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**

OHIO POWER COMPANY'S MOTION TO COMPEL OR, IN THE ALTERNATIVE, MOTION TO STRIKE TESTIMONY AND REQUEST FOR EXPEDITED RULING

Pursuant to Rule 4901-1-23, Ohio Adm. Code, Ohio Power Company ("Ohio Power" or "AEP Ohio") respectfully moves the Commission for an order compelling FirstEnergy Solutions Corp. ("FES") to provide complete responses to Ohio Power Company's Second Set of Interrogatories, Request for Admissions, and Request for Production of Documents ("Second Discovery Requests"). As demonstrated in the attached memorandum in support, FES failed to adequately respond to certain requests seeking relevant information and documents. Because FES has failed to comply with its discovery obligations, the Attorney Examiner should order it to immediately provide the responses and produce the documents requested in Ohio Power's Second Discovery Requests and repeated in this Motion. Ohio Power's efforts to resolve this dispute and previous disputes by compromising on the data to be provided to address FES' concerns, pursuant to Rule 4901-1-23(C) are set forth in the Affidavit of Counsel attached as Exhibit A. FES has assigned itself Attorney Examiner in this case and sits in judgment of what it determines to be relevant matters in this proceeding. Coincidentally, that translates in FES not providing any information related to its claims that it will be unable to compete in Ohio and that anything above the RPM rate is anticompetitive. FES' position is that it can make whatever

arguments it sees fit but that nobody can have any information on its arguments because they are immune from defending the positions it takes.

Alternatively, should the Attorney Examiner determine that information Ohio Power seeks from FES on the retail customer impact of a higher than RPM capacity is not within the scope of this proceeding, then Ohio Power respectfully requests that the Attorney Examiner strike any and all Intervenor testimony that addresses any issue other than the issue of the appropriate charge for AEP Ohio's **wholesale capacity**.

Pursuant to Rule 4901-1-12(C), Ohio Power also requests expedited ruling on this Motion to Compel. Given the expedited nature of this proceeding, the fact that hearing begins tomorrow, and the complexity of the issues presented in this case, an expedited ruling is necessary to provide Ohio Power a fair opportunity to review the discovery responses and prepare its case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

There is no question that the ultimate prices charged to customers and capacity charges that FES would be required to pay as a result of this case are issues directly advocated by FES in this proceeding. The fact that AEP Ohio has proposed one number and a CRES provider like FES is supporting RPM does not make other values in between those two numbers irrelevant in this proceeding. In addition, it is not FES' place to declare what is relevant or irrelevant, especially for purposes of discovery. If FES wants to participate in this case and claim that the proposed capacity rate charged to it as a CRES provider will have an impact on end use retail customers and competition in Ohio, then it must also answer discovery questions dealing with those issues. FES claims in its testimony that the price it would be required to pay for capacity directly impacts its ability to operate in the state and the price customers will pay as a result. Discovery questions exploring the relationship between those elements and testing FES own arguments surely are an appropriate topic for discovery that correspond to its participation in the case as a party with full intervention.

AEP Ohio even signed a protective agreement and sent a copy to FES on Friday, April 13, 2012, leaving no concern that anything provided would not be treated appropriately. AEP Ohio understood the discussion to relate to the items that are the subject of the motion to compel that AEP Ohio filed on April 12, 2012, related to the first set of discovery. In an effort to be cooperative, AEP Ohio offered to allow FES to redact the ultimate pricing provided customers in those contracts and the customer name (redactions which FES later requested in its motion for a protective order filed today on April 16, 2012). AEP Ohio, when contacted, has attempted to be cooperative and adjust concerns raised by FES. The protective agreement signed by AEP Ohio

is the same agreement it requires of other competitive entities to ensure confidential treatment of the information.

Yet, even with the possession of an AEP Ohio-signed protective agreement, FES again failed to meet its basic obligation to respond to Ohio Power's discovery.[1] In its Second Discovery Requests, Ohio Power requested that FES provide relevant information and produce documents regarding FES's contracts with its retail customers, on whose behalf FES purports to oppose Ohio Power in this proceeding. In response, FES has levied vague, boilerplate objections and has refused to meaningfully respond to the vast majority of Ohio Power's requests, leaving Ohio Power with little more information than before it propounded the Second Discovery Requests. FES' responses are insufficient and do not satisfy FES's obligation to respond to discovery requests. FES, however, appears to assert that its duty to participate as a full party in the case amounts to harassment. FES filed numerous pieces of testimony on a number of positions in this case as well as deposed all of the AEP Ohio witnesses. The questions propounded in the second discovery request are related to the arguments by FES witnesses or FES positions and are not unduly burdensome. Likewise, there has been no attempt by FES to clarify any questions to ensure it is cooperatively providing the information sought. Accordingly, the Attorney Examiner should order FES to provide complete responses and produce responsive documents immediately. In the alternative, if the Attorney Examiner agrees with FES' position that the information requested is not within the scope of this proceeding, then the Attorney Examiner should strike any and all Intervenor testimony dealing with anything

[1] *See* Ohio Power Company's Motion to Compel and Request for Expedited Ruling, filed April 12, 2012, which details FES' insufficient responses to Ohio Power's First Discovery Requests, and which Ohio Power incorporates by reference herein.

beyond the scope of the retail customer impact of a higher-than-RPM capacity charge for AEP Ohio's wholesale capacity.

II. ARGUMENT

Parties to Commission proceedings have "ample rights" to conduct "full and reasonable discovery." *See* 4903.082, Ohio Rev. Code; Rule 4901-1-16, Ohio Adm. Code ("[A]ny party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding."). These ample rights necessarily include a party's right to receive complete, timely responses to discovery requests so that the party may prepare for hearing, particularly when a case is on an expedited schedule. *See* Rule 2901-1-23, Ohio Adm. Code; *In re Investigation into the Perry Nuclear Power Plan*t, Case No. 85-521-EL-COI, Entry at 10 (Mar. 17, 1987) (stating that "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly * * *").

