

**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.     )

---

**REPLY BRIEF  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") submits this Reply Brief on behalf of all the approximately 1.2 million residential utility consumers of the Ohio Power Company ("AEP Ohio" or "the Company"). At issue in this proceeding is the Public Utilities Commission of Ohio's ("PUCO" or "Commission") determination of the capacity price that AEP Ohio will charge to competitive retail electric service ("CRES") providers in Ohio that will ultimately be paid by customers of those CRES providers.

The Company has used the market-based Reliability Pricing Model ("RPM") to price capacity to Competitive Retain Electric Suppliers ("CRES") providers since 2007. But in this proceeding, the Company argues that RPM market-based capacity prices for planning years 2012/2013 and 2013/2014 (\$20.01 and \$33.71/MW-day, respectively) are confiscatory. In turn, the Company proposes a \$355.72/MW-day cost-based price for capacity until May 31, 2015, at which point AEP Ohio will again use RPM pricing when the price will be approximately \$136/MW-day.<sup>1</sup>

---

<sup>1</sup> Note that the final zonal price for 2015/2016 has not yet been established.

Parties to this proceeding submitted initial briefs on May 23, 2012. There is one common and resounding theme -- every intervening party to this proceeding opposes the Company's proposed capacity rate of \$355.72/MW-day. The parties have categorized the Company's position in this case as "unjust and unreasonable,"<sup>2</sup> lacking a regulatory basis,<sup>3</sup> "inconsistent with state policy,"<sup>4</sup> "dramatically overstated,"<sup>5</sup> and the list goes on.

OCC submits that the Commission should reject the Company's proposed cost-based capacity price of \$355.72/MW-day because it is inconsistent with the policy and law of the state of Ohio, and will ultimately cost AEP Ohio's customers considerably more money than market-based priced capacity.

## **II. ARGUMENT**

One of the main threshold issues in this proceeding is what authority supports the Company's request for a cost-based \$355.72/MW-day capacity price? The answer to this inquiry is found by examining Schedule 8.1, Section D.8 of the Reliability Assurance Agreement ("RAA").

### **A. A Fixed Resource Requirement ("FRR") Entity, Such As AEP Ohio, May Only Propose To Change The Basis For The Compensation It Receives To A Mechanism Based On The FRR Entity's Costs When There Is The Absence Of A State Compensation Mechanism.**

The Commission **expressly adopted an RPM-based price** as the "state compensation mechanism" (under Section D.8 of Schedule 8.1 of the RAA) in combination with retail rates that included the collection of capacity costs through

---

<sup>2</sup> OCC Initial Brief at 2; see also, IEU Post Hearing Brief at 45.

<sup>3</sup> Initial Post-Hearing Brief of the Kroger Company at 5.

<sup>4</sup> Initial Post-Hearing Brief of Exelon et al. at 8.

<sup>5</sup> Post Hearing Brief of FirstEnergy Solutions Corp. at 27.

provider-of-last-resort (“POLR”) charges.<sup>6</sup> Under the terms of PJM’s Reliability Assurance Agreement (“RAA”), the RPM price is what AEP Ohio—as a FRR entity—must charge.<sup>7</sup> However, the Company maintains that it is “entitled”<sup>8</sup> to recover its claimed embedded capacity costs, citing to the RAA as authority for its proposed cost-based capacity price.<sup>9</sup>

Specifically, AEP Ohio alleges that Schedule 8.1, Section D.8 of the RAA “establishes AEP Ohio’s right to elect to charge a cost-based rate to CRES providers for the capacity it is obligated to provide to them.”<sup>10</sup> But AEP Ohio is wrong. The RAA does not support AEP Ohio’s position. The Company is not entitled to a cost-based capacity price if there is a state compensation mechanism in place. The RAA states that an FRR entity may seek FERC approval of a price based on costs, only **in the absence of a state compensation mechanism**:

In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, **such state compensation mechanism will prevail**. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Section 205 of the Federal Power Act proposing to change the

---

<sup>6</sup> Case No. 10-2929-EL-UNC, Entry at 2 (December 8, 2010).

<sup>7</sup> Company Ex. 101, Munczinski at 4.

<sup>8</sup> AEP Ohio Initial Brief at 13.

<sup>9</sup> Id.

