BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of Capacity Charges of Ohio Power Company and Columbus Southern Power Company	)))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
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
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company	))	Case No. 13-1892-EL-FAC

OHIO POWER COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR A CONSOLIDATED RESOLUTION OF MULTIPLE PROCEEDINGS

Ohio Power Company ("AEP Ohio") submits this Reply Memorandum in support of its Motion for a Consolidated Resolution and in response to the Joint Memoranda Contra filed by the Ohio Energy Group and the Ohio Consumers' Counsel ("OEG/OCC") and by the Ohio Manufacturers' Association Energy Group and the Kroger Company ("OMAEG/Kroger" and, collectively with OEG/OCC, "Intervenors").

As discussed below, Intervenors offer no objection to AEP Ohio's request to consolidate the open issues in the above-captioned proceedings. Thus, the Commission should not hesitate

to grant AEP Ohio's request to issue a consolidated procedural schedule (and, eventually, issue a consolidated decision) for these proceedings.

Moreover, Intervenors' objections to AEP Ohio's procedural schedule are meritless. There have already been full records established in these proceedings, and the limited issues remaining for decision – how to implement the Supreme Court's remand directives and how to resolve the erroneous "double recovery" allegation – are discrete and amendable to an expeditious procedural schedule and Commission decision. Therefore, the Commission should grant AEP Ohio's proposed procedural schedule.

On the substance of AEP Ohio's motion, Intervenors argue that AEP Ohio's request to adjust the deferred capacity balance to reflect a corrected energy credit would violate the prohibition on retroactive ratemaking. But in making this claim, Intervenors engage in selective, results-oriented reasoning that is not only profoundly unfair, but also manifestly against the clear reasoning of the Supreme Court's decisions in the *ESP II Appeal* and *Capacity Charge Appeal*.[1] Intervenors do not oppose AEP Ohio's request to consolidate the remand issues from the *ESP II Appeal* and *Capacity Charge Appeal*. And, critically, they do not question that the Commission, pursuant to the Court's remand order in the *ESP II Appeal*, should adjust AEP Ohio's deferred capacity balance to eliminate the "nondeferral part of the RSR during the ESP." Yet on the energy credit issue in the *Capacity Charge Appeal*, Intervenors arbitrarily claim that the very same remedy – adjusting the deferred capacity balance to correct an error identified on appeal – would constitute unlawful "retroactive ratemaking."

That position is inconsistent and cannot be reconciled with the Supreme Court's decisions. The only way that the Court's remand directive in the *ESP II Appeal* makes sense is if

[1] In this Reply, AEP Ohio will use the abbreviations and short forms set forth in the Table of Abbreviations appended to AEP Ohio's Motion for a Consolidated Resolution.

adjusting a deferral balance to correct an error does *not* violate the prohibition on retroactive ratemaking (otherwise, the Court's directive to eliminate the "nondeferral part of the RSR" would be unlawful). Thus, AEP Ohio is merely requesting that the Commission adopt a consistent approach in implanting the Court's remand directives: If the Commission is to adjust the deferral balance to correct an error in the ratepayers' favor (the "nondeferral part of the RSR"), it must also adjust the deferral balance to correct an error in AEP Ohio's favor (the erroneous energy credit).

Lastly, OEG/OCC argue that so-called "after-the-fact" evidence in the testimony of AEP Ohio witness William Allen should be stricken. But the motion to strike is procedurally unsound because it improperly seeks to insinuate evidentiary issues (which can be dealt with shortly before or during the hearing) into a response to a substantive motion, where they have no place. It is also procedurally improper because OEG/OCC's objection is not truly evidentiary at all; the motion to strike merely expresses OEG/OCC's disagreement with the *merits* of Mr. Allen's testimony, not its admissibility. Moreover, on substance, the motion to strike should be denied because the challenged portions of Mr. Allen's testimony are helpful and highly probative as the Commission implements the *Capacity Charge Appeal* directive to "correct [the] error" on the energy credit issue. 2016-Ohio-1607, ¶ 51. Mr. Allen's testimony demonstrates that on several issues, actual data following the Commission's decision in the *Capacity Charge* proceeding vindicates the arguments AEP Ohio made about Staff's faulty inputs in the energy credit calculation.

