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**

RETAIL ENERGY SUPPLY ASSOCIATION'S MEMORANDUM CONTRA TO THE OHIO ENERGY GROUP'S APPLICATION FOR REHEARING

August 6, 2012

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Pursuant to Rule 4901-1-35 of the Ohio Administrative Code, the Retail Energy Supply Association[1] ("RESA") hereby submits this memorandum contra in response to the July 27, 2012 application for rehearing by the Ohio Energy Group ("OEG").

I. INTRODUCTION

OEG's application for rehearing to reject the Commission's ordered deferral (Argument A) should be denied because it fails to acknowledge the full scope of the Commission's modification to the state compensation mechanism for costs related to AEP-Ohio's FRR capacity obligations.[2] In its July 2nd Opinion and Order, the Commission modified the state compensation mechanism into two distinct components. First, as fully supported by the record, the Commission directed AEP-Ohio to charge Competitive Retail Electric Service ("CRES") providers a capacity charge based on the adjusted PJM RPM rates. OEG has simply misread or misinterpreted the July 2nd Opinion and Order to stand for the proposition that capacity costs or

[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] RESA takes no position on OEG's Argument B concerning the treatment of special arrangements.

transition revenues needed by AEP Ohio above the RPM pricing is money owed by CRES providers. Second, although OEG argues the Commission lacked legal authority, the Commission appropriately relied on Section 4905.13, Revised Code, to authorize AEP-Ohio to establish a deferral account for the difference between the RPM priced capacity charge and $188.88 per MW-day. The authority for the Commission to set up such anticipatory deferral accounts has previously been affirmed by the Supreme Court of Ohio.[3]

The Commission should also deny OEG's alternative branch of the deferral argument in which it requests that CRES providers pay AEP-Ohio $188.88 per MW-day as AEP-Ohio incurs capacity costs. The record in this proceeding firmly supports the Commission's conclusion that CRES providers under the state compensation mechanism should pay AEP Ohio for capacity at the adjusted RPM rates, and the balance should be deferred for subsequent collection from all retail customers. As the Commission noted, "... the record in this proceeding demonstrates that RPM-based capacity pricing will promote retail electric competition[.]"[4] The need for RPM-based capacity pricing is why the Commission modified the state compensation mechanism into two parts. As legal authority exists for the Commission to implement and structure such a state compensation mechanism, OEG's application for rehearing based on its Argument A should be denied.[5]

II. BACKGROUND

To properly address OEG's contention that the Commission lacks authority to order AEP to create a deferral account, a brief description of the procedural history which led to the

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[3] *Elyria Foundry Company et al., v. Pub. Util. Commission of Ohio, et al.*, (2007) 114 Ohio St. 3d 305, 308, 2007 Ohio 4164, 871 N.E.2d 1176.

[4] July 2, 2012 Opinion and Order, p. 23.

[5] Although RESA does not present arguments against the other issues raised in OEG's application for rehearing, its silence on these issues should not be construed as support or a concession on those issues.

Commission's establishment of a state compensation mechanism to set the capacity rate is helpful. AEP-Ohio's load is part of the regional electricity market operated by the regional transmission organization PJM Interconnection, LLC ("PJM"). PJM operates a capacity market called the Reliability Pricing Model ("RPM") in which PJM requires load serving entities ("LSEs"), such as AEP-Ohio, to supply adequate capacity to meet PJM's forecasted demand and reserve margin. The RPM has a capacity auction, the Base Residual Auction ("BRA"), which sets rates for capacity at the market price three years prior to the delivery year.

Those LSEs that choose not to participate in the RPM auctions may satisfy their capacity obligation in another way: the Fixed Resource Requirement ("FRR") Alternative. As stated in the Reliability Assurance Agreement ("RAA"), part of PJM's tariff approved and adopted by the Federal Energy Regulatory Commission ("FERC"), "[t]he Fixed Resource Requirement ('FRR') Alternative provides an alternative means under the terms and conditions of this Schedule, for an eligible Load-Serving Entity to satisfy its obligation hereunder to commit Unforced Capacity to ensure reliable service to loads in the PJM Region."[6]

The FRR Entity will supply capacity for its entire load, including that load served by an alternative LSE (such as a CRES provider), requiring the alternative LSE to pay the capacity rates set by the RAA. An exception to this rule is that if the CRES provider/alternative LSE elected to supply its own capacity, it could avoid the FRR capacity charges. However, this election must be made three years in advance, consistent with the timing of the BRA. At this point in time, no current CRES providers have made such an election, and in order to avoid AEP-Ohio's requested price increases, or any other capacity price increases imposed by the Commission, CRES providers must have made this election no later than November 2010. As a

[6] Schedule 8.1, Section A, Reliability Assurance Agreement.

result, CRES providers and their customers *must* take capacity service from AEP-Ohio at the rates set under the RAA.