<sup>10</sup> Id.

basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable and a retail LSE may at any time exercise its rights under Section 206 of the FPA. (Emphasis added).

The Company focuses on the provision in the RAA that states that “the FRR Entity may, at any time, make a filing with FERC under Section 205 of the Federal Power Act **proposing** to change the basis for compensation to a method based on the FRR Entity's cost...,” as authority for its \$355.72/MW-day price. The Company argues that under the language of the RAA it may “change the basis for capacity pricing to a cost-based method **at any time**.”<sup>11</sup> But this reliance is misplaced.

The RAA's general rule in regard to the charge of capacity by a FRR entity is that any state compensation mechanism will control the price of capacity.<sup>12</sup> If there is no state mechanism in place, then the capacity price is set at the regional transmission organization's (“RTO”) capacity clearing price, which in PJM Interconnection LLC (“PJM”) is RPM.<sup>13</sup> The only exception to this rule is where a FRR entity (like AEP Ohio) is permitted, **in the absence of a state compensation mechanism**, to make a filing with FERC under Section 205 of the Federal Power Act proposing to change the basis for compensation.<sup>14</sup> But the Company ignores the rule and, instead, relies on an exception that does not apply in this proceeding.

To this end, on December 8, 2010, the PUCO issued an Entry, which found that a review was necessary to determine the impact of the Company's request to the FERC to

---

<sup>11</sup> AEP Ohio Initial Brief at 14. Emphasis added.

<sup>12</sup> See FES Ex. 110A, Reliability Assurance Agreement, Schedule 8.1, Section D-8.

<sup>13</sup> Id.

<sup>14</sup> See Schedule 8.1, Section D.8 of the RAA. Also note, the Company filed a complaint on April 4, 2011, with the FERC against PJM alleging that Schedule 8.1, Section D.8 to the PJM RAA is unjust, unreasonable, and unduly discriminatory. See, Docket No. EL11-32, *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.*, Complaint (April 4, 2011).

change capacity pricing to a cost-based mechanism.<sup>15</sup> In that same Entry, the Commission adopted an RPM-based price as the “state compensation mechanism” (under Section D.8 of Schedule 8.1 of the RAA) in combination with retail rates that included the recovery of capacity costs through POLR charges.<sup>16</sup>

Similarly, on January 20, 2011, FERC issued an Order holding that the PUCO had adopted, as provided for by the RAA, the use of the RPM auction price as the state compensation mechanism for capacity compensation related to load migrating to CRES providers.<sup>17</sup> Thus, FERC rejected the Company’s “cost-based” proposal.<sup>18</sup>

The Commission allowed parties the opportunity to comment on the impact of AEP-Ohio’s proposed capacity charges in this proceeding, and an extensive hearing was held on this very topic. The parties’ comments and the evidence presented at hearing support the conclusion that the Commission should reaffirm RPM as the state compensation mechanism.

**B. Under The Reliability Assurance Agreement, The Commission May Only Adopt The Company’s Proposed Cost-Based Capacity Price If The Commission Changes The State Compensation Mechanism.**

The Company focuses on the section of the RAA that is not applicable to this proceeding as authority for its cost-based capacity price. AEP Ohio cites to the section of the RAA that states: “[i]n the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the

---

<sup>15</sup> Case No. 10-2929-EL-UNC, Entry at 2 (December 8, 2010).

<sup>16</sup> Case No. 10-2929-EL-UNC, Entry at 2 (December 8, 2010).

<sup>17</sup> *American Electric Power Serv. Corp.*, 134 FERC 61039 (2011).

<sup>18</sup> FES Ex. 101, at 44, citing to, FERC Entry dated January 20, 2011, Case No. ER11-2183-000. Note that the Company sought rehearing of the FERC’s decision, and on March 24, 2011, FERC issued an Entry on Rehearing granting AEP’s request only for the purpose of affording itself additional time to consider the matters raised.

unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR entity may, at any time, make a filing with FERC under Section 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR entity's cost or such other basis shown to be just and reasonable... ." The only mention of costs in this section of the RAA is with respect to a Section 205 filing, which is not applicable in this proceeding.

