**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

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# MEMORANDUM CONTRA OF OHIO POWER COMPANY TO THE OHIO MANUFACTURERS' ASSOCIATION'S AND OHIO HOSPITAL ASSOCIATION'S JULY 30, 2012 APPLICATION FOR REHEARING AND FIRSTENERGY SOLUTIONS CORP'S, INDUSTRIAL ENERGY USERS – OHIO'S, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S, AND THE OHIO SCHOOLS' AUGUST 1, 2012 APPLICATIONS FOR REHEARING

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**On behalf of Ohio Power Company**

## I. INTRODUCTION

Pursuant to Section 4903.10, Ohio Revised Code ("R.C."), and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), the Ohio Manufacturers' Association and the Ohio Hospital Association (collectively, "OMA/OHA"); FirstEnergy Solutions Corp. ("FES"); Industrial Energy Users – Ohio ("IEU"); the Office of the Ohio Consumers' Counsel ("OCC"); and the Ohio Association of School Business Official, Ohio Schools Council, Buckeye Association of School Administrators, and Ohio School Board Association (collectively, "Schools") filed applications for rehearing of the Commission's July 2 Opinion and Order in this case (the "July 2 Opinion and Order"). Ohio Power Company ("AEP Ohio" or the "Company") hereby files this memorandum in opposition.

## II. ARGUMENT

### A. Arguments That The July 2 Opinion And Order Must Adhere To All Procedural And Substantive Requirements Applicable To Traditional Base Rate Increase Cases Are Without Merit.

FES, IEU, and the Schools contend that, in the course of establishing cost-based capacity prices, the Commission did not conduct a full-blown base rate case proceeding pursuant to the requirements of Revised Code Chapters 4905 and 4909. (*See* FES App. for Rehearing, at 13-15; IEU App. for Rehearing at 25-30; Schools App. for Rehearing at 9-10.) Their arguments that AEP Ohio and the Commission were required to conduct a traditional base rate case, following each and every procedural and substantive requirement in Chapter 4909 applicable to applications for an increase in rates, are without support. The Opinion and Order (at 12-14) indicates that the Commission is exercising authority to establish a state compensation mechanism, under Sections 4905.04, 4905.05 and 4905.06, Revised Code, as well as Section D.8 Schedule 8.1 of the Reliability Assurance Agreement (RAA), referencing a cost-based method

for pricing capacity. There is nothing in the Opinion and Order suggesting that the detailed process associated with a traditional base rate case should apply. The fact that Ohio-based standards for cost-based ratemaking may provide a familiar frame of reference and a guidepost for the Commission in its determinations, and the additional fact that applying cost-based ratemaking principles rooted in Ohio's ratemaking statutes and precedents instills confidence in the Commission's decision making, do not convert the exercise into a full-blown base rate-increase proceeding, subject to the complete array of procedural requirements applicable to traditional base rate increase cases. The adjudicatory process used in this case was more than adequate, since the Commission permitted extensive discovery, written testimony, oral testimony, cross examination, presentation of evidence through hearing exhibits, and additional argument through paper briefings. Thus, the record confirms that the adjudicatory process was more than sufficient. While AEP Ohio believes that the Commission erred in several of the choices it made to develop a capacity price (which AEP Ohio has explained in detail in its own application for rehearing), the Commission was not obligated to follow all of the requirements applicable to traditional base rate increase applications.

Even if Ohio procedural and substantive ratemaking requirements were strictly applicable, the Commission could certainly have determined in this proceeding that it involves a "first filing" of rates for a service not previously addressed in a PUCO-approved tariff. Section 4909.18, Revised Code. Such an approach would not have required a hearing, let alone the extensive hearings that the Commission conducted. Nor would a "first filing" have required the application of a rate base, rate-of-return, cost methodology. In sum, the process provided and the standards applied exceeded by a wide margin those that would have been required by a "first filing" process under Ohio law.

### B. Arguments That Ohio Law Precludes The Commission From Establishing Cost-Based Rates For Capacity As The State Compensation Mechanism Are Unsupported.

Presuming the Commission has jurisdiction,[1] the Intervenors have questioned the Commission's ability to establish cost-based charges for capacity service. (*See, e.g.*, OCC App. for Rehearing at 15-16; Schools App. for Rehearing at 9-10.) This criticism is without merit.

The Commission's determination to establish charges for capacity must be based, in the first instance, upon authority provided by Section D.8 of Schedule 8.1 of the RAA, which is a portion of PJM Interconnection, L.L.C.'s (PJM) tariff approved by the FERC. That tariff provision, applicable to Fixed Resource Requirement (FRR) entities, provides as follows:

> In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In 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. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, 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 cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.

The Commission has concluded that, pursuant to this FERC-approved provision, it has unobstructed authority to establish a state compensation mechanism for AEP Ohio's FRR

[1] As the Commission is aware, AEP Ohio has contested the Commission's jurisdiction to establish a wholesale rate for capacity and the Company continues to reserve its right to pursue that dispute if necessary. The argument in this section relates primarily to a separate issue of whether to establish the rate using a cost basis versus a market basis.

capacity obligations. (December 8, 2010 Entry.) Furthermore, in that Entry, the Commission also concluded that its general supervisory authority under R.C. §§ 4905.04, 4905.05, and 4905.06, provided it with the necessary statutory basis to exercise the pricing authority which it found that Section D.8 of Schedule 8.1 of the RAA conferred upon it. In any event, the Commission has rejected similar arguments to those raised by OCC and the Schools:

> The Commission finds that the General Assembly has vested the Commission with broad authority to address the rate, charges, and service issues of Ohio's public utilities as evidenced in Title 49 of the Revised Code. * * * We are not convinced * * * that a specific act of the General Assembly is necessary to grant the Commission the authority to determine whether or not Ohio's retail customers are permitted to participate in the RTO's demand response programs.

Case No. 08-917 and 08-918-EL-SSO Opinion and Order, at 57-58 (March 18, 2009) (*ESP I Order*). Indeed, IEU relied upon that reasoning and holding in the Commission's *ESP I Order* to support the Commission's decision to exercise authority to establish a state compensation mechanism for capacity in this proceeding. (*See* IEU Mem. Contra (Jan. 14, 2011) at 9.)

In the Opinion and Order issued in the instant case, the Commission cited (at 22) the general requirement reflected in Section 4905.22, Revised Code, that utility rates be just and reasonable. The Commission went on to conclude that a cost-based State Compensation Mechanism (SCM) was necessary and appropriate for AEP Ohio. (*Id.*) In support of that conclusion, the Commission confirmed that the market-based pricing provisions of Chapter 4928, Revised Code, do not apply here. (*Id.*) This was a reasonable and lawful conclusion and is supported by abundant testimony and arguments by AEP Ohio.

