

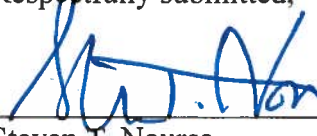
**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of</b>	)	
<b>Ohio Power Company to Establish</b>	)	
<b>a Competitive Bidding Process for</b>	)	<b>Case No. 12-3254-EL-UNC</b>
<b>Procurement of Energy to Support its</b>	)	
<b>Standard Service Offer</b>	)	

**OHIO POWER COMPANY’S MOTION TO STRIKE OR, IN THE  
ALTERNATIVE, FOR LEAVE TO FILE INSTANTER THE ATTACHED SUR-  
REPLY COMMENTS**

FirstEnergy Solutions Corp. (FES) – included a procedurally improper argument as part of its reply comments. FES’s third/final point in its reply comments (item II.C on pages 5-6) should be stricken from the record. FES addressed a matter that was not addressed in any of the initial comments filed in this docket, though AEP Ohio’s proposal was clearly explained in the Supplement to the Application that was filed prior to the comment cycle. “Sandbagging” is an underhanded technique committed by a party that wants to get the last word in without engaging in a fair debate of the issue. Sandbagging is particularly inappropriate where, as in this case, it is being used against the party who bears the burden of proof. FES’s unfair approach is exacerbated here because the particular argument being raised also amounts to an untimely rehearing challenge of the Commission’s final order in the AEP Ohio *ESP II* proceedings (Case Nos. 11-346-EL-SSO *et al.*). Consequently, the Commission should strike FES’s third/final point in its reply comments from the record. If the Commission does not strike the improper argument from FES, however, it should alternatively accept the sur-reply comments proffered by AEP Ohio in the attachment to this motion.

Respectfully submitted,



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## **MEMORANDUM IN SUPPORT**

Ohio Power Company d/b/a AEP Ohio (“AEP Ohio” or the “Company”) filed its December 21, 2012 Application to establish a competitive bidding process (CBP) for procurement of energy to support its standard service offer (SSO), following a stakeholder process to gather input regarding the Company’s proposals. As authorized by the Attorney Examiner’s January 31, 2013 Entry, the Company filed a Supplement to the Application on February 11, 2013 to further address retail rate issues and cost recovery issues related to the energy auctions consistent with the Commission’s rehearing decision in AEP Ohio’s Electric Security Plan (Case Nos. 11-346-EL-SSO *et al.*). Certain parties filed comments and on March 14, 2013, the Company and three other parties filed reply comments. One party, FES, included a new argument in its reply comments that was not raised by any party as part of the initial comments. For the reasons stated below, the Commission should strike FES’s third/final point in its reply comments from the record in this proceeding. Alternatively, the Commission should allow AEP Ohio to briefly respond to FES’s untimely argument by accepting the sur-reply comments proffered as an attachment hereto.

In its reply comments (at 5-6), FES raises a new and distinct issue that is not connected to the initial comments of any party. Specifically, FES disagrees with the Supplement and advocates (at 6) that base generation prices “should fluctuate with auction results.” Of course, initial comments are the proper place to respond to an Application and FES already took full advantage of that opportunity. The purpose of reply comments is to allow parties an opportunity to respond to points made in the initial comments of other parties – not go back and address issues raised in the Application that

were not discussed in initial comments. All of the other parties in this case used their reply comment opportunity for that appropriate purpose, as did FES for two of its three reply points. But FES's third item is not connected to any comment filed in this docket and, instead, is unequivocally based solely on the AEP Ohio's Supplement. There are only two explanations of why FES would have waited until the end of its reply comments to raise this issue: (1) FES did not fully review the Application and Supplement until after it filed its initial comments, or (2) FES intentionally held back the comment in an attempt to make a false claim that could not be rebutted (aka sandbagging). Either way, the issue is untimely and should have been raised in initial comments.

