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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S APPLICATION FOR REHEARING

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On December 13, 2013, Ohio Power Company ("AEP-Ohio") filed an application for rehearing from the Public Utilities Commission of Ohio's ("Commission") November 13, 2013 Opinion and Order in the above-captioned proceeding ("CBP Order"). AEP-Ohio's application for rehearing raises four assignments of error. As discussed below, the first three are meritless and should be rejected. The Industrial Energy Users-Ohio ("IEU-Ohio") does not oppose the relief AEP-Ohio requests in its fourth assignment of error.

I. BACKGROUND

On August 8, 2012, the Commission issued an Opinion and Order modifying and approving AEP-Ohio's application to establish an electric security plan ("ESP") in Case Nos. 11-346-EL-SSO, *et al.* ("*ESP II Case*" or "ESP II Order"), and further modified the ESP through an Entry on Rehearing dated January 30, 2013 ("ESP II Entry on Rehearing"). As part of the approved ESP, AEP-Ohio was directed to work with stakeholders to develop a competitive bid process ("CBP") for the energy-only auctions

that the Commission ordered in the *ESP II Case*.[1] AEP-Ohio filed an application to establish a CBP for the energy-only auctions on December 21, 2012, as supplemented on February 11, 2013.

AEP-Ohio's application did not propose to reduce its base generation rates once the delivery of energy from the energy-only auctions commenced, as required by the ESP II Order and ESP II Entry on Rehearing. AEP-Ohio's application also failed to propose a reserve price on CBP auctions. In response to AEP-Ohio's application, comments and reply comments were filed by various parties. In light of the issues raised in the comments, the Commission set the case for an evidentiary hearing.[2]

An evidentiary hearing was commenced on June 24, 2013 and concluded on July 15, 2013. Post-hearing briefs were submitted by the parties. In these briefs, several important issues were raised that are relevant to AEP-Ohio's application for rehearing. First, the evidence in the record demonstrated that AEP-Ohio's application would result in significant rate increases for standard service offer ("SSO") customers.[3] The intervening parties proposed three methods for the Commission to address the expected significant rate increases.

FirstEnergy Solutions Corp. ("FES") proposed that the Commission direct AEP-Ohio to comply with the ESP II Order and ESP II Entry on Rehearing; *i.e.* to reduce its base generation rates in proportion to the energy load auctioned off to reflect the price of capacity as determined through the Commission's invented and applied cost-

[1] CBP Order at 2.

[2] *Id.* at 3.

[3] IEU-Ohio Initial Brief at 5-7 (Aug. 16, 2013); IEU-Ohio Exs. 3-7; Tr. Vol. I at 160-172.

based ratemaking methodology, $188 per megawatt-day ("MW-day").[4] IEU-Ohio, along with the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Energy Group ("OEG"), proposed that the Commission establish a reserve price on the energy-only auctions to ensure that energy-only auctions did not lead to a rate increase for SSO customers; a result contrary to the Commission's stated expectations in the *ESP II Case*.[5] Exelon Generation Company, LLC ("Exelon") and Constellation NewEnergy, Inc. ("Constellation") proposed a crediting mechanism in addition to the base generation rate reduction that would offset any increase from the energy-only auctions.

In the CBP Order, the Commission held that AEP-Ohio's proposed CBP was inconsistent with its ESP II Order and ESP II Entry on Rehearing, and found that FES' proposed blending methodology appropriately reflected these orders. Accordingly, the Commission adopted FES' blending proposal.[6] In the CBP Order, the Commission also rejected the auction reserve price supported by IEU-Ohio, OCC, and OEG and rejected the crediting mechanism proposed by Exelon and Constellation.[7]

Additionally, the parties urged the Commission to reject AEP-Ohio's proposed Fixed Cost Rider ("FCR") because it would result in a double-recovery of certain capacity costs.[8] Specifically, as part of its application in this case, AEP-Ohio proposed to bifurcate its current Fuel Adjustment Clause ("FAC") into two components. The first component, the Auction Phase-In Rider, will collect energy costs that had previously been collected through the FAC and will be blended with the results of the energy-only

[4] FES Initial Brief at 3-11 (Aug. 16, 2013).

[5] IEU-Ohio Initial Brief at 7-9; ESP II Order at 75-76.

