

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of</b>	)	
<b>Columbus Southern Power Company and</b>	)	<b>Case No. 11-346-EL-SSO</b>
<b>Ohio Power Company for Authority to</b>	)	<b>Case No. 11-348-EL-SSO</b>
<b>Establish a Standard Service Offer</b>	)	
<b>Pursuant to § 4928.143, Ohio Rev. Code,</b>	)	
<b>in the Form of an Electric Security Plan.</b>	)	

<b>In the Matter of the Application of</b>	)	
<b>Columbus Southern Power Company and</b>	)	<b>Case No. 11-349-EL-AAM</b>
<b>Ohio Power Company for Approval of</b>	)	<b>Case No. 11-350-EL-AAM</b>
<b>Certain Accounting Authority.</b>	)	

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

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**OHIO POWER COMPANY'S REPLY MEMO IN SUPPORT OF  
ITS MOTION TO CONSOLIDATE**

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On September 11, 2012, Ohio Power Company (“AEP Ohio” of the “Company”) filed a motion to consolidate Case Nos. 11-346-EL-SSO *et al.* (the *ESP II* proceeding) with Case No. 10-2929-EL-UNC (the *Capacity Pricing* proceeding) for purposes of deciding, on an integrated basis, the issues raised on rehearing in both cases. The Company contends there are significant benefits that would result from such a consolidation. The issues addressed relating to capacity pricing and the State compensation mechanism, in the *Capacity Pricing* proceeding, and the

integrally related cost-recovery mechanism devised by the Commission in the *ESP II* proceeding for the deferrals that the capacity pricing and the *ESP II* proceeding establish, are best explained, understood, and supported when those issues are considered in a comprehensive and integrated manner. In addition, consolidation of rehearing decision making will ensure that the procedural timelines for consideration of any appeals from both the capacity pricing decisions in Case No. 10-2929-EL-UNC and related decisions in this *ESP II* proceeding coincide. That will allow for a more efficient and logically consistent consideration and decision on any appeals arising from the capacity pricing and cost-recovery issues, which are presently linked together through two separate decisions.

Office of the Ohio Consumers' Counsel ("OCC"); Industrial Energy Users – Ohio ("IEU"); the Ohio Association of School Business Officials, Ohio Schools Council, Buckeye Association of School Administrators, and Ohio School Board Association (collectively, "Schools"); Duke Energy Commercial Asset Management and Duke Energy Retail Sales ("DECAM and DER") timely filed memorandum contra. Duke Energy Ohio filed an untimely memorandum contra AEP Ohio's motion. The following is AEP Ohio's reply to the arguments raised in these memoranda.

OCC argues that AEP Ohio's request for consolidation is vague, and that it is "unclear what it means." (OCC Memo Contra at 5.) The reason for consolidation is that the issues addressed relating to capacity pricing and the State compensation mechanism, in the *Capacity Pricing* proceeding, and the intricately related cost-recovery mechanism devised by the Commission in the *ESP II* proceeding for the deferrals that the capacity pricing and the *ESP II* proceeding establish, are best addressed when those issues are considered in a comprehensive and integrated manner. Thus, consolidation would afford the Commission with the opportunity

to provide a better explained, understood, and supported analysis and decision — a decision that seems destined for review by the Ohio Supreme Court. The Commission is tasked with making an understandable decision for the Court in case of appeal, and consolidation of the records in one rehearing decision will provide the Court the appropriate context to consider any arguments that may be raised by any of the parties in the most complete manner. In addition, a consolidated rehearing decision will ensure that the procedural timelines for consideration of any appeals from both the capacity pricing decisions in Case No. 10-2929-EL-UNC and related decision making in this *ESP II* proceeding coincide.

