

**BEFORE THE
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.)

**FIRSTENERGY SOLUTIONS CORP.'S
APPLICATION FOR REHEARING
OF THE OCTOBER 17, 2012 ENTRY ON REHEARING**

Pursuant to R.C. § 4903.10 and O.A.C. 4901-1-35, FirstEnergy Solutions Corp. (“FES”) seeks rehearing of the Commission’s October 17, 2012 Entry on Rehearing (the “Entry”). In the Entry, the Commission granted rehearing both to “clarify that the Commission is under no obligation with regard to the specific mechanism used to address capacity costs” and “for the limited purpose of clarifying that the Capacity Order was issued in accordance with the Commission’s authority found in Section 4905.26, Revised Code”¹ Neither is an accurate statement of law. Thus, the Entry is unlawful and unreasonable in suggesting that the Commission’s rate-making powers are unbounded by any law and in separately relying on Revised Code § 4905.26 as authority to set a price for the capacity provided by Ohio Power Company for shopping customers. Revised Code § 4905.26 does not grant the Commission any substantive ratemaking authority and does not obviate the Commission from adhering to the requirements of Chapter 4909 in setting a cost-based rate.

A memorandum in support of this Application is attached hereto and made a part hereof.

¹ Entry, pp. 28, 29.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.'S
APPLICATION FOR REHEARING
OF THE OCTOBER 17, 2012 ENTRY ON REHEARING**

I. INTRODUCTION

In its October 17, 2012 Entry on Rehearing (the “Entry”), the Commission granted rehearing to state that it is not bound by any mechanism when addressing capacity costs for the Ohio Power Company (“AEP Ohio”). Rehearing was necessary because the Commission’s Opinion and Order issued July 2, 2012 (the “Capacity Order”) had relied upon Chapter 4909 when establishing a cost-based state compensation mechanism for AEP Ohio. The Commission also granted rehearing to identify, for the first time, Revised Code § 4905.26 as a source of authority for its establishment of a new state compensation mechanism. Yet the Commission is a creature of statute. It can neither act independently of any statutory authority nor cast about after-the-fact for a statute that it hopes may be (unreasonably) interpreted to provide it with the unlimited authority it exercised in the Capacity Order.

Nothing in Revised Code § 4905.26 authorizes the Commission to allow AEP Ohio to recover from CRES providers its above-market, fully embedded costs for capacity provided to shopping customers. The Commission should have established a state compensation mechanism consistent with the Reliability Assurance Agreement (“RAA”) and the Reliability Pricing Model (“RPM”), which would have eliminated any possibility of a rate based on fully embedded cost

recovery.² In turning away from the RAA and RPM, the Commission committed its first fatal error. Then, by finding rate-making authority in state law for a cost-based rate in Revised Code § 4905.26, the Commission compounded its error. To the extent the Commission has such authority, it must be found in Revised Code Chapter 4909. However, as discussed in FES' first Application for Rehearing, the requirements of Chapter 4909 were not followed here. Therefore, for all these reasons, the Capacity Order's provision for the recovery of fully embedded costs cannot stand.

II. ARGUMENT

A. The Entry's Reliance On R.C. § 4905.26 As A Source Of Authority To Set A Cost-Based State Compensation Mechanism Is Unlawful And Unreasonable.

In the Entry, the Commission granted rehearing “to clarify that the Commission is under no obligation with regard to the specific mechanism used to address capacity costs” and to “clarify[] that the Capacity Order was [also] issued in accordance with the Commission’s authority found in Section 4905.26.”³ But Section 4905.26 provides no rate-making authority to the Commission. As the Commission states in the Entry, Section 4905.26 provides authority to review rates,⁴ not to set a new cost-based rate. Thus, this statute is not a basis for the Commission’s authority to allow AEP Ohio to recover its fully embedded costs for capacity provided for shopping customers. This is true for the same reasons argued by Industrial Energy Users-Ohio in its Application for Rehearing of the Capacity Order as to other sections of Chapter 4905.

² See FES' first Application for Rehearing, pp. 1-13.

³ Entry, pp. 28, 29.

⁴ Entry, p. 29.

