BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider	**)** **)** **)** **)**	**Case No. 14-1186-EL-RDR**

OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO THE MOTION OF INDUSTRIAL ENERGY USERS – OHIO FOR AN ORDER PERMITTING THE FILING OF ADDITIONAL AUTHORITY IN SUPPORT OF ITS MOTION TO DISMISS

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The Industrial Energy Users – Ohio (IEU) has filed a motion seeking to submit *PPL Energy Plus, LLC v. Solomon*, No. 13-4330 (3d Cir. Sept. 11, 2014), as additional authority in support of its motion to dismiss the Application of the Ohio Power Company (dba AEP Ohio) in this case. The motion should be denied. Like its motion to dismiss, IEU's motion to submit *Solomon* is an impermissible attempt to resurrect a federal preemption argument the Commission long ago rejected, and IEU should not be allowed to needlessly complicate the narrow issues presented in this case. Moreover, the content of IEU's motion includes sur-reply argument in support of IEU's motion to dismiss, which is not permitted by OAC Rule 4901-1-12. In any event, *Solomon* is inapposite and fails to support IEU's preemption claims.

As an initial matter, *Solomon* has no bearing on this case because IEU's preemption argument was fully briefed in the underlying *Capacity Charge* proceeding (Case No. 10-2929-EL-UNC), and the Commission held unambiguously that its decision was *not* preempted by federal law. (*See Capacity Charge*, Opinion & Order 9, 12-14, 21-24; Oct. 17, 2012 Entry on Rehearing 14-15.) That legal conclusion is *res judicata*, and if *Solomon* has any bearing on the Commission's preemption ruling (it does not, as described below), it may be addressed by the Supreme Court in the pending appeal of the *Capacity Charge* decision (Sup. Ct. No. 2013-0228). Indeed, IEU has submitted *Solomon* to the Court as additional authority in that appeal. (*See* Sup. Ct. No. 2013-0228, Second Notice of Additional Authority.) But as discussed in AEP Ohio's

memorandum in opposition to IEU's motion to dismiss, IEU should not be permitted in this proceeding to reopen questions long ago resolved by the Commission.

In addition, the preemption argument for which IEU cites *Solomon* falls far beyond the scope of this proceeding. AEP Ohio filed its Application in this case for the sole purpose of implementing one part of the Commission's decision in the *ESP II* proceeding (Case Nos. 11-346-EL-SSO et al.) – namely, to verify the capacity deferral balance and finalize the Retail Stability Rider (RSR) rate for the post-ESP term collection period. *See ESP* II, Opinion & Order 36. *Solomon* has nothing to do with verifying AEP Ohio's capacity deferral balance and thus has no place in this relatively narrow proceeding.

In the event that the Commission grants IEU's motion to submit and consider *Solomon*, AEP Ohio will briefly address the reasons why the Third Circuit's decision does not support IEU's preemption argument. *Solomon* involved a New Jersey program in which electric distribution companies were required to make payments to an independent generator to guarantee that the generator received not the RPM auction price for capacity, but rather a higher wholesale price set by the state commission. The Third Circuit struck down the program because the payments effectively supplanted the FERC-approved RPM capacity price and thereby encroached into FERC's exclusive jurisdiction under the Federal Power Act to regulate wholesale prices. *See Solomon*, Slip Op. 23-29.

The distinctions between the program at issue in *Solomon* and the Commission's *Capacity Charge* decision are legion. First, during the time period covered by the *Capacity Charge* decision, AEP Ohio has participated in the Fixed Resource Requirement (FRR) option. Under the FRR provisions of the Reliability Assurance Agreement (RAA) governing the PJM regional transmission organization, FERC *expressly authorized* the Commission to set the

Capacity Service prices at issue in the *Capacity Charge* case. *See Capacity Charge*, Opinion & Order 7 (discussing RAA Schedule 8.1, § D.8); *see also id.* at 9, 12-14, 21-24. No such FERC authorization existed in the *Solomon* case because New Jersey utilities have declined to participate in FRR. Thus, whereas New Jersey's attempt to supplant the FERC-mandated RPM auction price was at odds with FERC's regulation of wholesale prices in PJM, the Commission's *Capacity Charge* decision followed FERC's express permission for states to set capacity rates in the context of the FRR.

Second, if there were any doubt that FERC had authorized the Commission's *Capacity Charge* decision, that doubt was eliminated when AEP Ohio submitted – and FERC accepted[1] – an appendix to the RAA that expressly set out the wholesale component of the state compensation mechanism adopted by the Commission. *See PJM Interconnection, LLC*, 143 FERC ¶ 61,164 (May 23, 2013). FERC reiterated that under Schedule 8.1 of the RAA, "a state is permitted to establish the [state] compensation mechanism in a state regulatory jurisdiction that has implemented retail choice." *Id.* ¶ 25. It further found that AEP's proposed appendix, which reflected the state compensation mechanism approved by the Commission, was "consistent with the RAA." *Id.* ¶ 26. Thus, FERC has not only approved state compensation mechanisms in general; it has considered precisely the mechanism adopted by the Commission in the *Capacity Charge* case and found it to be "consistent" with FERC regulations. Given FERC's clear position here, any comparison with *Solomon* – where there was no such FERC guidance – rings hollow.

[1] FERC accepted AEP Ohio's proposed appendix subject to a compliance filing not relevant here.

Third, even if FERC had not spoken so clearly, IEU's analogy to *Solomon* breaks down because IEU's true grievance – and the subject of this case – is the *RSR*, which is a *retail* rate unquestionably within the Commission's jurisdiction. The plaintiffs in *Solomon* were (in part) electric distribution companies that claimed that New Jersey violated the Federal Power Act by mandating wholesale capacity payments between the plaintiffs and a generator. Here, however, IEU represents *retail* customers whose true grievance is not the wholesale capacity rate paid by CRES entities to AEP Ohio (or any other wholesale rate). Rather, IEU is only participating in this case because it objects to its members paying the RSR, which is a *retail* rate. Wholly apart from the Commission's authority under the FRR to set the wholesale Capacity Service rate in the *Capacity Charge* decision (which, as discussed above, is clear), the Commission's authority to implement the *retail* RSR rate established in *ESP II* cannot be questioned under the Federal Power Act. With narrow exceptions not relevant here,[2] the Federal Power Act does *not* preempt state regulation of retail rates. *See* Federal Power Act § 201(b), 16 U.S.C. § 824(b) (FERC's exclusive jurisdiction extends to "the sale of electric energy at *wholesale*" but "*not* . . . to any other sale of electric energy" (emphasis added)); *see also Solomon*, Slip Op. 11 (holding only that "[t]he federal government . . . has exclusive control over interstate rates for *wholesales* of electricity capacity" (emphasis added)). Thus, unlike *Solomon*, which curtailed state meddling with FERC-approved *wholesale* rates, the Commission's authority to implement the RSR, a *retail* rate, is in no way limited by federal law. Since implementing the RSR is the sole matter at issue in this case, IEU's reliance on *Solomon* should be rejected.

[2] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and its progeny, which recognized narrow limits on states' retail ratemaking authority, are plainly irrelevant here, and IEU does not rely on them.

CONCLUSION

For the reasons set forth above, IEU's motion to submit additional authority in support of its motion to dismiss should be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ohio Power Company's Memorandum in Opposition has been served upon the below-named counsel by electronic mail this 2nd day of October, 2014.

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Summary: Memorandum in Opposition electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company