

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)	
Columbus Southern Power Company)	Case No. 10-343 – EL - ATA
to Amend its Emergency Curtailment)	
Service Riders)	

In the Matter of the Application of)	
Ohio Power Company for Approval)	Case No. 10-344 – EL - ATA
to Amend its Emergency Curtailment)	
Service Riders)	

COMMENTS OF ENERNOC, INC.

EnerNOC, Inc. (EnerNOC) submits these Comments concerning the Tariffs (Application) filed by Columbus Southern Power Company and Ohio Power Company (collectively AEP-Ohio) that propose amendments to their Emergency Curtailment Service Riders (Rider ECS). EnerNOC proposes modifications to AEP-Ohio’s revisions of Rider ECS and arguments supporting the modifications. EnerNOC respectfully requests that the Commission approve the AEP-Ohio Riders ECS with its proposed modifications. Alternatively, EnerNOC respectfully requests that the Commission suspend the tariffs and order a hearing and ample discovery so that the issues raised by the proposed Rider ECS can be evaluated upon a complete record after according parties to this case due process of law.

I. INTRODUCTION

EnerNOC is a leading developer and provider of clean and intelligent power solutions to commercial, institutional, and industrial end use customers, as well as electric grid operators and utilities. EnerNOC's technology-enabled demand side management solutions platform helps customers, utilities and grid operators optimize energy consumption and balance electric supply and demand toward improved reliability and lower energy costs.

EnerNOC currently manages over 4,350 MW of demand side resources in a wide variety of reliability-based demand response programs, economic price response programs, and demand side ancillary services programs. EnerNOC is a member of PJM Interconnection, LLC (PJM) and is a direct market participant in PJM's demand side response programs. EnerNOC currently serves as a PJM Curtailment Service Provider providing demand response services to Ohio customers, including retail customers of AEP-Ohio.

EnerNOC is a market participant in most open access wholesale markets throughout North America, including ISO-New England, New York ISO, and the Electric Reliability Council of Texas (ERCOT). In addition, EnerNOC provides demand side management services through bilateral contracts with utilities, including both investor-owned utilities and public power authorities, in Arizona, California, Colorado, Florida, Idaho, Maryland, New Mexico, Vermont, Washington State, and the Tennessee Valley Authority service territory. EnerNOC also participates in demand side response programs in Ontario, Canada and the United Kingdom.

II. BRIEF STATEMENT OF POSITION

EnerNOC wishes to acknowledge that the AEP-Ohio Application represents clear progress accommodating curtailment service providers in AEP-Ohio's service territory.

EnerNOC appreciates that AEP-Ohio seeks in its Application to preserve opportunities for customers to participate in demand response through curtailment service providers. EnerNOC and other curtailment service providers have been very effective at dramatically increasing the amount of customer participation in demand response in Ohio. EnerNOC and other curtailment service providers have brought about much of the innovation in demand side opportunities that brings value to customers and increases the opportunities to participate in various demand response activities in addition to capacity, including economic load response, demand response ancillary services, and energy efficiency capacity. EnerNOC also appreciates the Commissions' past and continued support for bringing these benefits to Ohio retail customers, and respectfully requests that the Commission consider this important policy objective as it considers the AEP-Ohio Application.

While EnerNOC applauds AEP-Ohio for making progress in supporting cooperation with customers participating in demand response with curtailment service providers, there are significant issues in the Tariffs that need to be changed prior to approving Rider ECS. In this regard, EnerNOC looks forward to working with the Commission, AEP-Ohio, and the other parties to these cases to resolve the issues it has identified.

EnerNOC's primary concern is that it is unnecessary and bad precedent for AEP-Ohio to be allowed to use its proposed Tariffs to regulate the participation by retail customers through curtailment service providers in wholesale demand response programs. We recognize that the Commission has jurisdiction concerning customer participation in wholesale market demand response programs¹, but allowing AEP-Ohio to assume that authority is not appropriate. EnerNOC supports AEP-Ohio's objective to claim load curtailment from customers participating through curtailment service providers towards its SB 221 mandates, but AEP's means for

¹ Aggregation of Retail Customers Rule, 18 C.F.R. §35.28(g)(1)(iii).

accomplishing this is both problematic and unnecessary. Current Ohio regulations allow AEP-Ohio to count load reduction from customers participating through curtailment service providers toward AEP-Ohio's compliance obligations under SB 221. If the Commission believes that it is necessary that Rider ECS be used to confirm this, Rider ECS should be modified to reflect that purpose, and revised to remove the other provisions that are unnecessary to this purpose and only erect barriers to customer participation in PJM's demand response programs.