The capacity rates that CRES providers and their customers pay the FRR Entity are laid out in Schedule 8.1, Section D.8 of the RAA. The schedule states:

> 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 Sections 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, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.[7]

In 2007, AEP-Ohio elected to be an FRR Entity under Section 8.1 of the RAA.[8] Since that date, alternative LSEs operating in AEP-Ohio's service territory (CRES providers) have been charged for capacity based upon the prevailing RPM auction price. Ohio is a retail choice state as is referenced in Schedule 8.1, Section D.8 of the RAA, and thus may set the SCM. The Public Utilities Commission of Ohio (the "Commission"), at least implicitly, approved the RPM-based price as the capacity price charged to CRES providers and shopping customers as part of AEP-Ohio's first ESP at Case Nos. 08-917-EL-SSO, et al ("ESP I"). As noted above, no CRES providers made the election to supply their own capacity, and must take capacity from AEP-Ohio at the rates set by the Commission.

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[7] Schedule 8.1, Section D.8, Reliability Assurance Agreement (emphasis added).

[8] However, AEP-Ohio has given notice to PJM as of April 2012 that it intends to participate in the BRA for delivery years 2015-2016. As a result, AEP-Ohio's status as an FRR Entity expired on May 31, 2012 and capacity will be available to CRES providers and/or their customers at the RPM auction price.

As the number of shopping customers increased, AEP-Ohio attempted to change the capacity rate charged to shopping customers by filing an application at the FERC in Docket No. ER11-2183 requesting compensation for capacity costs through a cost-based mechanism under Section D.8 of Schedule 8.1 of the RAA. In response, the Commission in its December 8, 2010 order in this docket explicitly adopted the RPM-based capacity price as the SCM for shopping customers, making clear that this rate was, and has been, the SCM, precluding AEP-Ohio's request at the FERC. The FERC recognized the Commission's authority to set the SCM by Order dated January 20, 2011 in ER11-2183, in which the FERC found "...the Ohio Commission has adopted such a state mechanism and we therefore reject the AEP-Ohio Companies' filing."[9]

The Commission, pursuant to the December 8, 2010 order, opened this docket for investigation of AEP-Ohio's capacity charges. By entry on August 11, 2011, the Commission set a procedural schedule and evidentiary hearing to determine the SCM.[10] Concurrently, the Commission and interested parties were considering AEP-Ohio's second electric security plan ("ESP II"), which incorporated new capacity charges for both shopping and non-shopping customers.[11]

This procedural history demonstrates the unique nature of this proceeding and AEP-Ohio's provision of capacity. AEP-Ohio is the sole provider of capacity for its service territory at this time as a result of its election of the FRR Alternative. Ohio, as a retail state, has set the cost for the provision of capacity under its state compensation mechanism that has been

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[9] July 2, 2012 Opinion and Order, p. 4. The Order additionally noted that because the state set the SCM, AEP-Ohio did not have the right to file a Section 205 application for a cost-based rate.

[10] December 8, 2010. The Commission put up for consideration the "appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism."

[11] See Case Nos. 11-346-EL-SSO et al.

recognized and honored by the FERC.[12] AEP-Ohio's provision of capacity is an essential utility service for both shopping and non-shopping customers alike because no CRES providers have opted to self-supply in AEP-Ohio's service territory.

It is in these unique circumstances that the Commission exercised its authority to modify the state compensation mechanism adopted in the Commission's December 8, 2010 Order. As noted by the Commission in its July 2, 2012 Order, Sections 4905.04, 4905.05 and 4905.06 of the Revised Code grant the Commission the " ... necessary statutory authority to establish a state compensation mechanism."[13] The Commission then made a determination to modify the state compensation mechanism currently in place for AEP-Ohio to be a cost based mechanism.[14] The Commission, however, took into consideration that RPM-based capacity pricing is a "... reasonable means of promoting shopping in AEP-Ohio's service territory and advancing the state policy objectives of Section 4928.02, Revised Code[.]"[15] Rather than assess CRES providers the full amount of AEP-Ohio's FRR capacity costs, the Commission approved assessing CRES providers an amount equal to the RPM-based price for capacity.[16] Any amounts above AEP-Ohio's incurred capacity costs not recovered from the CRES providers would be deferred until the Commission approved an appropriate recovery mechanism.[17]

III. ARGUMENT

OEG, in its application for rehearing, argues that the Commission has no legal authority to defer the unrecovered portion of AEP-Ohio's FRR capacity costs, and that the Commission

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[12] See Order, January 20, 2011, ER11-2183.

