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**Via E-file**

August 3, 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 OHIO ENERGY GROUP'S MEMORANDUM CONTRA TO APPLICATION FOR REHEARING OF FIRSTENERGY SOLUTIONS CORPORATION for filing in the above-referenced matters.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,



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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 :

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**MEMORANDUM CONTRA  
APPLICATION FOR REHEARING OF FIRSTENERGY SOLUTIONS CORP.  
BY THE OHIO ENERGY GROUP**

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**MEMORANDUM CONTRA  
APPLICATION FOR REHEARING OF FIRSTENERGY SOLUTIONS CORP.  
BY THE OHIO ENERGY GROUP**

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Pursuant to Ohio Adm. Code 4901-1-35, the Ohio Energy Group (“OEG”) submits this Memorandum Contra the Application for Rehearing filed by FirstEnergy Solutions Corp. (“FirstEnergy”) on August 1, 2012. FirstEnergy alleges that any deferred capacity costs recovered pursuant to the Commission’s July 2, 2012 Order (“Order”) represent an “*above-market guarantee/subsidy*” to Ohio Power Company (“AEP-Ohio”). FirstEnergy argues that those deferred excess costs of over \$725 million, before interest,<sup>1</sup> should be recovered from all customers on a nonbypassable basis.<sup>2</sup> But FirstEnergy’s argument is contrary to the Commission’s Order and would require the Commission to exceed its authority under state law and the PJM Reliability Assurance Agreement (“RAA”).

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<sup>1</sup> Application for Rehearing of Ohio Manufacturer’s Association and Ohio Hospital Association at 8.

<sup>2</sup> See FirstEnergy Application for Rehearing at 3 and 17.

**A. FirstEnergy's Description Of The Capacity Cost Differential As An Above-Market Subsidy Is Based Upon A Mischaracterization Of The Commission's Order.**

FirstEnergy's claims that the difference between the \$188.88/MW-day cost-based wholesale capacity rate and the current adjusted RPM-based capacity rates ("*capacity cost differential*") represents an "*above-market guarantee/subsidy*" to ensure AEP-Ohio's overall financial health and should therefore be recovered from all customers on a nonbypassable basis. This argument is directly contradicted by the language of the Commission's Order and should be rejected.

FirstEnergy argues that the state compensation mechanism is composed of two separate charges – one *wholesale market-based* charge to CRES providers (the current RPM rates) and one cost-based *retail* charge established as a "subsidy" to maintain AEP-Ohio's financial stability (the deferred capacity costs). But this characterization of the state compensation mechanism is vastly different from the language of the Commission's Order. Nowhere in the Order does the Commission describe the state compensation mechanism as a *retail* rate or a *market-based* rate. Rather, the Commission takes great care to explicitly characterize the state compensation mechanism as a *cost-based wholesale* rate. Throughout the Order, the Commission reinforces this point. For example, the Commission states:

- "*We agree that the provision of capacity for CRES providers by AEP-Ohio, pursuant to the Company's FRR capacity obligations, is not a retail electric service as defined by Ohio law. Accordingly, we find it unnecessary to determine whether capacity service is considered a competitive or noncompetitive service under Chapter 4928, Revised Code.*"<sup>3</sup>
- "*Although Chapter 4928, Revised Code, provides for market-based pricing for retail electric generation service, those provisions do not apply because, as we noted earlier, capacity is a wholesale rather than a retail service.*"<sup>4</sup>
- "*We conclude that the state compensation mechanism for AEP-Ohio should be based on the Company's costs.*"<sup>5</sup>
- "*Therefore, with the intention of adopting a state compensation mechanism that achieves a reasonable outcome for all stakeholders, the Commission directs that the state*

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<sup>3</sup> Order at 13.

<sup>4</sup> Order at 22.

<sup>5</sup> Order at 22.