As discussed below, EnerNOC is also strongly opposed to the penalty liability that AEP-Ohio would be authorized to impose on customers served by curtailment service providers. The penalty liability provision in Rider ECS is an example of the anticompetitive harm that could result when utilities attempt to control the relationships between curtailment service providers and customers. Rider ECS does not seek to impose this penalty liability upon AEP-Ohio's customers who participate in its response program. Giving AEP-Ohio the authority to impose penalties on customers served by curtailment service providers based upon *the customers' participation in PJM's DR programs* is contrary to federal law and should not be permitted under color of state law.

Rider ECS purports to authorize rate discrimination that Ohio law prohibits. EnerNOC does not oppose a lawful AEP-Ohio utility tariff option for participation in demand response that does not erect barriers customer participation in demand response through a curtailment service provider. EnerNOC competes against utility tariff offerings in many jurisdictions now. But any such utility DR option carries with it the obligations of being a regulated utility – including not engaging in rate discrimination. Regulated utilities have enormous power by virtue of their monopoly franchise and rate discrimination laws are essential customer protections. Rider ECS must be revised to eliminate rate discrimination.

III. AEP-OHIO’S ATTEMPT TO REGULATE THE CONTRACTUAL RELATIONSHIP BETWEEN CUSTOMERS AND CURTAILMENT SERVICE PROVIDERS IS UNLAWFUL. NEVERTHELESS, ENERNOC SUPPORTS LAWFUL MEANS OF COUNTING A CURTAILMENT SERVICE PROVIDER CUSTOMER’S CURTAILABLE LOAD TOWARD AEP-OHIO’S SB 221 OBLIGATIONS.

The right of customer to participate in demand response programs available in the wholesale market is not derived by virtue of a state utility tariff. Whether retail customers can participate in wholesale market demand response programs is subject to the Commissions’ authority as the retail regulator for AEP-Ohio retail customers.² Utility tariffs should not be permitted to regulate the contractual relationship between retail customers and curtailment service providers. While the Commission can determine whether retail customers can participate in wholesale demand response programs,³ the Commission should not permit utilities to attach conditions and otherwise regulate the terms and conditions of retail customer participation in wholesale market programs. If this practice is allowed, the Commission should require that any such tariff provisions be narrowly crafted to carry out a regulatory objective of the Commission, and not that of the utility.

A. It Is Unlawful and Undesirable To Allow Utilities To Impose Conditions In A Tariff On Customer Participation In Demand Response Programs Through A Curtailment Service Provider.

The practice of allowing utilities to condition retail customer participation in wholesale demand response programs retail tariffs is undesirable, at best, because it allows the utility to utilize its status as a monopoly to gain an unfair advantages in what are otherwise competitive markets. This could also create a state retail policy to allow utilities to engage in anti-competititve practices that would violate or otherwise undermine the nondiscrimination obligations of the PJM Open Access Transmission Tariff (PJM OATT). As a member of PJM,

² *Id.*

³ PJM Interconnection, LLC, 131 FERC ¶61,069, FERC Docket No. ER09-701-003, at ¶23 (April 23, 2010).

AEP-Ohio is subject to the nondiscrimination obligations of the PJM OATT and federal regulations.⁴

Rider ECS presents two options for customers wishing to participate in demand response. Option One is a utility tariff option to participate in demand response on terms that appear generally comparable to the requirements of the PJM Emergency Load Response Program. Option Two purports to be an option to allow customers to participate in PJM demand response programs through a curtailment service provider. A requirement of Option Two is that the retail customer must enter into a “Customer Demand Response Commitment Agreement” (Agreement). This Agreement is attached, as Exhibit C to the Application. The Agreement contains several substantive terms and conditions that are not in the Tariff ECS, although the requirement to execute an Agreement is a tariff requirement. All substantive terms and conditions of a Tariff offering should be in the Tariff. Unless the Agreement is incorporated into the Tariff by the Commission AEP-Ohio could impose additional terms and conditions - which could also be anticompetitive - without Commission approval.