[6] CBP Order at 14.

[7] *Id.* at 16-18.

[8] Tr. Vol. I at 98-101.

auctions. The second component, the FCR, will collect the fixed costs currently collected through the FAC. These fixed costs relate to the capacity costs from AEP-Ohio's purchase power agreements with the Lawrenceburg and Ohio Valley Electric Cooperative ("OVEC") generating facilities. The capacity costs associated with the Lawrenceburg and OVEC purchase power agreements were also accounted for in the $188/MW-day price for capacity assessed to shopping load and ordered by the Commission to be reflected in base generation rates. In the CBP Order, the Commission found that this proceeding was not the appropriate place to address the double-recovery issue.[9] Subsequently, in a separate proceeding involving audits of AEP-Ohio's FAC for 2012, 2013 and 2014 ("*2012-2014 FAC Audit Cases*"), the Commission issued an Entry directing the auditor in that proceeding to review and investigate the double-recovery issue and recommend appropriate action to the Commission.[10]

In response to the CBP Order, AEP-Ohio raised four assignments of error. First, AEP-Ohio claims it is unlawful and unreasonable for the Commission to direct AEP-Ohio to reduce its base generation rates.[11] Second, AEP-Ohio argues that it is unlawful and unreasonable to defer resolution of the double-recovery issue to the *2012-2014 FAC Audit Cases*.[12] Third, AEP-Ohio argues that it is unlawful and unreasonable to allow the auditor selected in the *2012-2014 FAC Audit Cases* to audit

[9] CBP Order at 16.

[10] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry at 3-4 (Dec. 4, 2013).

[11] AEP-Ohio Application for Rehearing at 4-9.

[12] *Id.* at 9-20.

the double-recovery issue due to a conflict of interest.[13] Fourth, AEP-Ohio argues that the Commission should correct its erroneous statement on page 14 of the CBP Order, which stated that the winners in the energy-only auctions would pay AEP-Ohio for capacity.[14] As discussed below, AEP-Ohio's first three assignments of error are without merit and should be denied.

II. ARGUMENT

A. The ESP II Order lawfully requires AEP-Ohio to reduce its base generation rates once delivery of energy from the energy-only auctions begins

In AEP-Ohio's Assignment of Error I, AEP-Ohio alleges that the CBP Order is unlawful and unreasonable because it requires AEP-Ohio to reduce its base generation rates. AEP-Ohio advances three arguments to support this assignment of error. First, AEP-Ohio argues that the ESP II Order and ESP II Entry on Rehearing do not require AEP-Ohio to reduce its base generation rates once delivery of energy from the energy-only auctions begins. Second, AEP-Ohio claims that the record is insufficient to support an order in this case requiring AEP-Ohio to reduce its base generation rates. Third, AEP-Ohio asserts that the $188/MW-day price was applicable to its costs to provide wholesale capacity service whereas it provides a separate service to SSO customers that is bundled and, therefore, argues it is not appropriate to use the $188/MW-day price for capacity as part of its base generation rates for the load that is bid out in the energy-only auctions. AEP-Ohio's arguments are without merit.

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[13] *Id.* at 20-22.

[14] *Id.* at 22-24.

AEP-Ohio's first argument, concerning what is required by the ESP II Order, was previously advanced by AEP-Ohio in its post-hearing briefs in this case and rejected by the Commission in the CBP Order. AEP-Ohio has not presented any new arguments in support of its position. As explained by the Commission in the CBP Order, the Commission expressly found in the ESP II Order and ESP II Entry on Rehearing that AEP-Ohio could not continue to freeze base generation rates once the delivery of energy from the energy-only begins. *See* CBP Order at 13-14; ESP II Order at 52; ESP II Entry on Rehearing at 37-39. Thus, in the CBP Order, the Commission did not order AEP-Ohio to reduce its base generation rates; rather, the Commission directed AEP-Ohio to comply with the Commission's orders in the *ESP II Case* that required AEP-Ohio to reduce its base generation rates.

