

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review of)	
the Capacity Charges of Ohio Power)	Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)	
Company)	

**MEMORANDUM CONTRA OF OHIO POWER COMPANY
TO FIRSTENERGY SOLUTIONS CORP.'S JUNE 15, 2012 APPLICATION FOR
REHEARING, INDUSTRIAL ENERGY USERS – OHIO'S JUNE 19, 2012
APPLICATION FOR REHEARING, AND THE OHIO MANUFACTURERS'
ASSOCIATION'S JUNE 20, 2012 APPLICATION FOR REHEARING**

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On behalf of Ohio Power Company

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I. BACKGROUND

The lengthy background and procedural history of this proceeding have been set forth on numerous occasions, and Ohio Power Company (“AEP Ohio” or the “Company”) will not repeat them in detail here. The following events, however, are relevant to the applications for rehearing that FirstEnergy Solutions Corp. (“FES”), Industrial Energy Users-Ohio (“IEU”), and The Ohio Manufacturers’ Association (“OMA”) respectively filed on June 15, June 19, and June 20, 2012.

On February 27, 2012, in light of the Commission’s February 23, 2012 Entry on Rehearing rejecting the previously-approved Stipulation and Recommendation (“Stipulation”) that would have resolved this and a number of other proceedings, the Company filed a Motion for Relief and Request for Expedited Ruling (“Motion for Relief”) in which it requested that the Commission approve a reasonable interim cost-based capacity pricing mechanism during the pendency of this proceeding. Record evidence and the Company’s Motion for Relief demonstrated that, without the requested interim mechanism, the Company would suffer immediate and irreparable financial harm. FES, IEU, and OMA, among others, opposed the Motion for Relief.

On March 7, 2012, the Commission issued an Entry (“March 7 Entry”) granting AEP Ohio’s Motion for Relief. In the March 7 Entry, the Commission stated that it found support in

the record that a flash cut to RPM pricing “could risk an unjust or unreasonable result.”¹

Accordingly, the Commission established a temporary interim state compensation mechanism in order to allow itself and the parties to this proceeding time “to fully develop the record to address the issues raised in this proceeding.”²

IEU, FES, and Retail Energy Supply Association (“RESA”) filed applications for rehearing of the March 7 Entry.³ Notably, OMA did not file an application for rehearing of the March 7 Entry. In their applications for rehearing, IEU and FES reiterated substantially the same arguments that they made in opposition to the Motion for Relief. On April 11, 2012, the Commission granted the applications for rehearing in order to further consider them.⁴ The Commission has not yet issued a merit decision. The hearing commenced on April 17, 2012.

Notwithstanding the Commission’s efforts to establish an expedited procedural schedule that would result in a decision on the merits by the end of May, it became apparent to the Company that such an outcome was unlikely – due to discovery disputes, motions to compel, related intervenor scheduling issues, an extension of the case presented by the Commission Staff, and the need for rebuttal testimony and hearing. Accordingly, in light of the unanticipated delays, the Company filed a Motion for Extension of the March 7 interim plan on April 20, 2012. FES, IEU, and OMA, among others, opposed the Company’s April 20, 2012 Motion for Extension, again raising substantially the same arguments they advanced in response to AEP

¹ March 7 Entry at 16.

² *Id.* at 17.

³ *See* RESA Mar. 14, 2012 Petition for Rehearing; FES Mar. 21, 2012 Appl. for Rehearing; IEU Mar. 27, 2012 Appl. for Rehearing.

⁴ April 11 Entry on Rehearing at 3-4.

Ohio's Motion for Relief and, in the case of IEU and FES, the same arguments also previously made in applications for rehearing of the March 7 Entry.⁵

The Commission granted AEP Ohio's Motion for Extension on May 30, 2012, agreeing that it is reasonable and appropriate to extend the current interim capacity pricing mechanism in light of the fact that the hearing and briefing schedule in this proceeding prevented the Commission from deciding the case before May 31, 2012.⁶ Specifically, the Commission found that the circumstances that AEP Ohio faces are unique and have not changed since the Commission issued the March 7 Entry.⁷ Thus, as the Commission explained in both Entries, an interim capacity pricing mechanism is reasonable and appropriate.