B. The AEP-Ohio Proposed Customer Demand Response Commitment Agreement Imposes An Unlawful And Unworkable Penalty Provision On Customers Who Participate In Demand Response Through A Curtailment Service Provider.

The Agreement includes language that would impose unlimited liability upon a customer who participates in PJM demand response programs through a curtailment service provider if AEP-Ohio fails to meet with its SB 221 mandates. The proposed penalty language holds the customer strictly liable for up to the entire payment the customer could receive under the customer’s contract with a curtailment service provider. This language could be interpreted to require a customer to disgorge its demand response compensation for all years of a multi-year

⁴ Non-discriminatory Open Access Transmission Tariff Rule, 18 C.F.R. §35.28 (2009).

agreement even if AEP-Ohio failed to meet its statutory mandates in one year. Even more troubling, the penalty can be imposed even when the customer's demand response is not the proximate cause of the AEP-Ohio failure to meet its statutory obligations.

What is striking about this penalty language is that AEP-Ohio would impose this liability only on customers who participate through a curtailment service provider, and not upon its utility tariff demand response customers. To impose this liability on customers participating through curtailment service providers, while not imposing the requirement on the utilities' tariff demand response customers, is anticompetitive and discriminatory.

Moreover, this type of penalty completely deconstructs how curtailment service providers manage demand response resources in wholesale markets to ensure reliable performance. Curtailment service providers aggregate the curtailable load of individual customers as a portfolio when a PJM emergency event is dispatched. There are penalty requirements imposed upon a curtailment service provider if the curtailment service provider mismanages the load of its customers and underperforms during a demand response event. In fact, the consequences of underperformance are comparable (and in some ways exceed) the requirements of when a generation resource fails to operate at committed levels. No other resource participating in the entire PJM market, not even the utilities' own tariff demand response customers or the utility-owned generation resources, would be subject to this performance penalty liability. The utility would not be permitted by federal law to attach such conditions on participation in FERC-jurisdictional wholesale market, and should not be permitted to include such conditions under color of state law.

The imposition of a penalty of this sort is not only unlawful; it completely misapprehends demand response portfolio management. Curtailment service providers manage resources as a

portfolio as a risk management tool. This enables the curtailment service provider to ensure that there are adequate resources available to meet its performance commitments and avoid penalties. Not every customer can reduce usage by committed amounts 100% of the time for numerous and perfectly legitimate reasons. For example, if an event is called when the customer was already off-line for maintenance, repairs, or even the company picnic, the customer may not be able to demonstrate a guaranteed load drop commensurate with its registration amount. In that circumstance, the curtailment service provider can make up for the customer's shortfall with a resource in the same zone that over performs its registration commitment. This portfolio risk management tool encourages curtailment service providers to nominate resources conservatively to avoid penalty exposure.⁵ Barriers to demand response are lowered by enabling curtailment service providers to reduce or completely insulate end use customers from PJM penalty risk. For this reason, many curtailment service providers shoulder the PJM penalty risk entirely and manage that financial exposure through sound portfolio management.

The penalty language in the Agreement undermines the valuable aggregation component of demand response participation in the PJM program, and instead would impose strict liability penalties on a customer whose underperformance is entirely excusable (e.g. the load is off line during the company picnic), even if another resource as part of the portfolio over performed to ensure full performance compliance to PJM.

AEP-Ohio may respond that it is appropriate to include penalty provisions in the Agreement because the Option One under Rider ECS includes penalty provisions. Such an argument would be both inaccurate and an inappropriate comparison. First, Rider ECS Option

⁵ There is strong evidence that conservative portfolio management is yielding positive results for system reliability. In the mandatory test of PJM demand response resources conducted in 2009, demand response resources demonstrated capability of 118% of committed levels system wide. PJM Load Management Performance Report 2009/2010. December, 2009 (<http://www.pjm.com/markets-and-operations/demand-response/~media/markets-ops/dsr/load-management-performance-report-2009-2010.ashx>).