There is no authority that mandates that a state's compensation mechanism must be based on the cost of capacity. In fact, the RAA states that an FRR entity can make a Section 205 filing (in the absence of a state compensation mechanism) requesting to change the basis for compensation *to a method based on costs*. It does not say an FRR entity is *entitled* to recover its costs. Commissioner Porter focused on this very point in his cross-examination of Company witness, Dana Horton, during the evidentiary hearing for this case. To this end, Witness Horton was unable to direct Commissioner Porter to authority for AEP Ohio's cost-based capacity price:

**Q.** Let's say there's a question about where that agreement established a state compensation mechanism. Assuming that there is a state compensation mechanism established going forward, wherein [sic] this Section D.8 is the Ohio Commission required to approve the costs requested by AEP as the FRR entity? Let me point you to a section before you answer. In section D.8, I believe it's second full sentence, it says "In the case of load reflected in the FRR capacity plan that switches to an alternative retail switching customers to compensate the FRR entity for its FRR capacity obligations, such compensation mechanism will prevail." Where is the cost mentioned there?

**A.** I don't see it.

**Q.** You don't see cost mentioned there? Are you aware that it's mentioned somewhere else? If you could just point me to -- maybe you don't have the document in front of you, but if it's mentioned somewhere else or if there's some other controlling agreement or rule that would require the

Ohio Commission to approve costs for the FRR entity, maybe you can just let me know of that provision.

**A.** I guess we've always thought that the last part of that Section 8 always provided for whatever there was a state recovery mechanism in place or an RPM there was always the cost-based option that AEP could -- or the FRR entity, not AEP, could file. So that's where we pick up the cost base.

**Q.** And by the last section of that section you mean the sections following the sentence that we just read that ends with "state compensation mechanism will prevail," there's then a section that follows that. And in that section there is a reference to cost. I'm sorry. In that section do you believe there's a reference to cost?

**A.** If I could just read the sentence, I'm looking at provided that the FRR entity may at any time make a filing with FERC under Section 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR entities cost or other such basis shown to be just and reasonable.

**Q.** Uh-huh.

**A.** So that's where we've always thought that the cost-based thought was always on option.

**Q.** But how do you get there? Do you only get there after it's demonstrated that there is no state compensation mechanism? If you read the sentence, it's in the middle of that paragraph, it says "In the absence of a state compensation mechanism," then it continues on to the sentence that you were referring to. So if there is no state compensation mechanism, would you agree that then you could do the things that you just referenced in your prior statement?

**A.** Yes. And I don't know what to say on the if there's a state compensation mechanism already in place. I don't know if that's a legal interpretation or it's beyond -- it's beyond my expertise on that.<sup>19</sup>

It is evident from Mr. Horton's responses that the only authority the Company can cite to for cost-based capacity pricing is not applicable in this proceeding because the PUCO established a state compensation mechanism in its December 8, 2010 Entry. In addition, the PUCO does not have the jurisdiction to approve a filing under Section 205

---

<sup>19</sup> Tr. Vol. II, p. 547-49.

of the Federal Power Act because any such filing is made with the FERC. Accordingly, the only way the Commission can adopt the Company's \$355.72/MW-day price as a result of this proceeding is to reverse its previous stance that the state's compensation mechanism is RPM, (as set-forth in its December 8, 2010 Entry) and instead implement a cost-based state compensation mechanism.

But the parties to this proceeding have argued extensively why the Commission should not adopt the Company's \$355.72/MW-day cost-based price. And if the Commission allows AEP Ohio to charge CRES providers "embedded costs" (which ultimately would result in Ohio retail customers paying more) AEP Ohio will be the only capacity supplier in PJM that will charge CRES providers its embedded costs for generation.<sup>20</sup> The Commission will be allowing AEP Ohio to charge a capacity price that is "over 400% higher than the average PJM delivered market price for capacity of \$69.22/MW-day for the next three years, beginning on June 1, 2012."<sup>21</sup> If the Commission adopts RPM prices for AEP Ohio "[the Commission] puts [AEP Ohio] in exactly the same position as every other generation supplier in PJM."<sup>22</sup>

### **III. CONCLUSION**

For the reasons stated in OCC's Initial Brief, and articulated herein, the Commission should reject AEP Ohio's proposal for a cost-based capacity price of \$355.72/MW-day. The Commission should instead reaffirm that RPM-priced capacity is the state compensation mechanism. RPM pricing is consistent with the policies of the State of Ohio, including those policies for serving the interests of Ohio customers.

