2, 2012 ("Order"). The Ohio Schools respectfully submit that the Commission's Order is unlawful and unreasonable in the following respects:

A. THE COMMISSION FAILED TO FIND THAT RPM-BASED CAPACITY PRICING IS REASONABLE AND LAWFUL AND SHOULD BE REINSTATED AS THE STATE COMPENSATION MECHANISM.

B. THE COMMISSION LACKS AUTHORITY TO SET COST-BASED CAPACITY RATES.

C. ASSUMING THE COMMISSION HAS AUTHORITY TO SET COST-BASED CAPACITY RATES, ITS ORDER IS UNLAWFUL AS IT FAILS TO FOLLOW THE PRESCRIBED RATEMAKING PROCESSES CONTAINED IN SECTIONS 4909.05, 4909.15, 4909.18, AND 4909.19, OHIO REV. CODE.

D. THE $188.88/MW-DAY COST-BASED CAPACITY CHARGE ORDERED IN THIS PROCEEDING NOT ONLY IS UNLAWFUL, BUT ALSO IS UNREASONBLE IN LIGHT OF THE HARM IT WILL CAUSE CONSUMERS AND

[1] Joint Intervenors Buckeye Association of School Administrators, Ohio Association of School Business Officials, Ohio School Boards Association and Ohio Schools Council are collectively referred to as the "Ohio Schools."

PARTICUALARLY OHIO'S SCHOOLS WHICH ARE ATTEMPTING TO OPERATE IN THE THROES OF A $2.8 BILLION FUNDING CUT.

WHEREFORE, for the reasons more fully set forth in the accompanying Memorandum in Support, the Ohio Schools respectfully request that the Commission grant rehearing of its Order, reverse its determination, and reinstate RPM-based pricing as the state compensation mechanism in Ohio.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The State of Ohio has been a customer choice state since Senate Bill 3 was enacted in 1999. As a customer choice state, the Ohio General Assembly deregulated generation (and, thus, capacity) services,[2] and the Commission adopted the Reliability Pricing Model ("RPM") as the state compensation mechanism. See Order of December 8, 2010. Since 2007, AEP Ohio[3] has offered capacity service under RPM pricing. It was not until 2010 that AEP Ohio, aware that market-based RPM pricing would temporarily dip in PJM planning years 2012/2013 and 2013/2014, sought to increase its capacity charge on the theory that it somehow had a "right" to charge cost-based rates. AEP Ohio Initial Br. at 13. As this application for rehearing demonstrates, AEP Ohio does not have a right to cost-based rates and the Commission's Order granting the same is unlawful.

The Commission's Order has serious consequences for Ohio Schools, which are suffering from $2.8 billion in funding cuts this biennium. Although the Order reduced the capacity charge from $188.88/MW-day to the RPM price (currently $20.01/MW-day), it orders the difference between these amounts deferred and recovered through a mechanism to be determined in AEP Ohio's electric security plan ("ESP") case. See PUCO Case No. 11-346-EL-SSO. The terms of the recovery, and particularly from whom, have not been determined. Recovery from consumers could substantially harm schools, as could recovery from CRES providers, which can pass through charges to the

[2] See Sections 4928.03 and 4928.05(A), Ohio Rev. Code.

[3] Ohio Power Company and Columbus Southern Power Company merged effective December 31, 2011. Ohio Power Company is the surviving entity and will be referred to as "AEP-Ohio" or "the Company."

schools or terminate their contracts, resulting in a school's loss of hundreds of thousands of dollars in savings per year.

Moreover, the Order acknowledges that the Commission will consider "any additional financial considerations in the [ESP] proceeding." Order, at 23. The Ohio Schools fear this statement is in reference to the Company's request for a retail stability rider ("RSR"), and its proposal to increase the RSR by $33 million for every $10/MW-day decrease to its proposed capacity charge. The Company's proposal could add approximately $550 million to the RSR, leading to the rate shock the Commission sought to avoid by its entry of February 23, 2012, to the considerable detriment of Ohio's cash-strapped schools.

The Commission has but one lawful and reasonable choice on rehearing, and that is to reverse its order and reinstate the traditional RPM compensation mechanism.