One clearly does not impose liability upon the participating customer for the utilities' failure to meet its SB 221 obligations, and certainly does not impose strict liability in the manner proposed to be applicable to customers served by curtailment service providers. Second, the penalty exposure that Option One customers participating in demand response under the utility tariff are designed to cover the utilities' financial liability to PJM for underperformance, and not to the SB 221 statutory obligations. AEP-Ohio is subject to the same PJM performance penalties as curtailment service providers, and whereas curtailment service providers often seek to manage to manage penalty risk through portfolio management practices, AEP-Ohio has elected to pass that risk through to participating customers. The customer penalty provisions included under Option One under Rider ECS are in no way relevant to the inappropriate penalties AEP-Ohio's proposal would seek to impose on customers participating in demand response through curtailment service providers.

Whether intentional or not, this penalty provision will severely harm the continued development of competitive demand response services that benefit customers; it is a poison pill that will lead customers to simply avoid participation in demand response. It erects an anti-competitive and discriminatory barrier to demand response that AEP-Ohio would be legally unable to impose directly on wholesale market participants. It completely misunderstands how customer demand response resources are aggregated for participation in the PJM program, and could risk subjecting innocent customers to unreasonable penalties.

While customers participating in demand response through curtailment service providers can certainly help the utility achieve its obligations under SB 221, it would be inappropriate to allow the utility to shift its risk and responsibilities to customers who elect to be served by curtailment service providers.

C. AEP-Ohio Does Not Need To Include Conditions In Rider ECS Or Require A Separate Customer Agreement To Count Demand Reductions Of Customers of Curtailment Service Providers Towards AEP-Ohio's SB 221 Mandates.

AEP-Ohio can accomplish its objective allowing it to count demand response activities of customers who participate in demand response through curtailment service providers without placing conditions in its tariffs. EnerNOC strongly supports, and always has supported,⁶ allowing AEP-Ohio to count demand response participation by customers through curtailment service providers toward the utility SB 221 obligations. PUCO regulations provide for precisely this treatment. EnerNOC urges the Commission to allow AEP-Ohio to recognize demand reduction coming from the PJM capacity resources toward SB 221 requirements, and eliminate AEP-Ohio's perceived need to include a special condition and customer agreement in its tariff.

The newly promulgated "Green Rules"⁷ recognize the ability of a utility to count capacity resources participating as capacity resources in the PJM program towards a utility peak-demand reduction benchmark.⁸ The regulation reads as follows:

(2) For demand response programs, an electric utility may count demand reductions towards satisfying some or all of the peak-demand reduction benchmarks by demonstrating that either the electric utility has reduced its actual peak demand, or has the capability to reduce its peak demand and such capability is created under either of the following circumstances:

- (a) A peak-demand reduction program meets the requirements to be counted as a capacity resource under the tariff of a regional transmission organization approved by the Federal Energy Regulatory Commission.
- (b) A peak-demand reduction program equivalent to a regional transmission organization program, which has been approved by this commission.

⁶ EnerNOC Inc. Comments on Staff's Proposed Rules – New Chapter 4901:1-39, PUCO Case No. 08-888-EL-ORD.

⁷ Energy Efficiency and Demand Reduction Benchmarks, Ohio Administrative Code, Chapter 4901:1-39-01 to 07.

⁸ Id. at 4901:1-39-05(E)(2).

The language of this regulation deems demand response resource capacity resources participating in the PJM programs eligible to count toward the utility peak-demand reduction benchmarks. The text of the regulation clearly says that an “electric utility may count” such demand reductions towards satisfying its benchmarks. The regulation does not include additional language suggesting that a condition in a utility tariff or separate agreement is required if demand reductions are due to participation as a PJM capacity resource. The regulation clearly says, without qualification, that “an electric utility may count” such demand reductions. The regulation is perfectly clear and understandable and does not require that additional words be imputed to discern the intent of the regulation. Pursuant to 4901:1-39-05(E)(2), AEP-Ohio already has the ability to count capacity resources of AEP-Ohio that are enrolled by curtailment service providers. Accordingly, there is simply no need for the utility to include a condition in its retail tariff to simply restate what is already provided for by regulation.