In sum, the Commission has already considered and rejected arguments, such as those raised by OCC and the Schools, in its Opinion and Order in this proceeding that it does not have sufficient statutory authority to establish a cost-based state compensation mechanism pursuant to

Section D.8 Schedule 8.1 of the RAA. Those parties have not raised anything new in support of their arguments.

### C. The Commission Appropriately Determined That "Cost", As Used In Section D.8 Schedule 8.1 Of The RAA, Refers To Embedded Costs.

FES and IEU contend that the Commission erred by establishing a capacity price based on AEP Ohio's embedded costs. FES claims that the "only possible" measure of cost that could be used under Section D.8 Schedule 8.1 of the RAA is FES's view of "avoidable costs" that its witness Stoddard supports. (FES App. for Rehearing at 4-13.) IEU contends that the Commission erred because it did not rely upon Delaware law to determine the proper measure of costs. (IEU App. for Rehearing at 42-44.) IEU, however, does not really explain how that criticism supports its preferred outcome. Nonetheless, IEU believes that the long-run incremental cost method used by the Federal Communications Commission to establish pricing of unbundled network elements furnished by incumbent local exchange telephone companies to competitors pursuant to the Telecommunications Act of 1996, which the U.S. Supreme Court upheld in *Verizon Communications, Inc. v. F.C.C.,*[2] is appropriate. (IEU App. for Rehearing at 42-59.) Both of these arguments are meritless. The telephone industry's long-run incremental cost method was uniquely based on the specific provisions of the 1996 Telecommunications Act. Moreover, interpreting the FRR provision for a cost-based capacity rate as providing for incremental pricing would be redundant to the default RPM pricing under the RAA; such an interpretation would not provide a meaningful alternative to RPM pricing as is clearly intended by the FRR provision. It is entirely appropriate to establish a compensation mechanism based on AEP Ohio's embedded costs of capacity.

[2] 535 U.S. 467, 152 L.Ed. 2d 701 (2002) (hereinafter "*Verizon*").

The RAA entitles AEP Ohio to charge a cost-based rate to CRES providers for the capacity it supplies to them. AEP Ohio actively participated in drafting Section D.8 of Schedule 8.1 and, at the time Section D.8 was drafted, AEP Ohio understood that provision to provide AEP Ohio with the right to elect to charge a cost-based price to CRES providers for the capacity that it supplies to them. (*See* AEP Ohio Br. at 13-15.) Moreover, AEP Ohio fully expected that the FRR provision would still allow AEP Ohio to recover its costs for the capacity that it is obligated to supply. (*Id.* at 14-15; AEP Ohio Ex. 103 at 10.) Regardless of the outcome of the dispute pending before FERC as to AEP Ohio's right under the RAA to establish a cost-based wholesale rate (that is a matter for FERC to decide), it is clear that a SCM under the RAA may be cost-based.

Consistent with the Company's understanding, Section D.8 explicitly states that an FRR entity may change the basis for compensation to a cost-based method at any time. (AEP Ohio Br. at 13-14.) While the meaning of the RAA is a FERC matter to decide, this Commission can decide that its State Compensation Mechanism should be cost-based – and that is the only fair and reasonable option to avoid undue financial harm to AEP Ohio while it remains an FRR entity. The primary purpose of the FRR status being created in the RAA was for AEP to supply its own capacity to support retail load at cost and avoid the RPM market price; all of the other AEP-East utilities that operate as FRR entities receive cost-based rates for providing capacity to retail customers.

Moreover, it is plain that the word "cost", as used in Section D.8, refers to embedded costs. As AEP Ohio witness Horton testified, AEP Ohio expected that, as drafted, Section D.8 would allow AEP Ohio to recover its embedded costs. (*Id*. at 14; AEP Ohio Ex. 103 at 9-10.) Nonetheless, FES argues on rehearing, as it and other intervenors argued in their post-hearing

briefs, that the RAA does not address embedded costs and that the term "cost" in Section D.8 means avoided costs and that FES witness Stoddard's opinion that the term "cost" means avoided cost should control its definition. These arguments, however, remain unavailing; as AEP Ohio witness Horton pointed out at the hearing, the reference to "avoided cost" also does not appear in Section D.8. (Tr. II at 532-533.) Since avoided costs are bid into the Base Residual Auction (BRA), FES and OCC wrongly conflate "costs" with RPM, rendering the option to establish a cost-based rate meaningless.

Further, in a regulatory context, including before the FERC, the use of the unqualified term "cost" can only be logically interpreted to mean full embedded cost. If Section D.8 meant "avoided" cost then it would need to be explicitly stated to provide that meaning to any informed reader of the document. It is also telling that witness Stoddard admitted that the avoided cost is below the RPM rate (*see* Tr. VIII at 1622-1624). It is even more telling that FES freely admits in its application for rehearing, at 10-11, that "RPM auction-based prices are substantially higher than AEP Ohio's *avoidable* costs [and that] [a]ccordingly, AEP Ohio's *avoidable* costs would be fully recovered using RPM auction-based prices." Mr. Stoddard's and FES's admissions that the avoidable cost-based price is historically less than the RPM price demonstrate that their interpretation of the word "cost" in Section D.8 of Schedule 8.1 of the RAA would render the reference meaningless, because no FRR Entity would ever elect to establish a price that would be less than the default RPM price. In the final analysis, it simply makes no sense whatever to conclude that avoided costs are a backstop remedy for the marginal pricing regime of the RPM.

IEU asserts initially that the Commission erred by not applying Delaware law to its determination of the meaning of the "cost" based alternative to RPM for pricing capacity furnished by an FRR Entity. However, IEU does not explain how the application of Delaware

law would make any practical difference in the Commission's interpretations of the meaning of the reference to "cost". That agreement relates to the contractual provisions within the RAA and could not reasonably be interpreted as substantively constraining any SCM adopted by a commission in one of many states to be based on Delaware law. Instead, IEU switches its focus to the U.S. Supreme Court's decision in *Verizon* to support the contention, apparently, that the Commission should have interpreted "cost" to mean a forward-looking measure, such as "avoidable costs," rather than an embedded cost measure.

As explained above in response to the FES arguments on this point, however, interpreting the reference to "cost" to mean "avoidable cost" (and to preclude interpreting it to mean embedded costs) would render it meaningless, and essentially write it out of the provision. It would also ignore the fact that when the FERC has established cost-based prices for capacity in other circumstances, it has relied upon the same embedded-cost method that AEP Ohio presented in this proceeding (*see* AEP Ohio Ex. 102 at 8-9), and it would ignore that the Commission used as a starting point for its cost-based determination. Moreover, the FERC recently accepted the capacity cost filing of AEP Ohio's affiliate, Indiana Michigan Power Company, that was based on embedded cost. *PJM Interconnection, LLC American Electric Power Service Corporation, Indiana Michigan Power Company*, 139 FERC ¶61,078 (April 30, 2012 Order Accepting Formula Rate Proposal and Establishing Hearing and Settlement Judge Procedures). The FERC would not have accepted AEP's embedded cost formula rate if the RAA only permitted rates based on incremental cost, as FES argues.