A. FES Has Failed To Provide Adequate Responses To Ohio Power's Second Discovery Requests.

FES' responses to Ohio Power's Second Discovery Requests are deficient in several ways, and the Attorney Examiner should order it to supplement those responses immediately.[2]

1. Interrogatory Nos. 22, 23, and 24.

In Interrogatory Nos. 22, 23, 24, Ohio Power requested that FES identify the total capacity requirement for the load that FES served in the AEP Ohio service territory over certain periods of time in 2010 (*see* Ex. B at Interr. No. 22), 2011 (*id.* at Interr. No. 23), and 2012. (*Id.* at Interr. No. 24). In response to each of these interrogatories, FES made numerous objections, including objections that the interrogatories were "unduly burdensome and harassing," sought

[2] A copy of FES' Responses to Ohio Power's Second Discovery Requests is attached as Exhibit B.

proprietary information, and were not reasonably calculated to lead to the discovery of admissible evidence. FES did not provide substantive answers to any of these interrogatories. The landscape of shopping has changed over time and a CRES provider's total capacity requirement in relation to the timeline of developments is a matter that could lead to admissible information. Therefore, the requested discovery should be provided.

2. Interrogatory Nos.25 through 40

In Interrogatory Nos. 25 through 34, Ohio Power requested that FES provide certain relevant information regarding FES' contracts with customers that participate in governmental aggregation programs in Ohio served under a contract with FES. (*Id.* at Interr. Nos. 25-34.) Specifically, Interrogatory Nos. 25 through 30 sought information regarding percentage discounts in FES' contracts with customers that participate in the Reynoldsburg governmental aggregation program. Interrogatory Nos. 31 through 34 asked whether FES customers who participate in other governmental aggregation programs in Ohio are guaranteed to save a percent off the competitive portion of their electric bill from June 2012 through May 2013.

In Interrogatory Nos. 35 through 38, Ohio Power requested that FES identify whether any retail customers served by FES in Ohio were <u>not</u> guaranteed to save a fixed percent off the competitive portion of their electric bill from June 2012 through May 2013. (*Id.* at Interr. Nos. 35-38.) Interrogatory No. 39 requested that FES explain whether a change in the capacity rate that AEP Ohio charges to FES be considered a "Pass-Through Event," as that term is used in FES' contracts with retail customers. (*Id.* at Interr. No. 39.) Interrogatory No. 40 similarly asked FES to identify any capacity rate that AEP Ohio could charge to FES that would not be considered a "change," as that term is used in FES' contracts with retail customers. (*Id.* at Interr. No. 40.)

FES responded to each of the interrogatories identified above with objections as to the interrogatory's purported vagueness, ambiguity, broadness, and irrelevance and refused to meaningfully answer the interrogatories. (*See id.* at Interr. 25-40.) The requests were clear and dealt with issues repeatedly discussed in the testimony of FES witnesses. FES claims any increase beyond RPM would be anticompetitive and have impacts on governmental aggregation programs, but is unwilling to indicate how it addresses the same issues with its existing customers. There may be relevant answers that would assist AEP Ohio in preparing for hearing and ultimately the Commission in making a determination in this case. Likewise, the response to what would be a change and not a change under a contract is important for understanding the impact of AEP Ohio proposed capacity pricing mechanism on retail customers. But FES did not find the matters to be relevant to its arguments and therefore made boilerplate objections and did not seek in any manner to work cooperatively with AEP Ohio to provide responsive discovery.

3. Request for Production of Documents Nos. 6 through 10

FES levied its same generic objections in response to Request for Production Nos. 6 through 8 – stating merely that it felt those requests were too broad, too burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The requests sought relevant information including copies of opt-out notices that FES provided to its aggregation (*see id.* at Req. for Prod. No. 6) and other retail customers in Ohio (*see id.* at Req. for Prod. No. 7), and generic or template opt-out notices that FES has prepared for use in Ohio. (*Id.* at Req. for Prod. No. 8.)

In Request for Production of Documents No. 9, Ohio Power requested that FES produce copies of the documents FES "identified, consulted, referred to, or utilized" in preparing its responses to Ohio Power's interrogatories. (*Id.* at Req. for Prod. No. 10.) In Request for

Production No. 10, Ohio Power similarly requested that FES produce copies of any documents responsive to Interrogatory Nos. 25-45. FES responded that these requests were "not applicable," despite that Ohio Power sought, among other things, information about relevant provisions of FES' contracts with its retail customers. (*Id.*) These responses are an extension of FES' unilateral ruling that it is not subject to discovery on the arguments it raises in this case. FES' arguments in this case should be disregarded and FES should be instructed to provide responsive answers.

B. FES Should Be Required To Immediately Supplement Its Responses.

FES' responses to Ohio Power's Second Discovery Requests are wholly unsatisfactory, vague, and evasive. FES' blanket refusal to provide Ohio Power with any of the information it seeks – information that is relevant to this proceeding – does not comport with the letter or the spirit of the Commission's discovery rules. FES has attempted to make the impact on the competitive market in Ohio a central issue in this case, and doing so implicates the terms and conditions of service with its customers related to the treatment of the capacity component of its costs.

The discovery questions unanswered by FES relate directly to FES' participation in this case and the testimony it filed. As previously stated, FES, in its Motion to Intervene, sought intervention based on the fact that it "would be charged the new wholesale capacity rates that the Ohio Power Company and Columbus Southern Power Company have filed for at the Federal Energy Regulatory Commission." (Motion for Leave to Intervene of FES, January 6, 2011.). The testimony of FES witnesses extends that point to argue that the impact of that charge is directly at issue in this case and questions related to that intervention request and the treatment of that charge in this case are all appropriate issues for discovery. Any argument that questions

propounded regarding the impacts of that charge on FES and its customers are not relevant to this proceeding is simply disingenuous.

FES' own testimony also opens the door to a discoverable look into the how the issues raised by FES are impacted by the capacity charge to be established in this case.[3] FES has argued that the capacity charge directly tied to competition in Ohio and its ability to serve retail customers. FES asserted in testimony that the Proposed Capacity Price would establish a significantly above-market price for capacity charged to CRES providers, which will constrain **customers'** ability to access savings. (See the Testimony of FES witness Tony Banks at 5.) FES witness Banks went on to state that "with every inappropriate increase in component costs, CRES providers' ability to offer savings is correspondingly limited." (Id.) While AEP Ohio disagrees that compensating the utility for its costs of capacity is an inappropriate cost, the matter still remains that FES has asserted end use customers' ability to save is impacted by increases in component costs, including capacity costs. Discovery that explores that argument by FES is not only appropriate but ultimately may be important to enable the Commission to make a decision on a complete record.