AEP-Ohio might be concerned that the language of 4901:1-39-05(G), recognizing an application process by which a mercantile customers can commit its demand side resources toward the utility’s programs. Paragraph (G) of the regulation does not conflict with paragraph (E), and both paragraphs can be harmonized with each paragraph given its full meaning and import. Paragraph (E) is addressed to demand response participating as capacity resources in a regional transmission organization program. Paragraph (G) is catch-all provision aimed at allowing mercantile customers to commit demand response and energy efficiency activities that are not capacity resources participating in the PJM program.

AEP-Ohio further does not need a condition in its tariff to obtain data needed to complete the utilities' compliance reports required under SB 221 and implementing regulations. PJM already regularly publishes in public form the amount of demand response capacity resources that is registered by zone and utility in each delivery year.⁹ For example, as of May 10, 2010, some 662.8 MW of demand response capacity was registered behind AEP-Ohio. This figure does not include the demand response capacity resources registered by customers served by utilities in the AEP-OH zone that are represented by Buckeye Power and American Municipal Power. Moreover, AEP-OH as the electric distribution company, and as the load serving entity for mercantile customers taking generation service under a standard service offer, receives "add back" information for each and every customer served by a curtailment service provider concerning any and all economic or emergency demand response that occurs during system peak periods. This information enables the utility and/or load serving entity to "add back" or reconstitute every customer participant's peak load contribution. The add-back information, coupled with publically available information regarding demand response capacity participation by customers provides sufficient information for AEP-Ohio to complete its required compliance reports.

If AEP-Ohio can identify any information that it needs and is not otherwise publically or otherwise available from PJM, EnerNOC is willing to work with AEP-Ohio and PJM to develop a reasonable accommodation. It is completely unnecessary to allow utilities to impose conditions in its retail tariff on curtailment service provider services to retail customers when reasonable options achieving the same goals are available.

⁹ Load Response Activity Report January – April 2010, <http://www.pjm.com/markets-and-operations/demand-response/~media/markets-ops/dsr/2010-dsr-activity-report-20100511.ashx>.

D. If The Commission Deems It Necessary, It May Be Acceptable To Include A Condition In Rider ECS For The Very Limited Purpose Of Allowing AEP-Ohio To Count Demand Response Participation Toward The Utilities' SB 221 Mandates If There Is No Other Administratively Efficient Means Of Accomplishing Those Objectives.

For all of the reasons discussed above, allowing utilities to condition customer participation of demand response with curtailment service providers is a very dangerous precedent to set. The hazards of this practice are fully realized where, as with AEP-Ohio's proposal, customers would be forced to assume inappropriate penalty liability that are wholly inconsistent with the demand response aggregation practices that are ubiquitous in the PJM program.

As discussed above, Commission regulations already permit AEP to count demand reductions from PJM capacity resources toward its obligations and data necessary to comply with Ohio law is already available. That notwithstanding, should the Commission determine that a condition in Rider ECS is necessary, EnerNOC would like to proffer a reasonable proposal for a tariff condition that would be competitively neutral.

While the AEP-Ohio proposal is clearly unreasonable as it stands, a benign provision could be included in the tariff if necessary to ensure that the utility can count the demand reductions toward its SB 221 obligations and obtain necessary information. Modeled after the language in the AEP-Ohio Rider ECS, AEP-Ohio could capture curtailment service provider customer curtailable load for its SB 221 mandates with this simple provision:

OPTION TWO: Conditional Participation in PJM Demand Response Capacity Programs

Conditions of Service

1. Customers ~~are prohibited from~~ participating in Demand Response Capacity Programs offered by PJM, either directly or through Curtailment Service

Providers, must comply with the terms of this Rider~~except as authorized in this Rider.~~

2. Customers that want to participate in PJM Demand Response Capacity Programs agree to commit, at no charge to the Company, the load being registered under the PJM Demand Response Capacity Program toward the Company's compliance with Peak Demand Reduction benchmarks imposed by Ohio law and enter into a customer demand resource commitment agreement approved by the Commission for the purpose of allowing the Company to collect data needed to comply with Ohio law. ~~and adhere to the terms and conditions within. Customers who do so are permitted to participate in the PJM Demand Response Programs.~~

The amended Rider ECS language would be accompanied by changes to the Customer Demand Resource Commitment Agreement that would strike all penalty references and limit the terms of the agreement to collection of data necessary to comply with Ohio law. EnerNOC would be pleased to work with AEP-Ohio to develop suitable language for a customer agreement that will enable AEP-Ohio to achieve its statutory obligations.