FES, IEU, and OMA filed applications for rehearing of the May 30 Entry,⁸ where they repeat for the third (in the case of OMA) or fourth (in the case of FES and IEU) time many now-familiar and previously-rejected claims. FES contends that the May 30 Entry is unreasonable and unlawful because: (1) it fails to follow PJM policies regarding capacity pricing under the Reliability Pricing Model, (2) continues to grant cost recovery for stranded investments and is based on non-market factors without providing sufficient justification, (3) imposes above-RPM capacity pricing on Tier One customers that have always previously had RPM-priced capacity, (4) is "not based on probative or credible evidence that AEP Ohio will suffer immediate or irreparable financial harm under RPM prices," and (5) continues an interim capacity mechanism

⁵ See FES/IEU May 3, 2012 Mem. Contra; OMA May 4, 2012 Mem. Contra. Notably, the Ohio Energy Group ("OEG") agreed that the Company's Motion for Extension is reasonable and pointed out that "AEP Ohio's request is reasonable to the extent that implementing a different capacity pricing scheme for a short period of time may only exacerbate the current uncertainty and customer confusion surrounding AEP Ohio's capacity pricing." OEG May 8, 2012 Mem. in Response at 1-2.

⁶ May 30 Entry at 8.

⁷ *Id.*

⁸ See FES June 15, 2012 Appl. for Rehearing; IEU June 19, 2012 Appl. for Rehearing; OMA June 20, 2012 Appl. for Rehearing.

that violates Ohio law.⁹ IEU explicitly restates and incorporates by reference the arguments it made in its application for rehearing of the March 7 Entry and additionally argues that the Commission's conduct throughout this proceeding violates the Fourteenth Amendment to the U.S. Constitution and that the Commission should order AEP Ohio to refund capacity revenues in excess of the RPM price or credit them against certain regulatory asset balances.¹⁰ OMA contends that the May 30 Entry is unlawful and unreasonable because it "is not supported by record evidence," undermines customer expectations, and harms Ohio customers.¹¹

II. ARGUMENT

FES's, IEU's, and OMA's applications for rehearing should be denied. They largely or entirely reiterate arguments that each intervenor has already made, and the Commission has already rejected, multiple times. The arguments that FES, IEU, and OMA raise that they have not explicitly advanced before are without merit and do not form the basis for rehearing.

A. FES's, IEU's, And OMA's Applications For Rehearing Improperly Attempt To Reiterate Arguments That They Have Already Made And The Commission Has Already Rejected.

FES, IEU, and OMA advance a number of arguments that they have already raised and that the Commission has already considered and rejected numerous times in this proceeding. Specifically, FES repeats the following arguments: capacity pricing is not intended to compensate AEP Ohio for the cost of its generation assets under the Reliability Pricing Model;¹² Tier One customers that previously received RPM-priced capacity should not now pay a price for

⁹ See FES June 15, 2012 Appl. for Rehearing.

¹⁰ See IEU June 19, 2012 Appl. for Rehearing.

¹¹ See OMA June 20, 2012 Appl. for Rehearing.

¹² See FES June 15, 2012 Appl. for Rehearing at 2-4; FES Mar. 21, 2012 Appl. for Rehearing at 3-6; FES Feb. 29, 2012 Mem. Contra at 12-18.

capacity that exceeds the current (near-zero) RPM price,¹³ AEP Ohio's financial harm from RPM-pricing is overstated and unsupported;¹⁴ and the interim capacity pricing mechanism violates Ohio law.¹⁵ IEU similarly repeats, through incorporation by reference, all of its previous arguments against the March 7 Entry.¹⁶ Likewise, OMA repeats its arguments that there is insufficient evidence that RPM pricing will cause AEP Ohio immediate and irreparable financial harm or to justify extending the interim capacity pricing mechanism,¹⁷ that the interim capacity pricing mechanism is harmful to Ohio customers,¹⁸ and that the Commission should require AEP Ohio to escrow the difference between the interim capacity pricing mechanism and RPM price.¹⁹

AEP Ohio has responded to each of the above arguments each time they have been made²⁰ and incorporates those responses by reference herein. Moreover, the Commission has already considered and rejected these arguments in both the March 7 Entry and the May 30 Entry as follows:

- “Our subsequent rejection of the ESP 2 Stipulation did not remove such evidence from the record, and we may, and do, rely upon such evidence in our decision granting interim relief.”²¹

¹³ See FES June 15, 2012 Appl. for Rehearing at 6-7; FES/IEU May 3, 2012 Mem. Contra at 12-14.