*compensation mechanism shall be based on the costs incurred by the FRR Entity for its FRR capacity obligations.”<sup>6</sup>*

- *“Upon review of the considerable evidence in this proceeding, we find that the record supports compensation of \$188.88/MW-day as an appropriate charge to enable AEP-Ohio to recover its capacity costs for its FRR obligations from CRES providers.”<sup>7</sup>*
- *“Given that compensation for AEP-Ohio’s FRR capacity obligations from CRES providers is wholesale in nature, we find that AEP-Ohio’s formula rate template is an appropriate starting point for determination of its capacity costs.”<sup>8</sup>*
- *“...a capacity charge of \$188.88/MW-day is just, reasonable and should be adopted. The Commission agrees with AEP-Ohio that the compensation received from CRES providers for the Company’s FRR capacity obligations should reasonably and fairly compensate the Company and should not significantly undermine the Company’s ability to earn an adequate return on its investment.”<sup>9</sup>*

FirstEnergy’s rehearing application is inconsistent with the Commission’s Order, which explicitly provides that AEP-Ohio is entitled to a wholesale cost-based rate of \$188.88/MW-day from CRES providers.<sup>10</sup> That the Commission did not approve immediate recovery of the rate from CRES providers does not mean that CRES providers are not responsible for paying the entire \$188.88/MW-day rate owed to AEP-Ohio. In fact, the Commission’s Order explicitly states that \$188.88/MW-day is an appropriate charge for AEP-Ohio to recover its capacity costs for its FRR obligations “*from CRES providers.*”<sup>11</sup> FirstEnergy cannot escape responsibility for paying its capacity cost obligations to AEP-Ohio by handing off part of its wholesale bill to retail customers. The Commission should reject FirstEnergy’s attempt to effectively rewrite the Commission’s Order and redefine the state compensation mechanism.

The purpose of establishing the state compensation mechanism is to provide AEP-Ohio just and reasonable compensation for its FRR capacity obligations. The Commission established a

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<sup>6</sup> Order at 23.

<sup>7</sup> Order at 33.

<sup>8</sup> Order at 33.

<sup>9</sup> Order at 36.

<sup>10</sup> Order at 33 and 36.

<sup>11</sup> Order at 33 and 36.

\$188.88/MW-day cost-based wholesale rate as the state compensation mechanism. Consequently, CRES providers should be responsible for paying the \$188.88/MW-day rate to AEP-Ohio.

**B. To Comply With Both The PJM Reliability Assurance Agreement And State Law, The Costs Of The State Compensation Mechanism Must Be Recovered From Load Serving Entities (i.e., CRES Providers).**

FirstEnergy's argument that the deferred capacity costs of over \$725 million should be recovered from both non-shopping and shopping customers is contrary to the plain language of the PJM RAA. Section D.8 of Schedule 8.1 of the RAA provides that "[i]n the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction *requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail.*" (Emphasis added). The language of the RAA therefore limits the parties that can be held responsible for compensating AEP-Ohio under the state compensation mechanism. The RAA contemplates only two categories of entities that could be responsible for compensating AEP-Ohio for its FRR capacity obligations: 1) "switching customers," aka shopping customers; *or* 2) "the LSE," aka CRES providers. The RAA does not authorize a state compensation mechanism in which non-shopping customers are held responsible for compensating AEP-Ohio for its FRR capacity obligations.

Further, even though the RAA provides two categories of entities that could be held responsible for compensating AEP-Ohio for its FRR capacity obligations, only one of those categories – the CRES providers - can lawfully be charged for those FRR capacity costs by the Commission. Because the Commission established a *wholesale* cost-based capacity rate of \$188.88/MW-day under the state compensation mechanism, the Commission cannot levy those charges upon shopping customers. The Commission's authority to directly charge shopping customers only relates to *retail* charges.

Consequently, the only entities that can properly be charged the \$188.88/MW-day wholesale cost-based capacity rate, in accordance with the terms of the RAA and state law, are the CRES providers.

