

**BEFORE
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)	

**MEMORANDUM CONTRA OF OHIO POWER COMPANY
TO INDUSTRIAL ENERGY USERS-OHIO'S
MARCH 27, 2012 APPLICATION FOR REHEARING**

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Fax: (614) 716-2950
Email: stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
Huntington Center
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2770
Fax: (614) 227-2100
Email: dconway@porterwright.com

On behalf of Ohio Power Company

**MEMORANDUM CONTRA
INDUSTRIAL ENERGY USERS-OHIO'S
MARCH 27, 2012 APPLICATION FOR REHEARING**

I. BACKGROUND

On September 7, 2011, AEP Ohio, Staff, and numerous other parties filed a Stipulation and Recommendation (Stipulation) in order to resolve the issues raised in ten major proceedings involving Ohio Power Company (Ohio Power, the Company, or AEP Ohio), including, among other cases, an electric security plan (ESP) proceeding (Case Nos. 11-346-EL-SSO and 11-348-EL-SSO) and the instant proceeding involving appropriate charges for capacity that CRES Providers purchase from AEP Ohio.

On December 14, 2011, the Commission issued an Opinion and Order in the cases that the proposed Stipulation addressed. That Opinion and Order modified in part and adopted the Stipulation, including its provisions regarding capacity pricing.

On January 23, 2012, the Commission clarified in several respects the capacity pricing provisions that would apply during the term of the ESP approved in the December 14, 2011 Opinion and Order. As part of that January 23 Entry, the Commission clarified the following about its modification regarding the Stipulation's customer class re-allocation of RPM-priced capacity set-aside:

For further clarification purposes, the Commission notes that this modification to the Stipulation goes back to the initial allocation among the customer classes based on the September 7, 2011, data, *regardless of whether any customer class is now oversubscribed.*

(Jan. 23, 2012 Entry at 3-4, emphasis added). Thus, the Commission clarified on January 23, 2012 that only the first 21% of shoppers in each customer class would receive the RPM capacity

price – regardless of whether the customer class was already oversubscribed. This is a clear and direct statement by the Commission that load (above the 21% level) furnished to CRES providers associated with customers that already had received RPM-priced capacity under the Stipulation would be bumped back to the second tier pricing of \$255/MW-Day.

Subsequently, on February 23, 2012, the Commission issued an Entry on Rehearing rejecting the September 7, 2011 Stipulation and Recommendation. The Entry on Rehearing provided the following directives, after quoting R.C. 4928.143I(2)(b) regarding the requirement to return to the prior SSO rate plan:

Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.

(Feb. 23, 2012 Entry on Rehearing at 12.)

On February 27, 2012, AEP Ohio filed a Motion for Relief and Request for Expedited Ruling (“Motion for Relief”) in the instant case. In its motion, AEP Ohio urged the Commission to consider expeditiously the implementation of a cost-based capacity rate, at least for a transition period during which it would remain a Fixed Resource Requirement (FRR) entity, in lieu of requiring the exclusive use of Reliability Pricing Model (RPM) auction pricing, and requested that the Commission issue a decision on the merits within 90 days. In addition, the Company requested that a reasonable interim cost-based capacity rate be established during the pendency of the instant proceeding. AEP Ohio estimated that, if RPM auction pricing were relied upon exclusively to price its capacity, it would experience a massive erosion in revenues.

Specifically, the Company projected that, under a capacity pricing regime composed solely of RPM-based pricing, its earnings for 2012 and 2013 would decrease by 27 percent and 67 percent, respectively, resulting in a return on equity of 7.6 percent and 2.4 percent, respectively as well as possible downward adjustments to the Company's credit ratings, which would result in immediate and irreparable harm.¹ (Mot. for Relief at 5.)

Accordingly, in its February 27 Motion for Relief, 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 (DIP) that it submitted on December 29, 2011, or, alternatively, as yet further modified by the Commission's January 23, 2012 Entry. (With regard to the alternative capacity pricing based on the January 23 Entry, AEP Ohio requested that, in the event that alternative were adopted, mercantile load should be excepted from the load eligible for RPM-priced capacity.)