FES witness Lesser also directly asserts that the price charged for capacity can affect the retail price and profit expectations for FES. Witness Lesser offered an extreme example of $1,000/MW-day for capacity and the risk that CRES providers could not match AEP Ohio's price without losing money. (See Testimony of FES witness Lesser at 10.) Yet, when discovery is propounded to investigate this claim and the aspects of FES' existing retail contracts which might have an impact on FES' profitability, FES asserts that it is not part of the case. FES cannot

[3] *See also* the numerous references in the testimony below that AEP Ohio is moving to strike if the Attorney Examiner determines that the discovery questions are not relevant to the proceeding.

have it both ways. FES cannot offer testimony denying its ability to offer customers retail service in the market as a result of certain capacity price points but then deny the relevance of discovery questions dealing with capacity price points or terms related to the treatment of the capacity charge that could impact the competitive market in Ohio.

Finally, any argument on FES' part that it is concerned with the disclosure of proprietary or trade secret information is no longer relevant to deciding the issue of whether FES should be compelled to provide responsive answers to the Second Discovery Requests because FES and Ohio Power entered into a protective agreement on April 13, 2012. (*See* Aff. of Counsel at ¶ 5.) FES, therefore, has no reason to deny Ohio Power the information and documents it seeks.

C. If The Attorney Examiner Determines That The Discovery Ohio Power Seeks from FES Is Not Relevant To This Proceeding, Then The Attorney Examiner Should Strike All Intervenor Testimony That Is Not Directly Applicable To The Commission's Determination Of The Appropriate Capacity Price for Ohio Power.

If the Attorney Examiner determines that the discovery that Ohio Power seeks from FES is not relevant to this proceeding, then the Attorney Examiner should fully carry out that ruling and should strike the portions of the FES witnesses' testimony, as well as the testimony of other parties' witnesses, that go beyond the question of the capacity charge to set for Ohio Power. FES cannot have it both ways - either the issues included in FES' witnesses' testimony and elsewhere in FES' filings to the Commission are part of the case and appropriate for Commission consideration or they are not. The Attorney Examiner should recognize FES' one-sided attempt to raise arguments and throw stones concerning competition in Ohio, while attempting to avoid fully participating in this proceeding, and the Attorney Examiner should allow FES' claims to be explored by Ohio Power and ultimately the Commission through the development of a full record.

In its response to Ohio Power's attempt to work out the discovery dispute concerning its first set of unanswered responses, FES laid out its apparent view of the scope of the hearing. Specifically, counsel for FES stated:

> In the Motion to Strike Testimony [Ohio Power] filed earlier today, you state: "The subject matter of this case is limited to one issue – Ohio Power Company's recovery of an appropriate charge for the cost of capacity it is legally obligated to supply to Competitive Retail Electric Service ("CRES") providers in the AEP Ohio Service Territory." AEP Ohio's Requests go far beyond that subject matter and are not reasonably calculated to lead to the discovery of admissible evidence.

See Exhibit C. It would appear that FES' rationale for its non-responsiveness to discovery is that it agrees that this proceeding is limited to "Ohio Power Company's recovery of an appropriate charge for the cost of capacity it is legally obligated to supply to Competitive Retail Electric Service ("CRES") providers in the AEP Ohio Service Territory." The argument provided to not provide responsive discovery means that all of the discussion on the impact of this **wholesale** concept on **retail** competition and the business models and viability of competitors for **retail** electric service are beyond the scope of this hearing and the hearing should be focused solely on the appropriate charge for **AEP Ohio's cost of capacity**. Likewise, all of the testimony dealing with anything other than the appropriate charge for the cost of AEP Ohio's capacity should be stricken from the record.

Based on the arguments of FES on the scope of the proceeding dealing with the wholesale market capacity charge and not the retail market and if FES is not required to answer discovery questions on the retail and aggregation issues then based on that definition of the scope of the proceeding, AEP Ohio moves to strike the following testimony of FES witnesses.[4]

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[4] The ruling on this matter will define the scope of the hearing based upon FES' relevance arguments. If the scope is limited as sought by FES' argument then AEP Ohio will supplement this filing to identify provisions of other Intervenors' testimony to strike.

1. Tony Banks

The large majority of FES witness Banks' testimony deals with competition in Ohio's retail electric market. Mr. Banks discusses the impact on shopping, argues the proposed capacity charge is anticompetitive for retail providers, argues that aggregation customers could miss out on the retail savings, and raises a number of state policies dealing with retail electric service as opposed to the setting of a wholesale capacity rate for a company under FRR. Based on FES' argument that none of these matters are relevant to the simple question of what rate should be set to compensate AEP Ohio for its capacity the following testimony in Mr. Banks' prefiled testimony should be stricken:

Page(s)	Lines	Comments
3	1-8	Discussed impact on competitive markets beyond the setting of price for AEP Ohio and focused on competition in the retail market not a discussion of the wholesale rate.
3	9-13	Argued the wholesale capacity rate was anticompetitive for Ohio 's retail generation market.
4	6-9	Roman Numeral II for the section is entitled: "**The Proposed Capacity Pricing Would Limit AEP Ohio 's Customers From Receiving The Full Benefits of a Competitive Market for Electric Service"** Again discussing the retail customers rather than the simple setting of a wholesale rate. If the scope of the case does not include the ability to determine what benefits a customer may achieve with a CRES provider then this whole section should be stricken.
4	18-25	Discusses the value of competition and customers shopping. Under FES' discovery response strategy these are not a relevant issue in the case.
5	1-13	Discusses the value of competition and customers shopping. Under FES' discovery response strategy these are not a relevant issue in the case.
5	14-23	Discusses the constraint imposed by the proposed capacity rate on a customer's ability to save and the limitation on a CRES provider to offer savings. He even argues customers will have fewer opportunities to access savings. Yet, FES argues that its position and ability depending on different capacity prices is not relevant to