In any event, if the Commission were to prohibit so-called "after-the-fact" evidence on the energy credit issue, then that rule would have to apply consistently, and Intervenors' witnesses must likewise be prohibited from addressing actual data following the Commission's

July 2, 2012 *Capacity Charge* Opinion and Order – a result, by the way, which would further streamline these proceedings and strengthen the case for an expedited procedural schedule.

I. The Commission should consolidate these four interrelated proceedings for a joint procedural schedule and decision.

As an initial matter, Intervenors offer no reason why the Commission should deny AEP Ohio's request to combine the open issues in these four interrelated proceedings for a consolidated procedural schedule and decision. OEG/OCC expressly state that they "have no objection to AEP Ohio's request that the PUCO consolidate and resolve all of the above-captioned proceedings simultaneously." OEG/OCC Mem. Contra at 4.[2] OMAEG/Kroger, for their part, oppose AEP Ohio's requested procedural schedule but do not offer any reason why it would be improper to decide the cases together.

As AEP Ohio noted in its motion, the Ohio Supreme Court's recent decisions and remands in the *Capacity Charge Appeal*, 2016-Ohio-1607, and the *ESP II Appeal*, 2016-Ohio-1608, present related, interlocking issues for the Commission to resolve, since both Supreme Court decisions impact the outstanding balance for AEP Ohio to recover through the RSR – all of which ultimately culminates to affect the ongoing *RSR Implementation Plan*. Those related issues, moreover, are further intertwined with another Commission proceeding addressing the (incorrect) allegation that AEP Ohio has "double recovered" capacity costs. Accordingly, the appropriate outcome – as a matter not only of logic, but also of expediency and conservation of resources – is for the Commission to adopt a consolidated procedural schedule for, and issue a unified decision of, all open issues in the *Capacity Charge*, *ESP II*, *FAC Audit*, and *RSR Implementation Plan* cases.

[2] OEG/OCC filed two documents, a "Memorandum Contra and Motion to Strike" and a "Memorandum in Support," with consecutive pagination. For ease of reference in this Reply, AEP Ohio will refer to these filings jointly as "OEG/OCC Mem. Contra."

II. The Commission should grant AEP Ohio's request for a procedural schedule.

OEG/OCC and OMAEG/Kroger offer various complaints concerning AEP Ohio's proposed procedural schedule. *See* OEG/OCC Mem. Contra at 4; OMAEG/Kroger Mem. Contra at 8-11. The complaints ring hollow. There were already extensive proceedings in the *ESP II* case, the *Capacity Charge* case, and the *RSR Implementation Plan* case, and there was a full audit in the *FAC Audit* case. *See, e.g.*, OMAEG/Kroger Mem. Contra at 9 (noting that the "ESP II proceeding alone included more than 70 witnesses and almost one month of an evidentiary hearing"). Thus, the Commission already has a well-developed record on which to base a consolidated decision here. The only outstanding issues are how to implement the remand in the *ESP II Appeal* and *Capacity Charge Appeal* and how to resolve the erroneous "double recovery" allegations in the *FAC Audit* case. Those are discrete, limited topics on which the parties can easily provide testimony and the Commission can reach a quick decision. There is no need for the excessive delay advocated by Intervenors.

OEG/OCC and OMAEG/Kroger complain that AEP Ohio's proposed schedule conflicts with other pending Commission matters. Intervenors now make this very same scheduling argument in virtually every Commission proceeding. The Commission will never be able to issue timely rulings on the important matters on its docket if it requires months between hearings, as Intervenors apparently would prefer. It is absurd, moreover, for Intervenors to continue to claim that they lack the resources to litigate multiple Commission proceedings. OCC has a large staff, and OEG, OMAEG, and Kroger are represented here by well-heeled law firms with considerable resources. They can litigate multiple matters.[3]

[3] OMAEG/Kroger further claim that AEP Ohio's proposed schedule would violate "basic due process rights contemplated by the law." OMAEG/Kroger Memo Contra 10. Once again, OMAEG/Kroger have invoked "due process" as if the mere incantation of these talismanic words were a sound legal argument. It is not. There is a vast body of case law limiting the Due Process Clauses of the U.S. and Ohio

III. AEP Ohio's requested adjustment to the deferred capacity balance does not violate the prohibition on retroactive ratemaking.