[13] July 2, 2012 Opinion and Order, p. 12.

[14] *Id.*, p. 22.

[15] *Id.*, p. 23.

[16] *Id.*, p. 22.

[17] *Id.*, p. 23.

has no authority to require future retail customers to pay the deferred amounts.[18] Central to its claims, OEG characterizes the deferral amounts as "money the unregulated CRES providers owe the utility."[19] As discussed below, however, the deferral amounts are not amounts owed by CRES providers. The Commission has set RPM capacity pricing for CRES providers. The cost of $188.88 per MW-day represents the amount the Commission believes is properly recovered as AEP-Ohio's incurred cost for its FRR capacity obligations. The deferral amounts, which represent costs above the RPM pricing recovery but below the $188.88 per MW-day cap are the second part of the state compensation mechanism (the first being RPM pricing for CRES providers). The Commission adopted these two parts pursuant to its authority under Sections 4905.04, 4905.05 and 4905.06 of the Revised Code and as discussed below, that authority along with the Commission's deferral authority under Section 4905.13 of the Revised Code supports the Commission's modifications of the state compensation mechanism, including subsequent recovery of amounts deferred under the state compensation mechanism.

As a practical matter creating a deferral paid by the retail customer is the only method that would keep the capacity price in AEP-Ohio at RPM, just as it is in all the other electric utility distribution companies in Ohio, and yet assure AEP-Ohio a revenue stream at its embedded cost until corporate separation is achieved. The CRES simply have no means to defer a capacity payment. The contract price for generation service must be established at the time the contract for generation service is let, and it cannot extend over the term of the contract. Thus, for a one-year contract, the CRES could only charge $188.88 per MW-day, as that is the time frame of the Agreement. Further, since the goal of the capacity structure is to allow all to shop at the regional price of capacity, it is reasonable to have all who have the opportunity to shop at RPM

[18] OEG, Memorandum in Support, p. 2.

[19] OEG, Memorandum in Support, p.2.

pay the deferral instead of just those who exercised the right. Thus, the Commission's design of a two part capacity fee is just and reasonable.

1. The Commission Order sets CRES provider capacity costs at RPM rates.

The basic flaw in OEG argument is that it infers that the state compensation mechanism requires CRES providers to pay AEP-Ohio's capacity costs. To the contrary, the Commission expressly stated in its July 2, 2012 order that it "... directs AEP-Ohio to charge CRES providers the adjusted final zonal PJM RPM rate in effect for the rest of the RTO region for the current PJM delivery year (as of today, approximately $20/MW-day), and with the rate changing annually on June 1, 2013, and June 1, 2014, to match the then current adjusted final zonal PJM RPM rate in the rest of the RTO region."[20]

The Commission made this finding because the record fully supported that RPM-based capacity pricing was a " ... reasonable means of promoting shopping in AEP-Ohio's service territory and advancing the state policy objectives of Section 4928.02, Revised Code[.]"[21] The Commission stated in its Order that RPM-based capacity pricing would further the development of the market, citing to Exelon Ex. 101 at 7; OEG Ex. 102 at 11.[22] The Commission also noted that RPM-based capacity pricing has been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field (FES Ex. 101 at 50-51; FES Ex. 102 at 3)."[23] Accordingly, OEG's premise that all of the monies authorized by the Commission for recovery under the state compensation mechanism ($188.88 per MW-day) is

[20] July 2, 2012 Opinion and Order, p. 23.

[21] July 2, 2012 Opinion and Order, p. 23.

[22] *Id.*

[23] *Id.*

incorrect. The Commission set AEP-Ohio's charges to CRES providers for capacity at RPM-based capacity prices.

2. The Commission's decision to break the state compensation mechanism into two components is appropriate.

Having adopted RPM-based capacity pricing for CRES providers, the Commission authorized AEP-Ohio to "... modify its accounting procedures, pursuant to Section 4905.13, Revised Code, to defer incurred capacity costs not recovered from CRES provider billings during the ESP period to the extent that the total incurred capacity costs do not exceed the capacity pricing that we approve now."[24] The Commission took this step because it determined that the state compensation mechanism should be based on the costs incurred by the FRR Entity for its FRR capacity obligations[.]"[25] Thus, the state compensation mechanism adopted by this Commission consists of two parts: (1) RPM-based capacity pricing for CRES providers and (2) a deferral of any unrecovered FRR capacity costs below $188.88 per MW-day. It is the second part of the state compensation mechanism that OEG claims the Commission lacked authority to authorize.