“It is axiomatic that the [Commission], as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly.”⁵ It is therefore incorrect that the Commission has “no obligation” regarding the mechanism to establish a wholesale capacity charge or any other utility charge, especially where the Commission cites, as justification for the rate, its authority “to approve rates based on cost.”⁶ Rather, in order for the Capacity Order to stand, the Commission must have some statutory power to set a cost-based rate for AEP Ohio’s capacity provided to shopping customers.⁷ Revised Code § 4905.26 does not grant the Commission that power. That statute provides:

Upon complaint in writing against any public utility . . . , or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, . . . is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, . . . if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Section 4905.26, therefore, provides the Commission with authority to investigate and set a hearing to review a potentially unjust or unreasonable rate or charge. It says nothing about any

⁵ *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 535 (1993); *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 448 (1953) (the “Commission is a creature of statute and has only those powers given it by statute”).

⁶ Entry, p. 28.

⁷ As explained in FES’ Application for Rehearing of the Capacity Order, to the extent the Commission has jurisdiction to set a state compensation mechanism, that jurisdiction must be exercised consistent with the RAA and the RPM. Yet the concept of embedded cost recovery through capacity rates is utterly antithetical to the RPM and directly undermines the very structure of the RPM. FES’ first App. for Rehearing, pp. 3-14.

authority to set a rate as a result of such a hearing.⁸ Section 4905.26 simply does not confer jurisdiction to establish a cost-based rate. If it did, then Chapter 4909 would be mere surplusage. The Commission’s reliance in the Entry on R.C. § 4905.26 as “authority” for the Capacity Order setting a state compensation mechanism is unlawful and unreasonable.

B. To The Extent The Commission Has Authority Under Chapter 4905 To Set The State Compensation Mechanism, The Commission Must Still Adhere To The Requirements Of Chapter 4909 To Set A Cost-Based Rate.

Even if Revised Code § 4905.26 (or any other provision of Chapter 4905) provided the Commission with authority to set the state compensation mechanism, nothing in that section would excuse the Commission from following the procedures of Chapter 4909 to set a cost-based state compensation mechanism.⁹

The Capacity Order noted that R.C. Chapter 4909 purportedly “require[s] that the Commission use traditional rate base/rate of return regulation to approve rates that are based on cost”¹⁰ Although in the Entry the Commission appears now to be walking away from that conclusion, Chapter 4909 is the only statutory grant of authority to the Commission regarding the establishment of a cost-based rate.¹¹ Indeed, the Ohio Supreme Court has confirmed that the Commission “must” adhere to the requirements of Chapter 4909 in setting rates.¹² The Court has stated:

⁸ The Ohio Supreme Court has recognized as much in finding that the Commission can set a rate at the conclusion of a Section 4905.26 proceeding based on its authority under Chapter 4909. *See Ohio Utils. Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 157 (1979) (as a result of a Section 4905.26 proceeding, “the commission could, as it did below, invoke its authority under R.C. 4909.15(D)(2)(b) to ‘fix and determine the just and reasonable rate * * * to be charged’”); *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 1 Ohio St.3d 22, 24 (1982).

⁹ *See* R.C. §§ 4905.26, 4905.04, 4905.05, 4905.06.

¹⁰ Capacity Order, p. 22; *see also* pp. 33-36.

¹¹ *See* R.C. Ch. 4909.

¹² *City of Cleveland v. Pub. Util. Comm.*, 164 Ohio St. 442, 443 (1956) (citing requirements of R.C. §§ 4909.04, 4909.05, and 4909.15) (emphasis added).

While the General Assembly has delegated authority to the [Commission] to set just and reasonable rates for public utilities under its jurisdiction, it has done so by providing a detailed, comprehensive and, as construed by this court, mandatory ratemaking formula under R.C. 4909.15.¹³

These requirements include, among other things, that the Commission determine the value of the utility's used and useful property as of a date certain; the dollar return applying the reasonable rate of return to the valuation of the property; and cost-of-service analyses for a specified test period.¹⁴ All of those determinations have not been made in connection with AEP Ohio's capacity costs. If the state compensation mechanism is based on the Commission's "traditional rate regulation" authority (which FES has disputed), then Chapter 4909 must be followed. The Commission's Entry confirming a cost-based state compensation mechanism without adhering to those requirements is, therefore, unlawful and unreasonable.

III. CONCLUSION

For the foregoing reasons, the Commission should grant FES' Application for Rehearing to correct the errors described herein.

¹³ *Columbus So. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 535 (1993) (citing *Gen. Motors Corp. v. Pub. Util. Comm.*, 47 Ohio St.2d 58 (1976)) (emphasis added).

¹⁴ R.C. § 4909.15(C)(1).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Application for Rehearing of the October 17, 2012 Entry on Rehearing* and the *Memorandum in Support* thereof were served this 16th day of November, 2012, via e-mail upon the parties below.

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