OEG/OCC and OMAEG/Kroger argue that AEP Ohio's request to implement the *Capacity Charge Appeal* remand by correcting the deferred capacity balance to reflect a proper energy credit violates the prohibition on retroactive ratemaking. OEG/OCC Mem. Contra at 5-8; OMAEG/Kroger Mem. Contra at 8. AEP Ohio fully supports the well-established precedent establishing the prohibition on retroactive ratemaking. Here, however, the Ohio Supreme Court in the *ESP II Appeal* determined that the rule against retroactive ratemaking does *not* prohibit the Commission from adjusting AEP Ohio's deferred capacity balance to correct errors identified on appeal. That is precisely what AEP Ohio is requesting with respect to the corrected energy credit.

In the *ESP II Appeal*, the Court held that the "nondeferral part of the RSR during the ESP" was unlawful. 2016-Ohio-1608, ¶ 40. For a remedy, the Court noted that AEP Ohio "is currently collecting the deferred capacity costs with carrying charges through the RSR." *Id.* ¶ 39. Thus, the Court "order[ed] the commission *to adjust the balance of [AEP Ohio's] deferred capacity costs* to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP." *Id.* ¶ 40 (emphasis added); *see also id.* ("remand[ing] this matter to the commission to determine that amount and *offset the balance of deferred capacity costs* by the amount determined" (emphasis added)).

This ordered remedy in the *ESP II Appeal* only makes sense if the prohibition on retroactive ratemaking does *not* prevent the Commission from adjusting a deferral balance to

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Constitutions, and OMAEG/Kroger have engaged with none of it. All due process requires is "notice and an opportunity to be heard," *State v. Hayden*, 2002-Ohio-4169, ¶ 6 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)), which OMAEG/Kroger surely will receive here. On matters of scheduling in particular, courts are loath to find due process violations, holding that "[o]rders granting or refusing continuance as well as orders setting time for argument or time for filing briefs generally rest . . . in the sound discretion of the commission." *City of Akron v. Pub. Utilities Comm'n*, 5 Ohio St. 2d 237, 241 (1966).

correct an error. By the time the Court issued its opinion, AEP Ohio had already fully collected the "nondeferral part of the RSR during the ESP." That is, following the expiration of AEP Ohio's ESP III, none of the deferred capacity balance was attributable to the "nondeferral part of the RSR during the ESP"; rather, the entire deferral balance was attributable to the State Compensation Mechanism ("SCM") that the Court *upheld*. Nonetheless, the Court ordered the Commission to "adjust" the deferred capacity balance to "eliminate the overcompensation" caused by the unlawful "nondeferral part of the RSR." *Id.* ¶ 40. That remedy would not be possible if the prohibition on retroactive ratemaking prohibited the Commission from adjusting a deferral balance, as OEG/OCC and OMAEG/Kroger argue here. Instead, the clear – and only – conclusion that can be drawn from the Court's ordered remedy in the *ESP II Appeal* is that the prohibition on retroactive ratemaking does *not* prohibit the Commission from adjusting a deferral balance relating to the same costs in order to correct an error as directed by the Court on remand.

Here, what AEP Ohio is proposing with respect to the energy credit is precisely what the Court ordered with respect to the nondeferral portion of the RSR: The Commission should "adjust the balance of [AEP Ohio's] deferred capacity costs," *id.* ¶ 40, in order to correct the Commission's "clear and prejudicial" error on the energy credit, *Capacity Charge Appeal*, 2016-Ohio-1607, ¶ 57. That is not unlawful retroactive ratemaking. It is the only consistent way to interpret the Court's remands in the *ESP II Appeal* and *Capacity Charge Appeal*.

