

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review)
of the Capacity Charges of Ohio Power,) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company.)

**MEMORANDUM CONTRA FIRSTENERGY SOLUTIONS'
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

BRUCE J. WESTON
CONSUMERS' COUNSEL

Kyle L. Kern, Counsel of Record
Melissa R. Yost
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
614-466-1291 (Yost Telephone)
kern@occ.state.oh.us
yost@occ.state.oh.us

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ARGUMENT	4
A. FES' Argument--That The Deferral Collection Mechanism Must Be Non-bypassable--Should Be Rejected Because No Customers Should Be Required To Subsidize CRES Providers For Capacity Purchased From AEP-Ohio; CRES Providers Should Be Responsible For Paying The Capacity Costs.	4
1. Charging wholesale rates to retail customers will result in unfair competition, double payments and discrimination.	4
2. Charging wholesale rates to retail, non-shopping customers results in an anticompetitive and unlawful subsidy.	6
3. Capacity deferrals may not be collected from non-shopping customers per the plain language of the PJM Reliability Assurance Agreement.	8
4. There is no basis under the law to collect the capacity deferral from all customers.....	9
B. FES' Argument--That All Customers Should Pay The Capacity Deferrals Because The Above-Market Costs Recovered Through The Deferrals Were Authorized To Benefit AEP-Ohio As A Whole--Should Be Rejected.....	12
III. CONCLUSION.....	15

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review)
of the Capacity Charges of Ohio Power,) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company.)

**MEMORANDUM CONTRA FIRSTENERGY SOLUTIONS’
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of the approximately 1.2 million residential utility customers of Ohio Power Company (the “Company” or “AEP-Ohio”), submits this Memorandum Contra¹ FirstEnergy Solutions Corporation’s (“FES”) Application for Rehearing (“Application”). FES seeks rehearing of the Public Utilities Commission of Ohio’s (“PUCO” or “Commission”) July 2, 2012 Opinion and Order (“July 2 Order”) in this proceeding. FES argues that the Commission should rule that certain capacity costs should be collected from all customers (shopping and non-shopping) on a non-bypassable basis. In response, OCC asks the PUCO to protect residential customers from paying hundreds of millions of dollars of capacity costs.

At issue in this case is the capacity price that AEP-Ohio will charge to competitive retail electric service (“CRES”) providers in Ohio—and the potential that the PUCO will allow AEP-Ohio to collect hundreds of millions of dollars from customers to

¹ Ohio Admin. Code 4901-1-35(B).

compensate it for the discounted capacity provided to its competitors. Through its July 2 Order the Commission reversed² its earlier decision to establish market-based capacity priced using the Reliability Pricing Model (“RPM”), as the state compensation mechanism for Ohio. Instead, the PUCO found that the state compensation mechanism was to be a cost-based approach.

The PUCO found that AEP-Ohio’s cost of capacity is \$188.88/MW-day for its fixed resource requirement (“FRR”) obligations to CRES providers,³ but the Commission ordered AEP-Ohio to charge CRES providers a discounted capacity charge set at the RPM market-based rate of \$20.01/MW-day.⁴ The PUCO authorized AEP-Ohio to defer the difference between AEP’s cost and the RPM capacity rates charged to CRES providers.⁵ The Commission indicated it would establish “an appropriate recovery mechanism” for these deferred costs—meaning someone will have to pay AEP-Ohio for the discounted capacity price set by the PUCO’s decision.⁶ The issue of who pays will be resolved in the Company’s electric security plan (“ESP”) case (Case No. 11-346-EL-SSO).⁷ That decision is expected this week.⁸

Given the new development of the PUCO’s authorization of deferrals with the potential that customers may be required to pay AEP-Ohio for the deferrals (plus carrying charges), OCC’s position is as follows. First, OCC maintains that the Commission

² See *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, Entry at 2 (December 8, 2010).

³ Case No. 10-2929-EL-UNC, Opinion and Order at 33 (July 2, 2012).

⁴ Id. at 23.

⁵ Id.

⁶ Id. at 38.

⁷ Id.