		the proceeding in discovery.
6	1-23	Discussion on the terms and experience with retail competition. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
7	1-4	Raises a concern that customers from other parts of the state pay a different price for capacity. Even though retail customers pay a retail rate and CRES providers pay the wholesale capacity charges. Under FES' discovery response strategy this is not a relevant issue in the case.
7	5-23	Discussion about the level of the wholesale capacity charge and at what level customers will shop, again mixing retail shopping with the question of the wholesale price for AEP Ohio. Under FES' discovery response strategy this is not a relevant issue in the case.
8	1-23	FES discusses its participation in the retail market and how it was "willing to continue to offer savings to customers" in anticipation of RPM. Under FES' discovery response strategy the level of what price it is willing to provide benefits to retail customers is not a relevant issue in the case.
9	1-2	Mr. Banks argues about uneconomic contracts. Under FES' discovery response strategy the different considerations of capacity costs that could go into its service to retail customers is not a relevant issue in the case.
9	3-12	Mr. Banks argues that governmental aggregation programs will suffer the same constraints he raised above. Under FES' discovery response strategy the question of whether benefits are guaranteed to aggregation customers and the impact of changing capacity is not a relevant issue in the case.
9 10	20-23 1-10	Mr. Banks asserts that customers will not receive the full benefits of governmental aggregation. Under FES' discovery response strategy the question of whether benefits are guaranteed to aggregation customers and the impact of changing capacity is not a relevant issue in the case.
10 11	11-20 1-5	Mr. Banks discusses the level of retail shopping. Yet, under FES' discovery response level of retail shopping and the elements that make up those different offerings are not relevant issues in the case.
11 12	6-10 1-15	Mr. Banks discusses the retail competition versus the wholesale rates. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
13	1-21	Mr. Banks raises a state policy dealing with retail electric service in a case it argues in discovery is only about setting a wholesale capacity rate and nothing more. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.

14	1-22	Mr. Banks raises a state policy dealing with retail electric service in a case it argues in discovery is only about setting a wholesale capacity rate and nothing more. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
115	1-14	Mr. Banks raises a state policy dealing with retail electric service in a case it argues in discovery is only about setting a wholesale capacity rate and nothing more. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.

2. Robert Stoddard

Mr. Stoddard raises a number of arguments comparing AEP Ohio SSO customers and CRES customers. However, Mr. Stoddard's comparison is irrelevant according to his counsel's discovery responses that declared irrelevant attempts to determine FES ability to provide service to customers under different capacity prices. Likewise, Mr. Stoddard refers to the establishment of an even playing field and retail competition, when FES' discovery determined that this case was about the setting of a wholesale rate not a retail competitive market.

Page(s)	Line(s)	Comments
3	10	Mr. Stoddard argues that any capacity price other than RPM distorts the competitive landscape. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
4	1-6	Mr. Stoddard argues about AEP Ohio's position in the competitive market and how the proposed capacity rate would adversely affect competition in retail energy. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
5	8-10	Mr. Stoddard argues about the concern to price capacity for the CRES instead of on what is required by AEP Ohio. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
5	21-23	Mr. Stoddard argues RPM is the only appropriate rate for CRES providers. Again the focus is on CRES providers instead of on what is required for AEP Ohio wholesale charge. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.

19	10-16	Mr. Stoddard argues about what AEP Ohio customers are paying versus what shopping customers pay. Yet FES will not provide information on what level of capacity is in its retail rate. Therefore, under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
23	17-22	Mr. Stoddard focuses on the CRES provider and making AEP Ohio like all other generation providers o benefit the CRES providers even though AEP Ohio is not in the same situation. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
24	6-11	Mr. Stoddard discussed the development of retail choice and that AEP has a competitive advantage. Even though AEP Ohio asked discovery concerning FES options for paying capacity. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
52 53	18-23 1-7	Mr. Stoddard argues that the PUCO should charge CRES providers RPM if PUCO wants a level playing field and diversity of depth of suppliers in retail services. Again in retail not wholesale matters. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
53 54	24- 2	Mr. Stoddard discusses AEP Ohio charging capacity costs to shopping customers. Again if this is a wholesale case then under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.

3. Dr. Jonathan Lesser

Dr. Lesser makes a number of arguments based on all distribution customers paying the capacity charges. However, as FES' discovery responses argue there are not relevant questions dealing with the impact of the capacity charges on what customers will pay in retail rates. Dr. Lesser discusses that economic opportunity facing a retail provider and the ability to compete in the retail market. All of this testimony would be considered irrelevant if FES' discovery position is upheld by the Commission and therefore the following testimony should be stricken.

Page(s)	Line(s)	Comments
3	11-15	Dr. Lesser argues that a certain amount of capacity will be recovered from its distribution customers making that unavailable for businesses to spend and compete. Yet, there is no indication

		that a CRES could not charge less to provide this. But under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
4-5	18-3	Dr. Lesser argues discussed the need for a level playing field for customer choice. This is not a wholesale concept but a retail customer issue. Under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
7 (7-25)	9-11	Dr. Lesser labels the caption for the next 25 pages, "**AEP Ohio's Proposed Capacity Charge is Discriminatory and Contrary to State Policy Promoting Retail Electric Competition**." Based on FES discovery responses the next 25 pages involve support for a retail issue and therefore are not relevant issues in the case and should focus on the right recovery for AEP Ohio.
9 10	27-28 1-11	Dr. Lesser makes an argument again concerning the retail market and argues that CRES providers cannot match AEP Ohio's price in some instances without losing money. Under FES' discovery response strategy the consideration of what capacity pricing can be used in different scenarios are not relevant issues in the case and should focus on the right recovery for AEP Ohio.
11	14-15	Dr. Lesser argues about the capacity charge AEP Ohio proposes to charge all customers. Under FES' discovery response strategy the case is about a wholesale rate and not retail charges customers pay therefore the testimony should be stricken.
15	5-7	Dr. Lesser again argues about charges to customers. This is a retail concept. Under FES' discovery response strategy the case is about a wholesale rate and not retail charges customers pay therefore the testimony should be stricken.
17	12-19	Dr. Lesser attempts to compare the capacity price between a CRES provider and AEP Ohio. FES did not find relevant the impact of different capacity prices on its offers. Therefore, under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
18 19	14-24 1-21	Dr. Lesser discusses the collection of costs for capacity from customers with an example. Under FES' discovery response strategy the case is about a wholesale rate and not retail charges customers pay therefore the testimony should be stricken.
20 21 22	1-9 1-8 1-2	Dr. Lesser again compare the capacity price between a CRES provider and AEP Ohio. FES did not find relevant the impact of different capacity prices on its offers. Therefore, under FES' discovery response strategy this is not a relevant issue in the case and should focus on the right recovery for AEP Ohio.
22	3-11	Dr. Lesser argues for enhancing retail competition through the capacity charge. Under FES' discovery response strategy this is beyond the focus of setting the wholesale rate for AEP Ohio and