EnerNOC would further request that the Commission order AEP-Ohio to accept the agreement executed by the customer (including accurate copies and facsimiles thereof) to be tendered to AEP-Ohio by the customer's curtailment service provider. EnerNOC has encountered situations in which utilities have erected barriers by requiring "wet" signatures and company letterhead for meter data and other similar requests. There is no reason not to allow the customer's curtailment service provider to assist the customer complete necessary paperwork and transmit the executed agreement to AEP-Ohio.

EnerNOC believes that Commission regulations render unnecessary any conditions in Rider ECS that would be applicable to customers participating as demand response in PJM capacity programs. Nevertheless, should the Commission determine otherwise, EnerNOC requests that the Commission limit the scope of any condition to the requirements of Ohio law, and not open the door to discriminatory and anticompetitive barriers to demand response.

IV. THE BASIC STRUCTURE OF THE APPLICATION IN PROVIDING OPTIONS FOR CUSTOMERS TO PARTICIPATE IN DEMAND RESPONSE THROUGH THE UTILITY OR CURTAILMENT SERVICE PROVIDERS WILL FACILITATE GREATER FLEXIBILITY FOR AEP-OHIO TO MEET ITS FIXED RESOURCE REQUIREMENTS TO PJM.

Differences have arisen between AEP-Ohio and curtailment service providers in the past as a result of misperceptions about the implications about AEP-Ohio's selection as the Fixed Resource Requirement (FRR) status to supply capacity outside of the PJM capacity auction. In the past, there has been a perceived "either/or" proposition with respect to demand response participation through the utility vs. a curtailment service provider. There has been the perception that demand response from AEP-Ohio customers participating in demand response through a curtailment service provider could not be included in the AEP-Ohio FRR plan to meet its capacity obligations to PJM. There has also been the perception that only customers who participate in demand response through an AEP-Ohio tariff program could be included in the utility's FRR plan. Both of these perceptions are false.

There is nothing in PJM rules or elsewhere to prevent AEP-Ohio from working with curtailment service providers to procure demand response capacity resources for inclusion in the FRR plan on a bilateral basis. The nature of the arrangement could work very similarly to a capacity purchase agreement that AEP-Ohio might have with an independent power producer. If AEP-Ohio procured demand response capacity from a curtailment service provider, it could include that capacity in its FRR plan. Moreover, the curtailment service provider with a capacity purchase agreement with AEP-Ohio, and then would not bid those resources into a PJM capacity auction.

The basic structure of the AEP-Ohio proposal, to offer a utility option for participation and provide for customers to be served with competitive demand response offerings through

third party curtailment service providers will facilitate opportunities for AEP-Ohio to incorporate cost-effective demand response capacity resources in its FRR plan that come from its utility tariff offering and from curtailment service providers.

This is the best possible outcome for AEP-Ohio, customers and for curtailment service providers. Because curtailment service providers will be operating in the AEP-Ohio territory, customers who want to participate will have more options and the opportunity to avail themselves of emerging technology for demand side management. AEP-Ohio will have the additional flexibility and opportunity to meet its FRR obligations with capacity resources coming from curtailment service providers, presumably at lower cost to other options (which is also another customer benefit). Finally, curtailment service providers will potentially have the ability to work directly with AEP-Ohio to help grow and promote customer demand response participation in Ohio.

V. RIDER ECS CONSTITUTES RATE DISCRIMINATION PROHIBITED BY OHIO LAW.

As filed, Rider ECS would authorize AEP to charge different rates to similarly-situated customers in violation of Ohio Law. Under Option 1, which is a utility option to participate in demand response, AEP will be able to negotiate the rates that will apply to customers taking DR services from AEP:

Curtailment Credits

The Curtailment Energy Credit shall **be a negotiated amount not less than 80 percent** of the AEP East Load Zone hourly Real-Time Locational Marginal Price (LMP) established by PJM (including congestion and marginal losses) for each event hour.