⁸ Id.

should have reaffirmed RPM market-based capacity prices as the state compensation mechanism for AEP-Ohio. Second, if the Commission requires the deferred capacity costs be collected from a third party, that third party should not be customers. Residential customers should not be required to subsidize CRES providers for discounted capacity purchased from AEP-Ohio. CRES providers (the cost-causers) should be responsible for paying the Company's costs. Third, if the PUCO intends to require retail customers to subsidize capacity discounts (in the form of deferrals) for CRES providers, then AEP-Ohio's Standard Service Offer ("SSO") customers (non-shoppers) should be excluded from the group of customers that will be required to pay such subsidies that benefit CRES providers and their shopping customers.

FES filed an Application for Rehearing of the PUCO's July 2 Order on August 1, 2012, and recommended that the deferred capacity charge be collected from all customers (shopping and non-shopping) on a non-bypassable basis. FES argued that a non-bypassable recovery mechanism is necessary to ensure that the Commission's goals of promoting competition are met.⁹ In addition, FES suggested that the above market costs recovered through the deferral were authorized to benefit AEP-Ohio as a whole, so all of the Company's customers should pay the deferred amount.¹⁰ OCC disagrees.¹¹ FES' argument is unsupported and will cause customers, especially non-shopping SSO customers, to pay millions of dollars over and above what they are already paying for capacity in SSO rates.

⁹ FES Application for Rehearing at 16.

¹⁰ Id. at 17.

¹¹ OCC contends that the deferrals should be collected from CRES providers. If the PUCO determines that customers should be responsible for the deferrals, then those customers should be shopping customers. Non-shopping customers should not be required to pay capacity charge deferrals when they are already fully paying for AEP Ohio's FRR obligation through SSO rates.

II. ARGUMENT

A. FES' Argument--That The Deferral Collection Mechanism Must Be Non-bypassable--Should Be Rejected Because No Customers Should Be Required To Subsidize CRES Providers For Capacity Purchased From AEP-Ohio; CRES Providers Should Be Responsible For Paying The Capacity Costs.

1. Charging wholesale rates to retail customers will result in unfair competition, double payments and discrimination.

FES suggests that a non-bypassable recovery mechanism is necessary to ensure that the Commission's goals of promoting competition through the deferral are met and that the charges are distributed in the most equitable way possible.¹² If FES' argument is accepted, the result will be that shopping and non-shopping customers will pay twice for capacity to "promote competition," and non-shopping customers will pay far more for capacity than shopping customers and CRES providers. This result is contrary to the law.

R.C. 4928.02(A) requires that "non-discriminatory" and "reasonably priced retail electric service" be available to consumers. R.C. 4928.141 requires the utility to provide a standard service offer of retail electric service on a "comparable and non-discriminatory basis." R.C. 4928.02(L) requires that the PUCO "protect at-risk populations." If the deferred capacity costs are in fact directly collected from customers,¹³ instead of from the CRES providers, hundreds of millions of dollars will be added to customers' bills.¹⁴ Such a result would violate these policy requirements under the statute.

¹² FES Application for Rehearing at 16.

¹³ It is not clear from the PUCO's July 2, 2012 Opinion and Order in Case No. 10-2929-EL-UNC who will be responsible for paying the deferrals.

¹⁴ See Reply Brief of IEU (Case No. 11-346-EL-SSO et al.) estimating that deferrals created will amount to \$800 million, without considering carrying charges.

Commissioner Roberto saw that customers may indeed bear the burden of paying for the subsidy provided to CRES providers. She explained that shopping customers may pay twice for the capacity unless the CRES providers directly pass through RPM market-based prices:

If the retail providers do not pass along the entirety of the discount, then consumers will certainly and inevitably pay twice for the discount today granted to the retail suppliers. To be clear, unless every retail provider disgorges 100 percent of the discount to consumers in the form of lower prices, shopping consumers will pay more for Fixed Resource Requirements service than the retail provider did. This represents the first payment by the consumer for the service. Then the deferral, with carrying costs, will come due and the consumer will pay for it all over again -- plus interest.¹⁵

In addition to shoppers potentially paying twice, non-shopping customers could also pay twice for capacity costs. SSO (non-shopping) customers will pay for capacity once in an overstated (above the \$188.88/MW-day) SSO rate,¹⁶ and then a second time if they end up paying for the capacity cost deferrals that the PUCO has created in this case. This violates R.C. 4928.141, 4928.02(A), and R.C. 4928.02(L). This outcome does not promote competition, and is inapposite to customers' interest.