	12-23	should be stricken.
23	1-13	Dr. Lesser answers a question about harming retail competition and responds with an answer touting the state goal of enhancing retail competition. Under FES' discovery response strategy the case is about a wholesale rate and not retail charges customers pay therefore the testimony should be stricken.
25	1-10	Dr. Lesser argues about the capacity charge AEP Ohio proposes to charge all customers. Under FES' discovery response strategy the case is about a wholesale rate and not retail charges customers pay therefore the testimony should be stricken.
26	1-21	Dr. Lesser raises an argument attacking AEP Ohio's position as unrealistic, comparing it to saying that retail customers should be charged the lower of market price or a utility's embedded cost. Under FES' discovery response strategy the case is about a wholesale rate and not retail charges customers pay therefore the testimony should be stricken.

III. CONCLUSION

The Attorney Examiner should require FES to act as a full party in this case and live up to the duties that come with a grant of intervention and should order FES to immediately supplement its responses to Interrogatory Nos. 22 through 40 and Request for Production Nos. 6 through 10 of Ohio Power's Second Discovery Requests. Alternatively, if the Attorney Examiner accepts FES' argument that these matters are not relevant to the proceeding, then AEP Ohio's motion to strike the testimony dealing with those same topics should be granted and the hearing thereby focused on the appropriate cost-based recovery of AEP Ohio's wholesale capacity charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Power Company's Motion to Compel Or In the Alternative Motion to Strike Testimony and Request For Expedited Ruling was served by E-mail upon counsel for all other parties of record in this case on this 16th day of April, 2012.

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Exhibit A

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**

AFFIDAVIT OF COUNSEL

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Matthew J. Satterwhite, being first duly sworn, states as follows:

1. I am more than eighteen (18) years of age and I am competent to testify to the matters set forth herein from my personal knowledge.

2. I am one of counsel for Ohio Power Company ("Ohio Power").

3. On April 6, 2012, Ohio Power's Second Set of Interrogatories, Request for Admissions, and Request for Production of Documents to FirstEnergy Solutions Corp. ("Second Discovery Requests") were served by e-mail on counsel for FirstEnergy Solutions Corp. ("FES") and all other counsel of record. True and accurate copies of FES' responses to Ohio Power's Second Discovery Requests are attached to Ohio Power Company's Motion to Compel and Request for Expedited Ruling as Exhibit B. Ohio Power received FES' responses on April 13, 2012.

4. On April 13, 2012, I sent email correspondence to counsel for FES, informing counsel that FES' responses to the Second Discovery Requests were not sufficiently responsive,

and I requested that counsel for FES advise whether FES' response to that request to supplement would be the same as FES' response to Ohio Power's request to supplement its responses to Ohio Power's First Discovery Requests.

5. Also on April 13, 2012, Ohio Power and FES entered into a protective agreement to keep confidential any sensitive proprietary or trade secret information that FES produced or disclosed to Ohio Power throughout this proceeding. AEP Ohio agreed to take the same agreement FES signed to keep the information provided by AEP Ohio confidential and apply those same standards to itself with an addendum to that effect. AEP Ohio executed that agreement and sent signatures to FES counsel Trevor Alexander. In an effort to address some of FES concerns, AEP Ohio even offered to allow FES to redact the ultimate pricing information and customer name on the contracts from the first set of discovery to address any concerns with specific customer identification.

6. I followed up with another email on the morning of April 16, 2012, to let counsel for FES know that if I did not hear back and receive a satisfactory response I would be filing another motion to compel production. FES replied, "AEP Ohio's Second Set of Discovery Requests raises essentially the same objections as did AEP Ohio's First Set of Discovery Requests. FES maintains its objections as set forth in its responses."

FURTHER AFFIANT SAYETH NAUGHT.

Matthew J. Satterwhite

Sworn to and subscribed before me this 16th day of April, 2012.

Notary Public

NOTARY PUBLIC STATE OF OHIO

Sharon Hutchens
Notary Public-State of Ohio
My Commission Expires
November 17, 2014

Exhibit B

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

FIRSTENERGY SOLUTIONS CORP.'S RESPONSES TO OHIO POWER COMPANY'S SECOND SET OF DISCOVERY REQUESTS

Pursuant to Rules 4901-1-16, 4901-1-19, 4901-1-20, and 4901-1-22 of the Ohio Administrative Code, FirstEnergy Solutions Corp. ("FES") hereby objects and responds to the Second Set of Discovery Requests (the "Requests") issued by Ohio Power Company, as set forth below.

GENERAL OBJECTIONS

1. FES objects to the Requests to the extent they seek information not relevant to the subject matter of this action nor reasonably calculated to lead to the discovery of admissible evidence.

2. FES objects to the Requests to the extent they seek to impose obligations greater than, or otherwise inconsistent with, those imposed by the Commission's Rules.

3. FES objects to the Requests to the extent they seek confidential or proprietary information.

INTERROGATORIES

22. Please identify the total capacity requirement for the load served by FES in the AEP Ohio service territory on a monthly basis from October 2010 through December 2010.

RESPONSE: Objection. FES objects to this Interrogatory because it is unduly burdensome and harassing in that it seeks information within the possession, custody and control of AEP Ohio and seeks proprietary information. FES also objects because the Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

PREPARED BY: Counsel.

23. Please identify the total capacity requirement for the load served by FES in the AEP Ohio service territory on a monthly basis from each month of 2011.