AEP-Ohio's next argument, that the record does not support the Commission's order in this case to reduce its base generation rates, is meritless because the Commission did not order that in this case. Further, as discussed by IEU-Ohio in its briefs in the *Capacity Case* and *ESP II Case*, the Commission did not require AEP-Ohio to reduce its base generation rates enough. The Commission should have priced the capacity provided to SSO customers at the price established by PJM Interconnection, L.L.C.'s ("PJM") Reliability Pricing Model ("RPM-Based Pricing").[15] However, that issue is not before the Commission in this proceeding and parties are prohibited from

[15] *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, Industrial Energy Users-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support, *in passim* (Aug. 1, 2012) (hereinafter, "*Capacity Case*"); *ESP II Case*, Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 18-22 (Sept. 7, 2012).

collaterally attacking this issue decided in the *ESP II Case*.[16] Accordingly, the Commission should reject AEP-Ohio's argument.

Further, AEP-Ohio argues that it is inappropriate to use the $188/MW-day price for capacity in base generation rates because that price relates to its costs to provide wholesale capacity service to competitive retail electric service ("CRES") providers and AEP-Ohio provides a bundled service to SSO customers. Initially, AEP-Ohio's argument fails because it is factually incorrect. The Commission directed AEP-Ohio to reduce its base generation rates in proportion to the amount of its SSO load that is unbundled and auctioned off through the energy-only auctions. Thus, the $188/MW-day price will only apply to the unbundled product.

Additionally, the Commission has already determined that AEP-Ohio provides the same capacity service to the shopping load and non-shopping load and therefore the service is comparable.[17]

> In the *ESP 2* decision below, the Commission determined *both a* fair and compensatory capacity rate and that it should be applied to shopping and non-shopping customers alike in non-discriminatory fashion. In doing so, the Commission correctly and consistently applied its findings from the companion *Capacity Case.* In that case, the Commission's rate determination methodology accounted for all of AEP Ohio's energy revenues and costs to serve its system-wide load, including both customers that take service from CRES providers (shopping customers) and standard-service-offer customers served by AEP Ohio (non-shopping customers) itself. *Capacity Case* (Opinion and Order at 33-36) (Jul. 2, 2012), IEU App. at 266-269. Imposing a different rate on non-shopping customers, as AEP Ohio proposes, is improper and discriminatory. The *Capacity Case* determined AEP Ohio's *actual* capacity costs to serve its system-wide load. *Id.* Whether a customer takes service from a CRES provider or AEP Ohio makes no difference - both types of customers ultimately use the same facilities and the same resources at the same

[16] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 116 Ohio St.3d 9 (1985).

[17] CBP Order at 13 (*quoting* ESP II Entry on Rehearing at 37); *The Kroger Co. v. Pub. Util. Comm.*, S.Ct. Case No. 2013-521, Third Merit Brief of Public Utilities Commission of Ohio at 13-15 (Dec. 10, 2013).

> time for capacity. In other words, both types of customers - shopping and non-shopping - are similarly situated. While Ohio law does not prohibit rate discrimination *per se*, R.C. 4905.33 does prohibit charging different rates when the utility is performing "a like and contemporaneous service under substantially the same circumstances and conditions." *Consumers' Counsel v. Pub. Util. Comm.*, 19 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 23; R.C. 4905.33, App. at 1. Discriminatory rates are generally prohibited under R.C. 4928.02(A), as well. Because both shopping and non-shopping customers use the same capacity resources, at the same time, the Commission logically and lawfully applied AEP Ohio's actual capacity cost to both types of customers. To do otherwise would result in arbitrary rate discrimination prohibited by law.[18]

AEP-Ohio's arguments in its application for rehearing also amount to a collateral attack on the Commission's findings in the ESP II Order and ESP II Entry on Rehearing. *Res judicata* and collateral estoppel are applicable to Commission proceedings and bar the attempts of parties to relitigate issues decided in prior proceedings that are finally decided.[19]

Accordingly, the Commission should deny AEP-Ohio's first assignment of error.

III. THE COMMISSION CORRECTLY DETERMINED THAT AEP-OHIO'S RATES NEED TO BE AUDITED TO ENSURE THAT AEP-OHIO IS NOT DOUBLE-RECOVERING THE SAME COSTS

During the evidentiary hearing in this proceeding, AEP-Ohio's witness admitted that the capacity costs related to its contracts with the Lawrenceburg and OVEC generating facilities that had been recovered through the FAC and will be recovered through the FCR were also included in AEP-Ohio's proposed cost-based capacity charge of $355/MW-day that it sought in the *Capacity Case*. Since the Capacity

[18] *The Kroger Co. v. Pub. Util. Comm.*, S.Ct. Case No. 2013-521, Third Merit Brief of Public Utilities Commission of Ohio at 13-15 (Dec. 10, 2013) (underline added).