In addition, R.C. 4928.141 requires the utility to provide consumers a standard service offer on a "comparable and non-discriminatory basis." R.C. 4905.33 prohibits a public utility from charging greater or lesser compensation for services rendered for "like and contemporaneous service under substantially the same circumstances and

¹⁵ July 2, 2012 Opinion and Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4.

¹⁶ AEP-Ohio approximates that non-shopping customers are paying and will continue to pay what the Company claims is its embedded cost of capacity (\$355/MW-day) See Tr. Vol. III at 716, where Company Witness William Allen stated: "[w]hat I did is I compared the SSO revenues that the company is collecting today and I compared that to the revenues the company would recover if we were charging that -- all that load \$355 a megawatt day. Those rates are equivalent." See also, Tr. Vol. II at 247, where Company Witness Kelly Pearce states: "[a]s far as just comparing the strict level of the charges, again, is what they look like within a rough approximation, they appear to be equal."

conditions.” And R.C. 4905.35 prohibits a utility from giving any “undue or unreasonable preference or advantage” to any person.

The capacity that the Company provides for serving non-shopping customers is no different than the capacity provided to serve shopping customers (through capacity made available to CRES providers). But SSO (non-shopping) customers are paying generation rates with \$355/MW-day for capacity embedded in their rates. In contrast, CRES providers are provided capacity at RPM rates well below \$355/MW-day (currently \$20/MW-day). It follows that non-shopping customers should not be responsible for paying the capacity charge deferrals. Requiring non-shopping customers to 1) pay twice for capacity and 2) pay more for capacity than CRES providers and shopping customers is discriminatory and contrary to the law. Accordingly, FES’ argument should be denied.

2. Charging wholesale rates to retail, non-shopping customers results in an anticompetitive and unlawful subsidy.

FES recommends that AEP-Ohio be permitted to collect from retail customers (and not from CRES providers)¹⁷ the difference between the high cost of AEP-Ohio’s capacity and the lower RPM price it will actually charge CRES providers for capacity. This approach will require customers to subsidize CRES providers such as FES. Under FES’ proposal, customers would be required to pay AEP-Ohio to make it whole so that it can charge CRES providers less than the PUCO-determined cost of capacity. This result is not in the best interest of customers and is unlawful.

R.C. 4928.02(H) states:

It is the policy of this state to do the following throughout this state:

¹⁷ The July 2, 2012 Opinion and Order is not clear who will be responsible for paying the difference between the RPM market-based price, and the \$188.88 per MW day price.

* * *

(H) **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; (Emphasis added).

In Commissioner Roberto’s concurring and dissenting opinion, she refers to this payment as a “significant, no-strings-attached, unearned benefit” to entice more sellers into the market.¹⁸ She further states that the deferral mechanism is “an unnecessary, ineffective, and costly intervention into the market” that she cannot support.¹⁹ OCC agrees. There is no basis to extend this benefit to CRES providers at the expense of retail customers, and especially no basis to make non-shopping customers pay for this anticompetitive subsidy for competition.

OCC recommended throughout the course of this proceeding that AEP-Ohio’s charge for capacity be set at the market price, through the use of the Reliability Pricing Model.²⁰ If this had been done, there would have been no discount for capacity, no subsidy to CRES providers, no deferrals, and competition would have been furthered. But the PUCO’s decision in this case seems to be an attempt to find a point in-between what AEP-Ohio wants and what CRES providers want. Unfortunately, that in-between point does not exist in law or reason. The result will be very costly for consumers.

R.C. 4928.02(H) prohibits anticompetitive subsidies from noncompetitive retail electric service to competitive retail service. Here, noncompetitive electric service rates

¹⁸ Id., Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4.

¹⁹ Id.

²⁰ OCC Initial Brief, Case No. 10-2929-EL-UNC (May 23, 2012) at 11.

would be subsidizing wholesale capacity rates to CRES providers, who will in turn be providing competitive retail service. Under this statute, it would be unlawful to collect the capacity costs (whether or not deferred) from retail customers. CRES providers should be responsible for compensating AEP-Ohio for its capacity costs.

3. Capacity deferrals may not be collected from non-shopping customers per the plain language of the PJM Reliability Assurance Agreement.

