

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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| 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 |) | |

**RETAIL ENERGY SUPPLY ASSOCIATION’S
MEMORANDUM CONTRA
OHIO POWER COMPANY’S MOTION FOR EXTENSION**

Pursuant to the Attorney Examiner’s procedural schedule, the Retail Energy Supply Association¹ (“RESA”) hereby submits this Memorandum Contra to the April 30, 2012 Ohio Power Company Motion for Extension. Ohio Power Company (“AEP Ohio”) asks the Commission to amend its interim plan established in the Commission’s March 7, 2012 Entry in this docket so that instead of providing RPM pricing for capacity for all shopping customers commencing with the start of the PJM year 2012/2013, AEP Ohio will be allowed to charge capacity rates to the current tier-one customers of \$146 MW/d² and the second tier customers a capacity price of \$255 MW/d. Further, AEP Ohio asks that these fixed capacity prices continue in existence until the Commission issues its merit decision in this proceeding.

¹ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant Energy Northeast LLC and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² MW/d stands for Megawatt day.

AEP Ohio argues that a flash-cut to RPM pricing on May 31, 2012 will cause a highly detrimental financial impact to AEP Ohio that can be avoided.³ In addition, AEP Ohio contends that the Commission should freeze the current capacity prices to avoid customer uncertainty and confusion, as well as to avoid pre-judging its decision on the merits. AEP Ohio argues that if a *status quo* price freeze is granted, it would avoid severe prejudice to AEP Ohio and additional litigation. On their face, these are not compelling arguments. Using AEP Ohio's argument, one can argue that maintaining non-RPM pricing is also pre-judging the case. As for customer confusion, a single capacity price for all shopping customers that also happens to be the same capacity price anywhere else in Ohio is clearly less confusing than the tiered prices in place now that do not track RPM. Clearly one capacity price, established through a transparent auction process at PJM, that is followed by all other Ohio public utilities is far less confusing to customers than continuing the two-tiered structure preferred by AEP Ohio. Further, if AEP Ohio's concern is solely for consumers, one wonders if customers would actually prefer additional complexity if it were accompanied with lower rates.

From a legal perspective the three arguments that AEP Ohio raises in its motion appear to be out of time.

In Finding (26) of its March 7, 2012 Entry in Case No. 10-2929, the Commission stated:

Accordingly, we find support in the record that, as applied to AEP-Ohio for the interim period only, the state compensation mechanism could risk an unjust and unreasonable result. Therefore, the Commission implements the two-tier capacity pricing mechanism proposed by AEP-Ohio in its motion for relief, subject to the clarifications contained in our January 23, 2012 entry, including the clarification including mercantile customers as governmental aggregation customers eligible to receive RPM-price

³ RESA does not dispute that AEP Ohio will collect less money if its capacity rates are set at RPM. The issue is whether AEP Ohio should continue to collect fees above the market based RPM price while the parties await a final decision in this matter.

capacity. Under the two-tier capacity pricing mechanism, the first 21 percent of each customer class shall be entitled to tier one RPM pricing. All customers of governmental aggregations approved on or before November 8, 2011, shall be entitled to receive tier-one RPM pricing. The second-tier charge for capacity shall be at \$255.00/mw-day. This interim rate will be in effect until May 31, 2012, at which point the rate for capacity under the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year. (emphasis added)

In its March 7, 2012 Entry, the Commission balanced all of the facts and equities and determined that it was appropriate to implement the two-tier capacity pricing for the interim period only.

....the rate for capacity under the state compensation mechanism shall revert to the current RPM in effect pursuant to the PJM base residual auction for the 2012/2013 year.⁴

Thus, the Commission by virtue of the above declaratory statement and the fact that it never set the Tier One price at \$146 MW/d, but rather at RPM, which changes on June 1, 2012, there should be no ambiguity about the Commission's intent for the interim rate to remain in effect only until May 31, 2012 and not extend its application until a final order was issued in this proceeding. If AEP Ohio is now arguing that it disagrees with the March 7, 2012 Entry, that is an impermissible collateral attack on the March 7, 2012 Entry.⁵ The method and time to raise

⁴ March 7, 2012 Entry at ¶ 26.

⁵ Precedent demonstrates that a Commission's order may only be collaterally attacked pursuant to a complaint under Section 4905.26, Revised Code, which AEP Ohio has not filed here. *Western Reserve Transit Authority v. Public Utilities Com.*, 39 Ohio St. 2d 16, 18-19 (Ohio 1974); *Martin Marietta Magnesia Specialties, L.L.C. v. PUC of Ohio*, 129 Ohio St. 3d 485, 494 (Ohio 2011). Instead, AEP Ohio's motion is more consistent with an untimely application for rehearing. *Dover v. Public Utilities Com.*, 126 Ohio St. 438, Syllabus 3 (Ohio 1933) ("An order made by the Public Utilities Commission, entered upon the record and service made upon the parties entitled thereto on the same day, cannot be attacked by an application for rehearing filed more than thirty days thereafter.").

issues concerning the March 7, 2012 Entry was by including that position in a rehearing petition, and the time for filing rehearing petitions expired on April 6th.⁶

Given the fact that AEP Ohio did not seek rehearing of the March 7th Entry, AEP Ohio failed to meet its burden of proof to amend the Commission's March 7th Entry and must now show events or circumstances not known or knowable at the time the Entry was issued in order to now raise this issue. A review of the three reasons AEP Ohio provides in support of its motion shows these reasons were all known or foreseeable on March 7th, the date of the Entry. Thus, AEP Ohio's motion should be denied.