On March 7, 2012, the Commission issued its Entry in the instant proceeding granting AEP Ohio's Motion for Relief. The Commission found support in the record for the 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. (Entry at 16.) Consequently, the Commission's March 7 Entry confirmed that, for the relatively short interim period during which the Commission considers what is a just

¹ On February 27, 2012, Fitch Ratings revised its rating outlook for OPCo from Stable to Negative, as a result of the potential impacts on OPCo of the recent adverse regulatory decisions and the uncertainty of future regulatory decisions. See <http://www.marketwatch.com/story/fitch-affirms-ratings-on-aep-and-subs-ohio-power-outlook-revised-to-negative-2012-02-27>. In the press release on the rating action, Fitch indicated, "the Negative Outlook on OPCo reflects the challenging operating environment in Ohio. The most troubling concern in Ohio is the Public Utility Commission of Ohio's (PUCO) decision last week to revoke the stipulation agreement on OPCo's Electric Security Plan (ESP) that it had approved just two months earlier." *Id.* Moody's and S&P have issued similar reports. See Moody's, "Ohio's Utility Commission Rescinds Ohio Power's Transition to Market-Based Rates, a Credit Negative for AEP" (Mar. 5, 2012); <http://www.reuters.com/article/2012/02/27/idUSWNA105620120227>.

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 will be priced on a status quo basis, using the same regime that the January 23 Entry had previously established.

Industrial Energy Users-Ohio's Petition for Rehearing

On March 27, 2012, Industrial Energy Users-Ohio ("IEU-Ohio") filed an Application for Rehearing of the March 7, 2012 Entry. IEU-Ohio contends that the March 7, 2012 Entry is unreasonable and unlawful because: (1) the Commission does not have subject matter jurisdiction to establish a formula or cost-based capacity charge; (2) the temporary interim relief granted is "unduly discriminatory and not comparable;" (3) the March 7, 2012 Entry impermissibly allows AEP Ohio to recover transition costs; (4) there is no record support for the Commission's finding that the interim relief granted was necessary to prevent AEP Ohio from suffering an unjust or unreasonable result; (5) the temporary interim relief is not economically justified; (6) the Commission failed to comply with R.C. 4909.16, regarding grants of emergency relief; and (7) AEP Ohio and the Commission failed to comply with the requirements for an application for rehearing contained in R.C. 4903.10. (IEU-Ohio Appl. for Rehear. at 1-2.)

II. ARGUMENT

IEU-Ohio's Application for Rehearing should be denied. First, IEU-Ohio's arguments that the March 7 Entry is unlawful because it did not comply with the provisions governing applications for rehearing or requests for emergency relief are inapplicable. Second, IEU-Ohio's arguments regarding discrimination, transition costs, the record, and the basis for the

Commission's March 7 Entry are nothing more than an improper attempt to re-litigate issues that the Commission has already considered at length and decided. Third, IEU-Ohio's other arguments regarding the purported lack of record support for the temporary interim relief granted in the March 7 Entry are without merit and do not warrant rehearing. For these reasons, the Commission should deny IEU-Ohio's Application for Rehearing.

A. AEP Ohio's Motion For Relief Was Properly Made And Properly Granted.

Contrary to IEU-Ohio's contention, AEP Ohio's February 27, 2012 Motion for Relief and the Commission's March 7, 2012 Entry granting that motion were appropriate. IEU-Ohio argues that the March 7 Entry is unlawful and unreasonable because, prior to granting AEP Ohio's Motion for Relief, the Commission "did not grant rehearing" and "did not determine that its prior order was unjust or unwarranted." (IEU-Ohio Appl. for Rehear. at 26-27.) IEU-Ohio misunderstands AEP Ohio's Motion for Relief to be seeking a revision of the February 23 Entry on Rehearing. (*Id.*) This is simply not the case. AEP Ohio's Motion for Relief does not challenge the February 23 Entry on Rehearing, and AEP Ohio did not ask the Commission to revise that Entry. Rather, AEP Ohio sought temporary interim relief for capacity pricing while this proceeding and its ESP proceeding are being decided.