The whole purpose of the Company's Supplement was to address the retail rate issues related to the energy auctions in a manner consistent with the final order from the *ESP II* cases, as explained by the Attorney Examiner in his January 31, 2013 Entry (issued the day after the *ESP II* Entry on Rehearing). It was FES's obligation to review the Supplement and raise any concerns in its initial comments. There is no claim that the Supplement was clarified or re-characterized through AEP Ohio's comments, which could create a basis for reply comments. Rather, FES merely states (at 5) that the Supplement – which was filed prior to FES's initial comments – causes confusion for FES.

The Commission has described the effect of the illegitimate sandbagging technique as follows: “by reserving for its reply brief arguments that could have and should have been raised in its initial brief [the sandbagging party] has the last, uncontested word.” *In re TDS Metrocom, Inc.*, Case No. 02-1254-TP-ARB, Arbitration Award at 4 (December 19, 2001). Similarly, the Commission has characterized

sandbagging as “deliberately withholding information to secure an advantage.” *In re Commission Investigation Regarding Payphone Services*, Case No. 96-1310-TP-COI, Entry (September 23, 2003). Depending on the facts involved and the Commission’s exercise of its procedural discretion, the Commission has rebuked sandbagging by either striking the offending pleading or granting the harmed party an opportunity to submit sur-reply. *In re Ameritech Ohio’s Economic Costs*, Case No. 96-922-TP-UNC, Entry at 2 (January 29, 2001); *In re TDS Metrocom, Inc.*, Case No. 02-1254-TP-ARB, Arbitration Award at 3 (December 19, 2001). Given that this case involves a simple comment cycle and FES had every opportunity to raise pertinent issues in its initial comments, it is most appropriate to strike the comment from the record.

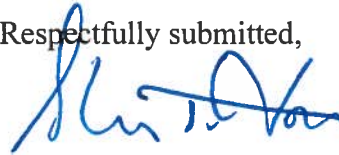
Here, as between striking FES’s comment and alternatively providing a sur-reply opportunity for AEP Ohio, striking the comment is a distinctly superior remedy. This is because the argument raised by FES is based on a novel reading of the Commission’s final order in AEP Ohio’s *ESP II* proceeding – and effectively constitutes an untimely application for rehearing of that decision. The time for rehearing of the January 30, 2013 Entry on Rehearing has passed. While two parties did file additional rehearing requests regarding the January 30 Entry, FES was not one of them. And the issue raised by FES is not within the scope of the pending rehearing requests in that docket. In short, the matters ruled upon in this regard are final and cannot be modified, except by the Supreme Court of Ohio on appeal. If the Commission does not strike FES’s third reply comment and allows the issue to be entertained in this docket (by also allowing AEP Ohio to submit sur-reply comments on that subject), the Commission would effectively be rehearing the January 30 Entry outside of the statutory rehearing process. Accordingly,

striking FES's third reply comment is far more appropriate than leaving the comment in the record and permitting AEP Ohio to file sur-reply on the subject.

### CONCLUSION

FES's third point is clearly not a proper reply comment. As such, it should be stricken from the record and ignored in deciding this case. If the Commission does not grant AEP Ohio's motion to strike, it should at least grant the Company permission to file *instantly* the attached sur-reply comments regarding the item. In responding to this motion, parties including FES must only address the procedural motion and are not permitted to make additional substantive comments or reply to AEP Ohio's proposed sur-reply comments.

Respectfully submitted,



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## Attachment: Sur-Reply Comments

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of</b>	)	
<b>Ohio Power Company to Establish</b>	)	
<b>a Competitive Bidding Process for</b>	)	<b>Case No. 12-3254-EL-UNC</b>
<b>Procurement of Energy to Support its</b>	)	
<b>Standard Service Offer</b>	)	

**OHIO POWER COMPANY’S SUR-REPLY COMMENTS**

Ohio Power Company d/b/a AEP Ohio (“AEP Ohio” or the “Company”) filed its December 21, 2012 Application to establish a competitive bidding process (CBP) for procurement of energy to support its standard service offer (SSO), following a stakeholder process to gather input regarding the Company’s proposals. As authorized by the Attorney Examiner’s January 31, 2013 Entry, the Company filed a Supplement to the Application on February 11, 2013 to further address retail rate issues and cost recovery issues related to the energy auctions consistent with the Commission’s rehearing decision in AEP Ohio’s Electric Security Plan (Case Nos. 11-346-EL-SSO *et al.*). Certain parties filed comments and on March 14, 2013, the Company and three other parties filed reply comments. One party, FES, included a new argument in its reply comments that was not raised by any party as part of the initial comments. In a separate motion, AEP Ohio requested permission to file sur-reply comments to address the new issue raised by FES.