II. THE COMMISSION'S ORDER AND THE OHIO SCHOOLS' GROUNDS FOR REHEARING

The Commission placed at issue in this proceeding the following three questions:

1. Does the Commission have jurisdiction to establish a state compensation mechanism?

2. Should the state compensation mechanism for AEP Ohio be based on the Company's capacity costs or on another pricing mechanism such as RPM-based auction prices?

3. What should the resulting compensation be for AEP Ohio's FRR capacity obligations?

See Order, at 9. As to the first issue, the Commission took subject matter jurisdiction over the state compensation mechanism pursuant to its general supervisory powers contained in Sections 4905.04, 4905.05, and 4905.06, Ohio Rev. Code. The Commission specifically rejected that its authority was derived from Chapter 4928, Ohio Rev. Code,

finding that such chapter related to retail electric service, and that the capacity compensation in question was an intrastate wholesale matter. Order, at 12-13.

As to the second issue, the Commission found that the state compensation mechanism should be cost-based, relying on its "regulatory authority under Chapter 4905, Revised Code, as well as Chapter 4909, Revised Code." Order, at 22. The Order does not identify the specific provisions of Chapters 4905 and 4909, Revised Code, which the Commission followed to set cost-based capacity rates, other than a reference to Section 4905.22, Ohio Rev. Code, which generally requires rates to be just, reasonable and lawful.

Finally, as to the third issue the Commission adopted a capacity charge of $188.88/MW-day, using "the capacity portion of a formula rate template approved by FERC for one of the Company's affiliates," as the starting point and making various adjustments "consistent with…ratemaking practices in Ohio." Order, at 33-34. Further, relying on Section 4928.02 and 4928.06(A), Ohio Rev. Code, the Commission ordered AEP Ohio to charge competitive retail electric service ("CRES") providers the current RPM price for capacity, with the difference between the RPM price and the $188.88 cost-based capacity charge to be deferred pursuant to Section 4905.13, Ohio Rev. Code, and recovered through a mechanism to be established in the pending ESP proceeding. Order, at 23.

The Commission's Order is unlawful and unreasonable in the following respects:

A. THE COMMISSION FAILED TO FIND THAT RPM-BASED CAPACITY PRICING IS REASONABLE AND LAWFUL AND SHOULD BE REINSTATED AS THE STATE COMPENSATION MECHANISM.

B. THE COMMISSION LACKS AUTHORITY TO SET COST-BASED CAPACITY RATES.

C. ASSUMING THE COMMISSION HAS AUTHORITY TO SET COST-BASED CAPACITY RATES, ITS ORDER IS UNLAWFUL AS IT FAILS TO FOLLOW THE PRESCRIBED RATEMAKING PROCESSES CONTAINED IN SECTIONS 4909.05, 4909.15, 4909.18, AND 4909.19, OHIO REV. CODE.

D. THE $188.88/MW-DAY COST-BASED CAPACITY CHARGE ORDERED IN THIS PROCEEDING NOT ONLY IS UNLAWFUL, BUT ALSO IS UNREASONBLE IN LIGHT OF THE HARM IT WILL CAUSE CONSUMERS AND PARTICUALARLY OHIO'S SCHOOLS WHICH ARE ATTEMPTING TO OPERATE IN THE THROES OF A $2.8 BILLION FUNDING CUT.

III. ARGUMENT

A. THE COMMISSION FAILED TO FIND THAT RPM-BASED CAPACITY PRICING IS REASONABLE AND LAWFUL AND SHOULD BE REINSTATED AS THE STATE COMPENSATION MECHANISM.

AEP Ohio has claimed throughout this proceeding that it has a "right" to a cost-based capacity charge. See, e.g., AEP Ohio Initial Br., at 13. The genesis of AEP Ohio's self-proclaimed "right" to change the capacity charge from RPM to a cost-based charge was PJM's Reliability Assurance Agreement ("RAA"), and specifically Section D.8 of Schedule 8.1, which provides:

> In the case of load reflected in the FRR Capacity Plan that switches to ***[a CRES], where the state regulatory jurisdiction requires*** switching customers or ***the [CRES] to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail***. ***In the absence of a state compensation mechanism***, ***the applicable [CRES] shall compensate the FRR Entity at [rest-of-pool or "RTO" clearing prices], provided that the FRR Entity may, at any time, make a filing with FERC*** under Sections 205 of the Federal Power Act proposing ***to change the basis for compensation to a method based on the FRR Entity's costs*** or such other

> basis shown to be just and reasonable. (Emphasis supplied.)

