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

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| In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals. | ) | Case No. 10-2376-EL-UNC |
| In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan. | ) | Case No. 11-346-EL-SSO<br>Case No. 11-348-EL-SSO |
| In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority. | ) | Case No. 11-349-EL-AAM<br>Case No. 11-350-EL-AAM |
| In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders. | ) | Case No. 10-343-EL-ATA |
| In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders. | ) | Case No. 10-344-EL-ATA |
| 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 |
| In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144. | ) | Case No. 11-4920-EL-RDR |
| In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144. | ) | Case No. 11-4921-EL-RDR |

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S MOTION AND REQUEST FOR EXPEDITED RULING**

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**January 30, 2012**

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## INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S MOTION AND REQUEST FOR EXPEDITED RULING

### I. INTRODUCTION

Ohio Power Company ("OPCo")[1] has sought an order permitting it to avoid compliance with a directive of the Public Utilities Commission of Ohio ("Commission") that OPCo modify the so-called Detailed Implementation Plan ("DIP"). The non-compliant DIP was initially filed on December 29, 2011 in response to the Commission's December 14, 2011 Opinion and Order.[2] In its Motion, OPCo states that it will not file a revised and compliant DIP unless ordered again to do so.[3]

Because OPCo's Motion has no legal basis and works a substantial harm on customers, it must be dismissed for procedural reasons and, in the event the Commission addresses the merits, rejected substantively. Moreover, the Commission should order OPCo to include the details which customers and Competitive Retail Electric Service ("CRES") suppliers need to identify how the two-tiered shopping-blocking generation capacity service pricing scheme ("pricing scheme") will be billed and collected. The absence of these details works against the fundamental transparency that is a long-standing requirement of utility regulation and is contributing to customer confusion and frustration as customers attempt to understand the source of increases in their electric bills. Finally, the Commission should direct that OPCo bill and

[1] OPCo asserts that it represents Columbus Southern Power Company ("CSP") and is the successor in interest to CSP. Ohio Power Company's Motion and Request for Expedited Ruling at 2 (January 25, 2012) (hereinafter "Motion").

[2] *Id*.

[3] *Id.* at 7.

collect the new rates and charges subject to the reconciliation to make sure that OPCo's noncompliance does not unjustly enrich OPCo.[4]

The relief requested herein is warranted and necessary. OPCo has demonstrated that it will test the Commission through non-compliant responses to Commission directives for the purpose of exploiting the shopping-blocking and electric-bill-increasing aspects of the as-modified Electric Security Plan ("ESP") authorized in the Opinion and Order. OPCo's defiance threatens the integrity of the Commission's proceedings and, more importantly, the public interest. In addressing OPCo's defiance, the Commission should also make it clear that any relief provided by the Commission shall not foreclose such relief as may be available to CRES suppliers or customers through a complaint.

## II. PROCEDURAL BACKGROUND

OPCo, CSP, and others (collectively, "Signatory Parties") filed a Stipulation and Recommendation ("Stipulation") on September 7, 2011. As part of the Stipulation, the Signatory Parties recommended that the Commission approve a shopping-blocking generating capacity service pricing scheme. The recommended pricing scheme removed prevailing and unlimited access to generating capacity service at a market-based price determined in accordance PJM Interconnection LLC's ("PJM") Reliability

[4] At page 65 of the Commission's December 14, 2011 Opinion and Order, the Commission authorized the new rates to go into effect on a bills rendered basis effective January 1, 2012 "…subject to final review by the Commission." This somewhat unusual approach bypassed the more normal process that requires a utility to file proposed compliance tariffs with an effective date that is subsequently determined by the Commission. This somewhat unusual process also included the more normal customer notification process (often through a bill insert) preceding the effective date of a rate increase so that customers might be better prepared prior to the receipt of higher electric bills. The reconciliation requested herein is necessary to make the Commission's "final review" meaningful. *See also* Motion by Industrial Energy Users-Ohio for an Order Directing the Companies to Serve Tariffs and Supporting Workpapers on the Parties and for an Order that New Rates and Charges be Billed and Collected Subject to Reconciliation, and a Request for Expedited Ruling and Memorandum in Support (December 20, 2011).

Pricing Model ("RPM-Priced Capacity") and replaced it with a $255 per Megawatt Day price once shopping exceeds (or is about to exceed) certain percentages. On October 5, 2011, OPCo filed a DIP that purported to provide the terms by which OPCo would allocate RPM-Priced Capacity under the Stipulation's shopping-blocking pricing scheme.

Following a lengthy hearing, the Commission issued an Opinion and Order approving the Stipulation with modifications on December 14, 2011. In one of the modifications, the Commission altered the pricing scheme so that RPM-Priced Capacity is available to all customers shopping through governmental aggregation programs operational by a date certain (December 31, 2012) in addition to and outside of the RPM-Priced Capacity available through the Signatory Parties' recommended percentage-based method of allocation.[5]

On December 29, 2011, OPCo filed a revised DIP[6] which it claimed complied with the Commission's Opinion and Order. However, OPCo's revised DIP backslid into OPCo's preference for limited access to RPM-Priced Capacity and failed to respect the letter and spirit of the Commission's Opinion and Order. OPCo's revised DIP included language that limited the government aggregation bucket of RPM-Priced Capacity to only programs related to ballot issues approved in the November 2011 elections and then only to non-mercantile customers participating in such programs.