OCC (at 5) and IEU (at 5) contend that making a request for consolidation at this stage of the proceeding circumvents the requirements of R.C. 4903.09, which requires the Commission to show the facts in the record that support its order. And, according to OCC, the Commission cannot utilize new facts on rehearing to bolster its decision when such facts could have been offered in the original hearing. (*Id.*) Doing so, OCC contends, would deny parties the opportunity "to make a record for critical decisions that the PUCO made when ruling." (*Id.* at 6.) Additionally, OCC argues that granting AEP Ohio's motion to consolidate at the rehearing stage of the proceedings would be unreasonable because it would prohibit OCC from challenging matters determined in the proceeding, as consolidation would have the effect of changing the underlying facts supporting the original order. (*Id.*) Finally, OCC, IEU, and the Schools argue that the parties in the *Capacity Pricing* case and the *ESP II* proceeding were not afforded the opportunity to litigate these cases jointly, thus, consolidation would interfere with these parties' due process rights. (OCC at 7; IEU at 4; Schools at 4.)

Contrary to OCC's assertion, there are no new facts needed to support the Commission's decision in either docket. OCC and other parties have had ample opportunity in each separate

proceeding to address in hearing, on brief, in oral arguments before the Commissioners, and now again on rehearing, the interrelated issues. Further, as noted by the Company in its memorandum in support of its motion, the parties to the *Capacity Pricing* proceeding are a subset of the parties in the *ESP II* proceeding. Consequently, there are no parties from Case No. 10-2929-EL-UNC that are not already parties to the *ESP II* proceeding, and so there would be no inadvertent or improper addition of parties to the *ESP II* proceeding. Thus, consolidation does not harm principles of due process and the consolidation of the interrelated issues in both proceedings is appropriate. The parties' arguments to the contrary are without merit.

According to OCC (at 6) and IEU (at 3), the motion to consolidate should be denied because there is no common question of law or fact and because approving the motion would not "avoid unnecessary costs of delay in the interest of judicial economy" under Ohio Civ. R. 42(A) and related case law. There are clearly, however, common issues of law and fact between the two cases, a point that OCC concedes at page 6 of its memorandum. In its July 2<sup>nd</sup> Opinion and Order in the *Capacity Pricing* proceeding, the Commission found that it was appropriate to set the price for capacity charged to CRES providers at the RPM level, then concluded that the precise features of the compensation mechanism, in particular how the difference between the cost and RPM pricing would be recovered, would be addressed in its *ESP II* decision. The Commission did go on to determine in its August 8<sup>th</sup> *ESP II* decision that cost recovery of AEP Ohio's deferred capacity cost would be accomplished, in part, through the RSR and, in part, through a non-bypassable charge established at a later date. IEU's claim that there are no common issues is especially disingenuous given that IEU has commenced an extraordinary original action against the Commission and individual Commissioners before the Supreme Court of Ohio, in order to jointly challenge the "*combined effects* of the Commission's decisions in the

*Capacity Case* and the *ESP II Case*” based on an alleged lack of jurisdiction over both related cases. (See S. Ct. Case No. 12-1494, IEU Complaint for Writs of Prohibition and Mandamus at ¶30 (emphasis added).)

The parties in these two proceedings have fully litigated and briefed these interrelated issues and a consolidated rehearing decision would advance a more comprehensive explanation and understanding of the Commission's ultimate decision and support for its decision. Moreover, such a consolidated decision would promote judicial economy by avoiding the risk that a piece-meal approach might otherwise pose — ensuring that the procedural timelines for any appeals would coincide, which would allow for a more efficient and logically consistent consideration of any appeals. As the company noted in support of its motion, efficiency and coordination are good reasons supporting the Commission's exercise of its discretion under R.C. 4901.13 to issue a consolidated rehearing decision. In sum, the parties have litigated and briefed these interrelated issues in the separate proceedings, thus consolidation achieves judicial economy without harming any party's due process rights, which is consistent with Ohio Civ. R. 42(A).

OCC cites an example of Attorney Examiner Price denying FirstEnergy's request to take administrative notice of the record in its *ESP II* case as support for the notion that the Commission does not support the incorporation of an entire record from one proceeding into another. (OCC at 8.) OCC (at 11) and IEU (at 2) both similarly identify OCC and the Appalachian Peace and Justice Network's joint motion to take administrative notice of parts of the *Capacity Charge* record in the *ESP II* case and, in particular, AEP Ohio's opposition to their motion. The Company challenged OCC/APJN's attempt to take notice of only a small subset of the *Capacity Pricing* record and its timing. The Company's rationale in its memorandum opposing OCC/APJN's motion for selective notice. But the Company also pointed out in its