The Curtailment Demand Credit **shall be a negotiated amount not less than 80 percent** of the Reliability Pricing Model (RPM) auction price established by PJM in its Base

Residual capacity auction for the current delivery year, expressed in \$/MW-day multiplied by the GLD MWs.¹⁰ (emphasis added).

AEP explains why it proposed negotiated rates:

The amended ECS Rider incorporates terms and conditions designed to make the program more competitive with the PJM DRPs [demand response service providers].¹¹

EnerNOC would underscore the effect of AEP's Tariff DR offering – to permit AEP to provide a competitive, non-monopolistic service offering, subsidized by retail customers, that specifically authorizes AEP to use the negotiated rate authority to discriminate against similarly-situated customers. R. C. 4905.33 states:

(A) **No public utility shall** directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or **receive from any person, firm, or corporation a greater or lesser compensation for any services rendered**, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, **than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.**

(B) No public utility shall furnish free service or **service for less than actual cost** for the purpose of destroying competition. (emphasis added).

R. C. 4905.35 also prohibits customer discrimination:

(A) No public utility **shall make or give any undue or unreasonable preference or advantage** to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage (emphasis added).

There is no requirement in the Rider ECS that the customer rate classes¹² taking service be treated similarly; AEP-Ohio would have specific authority under Rider ECS to discriminate by negotiating various curtailment credits with each customer. This is specifically prohibited by R. C. 4905.33 and 4905.35.

¹⁰ Columbus Southern Power Tariff No. 7, at 71-2.

¹¹ *Application*, at 4, ¶8.

¹² i.e., GS-2, GS-2-TOD, GS-3 and GS-4

If AEP wants an demand response program for its customers “that...[is] more competitive with the PJM DRPs,” it can offer such a program as an unregulated service through an affiliate that will compete head-to-head with curtailment service providers. What AEP-Ohio cannot do, as a regulated utility, is craft a tariff-based DR program that violates R. C. 4905.33 (A) by providing demand response services allows a greater or lesser compensation to customers that under substantially the same circumstances and conditions, or gives one customer an unreasonable preference or disadvantage compared to similarly situated customers.¹³ Rider ECS, in its current form, allows the utility to do exactly that.

EnerNOC is not opposed to AEP-Ohio having Rider ECS option available for customers to participate as demand response capacity through the utility, provided it does not invite rate discrimination and is not being subsidized by other ratepayers. To avoid violating Ohio law rate discrimination principles, the compensation amount must be stated in Rider ECS. Moreover, the level of compensation must be supported by cost data to ensure that Rider ECS does not result in customer cross subsidies. Unfortunately, the language Rider ECS allowing AEP-Ohio to negotiate special deals for customers falls short of the requirements of Ohio law.

VI. CONCLUSION

While the Application represents tremendous progress toward allowing AEP-Ohio utilities and curtailment service providers to work together to bring value to Ohio customers, EnerNOC respectfully requests that the Commission make modifications to strike references in Rider ECS that would condition participation in PJM demand response programs by curtailment service providers’ customers. Such restrictions are not necessary for AEP-Ohio to accomplish its compliance objectives under SB 221, and could erect barriers to competitive demand response

¹³ R.C. 4905.35(A).

services to customers. That notwithstanding, if the Commission deems it necessary to allow conditions in Rider ECS to enable AEP-Ohio to comply with SB 221 mandates, such conditions should be narrowly tailored to that purpose. In particular, EnerNOC would respectfully request that the imposition of inappropriate penalty liability on curtailment service provider customers by AEP-Ohio be stricken. EnerNOC respectfully request that the Commission modify Rider ECS to eliminate elements that would allow rate discrimination that is prohibited under Ohio law, and require AEP-Ohio to provide cost data to ensure that customer cross-subsidies do not occur. Finally, and in the alternative, EnerNOC requests ample discovery and contested hearings to challenge the terms and conditions of Rider ECS.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of EnerNOC Inc.'s *Comments* served on the persons identified below, *via electronic service*, this 28th day of May 2010.

/s/ Jacqueline Lake Roberts

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