Second, IEU's effort to enlist the *Verizon* decision in support of its argument is entirely misguided. The Telecommunications Act of 1996 specifically forbade the use of an embedded cost method to price interconnection and unbundled network element charges. Specifically, 47

U.S.C. § 252(d)(1)(A)(i) provides that prices for those items shall be based on their costs "determined without reference to a rate-of-return or other rate-based proceeding." There is no similar preclusive language in Section D.8 Schedule 8.1 of the RAA. Indeed, again, as explained above, if that provision had similar preclusive language, it would render the reference meaningless. It is, therefore, not surprising that there is no such qualifying language in Section D.8 Schedule 8.1, and, because there isn't, the *Verizon* decision is not applicable directly or by analogy to the instant case.

### D. Intervenor Arguments Regarding The Deferral Are Misplaced And Do Not Warrant Rehearing.

#### 1. OMA/OHA's, OCC's, and IEU's claims regarding the Commission's authority to authorize the deferral are flawed.

OMA/OHA and OCC seek rehearing of the July 2 Opinion and Order on the grounds that the Commission erroneously authorized wholesale capacity costs to be deferred for collection from retail customers. (*See* OMA/OHA App. for Rehearing at 4-6; OCC App. for Rehearing at 5-10.)[3] OMA/OHA and OCC's arguments regarding the deferral of the difference between AEP Ohio's costs of capacity (the Commission's calculation of which AEP Ohio disputes, as it explained in its own application for rehearing) and RPM pricing are two-fold. First, OMA/OHA and OCC contend that the Commission erred in authorizing the deferral of the Company's costs of capacity supplied to CRES providers for recovery from retail customers because those costs are the responsibility of CRES providers. (OMA/OHA App. for Rehearing at 5; OCC App. for Rehearing at 6.) Second, they, along with IEU, argue that the Commission lacks statutory authority to approve such a deferral. (OMA/OHA App. for Rehearing at 5; OCC App. for Rehearing at 7-10; IEU App. for Rehearing at 64-65.)

[3] AEP Ohio notes initially that its costs are neither wholesale nor retail in nature, although the provision of capacity to a CRES provider is a wholesale transaction. Thus, the costs at issue are more properly characterized as capacity costs associated with a wholesale service.

While AEP Ohio also has concerns about the Commission's July 2 Opinion and Order and would prefer that the Commission require CRES providers be charged the full rate, OMA/OHA and OCC are incorrect in characterizing the $189/MW-day capacity charge as an amount owed by CRES providers. As AEP Ohio explained in its memorandum in partial opposition to the Ohio Energy Group's ("OEG") application for rehearing, even though the Commission's July 2 Opinion and Order "establishe[d] a cost-based state compensation mechanism for AEP Ohio" that "should reasonably and fairly compensate the Company and should not significantly undermine the Company's ability to earn an adequate return on its investment" (*see* July 2 Opinion and Order at 22, 36), the order only authorized AEP Ohio to charge CRES providers RPM-based pricing for capacity. As designed, the State Compensation Mechanism (SCM) established in the July 2 Opinion and Order involves <u>both</u> a wholesale component (RPM pricing to CRES providers) and a retail component (with the retail recovery component being determined in the *ESP II* decision). The Commission explained these two components in its order:

> Therefore, with the intention of adopting a state compensation mechanism that achieves a reasonable outcome for all stakeholders, the Commission directs that the state compensation mechanism shall be based on the costs incurred by the FRR Entity for its FRR capacity obligations, as discussed further in the following section. * * * [1] [T]he Commission directs AEP-Ohio to charge CRES providers the adjusted final zonal PJM RPM rate in effect for the rest of the RTO region for the current PJM delivery year (as of today, approximately $20/MW-day), and with the rate changing annually on June 1, 2013, and June 1,2014, to match the then current adjusted final zonal PJM RPM rate in the rest of the RTO region. [2] Further, the Commission will authorize AEP-Ohio to modify its accounting procedures, pursuant to Section 4905.13, Revised Code, to defer incurred capacity costs not recovered from CRES provider billings during the ESP period to the extent that the total incurred capacity costs do not exceed the capacity pricing that we approve below. Moreover, the Commission notes that we will establish an appropriate recovery

> mechanism for such deferred costs and address any additional financial considerations in the 11-346 proceeding.

July 2 Opinion and Order at 23 (internal brackets added for convenience).

The below-cost discount from AEP Ohio's costs (according to the Commission's Opinion and Order) was to be funded by all customers because all customers benefit from the opportunity to shop afforded by RPM-priced capacity. (*Id*. at 23.) AEP Ohio agrees that it is fair for all customers to fund the $189/RPM differential because all customers are benefiting from the associated capacity, whether they shop or not. The capacity was developed or obtained years ago for all connected load based on AEP Ohio's FRR obligations; therefore, it is not accurate to say that the payment obligation is being transferred from CRES providers to non-shopping customers. CRES providers are being given a right to the capacity at a price below cost, in order to increase shopping levels in AEP Ohio's service territory. Because the $189/RPM differential is not a CRES obligation under the Opinion and Order, it is inaccurate to say that the obligation is being transferred to customers. Thus, the Company disagrees with OMA/OHA's and OCC's claims that the difference between $189/MW-day and RPM pricing is solely an obligation of CRES providers.[4]

[4] If the Commission does not permit recovery from retail customers of the $189/RPM differential, it should permit AEP Ohio to collect the full $189/MW-day rate from CRES providers. Similarly, if there is a legal challenge of the recent decision to allow recovery of the capacity deferral (via the Retail Stability Charge as provided for in the August 8, 2012 Opinion and Order in Case Nos. 11-346 et al), the Commission should establish a "backstop" remedy to address the contingency of a successful challenge. Specifically, the Commission should establish as part of finalizing the capacity deferral mechanism through the RSR that, if the RSR is reversed or vacated on appeal such that AEP Ohio cannot recover the capacity deferral through retail rates, CRES providers will be responsible for the entire $189/MW-day charge. The Opinion and Order determined that AEP Ohio is entitled to collect the full $189/MW-day being reflective of its costs and the Company should not be left with an under-recovery if the Commission's two-step recovery regime is modified on appeal. Providing a provisional rate up front would avoid retroactive rate issues in the future, while ensuring that the Company will not suffer a material adverse financial consequence should this contingency occur.