The emphasized language makes clear that a state compensation mechanism prevails over FERC approved capacity rates, and provides authority only for an FRR entity to apply to FERC to seek a change from RPM pricing to a cost-based rate. This language does not require a state with an RPM state compensation mechanism (such as Ohio) to provide an FRR entity (such as AEP Ohio) with cost-based rates. Rather, Ohio's statutory schemes apply. In Ohio, generation is unregulated and not subject to the Commission's ratemaking authority.[4] Rather, the Commission's authority is limited to assuring the applicable state policies found in Chapter 4928, Ohio Rev. Code, are fulfilled. Indeed, the Commission recognized its authority under Section 4928.02, when ordering that AEP Ohio charge competitive retail electric service ("CRES") providers the RPM rate:

> …the Commission recognizes that RPM-based capacity pricing will further the development of competition in the market..., which is one of our primary objectives in this proceeding. We believe that RPM-based capacity pricing will stimulate true competition among suppliers in AEP-Ohio's service territory. We also believe that RPM-based capacity pricing will facilitate AEP-Ohio's transition to full participation in the competitive market, as well as incent shopping. RPM-based capacity pricing has been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field…RPM-base capacity pricing is thus a reasonable means of promoting shopping in AEP-Ohio's service territory and advancing the state policy objectives of Section 4928.02, Revised Code, which the Commission is required to effectuate pursuant to Section 4928.06(A), Revised Code.

[4] See Sections 4928.03 and 4928.05(A)(1), Ohio Rev. Code.

Order, at 23. By its reasoning, the Commission is giving effect to Section 4928.02(C), Ohio Rev. Code, which provides that it is the policy of this state to:

> Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers…

RPM-based capacity pricing is reasonable and lawful and should be reinstated as the state compensation mechanism on rehearing. [5]

B. THE COMMISSION LACKS AUTHORITY TO SET COST-BASED CAPACITY RATES.

It is settled that the Commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm. (1999), 85 Ohio St. 3d 87; Columbus S. Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St. 3d 535; *Pike Natural Gas Co. v. Pub. Util. Comm*. (1981), 68 Ohio St. 2d 181; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153; and *Dayton Communications Corp. v. Pub. Util. Comm*. (1980), 64 Ohio St. 2d 302.

The State of Ohio has been a customer choice state since Senate Bill 3 was enacted in 1999. As a customer choice state, the Ohio General Assembly deregulated generation (and, thus, capacity) services. Sections 4928.03 and 4928.05(A), Ohio Rev. Code. Thus, the Commission lacks authority to set cost-based rates for capacity services. The Commission's authority regarding capacity service is limited to ensuring that the state's energy policy is fulfilled pursuant to Section 4928.02 and 4928.06(A). Under that

[5] In its application for rehearing, AEP Ohio argues that Chapter 4928.02, Ohio Rev. Code, applies only to retail service, and not to the capacity services at issue, which it claims are wholesale services. The Ohio Schools do not agree with AEP Ohio's characterization because Section 4928.02, Ohio Rev. Code, provides the general energy policies of the state. In any event, Section 4928.02(C), Ohio Rev. Code, which is the basis of the Commission's determination that AEP Ohio charge RPM-rates, is not limited to retail electric service.

limited authority, the Commission must reaffirm the applicability of the RPM-based state compensation mechanism.

C. ASSUMING THE COMMISSION HAS AUTHORITY TO SET COST-BASED CAPACITY RATES, ITS ORDER IS UNLAWFUL AS IT FAILS TO FOLLOW THE PRESCRIBED RATEMAKING PROCESSES CONTAINED IN SECTIONS 4909.05, 4909.15, 4909.18, AND 4909.19, OHIO REV. CODE.

In its Order, the Commission (erroneously) found that Chapter 4928, Ohio Rev. Code, did not apply in determining rates in this proceeding because the capacity services at issue are wholesale in nature, rather than retail.[6] The Commission's finding begs the question as to the explicit authority to set cost-based rates.