[5] Opinion and Order at 54-55 (December 14, 2011).

[6] All references to the DIP hereafter are to the version filed on December 29, 2011.

In response to OPCo's revised DIP, the Industrial Energy Users-Ohio ("IEU-Ohio") and FirstEnergy Solutions Corp. ("FES") filed pleadings urging the Commission to reject OPCo's revised and non-compliant DIP and direct OPCo to comply with the Opinion and Order.[7] The parties to this proceeding also filed Applications for Rehearing on January 13, 2012. Through its Application for Rehearing, OPCo sought to undo the Commission's modifications to the Stipulation and insert the more severe and shopping-blocking form of RPM-Priced Capacity access recommended by the Stipulation.[8]

On January 23, 2012, the Commission issued an Entry ("Compliance Entry") addressing the motions submitted by IEU-Ohio and FES on December 30, 2011. In the Compliance Entry, the Commission found that the Commission's prior modifications of the Stipulation were "meant to include all communities that have established governmental aggregation programs, up to and including those communities that approved government aggregation programs in the November 2011 election."[9] The Commission stated that the load associated with these programs was in addition to, not a part of, the shopping caps provided for in the Stipulation.[10] The Commission also concluded that it would retain jurisdiction over the pricing scheme for 2013 and 2014.[11] Finally, the Commission rejected OPCo's attempt to block eligibility of mercantile

[7] Motion of Industrial Energy Users-Ohio for Orders Modifying the Ohio Power Company's and Columbus Southern Power Company's Revised Implementation Plan and Request for Expedited Ruling and Supporting Memorandum in Support (December 30, 2011) (hereinafter "IEU-Ohio Motion"). FES raised similar issues on December 30, 2011. *See* FirstEnergy Solutions Corp.'s Objections to AEP Ohio's Proposed Compliance Filing and Request for Expedited Commission Action (December 30, 2011).

[8] Ohio Power Company's Application for Rehearing (January 13, 2012).

[9] Compliance Entry at 4.

[10] *Id*. at 5.

[11] *Id.*

customers for the additional RPM-Priced Capacity that the Commission determined must be made available to customers participating in governmental aggregation programs.[12] The Commission then ordered OPCo to revise and refile the DIP.[13] The Compliance Entry became effective upon journalization since the Commission did not specify otherwise.[14]

Despite the Commission's directive to revise and refile the DIP, OPCo has yet to comply. Rather, on January 25, 2012, OPCo filed a Motion stating that it would "continue to follow the December 29, 2011 Revised DIP."[15] Although styled as a request for "clarification,"[16] OPCo's Motion requests a stay of the Commission's order that OPCo revise the DIP "until after issuance of a rehearing decision that finalizes the Commission's resolution of these issues."[17]

## III. ARGUMENT

According to OPCo, it has elected to not comply with the Commission's directive to file a revised DIP for two reasons. First, it asserts that it should not be required to file a revised DIP because the Compliance Entry causes "confusion."[18] Additionally, it claims that the Compliance Entry adopts additional modifications to the Stipulation that

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[12] *Id.* at 6.

[13] *Id.* at 8-9.

[14] Section 4903.15, Revised Code.

[15] Motion at 7.

[16] *Id.* at 2.

[17] *Id.* at 3.

[18] *Id.* at 8.

materially and adversely affect OPCo.[19] Even if OPCo's Motion was proper procedurally (and it is not), neither of the grounds offered by OPCo entitles OPCo to ignore the Compliance Entry, a Commission order that is currently effective.

OPCo's Motion attempts to hide OPCo's selective[20] non-compliance by characterizing the Motion as a request for clarification. The Motion asks the Commission to excuse compliance with the directive that OPCo file a revised DIP until after the Commission issues an Entry on Rehearing addressing the issues related to the DIP.[21] State law, however, provides OPCo all of the clarification that OPCo is due as a result of the Compliance Entry: "Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission."[22] Because the Compliance Entry has been entered into the Commission's journal and does not specify a different time, it was effective upon journalization. Thus, there is no basis to suggest that there is a need for clarification of the effective date of the Compliance Entry.

Likewise, there is no confusion about what OPCo must do to comply with the Commission's Compliance Entry. The Commission modified the terms of the Stipulation

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[19] *Id*. at 2.

[20] OPCo's Motion is selective and unreasonable because if granted, it would allow OPCo to take the rate increase benefits provided by the Opinion and Order while deferring compliance with the Commission's determinations regarding access to RPM-Priced Capacity. Section 4928.143, Revised Code, provides the exclusive means by which OPCo may elect to not comply with the Commission's modifications of the Stipulation. To not comply with such modifications, OPCo must terminate and withdraw the ESP. OPCo has no legal right to implement the portion of the Opinion and Order that authorizes OPCo to increase rates and refuse to implement Commission directives which OPCo does not like.