In its reply comments (at 5-6), FES disagrees with the Supplement and advocates (at 6) that “generation prices charged to customers should fluctuate with auction results.” FES quotes an isolated passage from the January 30 Entry on Rehearing and ignores the



context of the language as well as other repeated statements that support AEP Ohio's reading of the clear intent. When one appropriately reviews the entirety of the decision, it is clear that the Commission adopted frozen base generation rates for AEP Ohio during the term of its ESP, except for the final five months when the Company will procure 100% of its SSO energy requirements from an external auction.

FES appears to particularly rely on the finding that "AEP Ohio's request to continue to freeze base generation rates through the auction process is inappropriate and should be rejected." The holding, of course, must be examined in light of the issue being addressed in that part of the decision. FES's improper attempt to blow open the narrow scope of the holding on page 36 is without basis in the language of the decision and is otherwise inappropriate as it would cause substantial financial harm to AEP Ohio.<sup>1</sup> FES's novel interpretation of the ESP II Entry on Rehearing is misguided and incorrect. As discussed below, FES's position directly conflicts with the actual language and structure of the ESP II Entry on Rehearing – and there are additional reasons why the position must be rejected as well.

First, the scope of the holding being reached in the quoted language addressed a more narrow issue raised by AEP Ohio on rehearing. As described at the top of the same page in the decision, the language quoted by FES in its reply comments is the portion of the order where the Commission was disposing of AEP Ohio's requested "modification to provide that, in light of the acceleration of AEP Ohio's proposed CBP, base generation

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<sup>1</sup> Of course, AEP Ohio fully intends to implement the Commission's actual holding in this regard, as explicitly stated in its Supplement filed in this case (at 5-6): "In accordance with the ESP II Rehearing Order, base generation rates during the 100% energy auction delivery period (*i.e.*, January through May 2015) would be adjusted to reflect capacity costs of \$188.88/MW-day."

rates will be frozen *throughout the entire term of the ESP, including the first five months after the January 1, 2015, 100 percent energy auction.*” *ESP II*, Entry on Rehearing at 36 (emphasis added). The Commission further explained in the same paragraph at the top of same page that “AEP Ohio believes *it would be unreasonable to adjust the SSO base generation rates for the first five months of 2015*, as proposed in AEP Ohio’s application, in light of the substantial modifications made by the Commission ...” *Id.* (footnote omitted). It is clear in that context that the holding quoted by FES was only addressing base generation rates during the last five months of the ESP term, January through May of 2015.<sup>2</sup> The Commission’s subsequent shorthand use of the phrase “through the auction process” in its holding is synonymous with the Commission’s own more detailed description (listed two paragraphs prior to that) of AEP Ohio’s proposal to freeze base generation rates “throughout the entire term of the ESP, including the first five months after the January 1, 2015, 100 percent energy auction.”

Second, in the order’s short discussion of these issues, there are at least three *additional* references indicating that the Commission’s holding was limited in scope (beyond the two references on Page 36 that were just discussed): (1) page 37, lines 17-18 (Commission referenced the Company’s application where a January 2015 base generation adjustment was proposed, as an additional basis supporting its holding); (2) page 37, line 26 (Commission indicated what it was addressing was “the cost of capacity for non-shopping customers beginning January 1, 2015”); and (3) page 37, lines 36-37

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<sup>2</sup> As a related matter, the page 36 holding’s phrase “*continue* to freeze base generation rates through the auction process” incorporates the concept that the base generation rate freeze would be in place leading up to the January 2015 100% energy auction, which also supports AEP Ohio’s understanding of the ruling applying to the continuation of the base rate freeze through the final five months of the ESP term.