response the Commission's authority to recognize portions of the *Capacity Pricing* record, as appropriate and as it relates to the ultimate decision under its broad oversight of its dockets. See AEP Ohio Memorandum Contra filed July 24, 2012. As the Commission can appreciate, a request to take administrative notice is a litigant's attempt to proffer specific evidence to be considered. OCC/APJN's joint request to take administrative notice of select parts of the *Capacity Pricing* record came after the *ESP II* docket had already been briefed, orally argued before the Commission, and submitted for decision. Unlike a request to take administrative notice by a litigant, a request to consolidate is not made pursuant to evidentiary rules (and not likely to favor a specific party trying to proffer specific evidence). It is a procedural request aimed at the Commission's discretion to manage its dockets in a reasonable manner, and to render a comprehensive and final decision on rehearing that will be more amenable to review by the Ohio Supreme Court.

The action proposed by the Company is more in line with the language the Commission used when denying OCC/APJN's attempt to add selective portions of the *Capacity Charge* record. The Commission was appeared to be concerned that taking only parts of the record proposed by OCC/APJN would be misleading. Specifically the Commission stated:

Were the Commission to take notice of this narrow window of information, we would be allowing a party to supplement the record in a misleading manner. Further, while we acknowledge that parties may rely on the Commission's order in the Capacity Case, as it speaks for itself, to show effects on items in this proceeding, to exclusively select narrow and focused items in an attempt to supplement the record is not appropriate.

August 8, 2012 *ESP II* Opinion and Order at 12-13. Here, the Company is seeking to consolidate the two dockets, not merge small subsections of one docket into another leaving the risk of misapplication. Consolidation, as explained in the Company's memorandum in support of its motion, is appropriate in this instance so that the Commission can provide a consolidated

decision on rehearing of these interrelated issues that does not run the risk of being misleading. A consolidated rehearing decision will not only allow for a better explained, understood, and supported Commission decision, but it will also provide for a more efficient and logically consistent consideration and decision of any appeals arising from the capacity pricing and cost-recovery issues.

DECAM/DER and Duke Energy Ohio memoranda contra, and to some extent the Schools (at 3), allege that consolidation is not necessary, thus, should not be granted. But necessity is not a threshold requirement to the Commission exercising its broad discretion in the conduct of its hearings. *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 10 Ohio Op. 3d 493, 500, 384 N.E.2d 264, 273. It is well-settled that pursuant to R.C. 4901.13, the Commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort. *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560, 23 Ohio Op. 3d 474, 475, 433 N.E.2d 212, 214. *See also Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St. 3d 15, 19 (same). Thus, there can be no question that it is permissible for the Commission to issue a consolidated decision on rehearing in both cases.

Finally, at page 10 of its memorandum contra, OCC concedes that there are interrelated issues between the two cases, but states that alleged evidentiary issues caused by the July 2<sup>nd</sup> *Capacity Charge* order cannot be cured by consolidating the two cases at the rehearing stage. To the extent the Commission may believe there are evidentiary issues that can be clarified regarding interrelated issues among the two proceedings, it is within the Commission's discretion under R.C. 4901.13 to grant AEP Ohio's motion and provide a well-supported analysis in its

consolidated entry on rehearing. Clearly, there are common and inter-related issues between the two cases and it would be reasonable and efficient to jointly address the issues as part of a single decision. While parties that have aggressively challenged the Commission's orders do not welcome the prospect of improving the decisions in this manner, the Commission should appreciate the benefits and consider doing so.

### **CONCLUSION**

For all of these reasons, the Commission should reject the arguments in opposition and grant the Company's motion to consolidate the *Capacity Pricing* proceeding and the *ESP II* proceeding, for purposes of issuing a single rehearing decision in both proceedings.

Respectfully submitted,

//s/ Steven T. Nourse

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**On behalf of Ohio Power Company**



### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Reply has been served, via electronic service, to the Parties of Record in Case Nos. 10-2929-EL-UNC and 11-346-EL-SSO et al. this 20th day of September 2012.

//s/ Steven T. Nourse

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Summary: Reply Memo in Support of its Motion to Consolidate electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company