OEG, however, points to no authority that precludes a state commission from designing a state compensation mechanism as the Commission did in this proceeding. OEG does not dispute that the Commission has authority under Sections 4905.04, 4905.05 and 4905.06, Revised Code, to implement a state compensation mechanism. OEG also does not point to any authority prohibiting the Commission from setting pricing for CRES providers at RPM rates while deferring the AEP-Ohio's remaining unrecovered FRR capacity costs pending authorization for

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[24] *Id.*

[25] *Id.*

how AEP-Ohio may recover those amounts. Implicit in the Commission's authority to adopt a state compensation mechanism is its ability to design the state compensation mechanism.

OEG argues that the General Assembly's establishment of Section 4928.144, Revised Code, shows that the Commission lacks general deferral authority of utility costs elsewhere in the Revised Code. But the Commission not only has general authority over public utilities pursuant to Sections 4905.04, 4905.05 and 4905.06, Revised Code, it also has specific authority from the General Assembly to establish deferrals under Section 4905.13, Revised Code. The Supreme Court of Ohio recognized that deferral authority in its 2007 decision in *Elyria Foundry* stating, "R.C. 4905.13 grants the commission authority to establish a system of accounts for public utilities and to prescribe the manner in which the accounts must be kept."[26] The Court also noted that the Commission's authority " ... pursuant to R.C. 4905.13 over public-utility accounting practices is distinct from the ratemaking statues in R.C. Chapter 4909.[27]

The Commission's deferral authorization to AEP-Ohio has many similarities with the *Elyria Foundry* case. The Court in *Elyria Foundry* stated that it has "upheld the commission's accounting orders when the accounting procedure did not affect current rates and the ratemaking effect of the accounting order would be reviewed in a later rate proceeding."[28] In the matter at bar, the Commission authorized AEP-Ohio to modify its accounting procedures to defer incurred capacity costs not recovered from CRES provider billings during the ESP period to the extent that the total incurred capacity costs do not exceed $188.88 per MW-day. Significantly, the Commission noted that it will "establish an appropriate recovery mechanism for such deferred

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[26] *Elyria Foundry Company et al., v. Pub. Util. Commission of Ohio, et al.*, (2007) 114 Ohio St. 3d 305, 308, 2007 Ohio 4164, 871 N.E.2d 1176.

[27] *Id.*

[28] *Id.* at 308.

costs and address any additional financial considerations in the 11-346 proceeding." This means that parties such as OEG will have an opportunity to challenge any recovery mechanism approved by the Commission as well as the recovered amounts.

OEG attempts to rely on another Supreme Court of Ohio decision, *In Columbus Southern Power Co. v. Pub. Util. Comm. Of Ohio* (1993), 67 Ohio St. 3d 535, 620 N.E. 2d 835 for the proposition that the Commission has no general ratemaking authority to order a deferral or phase in of money. That case is distinguishable because the Commission in that case was found to have ignored the plain language of Section 4905.15(D), Revised Code, when it attempted to adopt a phase-in of a rate required for an annual revenue requirement. In the matter at bar, the Commission had authority to implement the two part state compensation mechanism, and appropriately relied on Section 4905.13 to authorize AEP-Ohio to defer amounts not charged to CRES providers.

OEG also argues that there is no authority in the Revised Code that authorizes the Commission to force retail consumers to "repay the wholesale capacity payment obligations that unregulated CRES providers owe to AEP-Ohio."[29] The Commission's state compensation mechanism, however, clearly holds that CRES providers are only to pay the RPM rate. As discussed above, that is the rate established by the Commission and fully supported by the record. And as discussed above, that is the rate established by the Commission and fully supported by the record. And as a practical matter, AEP-Ohio's provision of capacity is a utility service that benefits all customers, shopping and non-shopping. That is why the Commission adopted a two part state compensation mechanism, setting CRES provider capacity rate at RPM

[29] July 2, 2012 Opinion and Order., p.3.

prices and authorizing AEP-Ohio to defer uncollected amounts pending recovery authorization by the Commission.

Lastly, OEG argues that competition can occur in AEP-Ohio's service territory with a price set at $188./88 per MW-day and therefore there is no need to defer any part of the $188.88 per MW-day. The fact that some level of competition may still occur is not justification alone to charge CRES providers $188.88 per MW-day. As the Commission found, RPM-based capacity pricing is a reasonable means to promote shopping, develop the market and advance state policies. It was not unlawful or unreasonable for the Commission to make this determination, and utilize RPM-based capacity as a way of continuing to promote shopping and full competition in the market place.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny OEG's application for rehearing as to the issues raised in this memorandum contra.

Respectfully submitted,

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On behalf of the Retail Energy Supply Association

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served this 6th day of August, 2012 via electronic mail on the following persons.

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

Summary: Memorandum Memorandum Contra to the Ohio Energy Group's Application for Rehearing electronically filed by M HOWARD PETRICOFF on behalf of Retail Energy Supply Association