As the Commission found in the August 8, 2012 Opinion and Order in the Modified ESP cases (at 36), "as a result of the Capacity Case, customers may be able to lower their bill impacts by taking advantage of CRES provider offers allowing customers to realize savings that may not have otherwise occurred without the development of a competitive market." Moreover, the Commission found that the RSR, including the capacity deferrals, enabled all of AEP Ohio's customers to receive substantial and valuable benefits that would not otherwise be achieved:

> [W]hile the RSR and the inclusion of the deferral within the RSR are the most significant cost associated with the modified ESP, but for the RSR it would be impossible for AEP Ohio to completely participate in full energy and capacity based auctions beginning in June 1, 2015. Although the decision for AEP Ohio to transition towards competitive market pricing is something this Commission strongly supports and the General Assembly anticipated in enacting Senate Bill 221, the fact remains that the decision to move towards competitive market pricing is voluntary under the statute and in the event this ESP is withdrawn or even replaced with an MRO, there is no doubt that AEP Ohio would not be fully engaged in the competitive marketplace by June 1, 2015.

(*Id*. at 76.) As the Commission has determined, the creation of the capacity deferrals is intended to benefit all AEP Ohio customers, not just shopping customers or CRES providers.

OMA/OHA's, OCC's, and IEU's arguments that the Commission lacks authority to authorize collection of the deferral it authorized in the July 2 Opinion and Order also are without merit.[5] As an initial matter, the Commission's July 2 Opinion and Order left open the issue of cost recovery to be decided in its decision in the Company's modified ESP proceeding, and recovery of the deferral was addressed the August 8, 2012 Opinion and Order in that case. Thus, it is more appropriate to address that issue in that docket. Nonetheless, as AEP Ohio explained

[5] In addition to its argument that there is no statutory basis under Ohio law for the Commission to authorize the deferral, OCC also contends that the Commission "went beyond its limited jurisdiction" to establish a state compensation mechanism provided by the RAA when it created the deferral. (*See* OCC App. for Rehearing at 5-6.) Notably, OCC does not cite to any authority to support its apparent position that a valid state compensation mechanism could not include a deferral. In any event, as discussed herein, even if the RAA did not authorize the deferral, Ohio law does.

in its memorandum in partial opposition to OEG's application for rehearing, and as the Commission stated in its August 8 Opinion and Order in the ESP case, the Commission may order any just and reasonable phase-in of any rate or price established under R.C. 4928.141, 4928.142, or 4928.143. *See* Case No. 11-346-EL-SSO, *et al.*, Opinion and Order at 52 (Aug. 8, 2012). Indeed, "[n]othing in Section 4928.144, Revised Code, limits the Commission's authority to modify the [Company's present] ESP to include deferrals on its own motion." Moreover, the Commission can authorize accounting deferrals under R.C. 4905.13, which is part of its general jurisdiction over utilities and is the cited basis for the deferral authorized in the July 2 Opinion and Order (at 23).

OCC also argues that the Commission erred in creating the deferral because "there is no basis in the record in this proceeding to authorize" them. (*See* OCC App. for Rehearing at 22-25.) Specifically, OCC contends that (1) the Commission erred in leaving to be decided in the Company's ESP case the method by which the deferral authorized in this case will be recovered (an error that AEP Ohio also raised in its application for rehearing); (2) the Commission erred in ordering the capacity charge deferral and recovery system set forth in the July 2 Opinion and Order because there is no record in either this proceeding or the ESP case regarding how the deferred costs will be recovered, which violates due process;[6] and (3) the record does not demonstrate a connection between the deferral and the development of retail competition or the need for development of retail competition beyond that which is currently occurring. (OCC App. for Rehearing at 22-24.)

[6] IEU similarly argues that the Commission's July 2 Opinion and Order was unreasonable and unlawful and violated due process by authorizing a deferral without record support and then moving the cost recovery mechanism to a separate proceeding where the evidentiary record is closed. (IEU App. for Rehearing at 66, 70.)

With regard to OCC's third argument, although the record does not demonstrate a connection between the authorized deferral and the development of retail competition, it *does* demonstrate a connection between customers receiving RPM-based capacity prices and an increase in shopping, as the Commission itself noted in the July 2 Opinion and Order. July 2 Opinion and Order at 23. OCC's argument that the record does not demonstrate the need for development of retail competition is simply false. OCC's and IEU's due process arguments also are unavailing and do not form a basis for granting rehearing in this proceeding. Those arguments focus on the record (or lack thereof) regarding recovery of the costs authorized to be deferred in this proceeding. The Commission's authority to authorize the deferral and associated cost recovery is supported as discussed above and the arguments challenging the cost recovery mechanism that was established in the August 8 Opinion and Order in the ESP case are beyond the scope of this case and should instead be addressed in the ESP case.

**2. The Commission's August 8, 2012 Opinion and Order in the Company's ESP case renders moot intervenor complaints regarding the carrying charge to be applied to the deferral during the period before a recovery mechanism is approved.**

Finally, OCC and IEU take issue with the Commission's decision authorizing AEP Ohio to collect a carrying charge on the deferral. (*See* OCC App. for Rehearing at 28; IEU App. for Rehearing at 67-68.) To the extent their complaints relate to the Commission's authorization of a weighted average cost of capital ("WACC") carrying charge, rehearing is not necessary because those arguments are moot. In the July 2 Opinion and Order, the Commission recognized that "AEP-Ohio should be authorized to collect carrying charges on the deferral based on the Company's weighted average cost of capital, *until such time as a recovery mechanism is approved in 11-346* * * * [.]" July 2 Opinion and Order at 23. The state compensation mechanism (and associated deferral) did not go into effect, however, until August 8, 2012, *see id.*

at 38, the same day on which the Commission approved a recovery mechanism in the Company's ESP proceeding. Because recovery was approved on August 8 at the same time the new capacity pricing became effective, the WACC carrying charge mentioned on page 23 of the Opinion and Order was not triggered. Rehearing of that portion of the Commission's decision, therefore, is unnecessary.

**3. OMA/OHA's and the Schools' arguments regarding the size of the deferral and its impact on retail customers are speculative and premature.**

OMA/OHA contend that having to repay the deferral will result in "significant negative customer impacts" and offer their opinion, based on the shopping estimates provided by Company witness Allen, that the total amount of capacity costs deferred will exceed $725 million over the ESP period. (OMA/OHA App. for Rehearing at 6-8.) The Schools opine that collection of the deferral from either retail customers or CRES providers will cause Ohio's Schools serious financial harm and that the deferral's impact on the RSR could lead to rate shock. (Schools App. for Rehearing at 13-14.) These opinions and projections, however, are speculative. Moreover, they are premised upon a number of variables whose values are not presently known with certainty – including future energy prices, future shopping levels, and the final decision in the Company's ESP case regarding the Retail Stability Rider ("RSR") and its design.[7] Because they are speculative, OMA/OHA's and the School's arguments regarding the size and impact of the deferral do not form a basis upon which the Commission should grant rehearing of the July 2 Opinion and Order.