RESPONSE: Objection. FES objects to this Interrogatory because it is unduly burdensome and harassing in that it seeks information within the possession, custody and control of AEP Ohio and seeks proprietary information. FES also objects because the Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

PREPARED BY: Counsel.

24. Please identify the total capacity requirement for the load served by FES in the AEP Ohio territory on a monthly basis for each month of 2012.

RESPONSE: Objection. FES objects to this Interrogatory because it is unduly burdensome and harassing in that it seeks information within the possession, custody and control of AEP Ohio and seeks proprietary information. FES also objects because the Interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

PREPARED BY: Counsel.

25. Have all residential customers that participated in the Reynoldsburg governmental aggregation program, served under a FES contract, saved 5 percent off the competitive portion of their electric bill?

a. If not why not?

b. If the amount is different than 5 percent what were the savings?

RESPONSE: Objection. FES objects to this Interrogatory because it is vague, ambiguous, capable of inconsistent interpretation and not reasonably calculated to lead to the discovery of admissible evidence.

PREPARED BY: Counsel.

26. Is a residential customer that participates in the Reynoldsburg governmental aggregation program, currently served under a FES contract, guaranteed to save 5 percent off the competitive portion of their electric bill?

a. If not why not?

b. If the amount is different than 5 percent what is the guaranteed savings?

RESPONSE: ***See*** **Response to Interrogatory No. 25.**

27. Is a residential customer that participates in the Reynoldsburg governmental aggregation program, currently served under an FES contract, guaranteed to save 5 percent off the competitive portion of their electric bill over the period June 1, 2012 through May 2013?

a. If not why not?

b. If the amount is different than 5 percent what is the guaranteed savings?

RESPONSE: ***See*** **Response to Interrogatory No. 25.**

28. Have all commercial customers that participated in the Reynoldsburg governmental aggregation program, served under a FES contract, saved 15 percent off the competitive portion of their electric bill?

a. If not why not?

b. If the amount is different than 15 percent what were the savings?

RESPONSE: ***See*** **Response to Interrogatory No. 25.**

29. Is a commercial customer that participates in the Reynoldsburg governmental aggregation program, currently served under a FES contract, guaranteed to save 15 percent off the competitive portion of their electric bill?

a. If not why not?

b. If the amount is different than 5 percent what is the guaranteed savings?

RESPONSE: ***See*** **Response to Interrogatory No. 25.**

30. Is a commercial customer that participates in the Reynoldsburg governmental aggregation program, currently served under an FES contract, guaranteed to save 15 percent off the competitive portion of their electric bill over the period June 1, 2012 through May 2013?

a. If not why not?

b. If the amount is different than 15 percent what is the guaranteed savings?

RESPONSE: ***See*** **Response to Interrogatory No. 25.**

31. Is any residential customer that participates in governmental aggregation program served under a contract with FES in Ohio not guaranteed to save a guaranteed fixed percent off the competitive portion of their electric bill? If so identify the governmental aggregation program?

RESPONSE: Objection. FES objects to this Interrogatory because it is vague, ambiguous, capable of inconsistent interpretation, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence.

PREPARED BY: Counsel.

32. Is any commercial customer that participates in governmental aggregation program served under a contract with FES in Ohio not guaranteed to save a guaranteed fixed percent off the competitive portion of their electric bill? If so identify the governmental aggregation program?

RESPONSE: ***See*** **Response to Interrogatory No. 31.**

33. Is a residential customer that participates in a governmental aggregation program under a current FES contract in Ohio guaranteed to save a guaranteed fixed percent off the competitive portion of their electric bill over the period June 1, 2012 through May 2013? If so identify the governmental aggregation program?

RESPONSE: ***See*** **Response to Interrogatory No. 31.**

34. Is a commercial customer that participates in a governmental aggregation program under a current FES contract in Ohio guaranteed to save a guaranteed fixed percent off the competitive portion of their electric bill over the period June 1, 2012 through May 2013? If so identify the governmental aggregation program?

RESPONSE: ***See*** **Response to Interrogatory No. 31.**

35. Is any residential customer that is served under a CRES contract by FES in Ohio not guaranteed to save a guaranteed fixed percent off the competitive portion of their electric bill? If so identify the terms under which those customers are served?

RESPONSE: ***See*** **Response to Interrogatory No. 31.**

36. Is any commercial customer that is served under a CRES contract by FES in Ohio not guaranteed to save a guaranteed fixed percent off the competitive portion of their electric bill? If so identify the terms under which those customers are served?

RESPONSE: *See* Response to Interrogatory No. 31.

37. Is any residential customer that is served under a CRES contract by FES in Ohio not guaranteed to save a fixed percent off the competitive portion of their electric bill over the period June 1, 2012 through May 2013? If so identify the terms under which those customers are served?

RESPONSE: *See* Response to Interrogatory No. 31.

38. Is any commercial customer that is served under a CRES contract by FES in Ohio not guaranteed to save a fixed percent off the competitive portion of their electric bill over the period June 1, 2012 through May 2013? If so identify the terms under which those customers are served?

RESPONSE: *See* Response to Interrogatory No. 31.

39. Referring to the Terms and Conditions included in Attachment 1 (see attached), would a change in the capacity rate that AEP Ohio charges FES be considered a "Pass-Through Event"?

RESPONSE: *See* Response to Interrogatory No. 31.

40. Referring to Paragraph 2 of the Terms and Conditions included in Attachment 1 (see attached), specifically the following language, "Changes may include, without limitation, transmission or capacity requirements, new or modified charges or shopping credits, and other changes to retail electric customer access programs." Please identify any capacity rate, in $/MW-day, that AEP Ohio would charge FES that would not be considered a change.

a. Provide this information for the period June 1, 2012 through May 31, 2013.

b. Provide this information for the period June 1, 2013 through May 31, 2014.

c. Provide this information for the period June 1, 2014 through May 31, 2015.

RESPONSE: Objection. FES objects to this Interrogatory because it is vague, ambiguous, capable of inconsistent interpretation, and not reasonably calculated to lead to the discovery of admissible evidence.

PREPARED BY: Counsel.