On the topic of consistency, it is notable that OEG/OCC and OMAEG/Kroger do not argue that it would violate the prohibition on retroactive ratemaking for the Commission to adjust the deferral balance to eliminate the "nondeferral part of the RSR." *See, e.g.*, OEG/OCC Mem. Contra at 2. Yet it would be just as impermissibly "retroactive," under their logic, to adjust the deferral balance to correct the error related to the nondeferral portion of the RSR as it

would be to adjust the deferral balance to correct the error related to the energy credit. If anything, it would be *more* "retroactive" to adjust the deferral to eliminate the nondeferral portion of the RSR, since that amount was fully collected by the end of ESP III, whereas the SCM portion of the RSR (which incorporates the energy credit) is what is being collected on a going-forward basis. In any event, if Intervenors were correct that the retroactive ratemaking prohibition strictly precludes remand adjustments affecting the prospective recovery of an accounting deferral relating to the same costs, the Court's specific directive to adjust the deferral balance (to exclude the revenue already collected under the nondeferral component of the RSR) would be blocked as unlawful. This fundamental inconsistency in Intervenors' position cannot be reconciled and exposes their position as being fatally flawed.

Indeed, if the Commission were to adjust the deferral balance downward to eliminate the "nondeferral portion of the RSR," yet *not* adjust the deferral upward to reflect a corrected energy credit, it would be completely arbitrary and patently unfair. The prohibition on retroactive ratemaking must apply – and *not* apply – consistently, regardless of whether the result is in AEP Ohio's favor or the ratepayers' favor. That kind of consistency is all AEP Ohio requests here with respect to the energy credit: If the Commission is to adjust the deferral balance to correct an error in the ratepayers' favor (the "nondeferral part of the RSR"), it must also adjust the deferral balance to correct an error in AEP Ohio's favor (the erroneous energy credit), and such adjustments should be made at one time in a consolidated proceeding.[4]

[4] OEG/OCC also cite to "principles of consistency and equity" in arguing that the Commission should not adjust the deferral balance to reflect a corrected energy credit. OEG/OCC Memo Contra at 11. But this is just OEG/OCC's erroneous retroactive ratemaking argument restated with more flowery language. As described above, the only consistent and equitable result would be to hold that, if the Commission may adjust the deferral balance to correct an error in the ratepayers' favor (the "nondeferral part of the RSR"), it may also adjust the deferral balance to correct an error in AEP Ohio's favor (the erroneous energy credit).

IV. AEP Ohio's proposed resolution of the energy credit issue directly responds to the Court's remand directive in the *Capacity Charge Appeal*; it does not "exceed" it.

OEG/OCC and OMAEG/Kroger claim that AEP Ohio's request for the Commission to correct the capacity charge energy credit "exceeds the scope of the Court's instruction on remand" in the *Capacity Charge* appeal. OEG/OCC Mem. Contra at 10. For instance, OEG/OCC claim that the "Court merely required that the Commission sufficiently explain its decision to reject AEP Ohio's input arguments." *Id.* OMAEG/Kroger make a similar claim. *See* OMAEG/Kroger Mem. Contra at 4-5.

Intervenors' contentions are meritless and themselves misconstrue the Court's remand directive in the *Capacity Charge Appeal*. The Court did not merely direct the Commission to "explain" its rejection of AEP Ohio's proposed energy credit. Rather, the Court expressly found that "the commission's analysis" on the energy credit issue "completely misses the mark." *Capacity Charge Appeal*, 2016-Ohio-1607, ¶ 56. It further held that the Commission had erred by failing to cite record citations on the energy credit issue, and by failing to directly address any of AEP Ohio's input arguments. *Id.* ¶¶ 55-57. It then held that the Commission's error on the energy credit issue was "clear and prejudicial (if the energy credit is overstated, it results in an understated capacity charge)," and the Court "reverse[d] this part of the order and direct[ed] the commission on remand to substantively address AEP's input arguments." *Id.* ¶ 57. Finally, most poignantly, the Court's opinion indicated in reversing the energy credit that it was "remand[ing] the cause *to correct this error*." *Id.* ¶ 51 (emphasis added). The whole purpose of the remand was to correct the error. The Court would not have remanded these issues at all if they were moot or academic in nature; rather, the Commission was directed by the Court to "correct this error."

