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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY RETAIL SALES' MEMORANDUM CONTRA OHIO POWER COMPANY'S MOTION FOR RELIEF AND REQUEST FOR EXPEDITED RULING

On February 27, 2012, Ohio Power Company (AEP Ohio) filed a Motion for Relief and Request for Expedited Ruling, asking that the Public Utilities Commission of Ohio (Commission) allow AEP Ohio to assess a capacity charge against competitive retail electric service (CRES) providers that is substantially higher than the market price. AEP Ohio argues that such an outcome would constitute maintaining the *status quo*, even though this contradicts the clear language of the Commission's recent order in AEP Ohio's electric security plan case (ESP case),[1] with which the above-referenced docket was previously consolidated.

Duke Energy Retail Sales, LLC, (DER) files these brief comments to urge the Commission to deny the motion of AEP Ohio and to require it to immediately institute market-based rates for capacity while this proceeding is under consideration, as has previously been ordered by the Commission.

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[1] *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 Section 4928.143, Revised Code, in the form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*

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BACKGROUND

The Commission initiated this proceeding through its entry of December 8, 2010, as a result of a change proposed by AEP Ohio in an application filed with the Federal Energy Regulatory Commission (FERC). In that FERC application, AEP Ohio proposed to alter the method by which it would be compensated for capacity costs. Rather than being compensated on the basis of capacity auctions conducted by PJM Interconnection, LLC (PJM), AEP Ohio asked FERC to approve a cost-based methodology. The Commission was rightly concerned that such a change would inappropriately impact competition in Ohio, as those capacity charges were passed through to certain retail shopping customers in unavoidable provider-of-last-resort charges. Thus, the Commission ordered, in its December 8, 2010, entry, that the PJM capacity auction would be the basis for AEP Ohio's capacity charges during the pendency of the Commission's review in this docket.

Following the filing of comments, AEP Ohio and some of the parties in this proceeding sought to resolve the capacity charge issues as part of the larger stipulation that was primarily focused on the ESP case. The Commission agreed to consolidate this docket with the ESP case, solely for purpose of consideration of that stipulation. On February 23, 2012, however, the Commission rejected the stipulation in total, ordering that the process in this capacity charge case be renewed. Although AEP Ohio filed an application for rehearing of this order, which application has not been resolved, the Commission is continuing its consideration of the issue and again, in its initial entry on rehearing, required that the compensation mechanism it had adopted on December 8, 2010, must remain in effect during its review. Thus, it is indisputable that the Commission's initial entry, directing that AEP Ohio use the PJM capacity auction as the

basis for its capacity charges while the Commission completes its review, now controls those charges.

Nevertheless, AEP Ohio has filed a motion to ask the Commission to allow it to charge substantially in excess of the auction-based prices.

ARGUMENT

Anticompetitive Impact

The request by AEP Ohio to increase its capacity charges to anything greater than the PJM auction price, which the Commission has set as the approved state compensation mechanism, is evidence of its continuing effort to harm the competitive market. Although AEP Ohio repeatedly describes its request as a desire to maintain the *status quo*, in reality it seeks a drastic change from the situation that existed before this proceeding commenced; one that is also not found in any other part of Ohio. The supposed *status quo* is actually a sliver pulled out of the now-rejected stipulation and not, as AEP Ohio suggests, a pre-existing, approved methodology.

AEP Ohio seeks authority to charge for capacity according to the plan that was proposed in the ESP case stipulation. That plan would have charged existing shoppers at the market-based PJM rate, while anyone else who wished to shop would have been charged at a much higher rate based on AEP Ohio's version of the costs it incurs to operate its generation. As of June 1, 2012, the cost-based rate AEP Ohio seeks to impose on new shoppers is more than ten times what the market-based rate will then be. While this approach might be found by the Commission to make sense as a part of an overall stipulation that is designed to reach market prices, on an isolated basis it simply harms the competitive market and dissuades customers from engaging in choice. This clearly violates the legislature's statement of Ohio policy in R.C. 4928.02, which policy has been strongly supported by the governor of Ohio as well as the Commission.

It is also critical to note that such a bifurcated capacity charge is entirely at odds with the capacity charge calculation methodologies approved for other utilities in the state. For example, in Duke Energy Ohio, Inc.'s recent proceeding to establish a new electric security plan,[2] the Commission approved a system that would tie capacity charges directly to PJM market-based prices. As PJM will charge CRES providers and Duke Energy Ohio's wholesale auction winners directly for capacity, all providers will have the same capacity costs. Thus, capacity will have no impact on the competitive market. Contrast that with AEP Ohio's desire to penalize any new shoppers – and the market participants that might serve them – with a dramatic escalation in capacity charges.

No Justification for this Remedy

AEP Ohio in essence asks the Commission to stay a portion of its recent order rejecting the ESP stipulation. It argues that this portion of the order, returning it to the RPM capacity pricing that was in place before the stipulation was considered, would cause financial harm to AEP Ohio. Unfortunately, Ohio law makes it quite clear that the granting of a stay requires much more than an allegation of economic harm.

It is axiomatic that a movant for a stay must address probable success on the merits of the case, past and future irreparable harm, the impact of a stay on others, and the interest of the public. The Commission has adopted a four-factor test for the granting of stays: "whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits; whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; whether the stay would cause substantial harm to other parties; and where lies the public

[2] *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549, *et al.*

interest."[3] AEP Ohio made no effort to address any of these factors other than to allege the financial harm that it believes it will incur.

Of course AEP Ohio did not address the likelihood that it will be successful on the merits. The Commission has made it quite clear in recent proceedings that competition is essential to Ohio's view of the electric industry. Given that the Commission acted expeditiously to commence this proceeding, apparently to fend off the possibility that AEP Ohio might be in a position to charge cost-based capacity prices, it seems unlikely that AEP Ohio would be successful in its overall effort.

AEP Ohio also did not address, in its motion, the impact on other parties or the public if the Commission were to grant its request. As described above, allowing AEP Ohio to impose dramatically bifurcated capacity charges would stifle competition. Consumers would not, under AEP Ohio's approach, have a true ability to shop; they would be essentially locked into receiving generation service from AEP Ohio. In addition, the entities that are in the business of providing competitive offers to customers, such as DER and other parties in this proceeding, will be unable to compete under AEP Ohio's proposed methodology. Such an outcome is clearly not in the interest of the public.

DER respectfully asks that the Commission deny AEP Ohio's motion filed on February 27, 2012, and again require AEP Ohio to re-institute capacity charges based on PJM's RPM market prices.

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[3] *In the Matter of the Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS (Entry, July 8, 2009). *See, also, Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (1991), *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission*, 812 F.2d 288 (1987).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered via U.S. mail (postage prepaid), personal, or electronic mail delivery on this 2nd day of March, 2012, to the parties listed below.

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