

**BEFORE THE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Columbus Southern Power Company and	)	
Ohio Power Company for Authority to	)	Case No. 11-346-EL-SSO
Establish a Standard Service Offer	)	Case No. 11-348-EL-SSO
Pursuant to §4928.143, Ohio Revs. Code,	)	
in the Form of an Electric Security Plan.	)	
In the Matter of the Application of	)	
Columbus Southern Power Company and	)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of	)	Case No. 11-350-EL-AAM
Certain Accounting Authority.	)	

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**FIRSTENERGY SOLUTIONS CORP.’S MEMORANDUM CONTRA  
THE OCC/APJN MOTION TO TAKE ADMINISTRATIVE NOTICE**

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**I. INTRODUCTION**

The Office of the Ohio Consumers’ Counsel and the Appalachian Peace and Justice Network (collectively, “OCC/APJN”) have moved to have the Commission take “administrative notice” of certain pieces of evidence from Ohio Power Company’s (“AEP Ohio”) capacity proceeding, Case No. 10-2929-EL-UNC (the “Capacity Case”). This Motion should be rejected. There is no justification for taking “administrative notice” of any evidence after the close of briefing in this proceeding. The parties have made their record in this case, and taking notice of any additional evidence at this point would prevent the parties from addressing this evidence or presenting any evidence to rebut the evidence cherry picked by OCC/APJN. In fact, the proposition that OCC/APJN apparently seek to establish – the capacity cost paid by nonshopping customers – was expressly refuted by AEP Ohio’s witnesses in this case. These witnesses testified that there was no way to determine what SSO customers paid for capacity. Moreover,

the evidence that OCC/APJN seek to rely on, in large part, relied on evidence in this case. Thus, OCC/APJN's Motion is improper, unfair, untimely and unnecessary. It should be denied.

## **II. ARGUMENT**

OCC/APJN filed their Motion on July 20, 2012, eleven days after post-hearing briefing in this case concluded. Attempting to add additional factual evidence to the evidentiary record in this case once the hearing has ended, two rounds of post-hearing briefs have been filed, and an oral argument has been held before the Commission, is simply improper. Adding additional evidence at this point in the proceeding prevents other parties from contesting this evidence through cross examination or contrary evidence.

OCC/APJN rely on Ohio R. Evid. 201(F) to claim that administrative notice "may be taken at any stage of the proceeding." However, Ohio R. Evid. 201(B) is determinative: "A judicially notice fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." OCC/APJN's request meets neither of these standards.

The amount that SSO customers pay for capacity is not generally known, and is not "capable of accurate and ready determination." Indeed, AEP Ohio's own witnesses testified in this case that they don't know what SSO customers pay for capacity. AEP Ohio witness Allen provided an analysis in this case that compared the revenues of base generation rates with revenues under a \$355/MW-day capacity price as applied to AEP Ohio's total connected load.<sup>1</sup> Mr. Allen admitted, however, that he could not say whether SSO customers are paying

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<sup>1</sup> Hearing Transcript ("Tr."), Vol. V, p. 1438.

\$355/MW-day for capacity because base generation rates are not cost-based.<sup>2</sup> AEP Ohio witness Roush agreed that AEP Ohio does not have a basis to disaggregate the base generation rates into subcomponents in any meaningful way, again because they are not cost-based.<sup>3</sup> Ms. Thomas also testified that the base generation price in the Modified ESP includes costs for energy and ancillary services in addition to capacity.<sup>4</sup> Further, FirstEnergy Solutions Corp. (“FES”) demonstrated that AEP Ohio’s claimed embedded capacity costs of \$355/MW-day, when converted to a per-MWh basis, are significantly greater than residential base generation rates and also greater than CSP industrial base generation rates.<sup>5</sup> Therefore, there is no justification for taking administrative notice of portions of the record from the Capacity Case that are subject to reasonable dispute.

OCC/APJN claim that the Motion was filed at this late date due to the timing of the Commission’s decision in the Capacity Case.<sup>6</sup> However, OCC/APJN fail to acknowledge that regardless of why they are seeking to introduce evidence at this late date, by seeking to introduce only part of the evidentiary record from the Capacity Case, they are presenting a misleading factual scenario to the Commission to the prejudice of other parties, who have no ability to contest or put this evidence in context. This would significantly prejudice parties, like FES,

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<sup>2</sup> Tr. Vol. V, pp. 1438-1439 (because “the company has not done a cost-of-service study to establish rates for retail customers in excess of 20 years or nearly 20 years depending on the company”).

<sup>3</sup> Tr. Vol. IV, p. 1112.

<sup>4</sup> Tr. Vol. IV, p. 1297. Mr. Allen also admitted that the base generation price was set to allow AEP Ohio to recover capacity and other costs, such as nonfuel O&M costs. Tr. Vol. V, pp. 1440-1441.

<sup>5</sup> Case No. 10-2929-EL-UNC, Direct Testimony of Jonathan Lesser on behalf of FES, p. 20.

<sup>6</sup> Reply To Memorandum Contra Motion To Take Administrative Notice By The Office Of The Ohio Consumers’ Counsel And The Appalachian Peace And Justice Network, p. 5.

which contested the points raised by OCC/APJN in this proceeding, and which presented record evidence in the Capacity Case and in this proceeding on this very topic.<sup>7</sup>

Moreover, OCC/APJN cannot claim any prejudice if their Motion is denied. They certainly had the opportunity to cross-examine witnesses, present evidence and argue in their briefs any issue relating to the cost of capacity for SSO customers. Their failure to do so to their satisfaction is not a reason to give these parties an unfair opportunity to supplement the record in one-sided fashion.

In addition, the evidence that OCC/APJN seek to offer now largely relied upon testimony in this case. For example, the Capacity Case testimony from Dr. Pierce that OCC/APJN want to offer expressly refers to the analysis that Mr. Allen did in this case – i.e., Mr. Allen’s meaningless comparison of *revenues* allegedly generated under SSO rates versus revenues generated using a \$355/MW-day capacity charge.<sup>8</sup> Since this comparison was the subject of cross-examination and briefing in this case, there is no need to introduce derivative evidence from the Capacity Case.

While OCC/APJN seek to cherry pick evidence from the Capacity Case, the fact is that AEP Ohio’s base generation rates are not cost-based and simply cannot be correlated with the \$188.88/MW-day cost estimated by the Commission in the Capacity Case. That issue was addressed in this case. OCC/APJN have had a more than adequate opportunity to deal with that

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<sup>7</sup> OCC/APJN make much of the fact that parties had knowledge of the testimony in the capacity case and had the opportunity to rebut the identified evidence in that case. Reply To Memorandum Contra Motion To Take Administrative Notice By The Office Of The Ohio Consumers’ Counsel And The Appalachian Peace And Justice Network, p. 5. Even if this were relevant to the test for administrative notice, OCC/APJN are not seeking to introduce the entire factual record of the Capacity Case. Instead, OCC/APJN seek to introduce only those portions of the record which are helpful to their position.

<sup>8</sup> See Direct Testimony of William A. Allen on behalf of AEP Ohio, p. 9.

issue in this case. Accordingly, the Commission should not re-open the record in this proceeding to take administrative notice of disputed “facts” from the Capacity Case.

### III. CONCLUSION

For the reasons set forth herein, OCC/APJN’s Motion should be denied.

Respectfully submitted,

s/ Mark A. Hayden

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Memorandum Contra The OCC/APJN Motion to Take Administrative Notice* was served this 6th day of August, 2012, via e-mail upon the parties below.

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Summary: Memorandum Contra the OCC/APJN Motion to Take Administrative Notice electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.