---

<sup>20</sup> FES Ex. 101, Stoddard at 19.

<sup>21</sup> FES Ex. 103, Lesser at 3.

<sup>22</sup> FES Ex. 101, Stoddard at 23.



Respectfully submitted,

**BRUCE J. WESTON  
CONSUMERS' COUNSEL**

/s/ Kyle L. Kern

Kyle L. Kern, Counsel of Record

Melissa R. Yost

Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-9585 (Kern Telephone)

614-466-1291 (Yost Telephone)

[kern@occ.state.oh.us](mailto:kern@occ.state.oh.us)

[yost@occ.state.oh.us](mailto:yost@occ.state.oh.us)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Reply Brief of the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 30th day of May, 2012.

/s/ Kyle L. Kern

Kyle L. Kern  
Assistant Consumers' Counsel

## **SERVICE LIST**

[Thomas.lindgren@puc.state.oh.us](mailto:Thomas.lindgren@puc.state.oh.us)  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[joliker@mwncmh.com](mailto:joliker@mwncmh.com)  
[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)  
[drinebolt@ohiopartners.org](mailto:drinebolt@ohiopartners.org)  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)  
[Paul.Wight@skadden.com](mailto:Paul.Wight@skadden.com)  
[John.Estes@skadden.com](mailto:John.Estes@skadden.com)  
[cendsley@ofbf.org](mailto:cendsley@ofbf.org)  
[Amy.spiller@duke-energy.com](mailto:Amy.spiller@duke-energy.com)  
[rsugarman@keglerbrown.com](mailto:rsugarman@keglerbrown.com)  
[BarthRoyer@aol.com](mailto:BarthRoyer@aol.com)  
[Gary.A.Jeffries@dom.com](mailto:Gary.A.Jeffries@dom.com)  
[Gregory.dunn@icemiller.com](mailto:Gregory.dunn@icemiller.com)  
[Christopher.miller@icemiller.com](mailto:Christopher.miller@icemiller.com)  
[Asim.haque@icemiller.com](mailto:Asim.haque@icemiller.com)  
[rjhart@hahnlaw.com](mailto:rjhart@hahnlaw.com)  
[rremington@hahnlaw.com](mailto:rremington@hahnlaw.com)  
[djmichalski@hahnlaw.com](mailto:djmichalski@hahnlaw.com)

[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)  
[yalami@aep.com](mailto:yalami@aep.com)  
[Jeanne.Kingery@duke-energy.com](mailto:Jeanne.Kingery@duke-energy.com)  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[Thompson@whitt-sturtevant.com](mailto:Thompson@whitt-sturtevant.com)  
[campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  
[vparisi@igsenergy.com](mailto:vparisi@igsenergy.com)  
[mswhite@igsenergy.com](mailto:mswhite@igsenergy.com)  
[Sandy.grace@exeloncorp.com](mailto:Sandy.grace@exeloncorp.com)  
[lmcalister@bricker.com](mailto:lmcalister@bricker.com)  
[ricks@ohanet.org](mailto:ricks@ohanet.org)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[zkravitz@taftlaw.com](mailto:zkravitz@taftlaw.com)  
[myurick@taftlaw.com](mailto:myurick@taftlaw.com)  
[dane.stinson@baileycavalieri.com](mailto:dane.stinson@baileycavalieri.com)  
[Dorothy.Corbett@duke-energy.com](mailto:Dorothy.Corbett@duke-energy.com)  
[bpbarger@bcslawyers.com](mailto:bpbarger@bcslawyers.com)  
[dconway@porterwright.com](mailto:dconway@porterwright.com)  
[cmoore@porterwright.com](mailto:cmoore@porterwright.com)  
[dstahl@eimerstahl.com](mailto:dstahl@eimerstahl.com)  
[derekshaffer@quinnemanuel.com](mailto:derekshaffer@quinnemanuel.com)

[Greta.see@puc.state.oh.us](mailto:Greta.see@puc.state.oh.us)  
[Sarah.parrot@puc.state.oh.us](mailto:Sarah.parrot@puc.state.oh.us)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**5/30/2012 4:36:16 PM**

**in**

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

Summary: Brief Reply Brief by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.