The Commission has been uncharacteristically vague as to the authority it relied on in setting cost-based capacity rates in this proceeding, citing the general supervisory provisions (Sections 4905.04, 4905.05 and 4905.05, Ohio Revised Code) and its regulatory authority (Chapters 4905 and 4909, Ohio Rev. Code). The Order does not identify the specific provisions of Chapters 4905 and 4909, Revised Code, which the Commission followed to set cost-based capacity rates, other than a reference to Section 4905.22, Ohio Rev. Code. See Order, at 22.

If the pro-competitive provisions of Chapter 4928, Ohio Rev. Code, do not apply as the Commission contends then, by default, the Commission's traditional ratemaking statutes, which don't discriminate between wholesale and retail services, must apply. See, generally, Sections 4909.05, 4909.15, 4909.18, and 4909.19, Ohio Rev. Code. Unfortunately, AEP Ohio did not properly file its application in this proceeding as an application for an increase in rates pursuant to Section 4909.18, and the Commission did

[6] The Commission's error is evident by its own reliance on Chapter 4928, Ohio Rev. Code, in ordering that AEP Ohio charge RPM-based pricing. Order, at 23.

not follow the legislative dictates of Chapter 4909 in setting the capacity rate in this proceeding. Instead, without the submission of standard filing requirements and without following the processes required by Sections 4909.05, 4909.15, 4909.18 and 4909.19, the Commission unlawfully established "cost-based" capacity rates based on "the capacity portion of a formula rate template approved by FERC for one of the Company's affiliates." Order, at 33-34. In doing so, the Commission committed plain error that will survive neither an appeal, nor an application for a writ of prohibition to the Ohio Supreme Court. See *Columbus Southern Power Co. v. Pub. Util. Comm*. (1993), 67 Ohio St.3d 535, 540 ("*Columbus Southern*") (The Commission cannot disregard the ratemaking formula in Chapter 4909, Ohio Rev. Code, in setting cost-based rates).

1. The Commission's General Supervisory Powers Do Not Constitute Authority to Set Cost-Based Rates.

The Commission also relies on its general supervisory powers in Sections 4905.04, 4905.05 and 4905.06, Ohio Rev. Code, to set the cost-based rate in this proceeding. However, in rejecting a similar Commission position that a general enabling statute permitted it to deviate from the traditional ratemaking formula, the Ohio Supreme Court held:

> The comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike. *Dayton Power & Light Co. v. Pub. Util. Comm*., supra, 4 Ohio St.3d 91, 4 OBR 341, 447 N.E.2d 733. We cannot conclude that it was the General Assembly's intent under the above enabling statute, R.C. 4901.02(A), to permit the PUCO to disregard ***that very formula*** in instances in which it simply did not agree with the result. Cf. *Consumers' Counsel*, supra, 67 Ohio St.3d at 165, 21 O.O.3d at 104, 423 N.E.2d at 828 ("the General Assembly undoubtedly did not intend to build into its recently revised [1976] ratemaking formula a means by which the PUCO may

> effortlessly abrogate that very formula"). [Emphasis original.]

Columbus Southern, supra. Moreover, reliance on the general supervisory powers to set cost-based rates offends Section 1.51, Ohio Revised Code,[7] which provides that a special statutory provision (e.g., the comprehensive ratemaking formula of Section 4909.15) prevails over general provisions of the Revised Code (e.g., the general supervisory powers in Sections 4905.04, 4905.05 and 4905.06).

Accordingly, reliance on the general supervisory powers to set cost-based rates is unlawful.

2. Section 4905.22, Ohio Rev. Code, Does Not Provide the Commission with Authority to Set Cost-Based Rates.

Rather than relying on the appropriate ratemaking statutes in Chapter 4909, the Commission (as well as AEP Ohio in its application for rehearing) attempts to place undue significance on Section 4905.22, Ohio Rev. Code, as authority to set cost-based rates.[8] This section generally prohibits a utility from charging an unjust, unreasonable, or unlawful rate. It does not prescribe the methodology for determining what the just, reasonable, and lawful rate is. If a rate is found unjust, unreasonable, or unlawful under

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[7] Section 1.51, Ohio Rev. Code, provides:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

[8] Section 4905.22 provides in part:

> Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. ***All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable and not more than charges allowed by law or order of the public utilities commission***...

Emphasis added.

Section 4905.22, the remedy is to be found in the specific ratemaking statute, Section 4909.15. Accordingly, the Commission's reliance on Section 4905.22, Ohio Rev. Code, to set cost-based rates also is unlawful under the authority of *Columbus Southern*, supra, and Section 1.51, Ohio Rev. Code.