IEU-Ohio also argues that the March 7 Entry is unlawful because AEP Ohio's Motion for Relief did not seek emergency relief under R.C. 4909.16. (*Id.* at 23-26.) IEU-Ohio further contends that, even if AEP Ohio had requested emergency relief pursuant to R.C. 4909.16, the Commission's March 7 Entry would be unlawful because AEP Ohio has purportedly failed to demonstrate that it will suffer confiscation. (*Id.* at 24-26.)

Importantly, IEU-Ohio's argument regarding R.C. 4909.16 is not new. IEU-Ohio has already made, and the Commission has already considered and rejected, this argument. (*See*

IEU-Ohio Mem. Contra Mot. for Relief at 12-14; Mar. 7, 2012 Entry at 10, 15.) Moreover, AEP Ohio's actions in filing its Motion for Relief are perfectly permissible under the Commission's procedural rules. *See* 4901-1-12, Ohio Adm. Code. Further, the Commission's decision granting temporary interim relief to AEP Ohio was well-reasoned and appropriate. As it correctly noted in its March 7 Entry, at 15, the Commission possesses the authority to modify the state compensation mechanism established in its December 8, 2010 Entry in this proceeding. It is for this reason also that IEU-Ohio's contention, at pages 10-15, that the Commission is "without subject matter jurisdiction" to grant the temporary interim relief it did, is without merit. Because the March 7 Entry was based on probative evidence set forth in a properly propounded motion, IEU-Ohio's Application for Rehearing on these grounds should be denied.

B. IEU-Ohio's Application Improperly Attempts To Reiterate Arguments That It Has Already Made And The Commission Has Already Rejected.

IEU-Ohio contends that: (1) the March 7 Entry unlawfully authorizes rates that are "unduly discriminatory and not comparable" (IEU-Ohio Appl. for Rehear. at 15-18); (2) the March 7 Entry impermissibly permits AEP Ohio to "recover transition costs in violation of state law" (*id.* at 18-20); (3) the Commission improperly relied upon the record from the Stipulation hearing (*id.* at 21-22); (4) and the temporary interim relief that the Commission authorized is "not based on any economic justification" (*id.* at 22-23.) Like its argument that the Motion for Relief should have been denied because it did not seek emergency relief pursuant to R.C. 4909.16, however, IEU-Ohio has already made each of these arguments, and the Commission has considered and rejected each of them. The Commission should once again reject these arguments, now made on rehearing, on the same basis that it overruled them previously.

IEU-Ohio's argument, at pages 15-18, that the March 7 Entry unlawfully authorizes AEP Ohio to charged discriminatory rates, has been argued before at length. (*See* IEU-Ohio Initial

Post-Hearing Br. at 38-45; IEU-Ohio Mem. Contra Mot. for Relief at 9-11.) The Commission has already considered and rejected the argument – twice. (*See* Dec. 14, 2011 Opinion and Order; Mar. 7, 2012 Entry.) Similarly, IEU-Ohio’s argument, at pages 18-20, that the temporary interim relief AEP Ohio proposed impermissibly allows AEP Ohio to recover transition costs, also has been raised before (*see* IEU-Ohio Mem. Contra Mot. for Relief at 15-16), and the Commission has already considered and rejected the argument. (Mar. 7, 2012 Entry at 10, 15-16.)

Likewise, IEU-Ohio’s argument, at 22-23, that the temporary interim relief sought and approved is not economically justified also has been raised, and rejected, before. (*See* IEU-Ohio Mem. Contra Mot. for Relief at 14; Mar. 7, 2012 Entry at 15-16.) The Commission correctly concluded, based on the evidence presented, that the temporary interim relief granted was necessary to prevent AEP Ohio from suffering an unjust or unreasonable result. Indeed despite IEU-Ohio’s contention to the contrary, the Commission’s March 7 Entry was based on credible and probative evidence that AEP Ohio would suffer immediate and irreparable harm and a massive erosion in revenue if RPM auction pricing were exclusively relied upon to price its capacity. As explained above, AEP Ohio projected that, under a capacity pricing regime composed solely of RPM-based pricing, it would be forced to provide CRES providers with capacity at below-cost rates and its earnings for 2012 and 2013 would decrease by 27 percent and 67 percent, respectively, resulting in a return on equity of 7.6 percent and 2.4 percent, respectively, as well as possible downward adjustments to the Company’s credit ratings. (*See* Mot. for Relief at 5; Mar. 7, 2012 Entry at 5.) Such consequence would clearly be unjust and unreasonable. In addition, switching to RPM-based capacity now, and later implementing a different pricing scheme after this case is decided, would also cause uncertainty and confusion