41. Provide the calculations supporting FES witness Jonathan A. Lesser 's "Table 1 : Comparison of BGR and Capacity/Ancillary Services Rates" from page 21 of his pre filed direct testimony.

RESPONSE: *See* workpapers for Dr. Lesser's testimony, which were previously produced to AEP Ohio.

PREPARED BY: Counsel.

42. Please provide all support for the FES witness Jonathan A. Lesser's statement in his prefiled testimony stating, "A well-known economic result is that the economically efficient transfer price is always the market price" (page 5 lines 11-12).

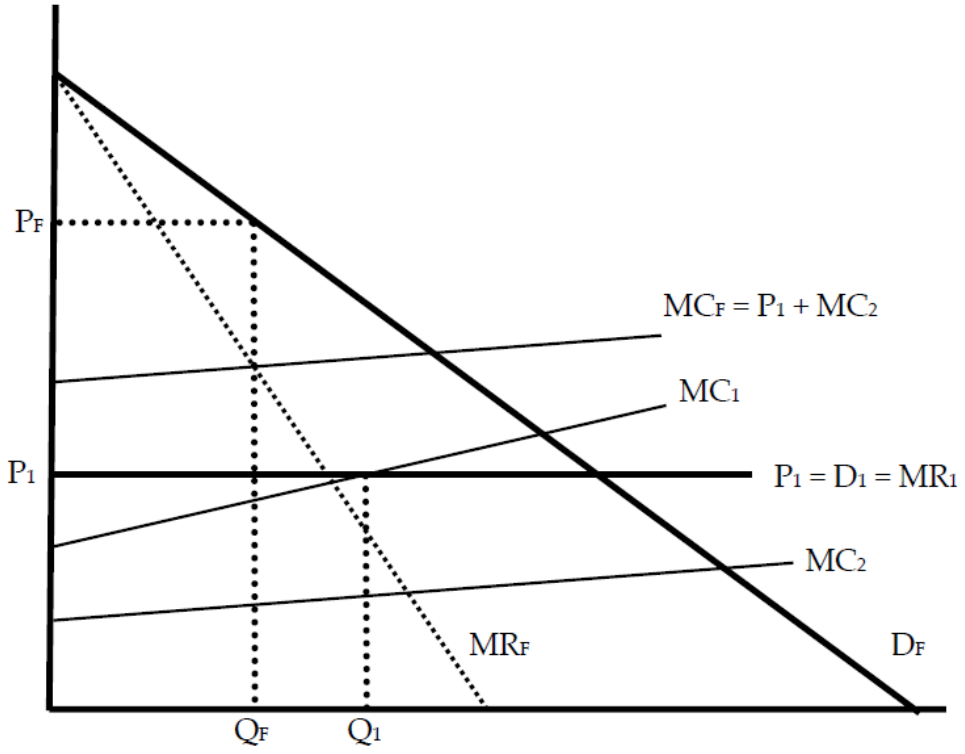
RESPONSE: The following provides a basic economic derivation of why the market price is the economically efficient transfer price. (The definition of "economically efficient" is provided in the response to question 43.)

Assume that a firm has two divisions. The upstream division manufactures a crucial input for the final product. However, there is also an outside market for this crucial input. This means that (a) if the upstream division produces more than the downstream division needs, the surplus can be sold in the external market; alternatively, (b) if the upstream division produces less than the downstream division needs, then the downstream division's managers can make up the shortfall with purchases from the external market. The downstream division completes the assembly and manufacturing process and distributes the product in the market.

This situation is shown in the figure below. Here the firm takes the external market price, P_1, as given. The fact that it is constant (flat) means the firm can buy or sell as much as it would like in the upstream external market, at a price of P_1 per unit. As always, the profit-maximizing level of output for the upstream division will set its marginal cost function (MC_1) equal to its marginal revenue (MR_1). But MR_1 is just the price P_1 in this case, since the incremental revenue from each additional sale on the upstream external market is P1. So setting $P_1 = MC_1$ determines the optimal upstream quantity, Q_1. The downstream division finds its profit-maximizing quantity (Q_F) by setting $MR_F = MC_F$. However, the marginal cost of the upstream division is equal to the external market price.

The firm's total marginal cost function is $MC_F = MC_1 + MC_2 = P_1 + MC_2$. In the figure, the quantity where MR_F crosses MC_F determines how much of the final good to make. In the figure, the upstream division is producing more units than the downstream division finds it profitable to buy. Therefore, the upstream division sells the remaining units on the external market. This is profitable for the firm overall, because the upstream division's marginal costs are lower than the external market price (P_1) right up until the upstream division has produced Q_1 units.

The firm implements this efficient production across both divisions using the external market price P_1. The intuition here is that the external market serves as a benchmark: The upstream firm should produce if its marginal cost is lower than the benchmark, and not produce when its marginal costs rises above the benchmark. Setting the transfer price equal to this external benchmark then gives the upstream firm the right production incentives. The downstream firm produces using the same cost basis as always, which is to say, using the marginal cost for the firm as a whole.



PREPARED BY: Jonathan Lesser

43. Please define the term "economically efficient" that is used in FES witness Jonathan A. Lesser 's and Robert B. Stoddard's prefiled testimony.

RESPONSE: Objection. FES objects to the Interrogatory because it is vague, ambiguous, capable of inconsistent interpretation, and fails to identify the specific reference or context from Dr. Lesser's and Mr. Stoddard's testimonies, and is not susceptible of being answered by a categorical statement without lengthy explanation. *See Penn Central Trans. Co. vs. Armco Steel Corp.*, 27 Ohio Misc. 76 (Montgomery C.P. 1971). Further objecting, FES states that the term "economically efficient" can be used in different contexts. Subject to its objections, FES states that the term

"economically efficient" refers to the use of resources so as to maximize the production of goods and services, i.e. production occurs at the lowest possible per-unit cost. Depending upon the context, this efficiency may refer either to static efficiency (production given a fixed set of resources) or dynamic efficiency (evolution of the capital stock to further improvements in static efficiency). In the allocative efficiency context, the term "economically efficient" also refers to the price that maximizes the value of a market, defined as the sum of consumers' and producers' surplus.