¹⁴ See FES June 15, 2012 Appl. for Rehearing at 7-9; FES/IEU May 3, 2012 Mem. Contra at 4-12; FES Mar. 21, 2012 Appl. for Rehearing at 6-8; FES Feb. 29, 2012 Mem. Contra at 6-9.

¹⁵ See FES June 15, 2012 Appl. for Rehearing at 9-10; FES Mar. 21, 2012 Appl. for Rehearing at 8-10; FES Feb. 29, 2012 Mem. Contra at 20-22.

¹⁶ See IEU June 19, 2012 Appl. for Rehearing at 10-12; IEU Mar. 27, 2012 Appl. for Rehearing at 10-27.

¹⁷ See OMA June 20, 2012 Appl. for Rehearing at 3-6; OMA May 4, 2012 Mem. Contra at 5-6.

¹⁸ See OMA June 20, 2012 Appl. for Rehearing at 6-8; OMA May 4, 2012 Mem. Contra at 6-8; OMA Mar. 5, 2012 Mem. Contra at 2-3.

¹⁹ See OMA June 20, 2012 Appl. for Rehearing at 8; OMA May 4, 2012 Mem. Contra at 8-9.

²⁰ See AEP Ohio Mar. 5, 2012 Mot. for Leave to File Reply; AEP Ohio Mar. 30, 2012 Mem. Contra FES Feb. 29, 2012 Appl. for Rehearing; AEP Ohio Apr. 6, 2012 Mem. Contra IEU Mar. 27, 2012 Appl. for Rehearing; AEP Ohio May 8, 2012 Reply in Support of Mot. for Extension.

²¹ March 7 Entry at ¶ 22.

- “[T]he Commission is [] vested with the authority to modify the state compensation mechanism established in our December 8, 2010, entry in this case.”²²
- “As we noted in the entry establishing the state compensation mechanism, the Commission approved retail rates for AEP-Ohio in its first ESP proceeding. These retail rates included the recovery of capacity costs through provider-of-last-resort (POLR) charges to certain retail shopping customers based upon the continuation of the current capacity charges established by the three-year capacity auction conducted by PJM under the current FRR mechanism. Further, the Commission established, as the state compensation mechanism, the current RPM rate established by the PJM base residual auction.”²³
- “However, on remand from the Supreme Court, the Commission eliminated the POLR charges. *Therefore, AEP-Ohio is no longer receiving any contribution towards recovery of capacity costs from the POLR charges. Further, evidence presented in this proceeding in support of the ESP 2 Stipulation claimed that RPM rates for capacity are below AEP-Ohio’s costs to provide such capacity. As we have previously noted, the evidence in the record indicates a range of potential capacity costs from a low of \$57.35/MW-day (FES Ex. 2 at 5) to a high of \$355.72/MW-day, as a merged entity (AEP-Ohio Ex. 3 at 10). Moreover, when retail customers switch to competitive suppliers, AEP-Ohio cannot take full advantage of the opportunity to sell into the wholesale market as any margin on off-system sales much be shared with other AEP affiliate companies under its*

²² *Id.* at ¶ 23.

²³ *Id.* at ¶ 24 (citations omitted).

*current Pool Agreement and in many instances is flowed through to customers of non-Ohio AEP utility affiliates. The Pool Agreement was last amended in 1980 and did not contemplate current circumstances. Until the Pool Agreement is modified, it places AEP-Ohio in a position different from other Ohio Utilities.”*²⁴

- *“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.”*²⁵
- *“Our decision today temporarily modifying the state compensation mechanism will allow the Commission to fully develop the record to address the issues raised in this proceeding.”*²⁶
- *“We reject the arguments that AEP-Ohio’s request [for extension of the interim capacity pricing mechanism] amounts to an untimely application for rehearing of the March 7, 2012, entry.”*²⁷
- *“The Commission is well within its jurisdiction to consider a request for an extension of its previous ruling. The fact that the Commission indicated that AEP-Ohio’s interim relief would be in effect until May 31, 201, does not prevent our subsequent approval of either an extension of the current interim relief or*

²⁴ *Id.* at ¶ 25 (citations omitted) (emphasis added).