FirstEnergy states that “[a] *state commission’s discretion to set a state compensation mechanism under the RAA is limited by the language and purpose of the RAA...*”<sup>12</sup> OEG agrees. The terms of the RAA that address the Commission’s authority to establish a state compensation mechanism do not provide authority for the Commission to charge costs established under the state compensation mechanism to non-shopping customers. And state law does not provide authority for the Commission to directly charge those costs to shopping customers. Therefore, the state compensation mechanism must apply only to LSEs (CRES providers) and allowing the capacity cost differential to be recovered from all customers on a nonbypassable basis would exceed the Commission’s authority under the RAA.

**C. The Commission Has No Authority To Implement FirstEnergy’s Argument That Any Deferred Capacity Costs Should Be Recovered On A Nonbypassable Basis.**

The Commission does not have authority to implement FirstEnergy’s recommendation that any deferred capacity costs should be recovered on a nonbypassable basis. Though the Commission can authorize a utility to defer certain costs under R.C. 4905.13 or R.C. 4928.144, those costs must be properly recoverable from retail customers in the first place. The Supreme Court of Ohio reinforced that costs must be properly recoverable before the Commission can authorize deferred recovery of such costs in *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305, 817 N.E. 2d 1176. There, the Court found that fuel costs incurred by the utility to supply retail customers could not be deferred and recovered on a nonbypassable basis at a later date because this would constitute an anti-competitive subsidy in violation of state policy. In fact, the subsidy to unregulated CRES providers proposed by FirstEnergy here is even more egregious than the anti-competitive subsidy struck down by the Court in *Elyria Foundry*.

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<sup>12</sup> FirstEnergy Application for Rehearing at 7.



The wholesale capacity costs that FirstEnergy seeks to have recovered from retail customers are not properly recoverable, either today or in the future. The timing of the recovery does not change the nature of the costs to be recovered. The ability to defer cannot by itself turn an improper expense into a proper one. For example, imprudent costs cannot be recovered from ratepayers either in today's rates or in tomorrow's rates on a deferred basis. Likewise, wholesale capacity costs owed by unregulated CRES providers to the utility cannot be recovered from ratepayers either today or in the future on a deferred basis.

The CRES providers are the entities responsible for paying that \$188.88/MW-day cost-based wholesale rate to AEP-Ohio in exchange for the FRR capacity service they receive. To be in compliance with both the RAA and state law, AEP-Ohio's retail customers cannot be held responsible for those wholesale costs. While the Commission could allow AEP-Ohio to defer and recover costs that AEP-Ohio customers actually owe to AEP-Ohio, the Commission has no authority to allow AEP-Ohio to charge its own customers for costs that CRES providers owe to AEP-Ohio. The Commission's job is not to ensure that unregulated CRES providers get fully compensated for the costs of providing service to shopping customers.

The Commission also lacks authority to allow AEP-Ohio to recover any deferred capacity costs from non-shopping customers as an Electric Security Plan ("ESP") provision under R.C. 4928.143 because the \$188.88/MW-day cost-based rate is a wholesale rate, not a retail rate. The ESP statute only provides the Commission authority over retail rates. Moreover, the Supreme Court of Ohio has held that an ESP provision is not authorized by statute if it does not fit within one of the categories listed in R.C. 4928.143(B)(2).<sup>13</sup> The deferred wholesale capacity costs do not fit into any of those categories. Because such costs are not properly recoverable from AEP-Ohio customers, the Commission cannot

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<sup>13</sup> *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

authorize a nonbypassable charge for the difference between the \$188.88/MW-day cost-based rate and the current RPM based rate, either immediately or on a deferred basis.

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 FRR period. Because the state compensation mechanism is a wholesale rate, that rate must be recovered from CRES providers on a wholesale basis. In addition, allowing AEP-Ohio to charge CRES providers the entire cost-based capacity rate of \$188.88/MW-day during the FRR period will bolster AEP-Ohio's overall financial health and cash flow during the FRR period.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, the Commission should reject FirstEnergy's arguments and should charge CRES providers the full \$188.88/MW-day cost-based wholesale rate during the FRR period.

Respectfully submitted,



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August 3, 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 3<sup>rd</sup> day of August, 2012 to the following:



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