[19] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 116 Ohio St.3d 9 (1985).

Order's[20] adjustments to AEP-Ohio's requested rate were not related to the Lawrenceburg or OVEC capacity costs, it is apparent that there is a double-recovery of these costs. Although two Commissioners specifically noted the potential double-recovery, the Commission concluded in the CBP Order that this was not the correct proceeding to address the double-recovery issue. Subsequently, the Commission directed the auditor in AEP-Ohio's *2012-2014 FAC Audit Cases* to conduct an investigation to determine if and to what extent AEP-Ohio was double-recovering capacity costs.[21]

AEP-Ohio seeks an order on rehearing from the Commission holding that either AEP-Ohio is not double-recovering certain capacity costs or, alternatively, that parties are presenting an improper collateral attack of prior decisions. As discussed below, AEP-Ohio's arguments in regard to its second assignment of error are without merit.

A. AEP-Ohio is provided compensation through base generation rates that exceeds its company-wide cost of capacity and additionally is explicitly provided compensation for the Lawrenceburg and OVEC capacity costs through the FAC/FCR and the $188/MW-day price for capacity

In its Assignment of Error II.A, AEP-Ohio argues that because its base generation rates are not cost-based, they do not recover any costs and therefore a double-recovery cannot exist. In Assignment or Error II.D, AEP-Ohio asserts the record in this case demonstrates that a double-recovery does not exist. As discussed below, AEP-Ohio's arguments are without merit.

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[20] *Capacity Case*, Opinion and Order (July 2, 2012) (hereinafter "Capacity Order").

[21] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry at 3-4 (Dec. 4, 2013).

From the outset, AEP-Ohio's argument ignores the fact that it is recovering revenue that compensates AEP-Ohio for its capacity costs in ***three*** separate places. AEP-Ohio recovers its OVEC and Lawrenceburg capacity costs through: (1) the current FAC rates in conjunction with the newly-authorized FCR; (2) through the $188/MW-day price for capacity; and (3) through base generation rates. AEP-Ohio then claims, without citing any evidence in the record, that the record in this case confirms there is not a double-recovery.[22] In fact, in its Assignment of Error II.D titled "A threshold analysis using the ***existing record*** confirms that the allegations of double recovery are meritless,"[23] AEP-Ohio does not provide a citation to the record in this case or any other case. Of course, as IEU-Ohio argued in its post-hearing briefs, the record in this case confirms that a double-recovery exists.[24]

Further, a review of AEP-Ohio's arguments demonstrate that its arguments are completely nonsensical and do not actually address the double-recovery issue. First, AEP-Ohio introduces a mathematical equation that is completely meaningless. Specifically, AEP-Ohio states that it requested a capacity charge of $355/MW-day, that the Commission found AEP-Ohio's cost of capacity was $188/MW-day (a difference of $167/MW-day), and the OVEC and Lawrenceburg capacity costs amount to approximately $38/MW-day.[25] AEP-Ohio then asserts that because $38/MW-day is less than $167/MW-day, there cannot be a double-recovery. AEP-Ohio, however, fails to provide a reasoned explanation as to how its mathematical equation demonstrates that

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[22] *See* AEP-Ohio Application for Rehearing at 16-20.

[23] AEP-Ohio Application for Rehearing at 1 (emphasis added).

[24] IEU-Ohio Initial Brief at 9-11 (*citing* Tr. Vol. I at 98-101).

[25] AEP-Ohio Application for Rehearing at 16-18.

a double-recovery does not exist. And, since the reduction from $355 to $188/MW-day was almost entirely related to the Commission adopting an energy credit,[26] and because the $188/MW-day price still included all of the OVEC and Lawrenceburg capacity costs, it is clear that this equation cannot prove a double-recovery does not exist.