[7] The Commission's August 8, 2012 Opinion and Order in the Company's ESP case significantly altered the design of the RSR from that which the Company proposed and likely will be the subject of one or more applications for rehearing in that proceeding; thus, the impact of the deferral on the RSR over the term of the ESP cannot presently be ascertained.

**4. It is lawful and reasonable to continue recovery of the deferral after corporate separation.**

As discussed above, FES contends that the Commission's authorization of cost-based capacity recovery, via a deferral mechanism, is unlawful. FES argues in the alternative that, if the deferral mechanism is not removed on rehearing, the deferral should terminate once corporate separation occurs. FES alleges that the deferral mechanism will result in AEP Ohio providing an improper and unlawful subsidy to an affiliated competitive supplier – AEP Genco. (FES App. for Rehearing at 17.) FES notes that AEP Genco is not a public utility and, thus, the Commission lacks jurisdiction under Chapter 4909 over it. (*Id.* at 18.). FES argues further that there is no rational economic basis for AEP Ohio to agree to purchase capacity from AEP Genco at an above-market price. (*Id*.)

FES advanced these same arguments in connection with contesting the RSR in the Modified ESP case. The Commission rejected these claims at pate 60 of its August 8, 2012 Opinion and Order approving AEP Ohio's modified ESP plan by stating as follows:

> The Commission finds, that once corporate separation is effective and AEP-Ohio procures its generation from GenResources that it is appropriate and reasonable for certain revenue to pass-through AEP-Ohio to GenResources. Specifically, the revenues AEP-Ohio receives, after corporate separation is implemented, from the RSR which are not allocated to recovery of the deferral, [1] revenue equivalent to the capacity charge of $188.99/MW-day authorized in Case No. 10-2929-EL-UNC, [2] generation-based revenues from SSO customers, and [3] revenue for energy sales to shopping customers, should flow to GenResources.

(Brackets added for convenience.) It is entirely appropriate that generation revenues will also follow the generation assets and be passed on to AEP Genco, especially since the AEP Genco will be supporting the SSO.

Under AEP Ohio's proposed asset transfer and corporate separation plan, AEP Ohio will pass through other generation-related revenues to AEP Genco for providing capacity and/or energy for the SSO load. AEP Ohio will pay AEP Genco the non-fuel generation charges billed to AEP Ohio's SSO customers under applicable retail rate schedules, as well as AEP Genco's actual fuel costs. AEP Ohio will also reimburse AEP Genco, on a dollar-for-dollar basis, for any transmission, ancillary, and/or other service charges that AEP Genco may be billed by PJM in connection with the SSO Contract. In addition, revenues that AEP Ohio may receive from PJM in connection with capacity payments made by CRES providers under the RAA would be remitted to AEP Genco in return for AEP Genco providing capacity to AEP Ohio to fulfill its FRR obligations, as well as the obligations of the CRES providers. Also, capacity payments will be made by AEP Ohio to AEP Genco in connection with the energy-only auctions occurring while AEP Ohio is still an FRR entity in PJM. Any revenues related to moving to a competitive generation market in Ohio, such as the RSR, will also be remitted to AEP Genco as compensation for the fulfillment of its obligations.

FES fails to acknowledge that without these revenues the ESP will not take place and AEP Ohio would have no means of supporting the SSO after corporate separation. Specifically, the assets being transferred need the associated financial support. The revenues allow OPCo to pay AEP Genco for capacity to meet its FRR commitment. Without the certainty of these revenues, AEP Genco cannot credibly proceed with the transaction. Notably, FES does not cite any law that requires AEP Genco to lose millions of dollars, which would be the effect of terminating the deferral upon corporate separation and not allowing OPCo to pass through these revenues to AEP Genco. Indeed, FES operated under a similar agreement in support of FirstEnergy utilities' SSO plan for years.

In sum, there are four primary reasons that it is appropriate for AEP Ohio to pass through generation revenues to AEP Genco after corporate separation: (1) the Commission has approved functional separation for AEP Ohio at every step of the process during the past 12 years, and AEP Ohio presently remains a vertically-integrated utility in a lawful manner; (2) for part of the ESP term, AEP Ohio will (according to plan) be legally separated but remain obligated to provide SSO service at the agreed rates for the entire ESP term; (3) during this latter period, the AEP Genco will be obligated to support SSO service through the provision of adequate capacity and energy, and it is only appropriate that it receives the same revenue streams and deferrals agreed to by AEP Ohio for doing so; and (4) there will be an SSO agreement between AEP Ohio and the AEP Genco covering this arrangement, which is subject to review and approval by the FERC. FES's arguments should be rejected as disingenuous and misguided, as was already done in the Modified ESP case.

### E. Intervenors' Constitutional Arguments Are Largely Without Merit And, For The Most Part, Do Not Form A Basis For Rehearing.

#### 1. IEU's impairment-of-contracts argument is fatally flawed.

In its application for rehearing, IEU asserts that the Commission's July 2 Opinion and Order is unlawful because it impairs the value of unspecified contracts that may have been entered into between CRES providers and their customers. (*See* IEU App. for Rehearing at 31.) IEU asserts that "up until May 30, 2012, customers and CRES providers were entering into contracts on the warranted assumption that RPM-Based Pricing controlled." (*Id.*) Citing *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764 (2009) (hereinafter "*USP*") as the only legal authority in support of its impairment-of-contracts argument, IEU posits that, if the Commission asserts jurisdiction over capacity pricing, it "must also assure that the value of contracts already entered into at a time when either RPM-Based

Pricing controlled or at a time when the Commission had held that RPM-Based Pricing would be restored as required by Ohio law [are] not impaired." (IEU App. for Rehearing at 32.) There are multiple, fundamental flaws with IEU's impairment-of-contracts theory, and it provides no sound basis for the Commission to grant rehearing.