At the time the March 7, 2012 Entry was issued it was known that the RPM price on June 1, 2012 would change to \$16.75 MW/d plus losses and scaling fees.⁷ It was known that the hearing in Case No. 10-2929 would start on April 17, 2012.⁸ While it may not have been inevitable, it was foreseeable that six weeks would not be sufficient time to conduct a hearing, prepare briefs in the matter, allow the Attorney Examiners to write an opinion and permit the Commission to decide the matter at a sunshine meeting. Further, for a final order an additional 30 days are statutorily required to allow for petitions for rehearing, which can even come from non parties.⁹ Thus, no one can claim surprise or state that on March 7, 2012 it was not foreseeable that a final order in this case may not be issued by May 31, 2012. In fact, an independent action by AEP Ohio virtually assured that the issue of what the capacity price would be would not be completed by May 31, 2012. On March 30, 2012, AEP Ohio filed in Case No.

⁶ See Section 4903.10, Revised Code and Ohio Administrative Code Section 4901-1-35. AEP Ohio failed to file a petition on rehearing of the Commission's March 7, 2012 Entry.

⁷ Testimony of RESA witness Ringenbach, p. 19. RPM prices are set by auction three years in advance, and thus were known to AEP Ohio prior to the March 7th Entry.

⁸ March 7th Entry, ¶26.

⁹ Section 4903.10, Revised Code.

11-346-EL-SSO an application with a different capacity price than what was requested by AEP Ohio in the matter at bar.¹⁰ Without regard as to whether that application would supersede a decision in this proceeding, the fact that AEP Ohio has presented two capacity plans practically assures that resolution of the capacity price will not be resolved by May 31, 2012. It is unfair for AEP Ohio to create a time delay and then use that as leverage to acquire an extension of the two-tiered capacity pricing structure that was not provided by the Commission in its March 7th Entry.

AEP Ohio argues that the intervenors have delayed the proceeding with discovery disputes, but discovery disputes in complex litigation are foreseeable. Similarly, one can argue that AEP Ohio is responsible for the delay in the Commission's ability to issue an Order prior to June 1, 2012 because AEP Ohio has requested rebuttal witnesses. Once again, rebuttal witnesses are foreseeable in complex litigation. AEP Ohio's arguments, at their heart, seem to take issue with the Commission's provision of due process rights to litigants in this case through the discovery process. RESA disagrees with any attempt to deny any of the litigants in this case the ability to protect their legal rights – even AEP Ohio.

The final factual concern AEP Ohio pleads is the financial harm it will suffer if it cannot collect more than RPM as its capacity fee. Once again, the delta between RPM prices and the requested interim capacity fee was known, foreseeable and measurable and thus the reduction in potential revenue was known and foreseeable on March 7, 2012. Any failure on the part of AEP Ohio to timely raise its objection to the Entry before termination of the rehearing time frame should not be considered as a valid reason for adopting AEP's otherwise unsupported argument.

In addition to the fact that AEP Ohio is not entitled to its requested relief as a matter of law, RESA submits that equitable principles require the Commission to end the interim capacity

¹⁰ See Application, Case No. 11-346-EL-SSO at pp. 11-12 and the Testimonies of AEP Ohio witnesses Allen and Powers filed with the Application in Case No. 11-346-EL-SSO.

rates on June 1, 2012. The retail customers who have signed up for shopping service prior to the December 14, 2011 Opinion and Order did so under a State Compensation Mechanism that set capacity prices at the RPM rate. After the December 14, 2011 Opinion and Order retail customers signed up for shopping under a State Compensation Mechanism with the promise of RPM rates. Granting the relief sought by AEP Ohio means that contrary to the Commission's orders, including the March 7th Entry, the promised RPM capacity rate starting in June 2012 would now be withdrawn by action of the Commission. The shopping customers who signed up under a State Compensation Mechanism for capacity at RPM capacity prices should be able to rely on that policy and receive RPM pricing for all of the capacity provided to all customers.

WHEREFORE, RESA submits that AEP Ohio's motion for extension of the interim pricing period be denied.

Respectfully submitted,

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*On behalf of Retail Energy Supply
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served upon the following persons via e-mail this 7th day of May, 2012 and certify that I will serve additional parties as they become known who may file comments in this case.

/s/ M. Howard Petricoff

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Summary: Memorandum Contra Ohio Power Company's Motion for Extension electronically filed by Ms. Lija K Kaleps-Clark on behalf of Retail Energy Supply Association