FES' argument--that capacity deferrals should be collected from all customers--should be rejected because doing so would be contrary to the plain language of the PJM Reliability Assurance Agreement ("PJM RAA" or "RAA"). Section D.8 of Schedule 8.1 of the RAA provides:

[i]n the case of load reflected in the FRR Capacity Plan that switches to an alternative 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 PJM RAA language is clear. When a state compensation mechanism is in place, load serving entities (CRES providers) or switching (shopping) customers are responsible for compensating the FRR Entity (AEP-Ohio). The RAA **does not** authorize a state compensation mechanism in which non-shopping customers are responsible for compensating AEP-Ohio for its FRR obligations. There is no circumstance under which non-shopping customers can be responsible for paying capacity deferrals.²¹

In addition, and as noted by the Ohio Energy Group ("OEG"),²² even though the PJM RAA states that shopping customers or CRES providers are responsible for

²¹ See also; Ohio Energy Group's Memorandum Contra FES' Application for Rehearing in Case No. 10-2929-EL-UNC (August 3, 2012) where they raise a similar argument at 4.

²² Id.

compensating AEP-Ohio for its FRR obligations, the PUCO cannot charge a wholesale cost-based capacity charge to retail shopping customers. The PUCO’s authority, under R.C. 4928.141(A) extends only to ensuring that a utility provides consumers a standard service offer of all competitive “retail electric services” as defined under R.C. 4928.01(27). As the Commission determined, capacity charges to CRES providers are not retail electric services under R.C. 4928.01(27).²³ And the standard service offer AEP-Ohio has chosen is an electric security plan governed by R.C. 4928.143.

The Ohio Supreme Court has held that an electric security plan may only consist of provisions that fall within the confines of R.C. 4928.143(B)(2).²⁴ Wholesale capacity charges that are unrelated to retail electric service do not qualify under any subsection of that statute. This is especially apparent when considering the fact that R.C. 4928.143 establishes the standard service offer rate—a rate that already has incorporated into it the cost of AEP-Ohio providing capacity for retail electric service. Accordingly, under the plain language of the RAA, CRES providers are the only entity who can be lawfully charged for AEP-Ohio’s capacity obligations as an FRR entity.

4. There is no basis under the law to collect the capacity deferral from all customers.

FES argues that all customers should be required to pay the capacity deferral. That is mistaken. There is no statutory basis to collect deferred capacity charges from all customers under the provisions of an ESP. The Commission authorized the capacity charges -- and the deferrals -- specifically under R.C. 4905.04, 4905.05, and 4905.06, and

²³ July 2, 2012 Opinion and Order at 13.

²⁴ *In re: Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶ 32.

generally under R.C. Chapters 4905 and 4909.²⁵ AEP-Ohio's ESP, however, is governed by R.C. 4928.143.

The only deferrals mentioned in R.C. 4928.143 are “deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding *retail electric service*.”²⁶ But this deferral would not have the effect of stabilizing or providing certainty regarding *retail electric service*. And the Commission made no such finding. Instead, the Commission recognized 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.”²⁷ The deferral itself was created out of the Commission's notion that “RPM-based capacity pricing would be insufficient to yield reasonable compensation for AEP-Ohio's provision of capacity to CRES providers in fulfillment of its FRR capacity obligations.”²⁸

Next, the deferral does not comply with R.C. 4928.144, which states, in pertinent part: “[t]he public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers.” Here, by ordering AEP-Ohio to charge CRES providers RPM-based capacity prices, then deferring the difference between those prices and the Company's capacity costs for potential collection through the ESP, the Commission appears to be potentially creating a phase-in of AEP's wholesale capacity charges. This approach would not comport with R.C.

²⁵ July 2, 2012 Opinion and Order at 22.

²⁶ R.C. 4928.143(B)(2)(d). (Emphasis added).

²⁷ July 2, 2012 Opinion and Order at 13.

²⁸ Id. at 23.

4928.144 because (a) the rate was not established as a *retail electric service* rate under R.C. 4928.141 to 4928.143 and (b) as mentioned above, the deferral has not been shown to be necessary to ensure rate or price stability for retail electric service to consumers.