It is worth noting that the CRES providers who intervened in this proceeding – and who would seem to have the most to gain by advancing an impairment-of-contracts theory, given that they are actually *parties* to the contracts that IEU asserts have been impaired – have *not* sought rehearing from the Commission on this ground. (*See generally* FES App. for Rehearing.) Nor did the customers' advocate advance the impairment-of-contracts theory that IEU asserts. (*See generally* OCC App. for Rehearing.) A major weakness of IEU's impairment-of-contracts theory is thus revealed by the fact that it has not been advanced by any of the intervenors with true standing to do so. In addition, IEU does not identify *any* specific contract between a CRES provider and a customer that it claims has been unconstitutionally impaired by the Commission's Opinion and Order (much less any contract to which any IEU member is a party) Nor does IEU point the Commission to a location in the evidentiary record where any such contract became a hearing exhibit. IEU thus asks the Commission to adjudicate its constitutional argument in the abstract, divorced from any specific facts or controversy – a request that no court or commission should entertain. Courts assessing the merits of impairment-of-contract claims (including the Ohio Supreme Court) correctly insist on doing so only when the claimant has made an adequate record, specifying the contract rights that it alleges have been infringed. *See, e.g., USP*, 2009-Ohio-6764 at ¶ 40 ("We may not speculate regarding USP's contractual obligations. Thus, the lack of this essential evidence is fatal to USP's impairment-of-contracts claim.")[8]

[8] *Citing Hughes v. Wendel*, 317 U.S. 134, 63 S.Ct. 103, 87 L.Ed. 139 (1942) ("Appellant contends that this statute * * * impairs the obligation of her contract * * *. The record, however, does not set forth

As a factual matter, IEU's assertion that customers and CRES providers entered into agreements "up until May 30, 2012" on the "warranted assumption" that RPM-based pricing did (and would forever) control their relationship is simply absurd. If any such assumptions about permanent RPM-based pricing were made, they were both unwarranted and ill-advised. CRES providers and customers have been aware since long before May 30, 2012, that this Commission was in the process of establishing a state compensation mechanism that could result in a capacity charge different from RPM. Merely by way of example, FES sought leave to intervene in this proceeding on January 7, 2011, and filed comments on that date confirming that FES was fully aware of AEP Ohio's filing at FERC in November 2010 "*for* '*new capacity compensation formulae*.'" (FES Initial Comments at 1 (Jan. 7, 2011), *citing* FERC Docket No. ER11-2183-00 (emphasis added).) OCC similarly intervened here in December 2010, acknowledging that this docket "involves the Commission's review of *** what changes to the current state mechanism are appropriate to determine AEP Ohio's capacity charges to Ohio CRES providers." (OCC Mot. to Intervene, Mem. in Supp. at 1 (Dec. 20, 2010).) Given these express acknowledgments by both CRES providers and customers about the potential for new capacity charges, IEU cannot fairly assert, as it attempts to do in its application for rehearing, that these parties made a "warranted assumption" that RPM-based pricing would always control. If such assumptions were made, they contradicted what those parties were telling this Commission as they sought leave to intervene.

Finally, as a legal matter, the only case that IEU cites in support of its impairment-of-contracts argument cuts against its success here. In the *USP* case IEU cites, Utility Service

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appellant's lease, and the incomplete summary of it contained in her pleading is not adequate to enable us to determine what her rights may be."); *Chicago, Burlington & Quincy RR. Co. v. Cram*, 228 U.S. 70, 85, 33 S.Ct. 437, 57 L.Ed. 734 (1913) ("The contention is made that the statute impairs the obligation of the contracts * * *; but that contention was not made in the court below and cannot therefore be made here. Besides, there is no evidence of the contracts in the record.").

Partners *lost* its impairment-of-contracts claim both on rehearing at the Commission and in the Ohio Supreme Court. *USP*, 2009-Ohio-6764 at ¶ 11, 37-47. Utility Service Partners was a private company that, for a fee, provided a warranty and repaired or replaced natural gas service lines (which were, at the time, typically owned by customers) if something went wrong with them. After a Commission investigation into the safety of natural gas lines, however, Columbia Gas of Ohio, Inc. submitted an application seeking authority to assume responsibility for the future maintenance, repair, and replacement of customer-owned service lines. When the Commission approved a stipulation giving Columbia such responsibilities, Utility Service Partners raised an impairment-of-contracts claim, arguing that Columbia's assumption of responsibility would eradicate the corresponding gas service line warranty component of its business. Both the Commission and the Ohio Supreme Court disagreed.

In rejecting the impairment-of-contracts claim, the Supreme Court noted that "[n]o contract or detailed descriptions of the terms of any contract has been included in the record" and that USP's assertions were "merely unsupported legal conclusions." *USP*, 2009-Ohio-6764 at ¶ 39. Even assuming that USP had established an appropriate record, the Ohio Supreme Court concluded that Columbia's assumption of responsibility over gas service lines was justified by a significant and legitimate public purpose, and that the Commission's order approving the stipulation "rationally responded" to a pressing public-safety issue. *Id.* at ¶ 41-46. Notably, although the Ohio Supreme Court in *USP* adopted and applied the U.S. Supreme Court's three-part *Energy Reserves* test for analyzing impairment-of-contract claims, IEU fails to cite *Energy Reserves* and makes no attempt to meet that test in its Application for Rehearing. *See USP*, 2009-Ohio-6764 at ¶ 37.[9] As such, although AEP Ohio agrees that the Commission's July 2

[9] "In determining whether the obligations of USP's then-existing contracts were unconstitutionally impaired, the parties agree that *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459

Opinion and Order is properly subject to rehearing for the reasons expressed in AEP Ohio's own Application, IEU's impairment-of-contracts argument in support of rehearing is fatally flawed.

**2. IEU's and OCC's due process concerns are misguided.**

IEU and OCC assert several due-process arguments in their respective applications for rehearing. For its part, IEU devotes twenty pages of its brief to a lengthy diatribe against "the totality of the Commission's conduct throughout this proceeding," alleging that the Commission violated IEU's due-process rights in at least five different ways, including by: (1) indefinitely tolling its rulings on earlier applications for rehearing; (2) imposing the interim, two-tiered capacity charge "without any record support;" (3) ignoring "major issues raised by the parties" in violation of R.C. 4903.09; (4) creating an "incomplete deferral component" without evidentiary support, and moving the completion of that component to the ESP proceeding, where the record is already closed; and (5) authorizing carrying charges on the deferral component at a WACC rate without record support. (IEU App. for Rehearing at 69-89.) IEU contends that the Commission's conduct has subjected intervenors to "condemnation without trial" and that the Commission has "taken it upon itself to rewrite the law and claim authority it does not have." (*Id.* at 89.) OCC also invokes a due-process theory in support of rehearing, asserting that the Commission's decision in its July 2 Opinion and Order to refer the capacity cost deferral mechanism to the ESP proceeding, after the record in that proceeding was already complete, effectively denied the parties due process in *both* proceedings. (OCC App. for Rehearing at 22-23.) AEP Ohio addresses IEU's and OCC's arguments relating to the deferral component

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U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569, applies. That case instructs us to ask "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" If so, then we determine whether the government has "a significant and legitimate public purpose behind the regulation." And if that is the case, we inquire "whether the adjustment 'of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *USP*, 2009-Ohio-6764, ¶ 37 (internal citations omitted).

elsewhere in this brief.[10] AEP Ohio addresses IEU's remaining due-process issues (unaddressed applications for rehearing; alleged lack of record support for the interim, two-tiered capacity charge) as follows.