Second, AEP-Ohio argues that if the Commission updated the inputs in its capacity pricing formula, it would be clear that a double-recovery is not occurring. AEP-Ohio fails to explain, however, how updating its cost of capacity would eliminate a double-recovery because that cost of capacity would still include the OVEC and Lawrenceburg capacity costs. Additionally, as IEU-Ohio has previously argued, AEP-Ohio is only entitled to compensation at the market-established RPM-Based Prices.[27] Finally, AEP-Ohio's argument should be rejected because AEP-Ohio had an opportunity to present these arguments in this case and failed to do so. AEP-Ohio witness Roush was cross-examined regarding the double-recovery issue, but AEP-Ohio failed to address this issue in its rebuttal testimony. AEP-Ohio also failed to argue in its briefs that updating the inputs into its capacity pricing formula would prove a double-recovery does not exist. Accordingly, the Commission should reject AEP-Ohio's argument.

In sum, the double-recovery issue is real and should be fully audited to ensure that customers are not being charged multiple times for the same costs. The

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[26] Capacity Order at 33-36.

[27] *Capacity Case*, Industrial Energy Users-Ohio's Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support, *in passim* (Aug. 1, 2012); *ESP II Case*, Industrial Energy Users-Ohio's Application for Rehearing of the August 8, 2012 Opinion and Order and Memorandum in Support at 18-22 (Sept. 7, 2012).

Commission has recognized as much and has ordered an audit of this very issue.[28] Accordingly, the Commission should deny AEP-Ohio's Assignments of Error II.A and II.D.

B. The Commission has recently confirmed that there is no difference in the capacity service provided to CRES providers/shopping customers and the capacity service provided to non-shopping customers

In Assignment of Error II.B, AEP-Ohio argues that the Commission's directive that AEP-Ohio blend the $188/MW-day price with current base generation rates is improper because the capacity service provided to the shopping load is different from the capacity service provided to non-shopping load.[29] AEP-Ohio supports this argument by claiming that the $188/MW-day price applicable to shopping load is a wholesale charge and the FCR and base generation rates are retail charges. AEP-Ohio's argument is meritless.

Even if AEP-Ohio were correct that one charge is wholesale and one is retail, both charges are collecting the same set of system-wide costs and are related to the same service. As explained by the Commission in its third merit brief in the appeal of the *ESP II Case*:

> *Whether a customer takes service from a CRES provider or AEP Ohio makes no difference - both types of customers ultimately use the same facilities and the same resources at the same time for capacity. In other words, both types of customers - shopping and non-shopping - are similarly situated.*[30]

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[28] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry at 3-4 (Dec. 4, 2013).

[29] AEP-Ohio Application for Rehearing at 12-13.

[30] *The Kroger Co. v. Pub. Util. Comm.*, S.Ct. Case No. 2013-521, Third Merit Brief of Public Utilities Commission of Ohio at 14 (Dec. 10, 2013).

Additionally, AEP-Ohio's argument is factually incorrect as the $188/MW-day price is not billed and collected entirely through a wholesale charge; it is also collected through a retail charge. A portion of the $188/MW-day price equal to the RPM-Based Price is collected through a wholesale charge collected from CRES providers; AEP-Ohio collects the remainder through a non-bypassable retail charge.

Accordingly, the Commission should reject AEP-Ohio's arguments in Section II.B of its application for rehearing.

C. The Commission correctly determined (in a separate proceeding) that there should be an audit of AEP-Ohio's FAC/FCR and the deferred portion of the $188/MW-day capacity price not collected from CRES providers to ensure AEP-Ohio does not charge customers for the same costs multiple times

In Assignment of Error II.C, AEP-Ohio argues that auditing its apparent double-recovery of certain capacity costs amounts to improper collateral attacks on prior Commission orders.[31] In support of this assignment of error, AEP-Ohio claims that the Commission previously determined that its base generation rates are not cost-based rates and found that the FAC and base generation rates are reasonable. AEP-Ohio's argument is without merit.

First, AEP-Ohio's argument should be rejected because it does not challenge a finding in the CBP Order. In the CBP Order, the Commission only held that this was not the proper case to raise arguments related to the apparent double-recovery. The Commission, subsequently and through an entry in a separate proceeding, selected an auditor to audit AEP-Ohio's FAC for 2012 through 2014 and directed that auditor to

[31] AEP-Ohio Application for Rehearing at 13-15.

include an analysis of the double-recovery issue in its audit report.[32] Because AEP-Ohio's argument in Assignment of Error II.C does not challenge any aspect of the CBP Order, the arguments should be denied.