(indicating it need not address DER/DECAM's argument "for the limited purpose of the January 1, 2015, energy only auction"). All of these references reinforce that the scope of the discussion was base generation rates during January through May of 2015. Indeed, the only place the January 2015 reference was not explicitly stated is the sentence selectively quoted by FES in its reply comments. As explained above, even that reference clearly applies only to the January 2015 energy auction period as well when considered in its obvious context. Thus, this section of the order was deliberate and consistent in providing that the only departure from the base generation rate freeze would be during the January through May 2015 delivery period of the 100% energy auction.

Third, other parts of the *ESP II* Entry on Rehearing also confirm the same manifest interpretation. Just a few pages earlier, the Commission characterized the ESP's frozen base generation rates as being a central feature and a significant benefit to SSO customers. On page 33 of the Entry on Rehearing, the Commission found that "the frozen base generation rates amount to a reasonably priced, stable alternative that will remain available for all customers who choose not to shop." This finding would not make sense if FES is correct that base generation rates are to fluctuate throughout the ESP term based on the numerous energy auctions being conducted pursuant to the Commission's directives. Similarly, the Commission did not incorporate sweeping base generation rate reductions advocated by FES into either its MRO test analysis or its development of the RSR. In sum, both the specific holding on page 36 and the entirety of the order makes it clear that the Commission was only departing from the base generation rate freeze for the final five months of the ESP term, during the period when 100% of SSO energy was being procured externally through an auction.

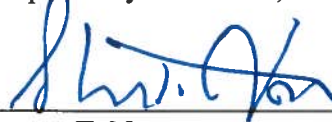
In addition to lacking support in the language and structure of the *ESP II* Entry on Rehearing, FES's position that base generation rates should fluctuate with the energy auctions is unreasonable and lacks a basis in the record. AEP Ohio's proposal is to unbundle the FAC into energy and non-energy components and combine the energy component with the prices that result from the energy auctions. There is no reason or record basis to conclude that base generation rates reflect energy-related costs or should fluctuate based on the energy auction process.

Finally, the Commission should also note that it is disingenuous for FES to advocate for lower base generation SSO rates, given that FES competes against the SSO rates in AEP Ohio's service territory. By contrast, none of the customer parties – who actually pay AEP Ohio's retail rates – have raised this issue. Lowering AEP Ohio's base generation SSO rate would cut against FES's business interests and this argument is an attempt by FES to undermine AEP Ohio's financial position even at the expense of its own. Rather than accommodating FES's improper agenda, the Commission should confirm that the only reasonable interpretation of the *ESP II* Rehearing Order is that base generation rates remain frozen through 2014 and only need to fluctuate during the delivery period of the 100% energy auctions (*i.e.*, January through May 2015).

## CONCLUSION

Because FES's third point made in its reply comments raised a new issue not previously addressed in initial comments, AEP Ohio requested permission to file sur-reply comments to respond to that issue. For the reasons stated above, the Commission should reject the position advocated by FES and confirm its ruling in the *ESP II* Entry on Rehearing, as reflected in the Company's Supplement, that the base generation rate freeze continues through the end of 2014 and generation rates only need to be adjusted to reflect the \$188.88/MW-day capacity charge for the period from January through May of 2015. This is a key part of the balanced package struck by the Commission in reaching its final order in the *ESP II* cases and it should not be revisited or disturbed in this collateral proceeding, especially given the substantial financial impacts of such a major change.

Respectfully submitted,



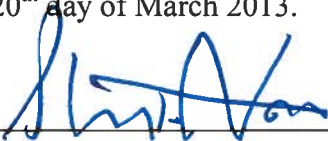
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Counsel for Ohio Power Company

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AEP Ohio Motions and attached Sur-Reply Comments was served upon the parties of record of the Public Utilities Commission of Ohio by electronic service this 20<sup>th</sup> day of March 2013.

  
Steven T. Nourse

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Summary: Motion TO STRIKE or, IN THE ALTERNATIVE, FOR LEAVE TO FILE INSTANTER THE ATTACHED SUR-REPLY COMMENTS electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company