***a. IEU's claims regarding unaddressed applications for rehearing.***

First, with respect to IEU's contention regarding the Commission's indefinite tolling of rulings on earlier applications for rehearing, IEU claims that "[s]ince granting AEP-Ohio's application for rehearing on February 2, 2011, the Commission has not taken up or addressed the substantive and procedural issues which the Commission found, based on AEP-Ohio's rehearing request, were worthy of consideration." (IEU App. for Rehearing at 71.) For the reasons expressed in AEP Ohio's own Application for Rehearing of the Commission's July 2 Opinion and Order (at 65), AEP Ohio agrees with IEU insofar as the Commission has not yet issued a decision on the merits regarding the arguments raised in the Company's January 7, 2011 application for rehearing. The July 2 Opinion and Order, while apparently intended to address all outstanding issues in this proceeding, nowhere mentions the January 7, 2011 application for rehearing and does not specifically address any of the arguments raised therein. The Commission thus has erred in failing to either grant or deny the January 7, 2011 application for rehearing. This error should be corrected on rehearing of the July 2 Opinion and Order.

IEU also contends that the Commission has violated due process by failing to act further on: (1) the Commission's April 11, 2012 decision to grant rehearing of its March 7 Entry maintaining the interim two-tiered capacity charge established in the January 23 Entry; and (2) the Commission's July 11, 2012 decision to grant rehearing of its May 30, 2012 Entry extending the interim two-tiered capacity charge. (IEU App. for Rehearing at 79-83.) AEP Ohio acknowledges that the Commission has not yet acted upon the requests for rehearing that it

[10] *See* Section II.D.1, *supra*.

granted. However, for the many reasons already comprehensively set forth in AEP Ohio's March 23, April 6, and June 25, 2012 memoranda contra the applications for rehearing pertaining to the interim two-tiered capacity charge, which are incorporated as if fully set forth herein, AEP Ohio believes that those applications for rehearing should be denied on the merits.

***b. IEU's contentions regarding the lack of record support for the interim, two-tiered capacity charge are without merit.***

Second, with respect to IEU's contention that the Commission imposed the interim, two-tiered capacity charge "without any record support," AEP Ohio thoroughly debunked this claim in the above-referenced memoranda contra rehearing of the Commission's March 7 and May 30 Entries, which are incorporated as if fully set forth herein.

In its February 27 Motion for Relief, which resulted in the March 7 Entry, AEP Ohio proposed using, on an interim basis, the same two-tiered capacity pricing contemplated by the Stipulation, as modified and adopted by the revised Detailed Implementation Plan that it submitted on December 29, 2011, or, alternatively, as yet further modified by the Commission's January 23, 2012 Entry. On March 7, 2012, the Commission issued its Entry granting AEP's Motion for Relief. The Commission found support in the record for a conclusion that reverting from the capacity pricing structure established by the January 23 Entry to a state compensation mechanism based exclusively on RPM auction pricing could risk an unjust and unreasonable result. Consequently, the Commission's March 7 Entry confirmed that, for the relatively short interim period during which the Commission considers what is a just and reasonable capacity pricing structure for the longer term, AEP Ohio should continue to charge CRES providers for capacity in accordance with the January 23 Entry (including, despite AEP Ohio's request, allowing mercantile load to be eligible for RPM-priced capacity through aggregation programs).

In other words, the Commission concluded that for the interim period, capacity would be priced on a *status quo* basis, using the same regime that the January 23 Entry previously established.

The Commission's conclusions regarding the interim, two-tiered capacity charge were adequately supported by the record. Merely by way of example, AEP Ohio demonstrated in its Motion for Relief and supporting workpaper that a flash-cut to 100% RPM pricing would cause immediate and irreparable harm to AEP Ohio – including material diminution of its earnings to confiscatory levels and potential downgrading of its credit rating. AEP Ohio demonstrated, for example, that such a flash-cut would cause AEP Ohio's projected 2012 & 2013 earnings (which already reflected rejection of the Stipulation) to drop by 27% and 67%, respectively. (AEP Ohio Mot. for Relief and Request for Expedited Ruling at 5 (Feb. 27, 2012).) AEP Ohio also demonstrated in its Motion for Relief that "the information, data, and record materials, including testimony, already submitted by AEP Ohio provide more than adequate support for the conclusion that the status quo capacity pricing already implemented by AEP Ohio to date *** is a reasonable interim capacity pricing mechanism. Alternatively, should the Commission decline to adopt the *status quo* approach, that existing data, and testimony also provide adequate support for an interim mechanism that conforms to the January 23, 2012 Entry's new and enhanced obligations (without including the mercantile customer load in the RPM-priced capacity set aside.)" (*Id.* at 9, citing Dr. Pearce's August 31, 2011 and September 13, 2011 prefiled testimony.)

In its March 7 Entry, the Commission correctly "reject[ed] claims that the interim relief is not based upon record evidence. The instant proceeding was consolidated with 11-346 and the cases enumerated in footnote three of this entry for purposes of considering the ESP 2 Stipulation. All of the testimony and exhibits admitted into the record for purposes of

considering the ESP 2 Stipulation are part of the record in this proceeding. Our subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief." Accordingly, there is simply no merit to IEU's claim that its right to due process of law was violated by the Commission's decision to establish, and then temporarily extend, the interim two-tiered capacity charge. The Commission's conclusions in these respects were based upon record evidence, and IEU (and all other intervenors) had more than adequate notice and opportunity to be heard on these issues.

### F. The Return On Equity Authorized By The Commission Is Supported By The Record And Appropriate For The Riskier Generation Side Of The Business.

OMA/OHA and OCC seek rehearing on the grounds that the Commission-approved ROE target of 11.15% is unreasonable. (OMA/OHA App. for Rehearing at 9-10; OCC App. for Rehearing at 27-28.) These intervenors do not devote a great deal of argument to this issue, and their complaints overlap to some extent. OCC contends that the Commission's decision to accept an 11.15% ROE target is "inexplicable" and lacks any stated rationale, and argues further that "[h]ad the Commission adopted an ROE recommendation that was fully supported by the record, the capacity charge would have been much lower. For instance, had the PUCO selected the ROE recommended by Staff, the $188.88 capacity charge would be $10.09 less/MW-day." (OCC App. for Rehearing at 27-28.) For their part, OMA/OHA complain that the 11.15% ROE was "based upon an *increase* to the ROE of 11.10 percent in the AEP-Ohio affiliate settlement that should not be used as precedent." (OMA/OHA App. for Rehearing at 9.) OMA/OHA share OCC's view that the Commission should, on rehearing, adopt Staff's recommended target ROE. (*Id.* at 10.)