Additionally, AEP-Ohio's argument is meritless because an audit of the double-recovery issue will not be a collateral attack on the Commission's prior orders. AEP-Ohio argues that an audit will amount to two separate collateral attacks. First, AEP-Ohio argues that an audit will collaterally attack the Commission's prior findings that hold that AEP-Ohio's base generation rates are cost-based. Second, AEP-Ohio argues that an audit will collaterally attack the Commission's prior finding that base generation rates and the FAC mechanism are reasonable. Neither of these arguments is true.

An audit on the double-recovery issue will look to see if AEP-Ohio is already compensated for the Lawrenceburg and OVEC capacity costs outside of the FAC/FCR. If the audit concludes that AEP-Ohio is already compensated for these costs outside of the FAC/FCR, then certain adjustments should be made to ensure that customers are not providing AEP-Ohio compensation for the same costs multiple times. A solution to a double-recovery would be to disallow any future collection of the OVEC and Lawrenceburg capacity costs through the FAC/FCR and credit the double-recovered costs from the audit period against the FAC or a deferred regulatory asset on AEP-Ohio's books. None of this will require a finding by the Commission that base generation rates are cost-based or are unreasonable and therefore there will not be a collateral attack on base generation rates.

[32] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.* Entry at 3-4 (Dec. 4, 2013)

Additionally, an audit of the double-recovery issue will not result in a collateral attack on the FAC mechanism. When the FAC was authorized in AEP-Ohio's first ESP, and reauthorized in the *ESP II Case*, it was done so subject to financial and prudency audits.[33] Thus, an audit of the costs collected through the FAC/FCR conforms to the Commission's prior orders.

In sum, AEP-Ohio's arguments in Assignment of Error II.C are not ripe for review in this case because they do not challenge the CBP Order. Additionally, as discussed above, the arguments are otherwise without merit.

IV. IT IS REASONABLE FOR THE COMMISSION TO HAVE DIRECTED THE AUDITOR IN AEP-OHIO'S FAC AUDIT CASES TO REVIEW WHETHER, AND TO WHAT EXTENT, AEP-OHIO IS DOUBLE-RECOVERING CERTAIN CAPACITY COSTS

In Assignment of Error III, AEP-Ohio argues that the Commission should determine in this case whether AEP-Ohio is double-recovering certain capacity costs.[34] AEP-Ohio also argues that it would be unreasonable to allow the auditor in its FAC audit cases to audit AEP-Ohio to determine if AEP-Ohio is double-recovering certain capacity costs.[35] AEP-Ohio's arguments are without merit.

The Commission has already held that the *2012-2014 FAC Audit Cases* are the appropriate place to review the double-recovery issue.[36] In response, AEP-Ohio argues

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[33] The Commission has already conducted a financial and prudency audit for AEP-Ohio's 2009 FAC, and a hearing regarding audits of AEP-Ohio's 2010 and 2011 FAC was recently completed. *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order (Jan. 23, 2012).

[34] AEP-Ohio Application for Rehearing at 20-22.

[35] *Id.*

[36] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.* Entry at 3-4 (Dec. 4, 2013); CBP Order at 16; CBP Order, *Concurring Opinion of Commissioners Steven D. Lesser and M. Beth Trombold*, at 1.

that the FAC audit proceeding is not the appropriate place to review its capacity costs because "there is no connection between the FAC, which established one component of the SSO provided to non-shopping retail customers, and wholesale costs of capacity furnished to CRES providers ... ."[37] This statement is clearly incorrect as the Commission has already recognized that the capacity service provided to the shopping load and to the non-shopping load is the same and has already held that the $188/MW-day price is AEP-Ohio's system-wide "cost" of capacity:

> In the *ESP 2* decision below, the Commission determined *both a* fair and compensatory capacity rate and that it should be applied to shopping and non-shopping customers alike in non-discriminatory fashion. ... Imposing a different rate on non-shopping customers, as AEP Ohio proposes, is improper and discriminatory. The *Capacity Case* determined AEP Ohio's *actual* capacity costs to serve its system-wide load. *Id.* Whether a customer takes service from a CRES provider or AEP Ohio makes no difference - both types of customers ultimately use the same facilities and the same resources at the same time for capacity. In other words, both types of customers - shopping and non-shopping - are similarly situated. ... Because both shopping and non-shopping customers use the same capacity resources, at the same time, the Commission logically and lawfully applied AEP Ohio's actual capacity cost to both types of customers. To do otherwise would result in arbitrary rate discrimination prohibited by law.[38]