PREPARED BY: Jonathan Lesser and Robert Stoddard

44. Please give specific references as to where the term "avoided cost rate", the acronym "ACR", or the ACR concept is present in Schedule 8.1 of the PJM Reliability Assurance Agreement.

RESPONSE: Schedule 8.1 of the RAA was first filed with the FERC, along with Attachment DD to the PJM Tariff, to implement the RPM Settlement Agreement, in which the term "cost" always has the meaning of "avoidable cost" or the related term "opportunity cost."

PREPARED BY: Robert Stoddard

45. Please give specific references as to where the term "avoided cost rate" or the acronym "ACR" pertaining directly to FRR resources is present in Attachment DD to the PJM Tariff.

RESPONSE: As used in Attachment DD, the "Avoidable Cost Rate" is a component of the Market Seller Offer Cap and would therefore apply to an FRR Entity that offered available resources into an RPM auction. Further, Attachment DD to the PJM Tariff was first filed with the FERC, along with Schedule 8.1 of the RAA, to implement the RPM Settlement Agreement, in which the term "cost" always has the meaning of "avoidable cost" or the related term "opportunity cost."

PREPARED BY: Robert Stoddard

REQUEST FOR ADMISSIONS

27. Admit that an Opt-Out Notice was filed on behalf of FirstEnergy Solutions in case PUCO No. 10-2366 on March 30, 2012.

RESPONSE: Objection. FES objects to this Request because it seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Subject to its objections, FES states: Admit.

28. Admit that an Opt-Out Notice was filed on behalf of FirstEnergy Solutions in case PUCO No. 10-2366 on March 30, 2012 is attached as Attachment 1 and that this is a true and accurate copy of that notice.

RESPONSE: Objection. FES objects to this Request because it seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Subject to its objections, FES states: Admit.

29. Admit that the Opt-Out Notice filed in PUCO case No. 10-2366 on March 30, 2012 is the notice sent to eligible customers in Reynoldsburg on or after April 9, 2012 with the deadline to be on or after April 30, 2012.

RESPONSE: Objection. FES objects to this Request because it seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Subject to its objections, FES states: Admit.

REQUEST FOR PRODUCTION OF DOCUMENTS

6. Provide a copy of all opt-out notices provided to customers served by FES under a governmental aggregation program.

ANSWER: Objection. FES objects to this Request because it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

7. Provide a copy of all opt-out notices provided to customers served by FES in the state of Ohio.

ANSWER: Objection. FES objects to this Request because it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

8. Provide any generic template used for opt-out notices to customers served by FES in the state of Ohio.

ANSWER: Objection. FES objects to this Request because it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

9. Produce a copy of each document you identified, consulted, referred to, or utilized in preparing your responses to Interrogatories 22-45.

ANSWER: Not applicable.

10. Produce a copy of any and all documents that are responsive to any of the questions asked in Interrogatories 22-45

ANSWER: Not applicable.

As to objections,

Dated: April 13, 2012

/s/ *Laura C. McBride*

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Attorneys for FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Responses to Ohio Power Company's Second Set of Discovery Requests* was served this 13th day of April, 2012, via e-mail upon the parties below.

/s/ *Laura C. McBride*
One of the Attorneys for FirstEnergy Solutions Corp.

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Exhibit C

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April 12, 2012

VIA ELECTRONIC MAIL

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Re: In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company
Public Utilities Commission of Ohio
Case Nos. 10-2929-EL-UNC

Christen:

We write in response to your April 12, 2012 letter sent earlier today to FirstEnergy Solutions Corp. ("FES"). First, FES did provide a response to Interrogatory Nos. 6 and 9 and Document Request No. 1 and, thus, they need not be supplemented. Second, as to the remaining Interrogatories, Requests for Admission, and Document Requests (the "Requests") that your letter cites, FES set forth its numerous objections to those Requests and nothing in your letter changes FES' objections.

In the Motion to Strike Testimony you filed earlier today, you state: "The subject matter of this case is limited to one issue – Ohio Power Company's recovery of an appropriate charge for the cost of capacity it is legally obligated to supply to Competitive Retail Electric Service ("CRES") providers in the AEP Ohio Service Territory." AEP Ohio's Requests go far beyond that subject matter and are not reasonably calculated to lead to the discovery of admissible evidence. For example, whether FES includes terms in its contracts addressing price changes or termination is wholly unrelated to AEP Ohio's cost of capacity (Interrogatory Nos. 5 and 8 and Document Request No. 1). In addition, to the extent the Requests seek customer-specific information (Interrogatory Nos. 7 and 10 and Document Request No. 1), these Requests are unduly burdensome and improperly seek production of proprietary trade secrets in addition to be irrelevant.

Similarly, FES' profits, if any, are not at issue in this proceeding (Interrogatory Nos. 11-17 and Request for Admission Nos. 1-24), and any determination of "profitability" under the incomplete hypotheticals presented is of no relevance to AEP Ohio's capacity charges to be established in

this proceeding. The Requests asking whether certain contracts would be profitable also are objectionable because they are not limited in time and fail to take into account that profitability involves multiple factors. Moreover, to the extent AEP Ohio's Requests seek a profitability determination with regard to capacity pricing proposed by AEP Ohio in the Revised ESP II proceeding ($146/MW-day or $255/MW-day), these Requests are inconsistent with your recent argument in your Motion to Strike Testimony that ESP pricing is not relevant in this proceeding.

As stated in response to your Requests, each is vague, ambiguous, overbroad, unduly burdensome, capable of inconsistent interpretation, seeks proprietary trade secrets and is not reasonably calculated to lead to the discovery of admissible evidence. Lastly, not only is Document Request No. 5 absurdly overbroad and unduly burdensome, but it also seeks information protected by the work-product doctrine. Responsive documents, however, were identified in response to Document Requests No. 1 and 3.

Very truly yours,

/s/ Laura C. McBride

cc: Mark Hayden
Jim Lang
David Kutik
Steve Nourse
Dan Conway

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/16/2012 3:12:40 PM

in

Case No(s). 10-2929-EL-UNC

Summary: Motion to Compel or, in the Alternative, Motion to Strike Testimony and Request for Expedited Ruling electronically filed by Mr. Matthew J Satterwhite on behalf of American Electric Power Service Corporation