Third, although the PUCO has general authority to supervise and regulate all public utilities within its jurisdiction²⁹ such statutes do not equate to the power to set rates, especially rates that are established through a utility's electric security plan. As it relates to EDUs, R.C. 4905.04 only gives the Commission "the power and jurisdiction to supervise and regulate public utilities [and] * * * to require all public utilities to furnish their products and render all services exacted by the commission or by law...." R.C. 4905.05 gives the Commission certain limited rights over public utilities' property and records. And R.C. 4905.06 provides the Commission with general supervisory powers over public utilities' property and records. In sum, none of these statutes permits the Commission to defer AEP-Ohio's wholesale capacity costs and allow AEP-Ohio to collect those costs through retail rates set as the standard service offer in its ESP. Indeed the General Assembly specifically exempted EDUs from the PUCO's supervision and regulation under R.C. 4905.04 and 4905.05.³⁰ As often noted, the PUCO is a creature of statute and possesses no power other than that specifically granted to it by the General Assembly.³¹

²⁹ See R.C. 4905.04, 4905.05, and 4905.06.

³⁰ R.C. 4928.05(A)(1). Although EDUs may be subject to PUCO regulation under 4905.06, such regulation is "only to the extent related to service reliability and safety," neither of which is at issue here.

³¹ *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 Ohio Op.3d 478, 414 N.E.2d 1051.

The Supreme Court of Ohio has found that costs must be properly recoverable before the Commission can authorize deferred recovery of such costs.³² In *Elyria Foundry v. Pub. Util. Comm.*, the Supreme Court reversed the orders of the PUCO that had authorized increased fuel-cost deferrals, finding that it is Ohio's policy to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies.³³ Similarly, it would be improper in this proceeding for the PUCO to rule that capacity deferrals can be collected from all customers on a non-bypassable basis, as suggested by FES. The PUCO simply does not have the jurisdiction under Chapter 4928 to impose wholesale costs onto retail customers.

In order to comply with the law and plain language of the PJM RAA, the Commission must reject FES' argument that all customers should be responsible for paying the deferred capacity charges. Instead, FES and the other CRES providers should be held responsible for the discount that they are receiving.

B. FES' Argument--That All Customers Should Pay The Capacity Deferrals Because The Above-Market Costs Recovered Through The Deferrals Were Authorized To Benefit AEP-Ohio As A Whole--Should Be Rejected.

FES argues that the deferral recovery mechanism should be paid by all customers³⁴ because the above-market costs to be collected through the deferrals were "authorized to benefit AEP-Ohio as a whole."³⁵ FirstEnergy attempts to recast the decision of the PUCO as a decision based on retail rate matters (the financial well being

³² *Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305, 817 N.E. 2d 1176.

³³ *Id.*

³⁴ FES states that the "only equitable method to implement recovery of the deferred amount is to apply the charge evenly to all of AEP Ohio's customers on a non-bypassable basis." FES Application for Rehearing at 16. To the contrary, the only equitable method to implement recovery of the deferred amount is to apply that charge evenly to all of the CRES providers who are receiving the discounted capacity.

³⁵ FES Application for Rehearing at 17.

of AEP-Ohio) instead of wholesale matters (cost of capacity charged to CRES). That is mistaken. Rather, FirstEnergy's maneuvering implicitly reveals two things: (1) FirstEnergy itself has concerns that the PUCO's decision is unsupportable and (2) FirstEnergy wants to secure its status as the beneficiary of the discounted (subsidized) capacity in the PUCO's decision.

FirstEnergy alleges that the capacity charges allow AEP-Ohio to "recover positive cash returns for fulfilling its FRR capacity obligations."³⁶ FES further argues that such returns would also "contribute to the recovery***of AEP Ohio's other costs."³⁷ FES then concludes that the Commission's decision to allow AEP to recover fully embedded costs, rather than avoided costs, is based on a retail ratemaking premise that requires AEP-Ohio to be given a return on equity that is appropriate under retail rates. It points to the finding of the Commission that "RPM prices would provide AEP Ohio with 'an unusually low return on equity' and would be 'insufficient to yield reasonable compensation' to AEP Ohio."³⁸ FES concludes that the impact of the "additional" cost recovery (beyond RPM) is primarily directed at providing a financial subsidy to AEP-Ohio as a whole, and thus, all customers should pay the deferred amount.³⁹ This circular argument misinterprets the PUCO's July 2 Order, as recognized by the Ohio Energy Group, in their Memo Contra.⁴⁰

³⁶ Id. at 11.

³⁷ Id.

³⁸ Id. at 17.

³⁹ Id.

⁴⁰ See OEG Memo Contra FES' Application for Rehearing, Case No. 10-2929-EL-UNC (August 3, 2012) at 2-4.