These asserted bases for rehearing should be rejected. Relevant and competent evidence in the record fully supports the target 11.15% ROE that was adopted by the Commission in its July 2 Opinion and Order. As AEP Ohio explained in its post-hearing briefs, with appropriate citations to the record, Staff's downward adjustments to the ROE originally proffered by AEP Ohio witness Pearce were inappropriate. (AEP Ohio Initial Post-Hearing Br. at 83-85; AEP Ohio Reply Post-Hearing Br. at 40-42.) Those downward adjustments were made when Staff's witness, Mr. Smith, *by his own admission*, simply plucked lower ROE values than those proffered by Dr. Pearce from a *stipulation* in the most recent CSP and OPCo *distribution* rate cases. (Staff Ex. 103 at 12-13.) Cross-examination of Mr. Smith revealed the flaws in this approach. Mr. Smith admitted on cross-examination that if ROE had actually been litigated to a conclusion in those distribution rate cases, the Commission-authorized ROEs could very well have been higher. (Tr. IX at 1990:21-1991:7.) Mr. Smith also admitted that "generation operating in an unregulated market or an open market, in competitive generation, is probably more risky than distribution." (Tr. IX at 1991:21-24.) And, in another admission further undercutting his downward adjustment to the Company's target ROE, Mr. Smith conceded that the generation business faces substantially greater risks from the imposition of costly environmental regulations than the distribution business is ever likely to confront. (Tr. IX at 1993:22-25.) Given these admissions on the record by Staff's own witness, which the Company brought to the Commission's attention in post-hearing briefing, it is hardly surprising that the Commission agreed with the Company that this particular downward adjustment by Staff lacked a proper foundation and did not properly reflect the increased risks that everyone knows are associated with the generation business.

AEP Ohio witness Allen confirmed in his prefiled rebuttal testimony that it was inappropriate for Mr. Smith to simply plug in ROEs that were stipulated to in the company's most recent distribution rate case. (AEP Ohio Ex. 142 at 17.) Mr. Allen further noted on cross-examination that "[t]ypically the ROEs that the company has requested in the other jurisdictions has been in the 11 plus percent" range. (Tr. XI at 2392:23-25.) He noted that in Virginia, for example, "the generation business unit would have had an ROE of probably north of 11 percent." (*Id.* at 2393:23-24.) For these reasons, the Commission's rejection of Staff's downward adjustment to the target 11.15% ROE is hardly "inexplicable" or lacking in rationale, and the Commission should reject this branch of OCC/OMA/OHA's applications for rehearing, which improperly seek to second-guess the Commission's judgment and discretion.

### G. Intervenors' Other Arguments In Support Of Rehearing Improperly Attempt To Reiterate Arguments That Have Already Been Made And The Commission Has Already Rejected.

IEU and OCC each make a number of additional arguments in support of their rehearing requests. These arguments essentially reiterate arguments that have already been advanced, and the Commission has already rejected, multiple times. The Commission should decline to review them on rehearing.

IEU repeats the following arguments in support of its rehearing request: the July 2 Opinion and Order impermissibly authorizes AEP Ohio to recover transition revenue (IEU App. for Rehearing at 34-36); the Commission authorized AEP Ohio to collect "above-market" (higher-than-RPM) revenues for capacity that will provide the Company with an unlawful subsidy (*id.* at 38-40); and the July 2 Opinion and Order is discriminatory and not comparable. (*Id.* at 40-42, 68-69) OCC similarly argues that the July 2 Opinion and Order will provide CRES

providers with an unlawful subsidy and violates statutory comparability and anti-discrimination requirements. (OCC App. for Rehearing at 16-21.)

In addition to repeating (for the third or fourth time) the substance of each of the arguments listed above, IEU also argues that the Commission has failed to "properly address" them, in violation of R.C. 4903.09. (*Id.* at 59-61.) This is simply not the case, as discussed below. That IEU does not agree with the results reached by the Commission does not mean that the Commission has failed to adequately address any of the above arguments. IEU also contends that the Commission erred because it did not order AEP Ohio to "refund all revenue collected above RPM-Based Pricing" or direct the Company "to apply such excess as a credit to regulatory asset balances otherwise eligible for amortization through retail rates." (IEU App. for Rehearing at 16-21.)

AEP Ohio has responded to each of the above arguments each time they have been made[11] and incorporates those responses by reference herein. And, the Commission has now addressed each argument on numerous occasions, as R.C. 4903.09 requires.[12] While the July 2 Opinion and Order may run afoul of R.C. 4903.09 in other respects (*see* AEP Ohio App. for Rehearing), it does not do so with respect to the arguments that IEU identifies. Moreover, with respect to IEU's argument that the Commission should order the Company to issue refunds or credit regulatory asset balances, the Commission has recently rejected this position at least twice. *See, e.g.,* Case No. 11-4920-EL-RDR, *et al.*, Finding and Order at 20 (Aug. 1, 2012) (rejecting

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[11] *See* AEP Ohio Mar. 5, 2012 Mot. for Leave to File Reply; AEP Ohio Mar. 30, 2012 Mem. Contra FES Feb. 29, 2012 App. for Rehearing; AEP Ohio Apr. 6, 2012 Mem. Contra IEU Mar. 27, 2012 App. for Rehearing; AEP Ohio May 8, 2012 Reply in Support of Mot. for Extension; AEP Ohio May 23, 2012 Post-Hearing Br.; AEP Ohio May 30, 2012 Reply Br.; AEP Ohio June 25, 2012 Mem. Contra FES, IEU, and OMA Appls. for Rehearing.

[12] *See* Entry (Mar. 7, 2012); Entry (May 30, 2012); July 2 Opinion and Order; *Modified ESP*, August 8, 2012 Opinion and Order at 32 (rejection of IEU's untimely stranded cost theory).

IEU's and other intervenors' request to adjust the PIRR deferral balance to account for the results of other proceedings because doing so "would be tantamount to unlawful retroactive ratemaking"); Case No. 09-872-EL-FAC, Opinion and Order at 14 (Jan. 23, 2012) (declining to order the Company to refund increased coal costs to FAC customers). Nothing has changed to affect the Commission's rejection, on multiple occasions, of the arguments described above. Because those arguments have already been thoroughly considered and overruled on multiple occasions, the Commission should decline to rehash them yet again on rehearing.

## III. CONCLUSION

For the reasons set forth above, the Commission should deny OMA/OHA's, FES's, IEU's, OCC's, and the Schools' applications for rehearing.

Respectfully submitted,

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**On behalf of Ohio Power Company**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing of Ohio Power Company* was served by electronic mail upon counsel for all other parties of record in this case on this 13th day of August, 2012.

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