²⁵ *Id.* at ¶ 26 (emphasis added).

²⁶ *Id.*

²⁷ May 30 Entry at ¶ 12.

another interim capacity charge mechanism, if warranted under the circumstances.”²⁸

- “[F]or the reasons presented in the Commission’s March 7, 2012, entry, in particular the evidence in the record that supports a range of capacity costs, as well as AEP-Ohio’s participation in the Pool Agreement, the Commission concluded that ‘as applied to AEP-Ohio, ... the state compensation mechanism could risk an unjust and unreasonable result.’ *The circumstances faced by AEP-Ohio that prompted the Commission to approve the request for interim relief have not changed.*”²⁹
- “To the extent that the Commission has already concluded that the circumstances faced by AEP-Ohio are unique and have not changed since the issuance of the March 7, 2012, entry, and, given that the Commission has made significant progress to address the issues raised in the capacity charge proceeding, the Commission finds it reasonable and appropriate to extend the current interim capacity mechanism.”³⁰

Nothing has changed to affect the Commission’s rejection, on multiple occasions, of the arguments described above, except that the “unjust and unreasonable result” the Commission sought to avoid when it established the interim capacity pricing mechanism is further supported by the record.³¹ Because the above arguments have already been thoroughly considered and

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ *Id.*

³¹ See AEP Ohio May 8, 2012 Reply in Support of Mot. for Extension at 5.

overruled on multiple occasions, the Commission should decline to rehash them yet again on rehearing.

B. FES's, IEU's, And OMA's Other Arguments Are Without Merit And Do Not Warrant Rehearing.

In their applications for rehearing, FES, IEU, and OMA raise arguments not explicitly made before in this proceeding (although similar to others previously advanced), which they contend demonstrate that the Commission's May 30 Entry is unreasonable or unlawful. These arguments, like those discussed above, are without merit and should be rejected.

FES and IEU complain that the Commission did not provide sufficient justification for its decision to grant AEP Ohio's Motion for Extension.³² This, however, is simply not true. Contrary to FES's claims that the Commission's decision is "silent" and "insufficient," the Commission thoroughly addressed all of the arguments made in support of and opposition to the Motion for Extension.³³ Perhaps itself recognizing that the majority of issues and arguments raised in opposition to AEP Ohio's Motion for Extension have been exhaustively briefed and analyzed on more than one occasion in this case, and recognizing that the circumstances facing AEP Ohio have not changed since its March 7 Entry, the Commission declined to restate the entirety of its March 7 Entry's analysis and instead wisely recognized in the May 30 Entry that that analysis is applicable to the Motion for Extension.³⁴ Moreover, as the Commission noted, the Commission is well within its jurisdiction to consider a request for extension of its March 7 Entry.³⁵ That FES and IEU do not like or agree with the Commission's May 30th decision does

³² FES June 15, 2012 Appl. for Rehearing at 4-6; IEU June 19, 2012 Appl. for Rehearing at 29-30.

³³ May 30 Entry at 1-7.

³⁴ *Id.* at ¶ 12.

³⁵ *Id.*

not mean that the decision lacked justification. These arguments are without basis and should be disregarded.

OMA improperly states that there is no evidence that AEP Ohio will suffer irreparable harm resulting from an interim RPM price, claiming that the “record evidence demonstrates that AEP Ohio was willing to accept a two-tiered pricing structure wherein the first tier would be priced at RPM.”³⁶ This argument is completely inaccurate and misinformed. OMA’s argument squarely conflicts with the record in the Modified ESP case concerning the two-tiered capacity charge alternative being presented therein. There can be absolutely no ambiguity on this point for someone who reads AEP Ohio’s pre-filed testimony and has heard the live testimony given by AEP Ohio witnesses: the two-tiered capacity charge is being offered only as a component of a package of terms and conditions, including the Retail Stability Rider, and is not being offered or accepted independent of that package.