In the July 2 Order the PUCO found that the state compensation mechanism for AEP-Ohio should be based on the Company's embedded, not avoided capacity costs.⁴¹ The Commission ultimately found that AEP-Ohio's costs for capacity are \$188.88/MW-day. The \$188.88/MW-day does not represent AEP-Ohio's "financial stability costs," as suggested by FES—it represents AEP-Ohio's capacity costs. The financial stability of AEP-Ohio was not a component of the \$188/MW-day capacity charge. FES cannot point to a single record citation that shows otherwise. Rather the Commission set the compensation at \$188/MW-day and noted in passing that it "expected" that the \$188/MW-day compensation for AEP's FRR obligations would "likewise ensure that the Company earns an appropriate return on equity as well as enable the further development of competition in the Company's service territory."⁴²

FES merely seeks to characterize the \$188.88/MW-day cost-based capacity price as a financial subsidy to AEP-Ohio in order to avoid paying those costs themselves. But FES' interpretation is wrong. There is no subsidy to AEP if AEP is being compensated for what the Commission determined was AEP's cost of providing capacity. Rather the subsidy that will exist is created if third parties, other than CRES providers, must pay for the deferred capacity costs caused by RPM pricing being given to CRES providers. As fully explained by OCC in its application for rehearing, that is a subsidy that is prohibited by law under R.C. 4928.02(H).

It is also nonsensical for FES to argue that non-shopping customers should be responsible for paying the capacity deferrals when the deferrals are simply the cost of AEP Ohio providing discounted wholesale capacity to CRES providers. Moreover, non-

⁴¹ July 2 Order at 22.

⁴² Id. at 35.

shopping customers are already paying for capacity through their SSO rates. Charging these non-shopping customers twice for capacity is not just, reasonable, or in keeping with ensuring that customers have reasonably priced electric service in the state of Ohio. FES' application for rehearing should be rejected.

III. CONCLUSION

FES argues that all customers should pay the deferred amounts between the \$188.88/MW-day capacity price set by the PUCO and the RPM market-based price CRES providers will be charged. That is mistaken.

FES' proposal would have retail customers subsidizing competitors. It would lead to discriminatory rates. And it would result in unreasonably priced electric service for customers. All of those results and others would violate Ohio law. For the reasons set forth in this Memorandum Contra, the Commission should protect consumers and deny FES' Application for Rehearing.

Respectfully submitted,

BRUCE J. WESTON
CONSUMERS' COUNSEL

/s/ Kyle L. Kern

Kyle L. Kern, Counsel of Record
Melissa R. Yost
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-9585 (Kern Telephone)
614-466-1291 (Yost Telephone)
kern@occ.state.oh.us
yost@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra FirstEnergy's Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 7th day of August, 2012.

/s/ Maureen R. Grady

Maureen R. Grady
Assistant Consumers' Counsel

SERVICE LIST

Thomas.lindgren@puc.state.oh.us
Werner.margard@puc.state.oh.us
John.jones@puc.state.oh.us
Steven.beeler@puc.state.oh.us
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org
haydenm@firstenergycorp.com
Paul.Wight@skadden.com
John.Estes@skadden.com
cendsley@ofbf.org
Amy.spiller@duke-energy.com
rsugarman@keglerbrown.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
Gregory.dunn@icemiller.com
Christopher.miller@icemiller.com
Asim.haque@icemiller.com
rjhart@hahnlaw.com
rremington@hahnlaw.com
djmichalski@hahnlaw.com

stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
Jeanne.Kingery@duke-energy.com
whitt@whitt-sturtevant.com
Thompson@whitt-sturtevant.com
campbell@whitt-sturtevant.com
vparisi@igsenergy.com
mswhite@igsenergy.com
Sandy.grace@exeloncorp.com
lmcalister@bricker.com
ricks@ohanet.org
tobrien@bricker.com
mhpetricoff@vorys.com
zkravitz@taftlaw.com
myurick@taftlaw.com
dane.stinson@baileycavalieri.com
Dorothy.Corbett@duke-energy.com
bpbarger@bcslawyers.com
dconway@porterwright.com
cmoore@porterwright.com
dstahl@eimerstahl.com
derekshaffer@quinnemanuel.com
Greta.see@puc.state.oh.us
Sarah.parrot@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/7/2012 1:41:16 PM

in

Case No(s). 10-2929-EL-UNC

Summary: Memorandum Memorandum Contra FirstEnergy Solutions' Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.