[21] Motion at 3.

[22] Section 4903.15, Revised Code.

in its Opinion and Order to exempt customers shopping through governmental aggregation programs from the higher generation service capacity charge triggered by the shopping caps. The Commission permitted the new tariffs compliant with the Opinion and Order to become effective, on a bills rendered basis on January 1, 2012 subject to the Commission's further review.

During the compliance phase, OPCo had repeatedly sought to ignore the Stipulation modifications made by the Opinion and Order and rewrite the Opinion and Order as though the Commission approved RPM-Priced Capacity access limits on customers served through governmental aggregation programs. When IEU-Ohio and FES challenged OPCo's unilateral attempt to ignore the Commission's Opinion and Order that made RPM-Priced Capacity available to customers served through governmental aggregation programs without regard to the shopping caps, the Commission ordered OPCo to file a revised and compliant DIP.[23] There is nothing confusing about what OPCo is supposed to do to comply with the Commission's directives. And there is also no confusion about what OPCo has refused to do in response to the Commission's directives as it takes the benefits of the rate increases that were approved by the Commission's Opinion and Order.

OPCo's Motion, thus, is based on its disagreement with the Commission's modifications to the Stipulation. Disagreement with a Commission order, however, is not a basis for ignoring it. Rather, an application for rehearing is the appropriate means for challenging a Commission order, and OPCo has already presented its assignments

[23] Compliance Entry at 8-9.

of error concerning the Opinion and Order[24] to the Commission and has stated that it may seek further rehearing from the Commission's Compliance Entry.[25] Unless OPCo secures a stay from the Commission Order or withdraws the Stipulation, as it has often threatened to do, there is no legal basis for OPCo's unilateral decision to ignore the Commission's orders.

Moreover, the Commission should act promptly to hold OPCo accountable for OPCo's non-compliance. Recent auction results[26] confirm that customers with access to market-based electricity prices can and will reduce their electric bills. OPCo's affiliate, AEP Retail, has also confirmed the electric bill reduction opportunities that are presently available.[27] But for OPCo's selective non-compliance with the Commission's directives, these electric bill reduction opportunities could and should proceed in accordance with the Commission's directives. Unless the Commission acts promptly to deny OPCo's meritless Motion, OPCo's customers will be prejudiced by OPCo's refusal to implement the Commission's orders.

OPCo's refusal to comply with the Commission's orders also highlights the risks created by leaving implementation of the Commission's directives dependent on OPCo's discretion to follow the letter and spirit of the Commission's directives. Based on OPCo's course of conduct including the defiance documented in the Motion,

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[24] Ohio Power Company's Application for Rehearing (January 13, 2012).

[25] Motion at 2-3.

[26] *In the Matter of the Procurement of Standard Service Offer Generation for Customers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 10-1284-EL-UNC, Finding and Order at 2 (January 26, 2012).

[27] *See generally* AEP Retail website offering residential customers up to an 18% discount off of the OPCo rate (found at https://aepretailenergy.com/residential/get-started/aep-ohio).

IEU-Ohio again urges the Commission to also direct OPCo to include the details that IEU-Ohio has urged the Commission to require from OPCo[28] in the revised DIP. As filed, the DIP fails to provide the billing determinants and other information necessary to establish that the pricing scheme is operating as it should under the PJM process. The lack of information, like OPCo's refusal to make RPM-Priced Capacity available in accordance with the Commission's directives, will make it more difficult for customers to identify, on an "apples to apples" basis, the electric bill consequence of exercising their right to choose their electric service. As part of the Commission's response to OPCo's Motion, therefore, IEU-Ohio urges the Commission to direct OPCo to provide the detail that is necessary to implement the DIP.

The Commission should also require OPCo to collect its rates subject to reconciliation until the Commission issues its final orders in these matters. In the Opinion and Order, the Commission directed OPCo to file compliance tariffs by December 23, 2011.[29] The Commission stated that OPCo's tariffs are effective January 1, 2012, subject to final Commission review.[30] The Commission has reviewed OPCo's tariffs and found them to be not in compliance with the Commission's orders. Customers are currently at substantial risk of being closed out of lower cost alternatives to the ESP rates as a result of OPCo's unilateral refusal to comply with the Commission's orders. OPCo's Motion to stay the orders in the Compliance Entry until the Commission acts on the Application for Rehearing would have customers waiting

[28] IEU-Ohio Motion at 5-8, 9-10.

[29] Opinion and Order at 65.

[30] *Id.*

even longer. Under these circumstances, IEU-Ohio renews its request that OPCo be ordered to collect its rates and charges subject to reconciliation.

## IV. CONCLUSION

For the reasons stated herein, IEU-Ohio requests that the Commission deny OPCo's Motion and issue further orders directing OPCo to comply with the Commission's orders, direct OPCo to revise the DIP in a manner that will make the pricing and operation of the pricing scheme transparent to customers, and order that rates and charges be collected subject to reconciliation.

Respectfully Submitted,

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I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Motion and Request for Expedited Ruling* was served upon the following parties of record this 30th day of January 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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