D. THE $188.88/MW-DAY COST-BASED CAPACITY CHARGE ORDERED IN THIS PROCEEDING NOT ONLY IS UNLAWFUL, BUT ALSO IS UNREASONBLE IN LIGHT OF THE HARM IT WILL CAUSE CONSUMERS AND PARTICUALARLY OHIO'S SCHOOLS WHICH ARE ATTEMPTING TO OPERATE IN THE THROES OF A $2.8 BILLION FUNDING CUT.

The Commission's Order appears to attempt to appease AEP Ohio by providing it (unlawfully) with cost-based rates. The Order also attempts to appease CRES providers by having AEP Ohio charge them RPM-based prices for capacity. The Order does not address the two elephants in the room: (1) how and from whom the deferrals will be recovered, and (2) the effect of this Order on the Company's requested RSR.

1. Collection of the Deferrals from CRES Providers or Consumers Would Cause Ohio's Schools Serious Financial Harm.

If the $188.88 capacity charge is finally adopted and the deferral recovered from CRES providers, the harm to schools would be significant. CRES providers could pass the increase through to their shopping customers under existing contracts. Ohio Schools Exhibit 101 (Frye), at 9. If CRES providers are unwilling to pass the costs through and believe the contract has become uneconomic, a CRES provider could terminate the contract and send the customer back to the Company's standard service offer. Tr. VIII at 1688-1689, 1694.

If passed through, an increased capacity charge of $188.89/MW-day could cost a single school BUILDING using 130,000 kWh of electricity approximately $1,525 per month, annualized to $18,300 per year. See Ohio Schools Exhibit 101 (Frye), at 8-9.

Considering that most school districts have more than one building and service account, and that large suburban and city schools have many buildings and accounts, the potential increases to shopping schools are enormous, solely due to the pass through, without considering other rate increases in the ESP.

If the increased capacity charges make an existing competitive contract uneconomic and the contract is terminated, a school could be forced to forego savings from shopping of literally hundreds of thousands of dollars per year.

Moreover, although no evidence has been presented as to the terms of the deferral and its effect on rates, collection directly from consumers could be in the hundreds of millions of dollars and impose millions of additional and unnecessary dollars in carrying costs on Ohio's schools, dollars that they can ill afford considering their current budgetary constraints.

2. The Commission's Order Could Significantly Increase the RSR.

In its Order, the Commission stated not only that it would establish a recovery mechanism for the deferrals in the ESP proceeding, but that it also would address any additional financial consideration in the ESP proceeding. The Ohio Schools assume this means further consideration of the Company's proposed RSR.

Disturbingly, AEP Ohio presented testimony that, under its ESP proposal, the level of the RSR would increase in tandem with any decreases to the level of the capacity charge. Specifically, for every $10/MW-day decrease in the capacity charge, the RSR would increase by $33 million dollars. ESP Proceeding, AEP Ohio Ex. 116 (Allen) at 14-15. The capacity charge decrease from $355/MW-day to $188/MW-day, would equal an increase to the RSR of approximately $550 million, almost double the $284 million

projected in the Company's application. See ESP Proceeding, AEP Ohio Ex. 116 (Allen), Ex. WAA6. As proposed, the RSR would cost a larger suburban school district using 1,200,000 kWh of electricity per month approximately $2,000 per month, or approximately $24,000 per year under the initial RSR rate. Under the $188/MW-day capacity rate, the RSR could nearly triple, adding approximately $75,000 to this school's electric bill. See AEP Ohio Exhibit 116 (Allen), Exhibit WAA-6.

These provisions could lead to a similar rate shock for the schools that the Commission sought to avoid in its Entry on Rehearing issued in this proceeding on February 23, 2012.

III. CONCLUSION

For the foregoing reasons, the Ohio Schools request the Commission to grant rehearing of its Order, reverse its initial determination, and reinstate RPM-based pricing as the state compensation mechanism.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Ohio Schools' Application for Rehearing* was served by electronic mail this 1st day August, 2012, upon the following.

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Summary: Application for Rehearing electronically filed by Mr. Dane Stinson on behalf of Ohio School Board Association and Ohio Schools Council and Ohio Association of School Business Officials and Buckeye Association of School Administrators