for customers. (Mot. for Relief at 6-8; Mar. 7, 2012 Entry at 5), which would be an additional adverse and inappropriate result.

IEU-Ohio makes a related argument that the Commission should not rely upon the record from the Stipulation hearing (IEU-Ohio Mem. Contra Mot. for Relief at 20.) Again, the Commission has already considered and rejected this argument, and it specifically stated:

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.

(Mar. 7, 2012 Entry at 15.) Accordingly, because each of these arguments have already been thoroughly considered and overruled, the Commission should decline to rehash them again on rehearing.

C. IEU-Ohio's Remaining Arguments Regarding The Record Support For The Commission's March 7, 2012 Entry Are Without Merit And Do Not Form A Basis For Rehearing.

As part of its argument that there was no record support for the Commission's authorization of the temporary interim relief, IEU-Ohio argues, at page 22, that there "is no evidence to address what shortfall might occur because of [AEP Ohio's] decision to agree to share OSS revenue with other affiliates." This argument is not credible. The Commission noted that when retail customers switch to competitive suppliers, AEP Ohio cannot take full advantage of the opportunity to sell energy to the wholesale market because margins on off-system sales must be shared with other AEP Ohio affiliate companies. (Mar. 7, 2012 Entry at 16.) The Commission thus recognized the simple fact that AEP Ohio's ability to mitigate capacity costs with off-system energy sales is very limited. Recognition of this fact provides yet additional support for the Commission's conclusion that the temporary interim relief it approved is more

than supported by the evidence in the record. The point is that, even if one were to offset AEP Ohio's capacity costs with some share of margins from off-system energy sales, it would not be significant in comparison to the capacity costs that AEP Ohio incurred (\$355/MW-Day) to make its generation assets available. Thus, the Commission properly considered the impact of off-system sales in the deciding to grant temporary interim relief to AEP Ohio.

IEU-Ohio also contends that the Commission erred in noting, as part of its justification for granting AEP Ohio's Motion for Relief, that AEP Ohio is no longer authorized to collect POLR charges. (IEU-Ohio Appl. for Rehear. at 20.) Contrary to IEU-Ohio's assertions, however, the Commission's inclusion of and reliance upon that fact was proper. In its December 8, 2010 Entry initiating these proceedings, the Commission based its decision to adopt RPM-based pricing as the interim state compensation mechanism in part on the fact that, in the Commission's view, AEP Ohio was recovering capacity costs through POLR charges. (*See* Dec. 8, 2010 Entry at 1-2.) As IEU-Ohio points out, the Commission later determined that AEP Ohio is not entitled to recover POLR charges (*see* IEU-Ohio Appl. for Rehear. at 20); that determination, however, does not negate the fact that the Commission initially relied upon the fact that AEP Ohio recovered POLR charges in setting RPM-based capacity pricing as the interim state compensation mechanism. Thus, the Commission correctly included the fact that AEP Ohio is no longer permitted to recover such charges in its decision to grant AEP Ohio's motion for temporary interim relief that exceeds RPM pricing. IEU-Ohio's argument that it was unreasonable and unlawful to recognize this fact is neither reasonable nor credible.

III. CONCLUSION

For the reasons set forth above, the Commission should deny IEU-Ohio's Application for Rehearing.

Respectfully submitted,

/s/ Steven T. Nourse (by CMM per auth.)
Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Fax: (614) 716-2950
Email: stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
Huntington Center
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 228-2270
Fax: (614) 227-2100
Email: dconway@porterwright.com

On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum Contra of Ohio Power Company to Industrial Energy Users-Ohio's March 27, 2012 Application for Rehearing was served this 6th day of April, 2012 by electronic mail, upon the persons listed below.