OMA also asserts that customers properly anticipated that as of June 1, 2012, they would be served using RPM pricing for capacity, based on the March 7, 2012 Entry and based on the prior Stipulation order.³⁷ Regarding the Stipulation, it has been revoked and cannot be relied upon by anyone at this point. Further, the record demonstrates that all or virtually all of the existing retail contracts in existence today were entered into after November 2010, when AEP Ohio filed its FERC case to establish a cost-based capacity charge. (Tr. IV at 831.) Neither CRES providers nor customers can claim reliance upon, or a continuing expectation of, RPM pricing. It is also improper for OMA to rely upon the March 7 Entry’s expiration date for interim relief as being indicative of a decision on the merits or otherwise suggesting that RPM pricing would be in place after June 1, 2012. Obviously, the Commission established the

³⁶ OMA June 20, 2012 Appl. for Rehearing at 5.

³⁷ *Id.* at 6-8.

expiration date because it intended to issue a decision prior to that time; indeed, when it became evident that a decision could not be reached by then, the Commission extended the two-tiered capacity pricing until July 2, 2012.

Much of IEU's application for rehearing reads like an additional post-hearing brief. For example, IEU argues about (and mischaracterizes), *inter alia*, AEP Ohio's obligations under the RAA;³⁸ AEP Ohio's affiliate, Indiana Michigan Power's, Section 205 FERC filing;³⁹ issues relevant to the Stipulation phase of this proceeding;⁴⁰ and substantive issues bearing on the Commission's final merit determination of this case.⁴¹ These arguments are wholly irrelevant to the reasonableness and lawfulness of the Commission's May 30 Entry and, therefore, are inappropriately raised in an application for rehearing. Similarly, the time for IEU to criticize the Company's Motion for Relief and the Commission's March 7 Entry has long since passed.⁴² Nonetheless, IEU again recites a litany of unfounded and untimely criticisms of this Commission's handling of a unique and novel issue in Ohio, this time casting the Commission's behavior as unlawful and violative of due process.⁴³

Ironically, IEU's due process claim is predicated upon IEU's fifteen page description of the procedural history of this case. IEU's own description of the process that has occurred defeats its argument that it has not received the process it is due. Indeed, over the last eighteen months (and as IEU recounts in its application for rehearing), IEU has had the opportunity to thoroughly present to the Commission for consideration and review each of the positions and

³⁸ IEU June 19, 2012 Appl. for Rehearing at 17, 27.

³⁹ *Id.*

⁴⁰ *Id.* at 19-23.

⁴¹ *Id.* at 27-29.

⁴² *See id.* at 23-27.

⁴³ *Id.*

arguments that it now recites. IEU now seeks to restyle these previously-litigated issues as due process violations. That IEU does not agree with the results throughout this proceeding does not mean that it was not afforded the due process it deserves.

The Commission also should reject IEU's arguments because they are not relevant to the narrow issue to be addressed here, namely, whether the Commission's May 30 Entry was unreasonable or unlawful. As AEP Ohio has demonstrated, it was not. Accordingly, for this reason and those discussed above, IEU's application for rehearing should be denied.

III. CONCLUSION

For the reasons set forth above, the Commission should deny FES's, IEU's, and OMA's applications for rehearing.

Respectfully submitted,

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On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra of Ohio Power Company to FirstEnergy Solutions Corp. 's June 15, 2012 Application for Rehearing, Industrial Energy Users – Ohio's June 19, 2012 Application for Rehearing, and The Ohio Manufacturers' Association's June 20, 2012 Application for Rehearing* was served by electronic mail upon counsel for all other parties of record in this case on this 25th day of June, 2012.

//s/ Christen M. Moore

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Summary: Memorandum Contra of Ohio Power Company to FirstEnergy Solutions Corp.'s June 15, 2012 Application for Rehearing, Industrial Energy Users – Ohio's June 19, 2012 Application for Rehearing, and The Ohio Manufacturers' Association's June 20, 2012 Application for Rehearing electronically filed by Ms. Christen M Moore on behalf of Ohio Power Company