Additionally, AEP-Ohio also argues that it is inappropriate to defer an audit of the double-recovery issue to AEP-Ohio's *2012-2014 FAC Audit Cases* because the auditor in those cases (Energy Ventures Analysis, Inc. or "EVA") had previously audited AEP-Ohio's proposed $355/MW-day capacity charge in the *Capacity Case* on behalf of the Commission's Staff. AEP-Ohio claims that allowing EVA to conduct the audit to determine whether AEP-Ohio is double-recovering certain capacity costs would allow

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[37] AEP-Ohio Application for Rehearing at 20.

[38] *The Kroger Co. v. Pub. Util. Comm.*, S.Ct. Case No. 2013-521, Third Merit Brief of Public Utilities Commission of Ohio at 13-15 (Dec. 10, 2013).

EVA to audit its own audit. AEP-Ohio claims that such an outcome would result in a conflict of interest.[39]

Initially, AEP-Ohio's argument should be rejected because there will not be an audit of EVA's analysis from the *Capacity Case*. In the *Capacity Case*, EVA reviewed AEP-Ohio's requested $355/MW-day capacity charge, and proposed certain modifications to the fixed cost portion of the charge and an energy credit. The upcoming audit in AEP-Ohio's *2012-2014 FAC Audit Cases* will look to see if the costs collected through the FAC/FCR are already being recovered elsewhere; it will not require EVA to propose any changes to the $188/MW-day capacity price. Thus, AEP-Ohio's characterization that EVA will audit its own audit is incorrect.

Further, there is not a conflict of interest. The conflict of interest case cited by AEP-Ohio dealt with a situation where the independent auditor in an electric fuel component ("EFC") audit proceeding also contracted with an adverse party in that proceeding to provide testimony that was adverse to the utility in a separate pending case before the Commission.[40] Here, EVA provided an independent audit for the Commission's Staff in the *Capacity Case*, and will be providing an independent audit in *AEP-Ohio's 2012-2014 FAC Audit Cases*. This is akin to an independent auditor in an FAC audit proceeding making a recommendation adverse to a utility company, and then conducting an audit of that utility company's FAC for a subsequent year. This has

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[39] AEP-Ohio Application for Rehearing at 21 (*citing In the Matter of the Regulation of Electric Fuel Component Contained within the Rate Schedules of the Dayton Power & Light Co.*, Case No. 86-07-EL-EFC, Opinion and Order at 70-71 (Feb. 18, 1987)).

[40] *In the Matter of the Regulation of Electric Fuel Component Contained within the Rate Schedules of the Dayton Power & Light Co.*, Case No. 86-07-EL-EFC, Opinion and Order at 70-71 (Feb. 18, 1987).

regularly occurred for several decades, starting with audits in EFC cases and continuing today with audits of FAC cases. There is no conflict of interest.

Further, the solution to the problem is not to move the audit to this proceeding. If there were a conflict of interest, the Commission can remedy that conflict in the *2012-2014 FAC Audit Cases* by selecting a different auditor to audit the double-recovery issue.

Accordingly, AEP-Ohio's Assignment of Error III should be denied.

V. CONCLUSION

For the reasons stated above, the Commission should deny AEP-Ohio's first three assignments of error. The Commission properly directed AEP-Ohio to comply with the ESP II Order and ESP II Entry on Rehearing and properly directed the auditor in the *2012-2014 FAC Audit Cases* to review and investigate the apparent double-recovery of the Lawrenceburg and OVEC capacity costs.

Respectfully submitted,

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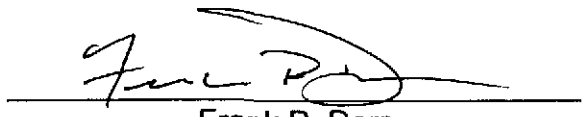
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Application for Rehearing* was served upon the following parties of record this 23rd day of December 2013 *via* electronic transmission, hand-delivery or first class mail, U.S. postage prepaid.



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