Christen M. Moore

Christen M. Moore

greta.see@puc.state.oh.us,
jeff.jones@puc.state.oh.us,
Daniel.Shields@puc.state.oh.us,
Tammy.Turkenton@puc.state.oh.us,
Jonathan.Tauber@puc.state.oh.us,
Jodi.Bair@puc.state.oh.us,
Bob.Fortney@puc.state.oh.us,
Doris.McCarter@puc.state.oh.us,
Stephen.Reilly@puc.state.oh.us,
Werner.Margard@puc.state.oh.us,
William.Wright@puc.state.oh.us,
Thomas.Lindgren@puc.state.oh.us,
john.jones@puc.state.oh.us,
dclark1@aep.com,
grady@occ.state.oh.us,
keith.nusbaum@snrdenton.com,
kpkreider@kmklaw.com,
mjsatterwhite@aep.com,
ned.ford@fuse.net,
pfox@hilliardohio.gov,
ricks@ohanet.org,
stnourse@aep.com,
cathy@theoec.org,
dsullivan@nrdc.org,
aehaedt@jonesday.com,
dakutik@jonesday.com,
haydenm@firstenergycorp.com,
dconway@porterwright.com,
jang@calfee.com,
lmcbride@calfee.com,
tallexander@calfee.com,
etter@occ.state.oh.us,
grady@occ.state.oh.us,
small@occ.state.oh.us,
cynthia.a.fonner@constellation.com,
David.fein@constellation.com,
Dorothy.corbett@duke-energy.com,
Amy.spiller@duke-energy.com,
dboehm@bkllawfirm.com,

cmontgomery@bricker.com,
lmcalister@bricker.com,
mwarnock@bricker.com,
gthomas@gtpowergroup.com,
mmassey@cov.com,
henryeckhart@aol.com,
laurac@chappelleconsulting.net,
whitt@whitt-sturtevant.com,
thompson@whitt-sturtevant.com,
sandy.grace@exeloncorp.com,
mhpetricoff@vorys.com,
smhoward@vorys.com,
mjsettineri@vorys.com,
lkalepsclark@vorys.com,
bakahn@vorys.com,
Gary.A.Jeffries@dom.com,
Stephen.chriss@wal-mart.com,
dmeyer@kmklaw.com,
holly@raysmithlaw.com,
barthroyer@aol.com,
philip.sineneng@thompsonhine.com,
carolyn.flahive@thompsonhine.com,
terrance.mebane@thompsonhine.com,
cmooney2@columbus.rr.com,
drinebolt@ohiopartners.org,
trent@theoeg.com,
nolan@theoec.org,
gpoulos@enernoc.com,
emma.hand@snrdenton.com,
doug.bonner@snrdenton.com,
clinton.vince@snrdenton.com,
sam@mwncmh.com,
joliker@mwncmh.com,
fdarr@mwncmh.com,
jestes@skadden.com,
paul.wight@skadden.com,
dstahl@eimerstahl.com,
aaragona@eimerstahl.com,
ssolberg@eimerstahl.com,

mkurtz@bkllawfirm.com,
ricks@ohanet.org,
tobrien@bricker.com,
jbentine@cwsllaw.com,
myurick@cwsllaw.com,
zkravitz@cwsllaw.com,
jejadwin@aep.com,
msmalz@ohiopoveritylaw.org,
jmaskovyak@ohiopoveritylaw.org,
todonnell@bricker.com,
rsugarman@kegler.com,
barthroyer@aol.com,
cendsley@ofbf.org,
bpbarger@bcslawyers.com

tsantarelli@elpc.org,
callwein@wamenergyllaw.com,
malina@wexlerwalker.com,
jkooper@hess.com,
kguerry@hess.com,
afreinfeld@viridityenergy.com,
swolfe@viridityenergy.com,
korenergy@insight.rr.com,
sasloan@aep.com,
Dane.Stinson@baileycavalieri.com,
Jeanne.Kingery@duke-energy.com,
christopher.miller@icemiller.com,
asim.haque@icemiller.com,
gregory.dunn@icemiller.com

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