Accordingly, on remand from the *Capacity Charge Appeal*, the Commission's approval of Staff's proposed energy credit has been "reversed," and now the Commission must substantively address *and correct* the many errors that AEP Ohio identified in Staff's energy credit calculation. Under AEP Ohio's proposed resolution of these proceedings, moreover, the Commission should accept AEP Ohio's criticisms of Staff's energy credit and make the adjustments to the energy credit that AEP Ohio previously advocated for and the Commission wrongly rejected. That outcome does not "exceed" the remand order in the *Capacity Charge Appeal*; it implements it directly.

By contrast, OEG/OCC's erroneous interpretation of the Court's remand directive in the *Capacity Charge Appeal* drains that decision of all force. In suggesting that the Court "merely required that the Commission sufficiently explain its decision to reject AEP Ohio's input arguments," OEG/OCC Mem. Contra at 10, OEG/OCC attempt to make the *Capacity Charge Appeal* decision on the energy credit issue a toothless formalism. That violates both the plain language and the unmistakable spirit of the decision, which found that the Commission committed a "clear and prejudicial" error on the energy credit issue. On remand, the Commission should not commit the same error a second time; the Commission should credit AEP Ohio's energy credit arguments and correct the energy credit as proposed in AEP Ohio's Motion for a Consolidated Resolution.

Finally, OMAEG/Kroger appear to argue that the Commission should not revisit the energy credit issue because the Commission's previous rejection of AEP Ohio's input arguments constitutes "res judicata and collateral estoppel." OMAEG/Kroger Mem. Contra at 7. That argument is difficult to fathom. Plainly, res judicata and collateral estoppel (as well as law of the case) do *not* apply where the Supreme Court has reversed the Commission's determination on an

issue and expressly "direct[ed] the commission on remand to substantively address" that issue. *Capacity Charge Appeal*, 2016-Ohio-1607, ¶ 57. Were those doctrines to apply and OMAEG/Kroger were so easily permitted to circumvent and selectively eviscerate the Court's remand directives, the Court's decision would be meaningless. Rather, under the plain language of the *Capacity Charge Appeal*, the Commission can – and must – revisit the energy credit issue. To do anything less would clearly be reversible error by the Commission.

V. OEG/OCC's motion to strike should be denied.

Lastly, OEG/OCC argue that certain portions of the testimony of AEP Ohio witness William Allen constitute "after-the-fact" evidence and should be stricken. OEG/OCC Mem. Contra at 9. This argument is procedurally improper and substantively meritless.

Procedurally, OEG/OCC's motion is an impermissible attempt to insinuate evidentiary issues into OEG/OCC's substantive response to AEP Ohio's motion. Any motion to strike – and other issues relating to the admissibility of evidence – can be dealt with shortly before or during the hearing in this matter, and these issues have no place in a substantive response to AEP Ohio's motion.

Moreover, OEG/OCC's motion to strike is improper because it is not truly an *evidentiary* objection at all; it is merely OEG/OCC's attempt to shoehorn their disagreement with the *merits* of Mr. Allen's testimony into an argument about its *admissibility*. But OEG/OCC cite no Commission precedent, no judicial case law, nor any rule of evidence suggesting that Mr. Allen's testimony is inadmissible and thus should be stricken. OEG/OCC merely disagree with AEP Ohio's (and Mr. Allen's) proposed methodology for resolving these cases. That is not grounds for striking testimony. OEG/OCC will have ample opportunity to cross-examine Mr. Allen and to submit their own testimony. That is the proper forum for OEG/OCC to raise their arguments, not this motion to strike.

Substantively, Mr. Allen's testimony is proper and useful for the Commission in reaching a decision in this proceeding. AEP Ohio does not oppose the general proposition, cited by OEG/OCC, that the Commission should decide the energy credit issue based on what the Commission "would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the decision was made." *See* OEG/OCC Mem. Contra at 9 (quoting cases). To that end, Mr. Allen's testimony proposes that the Commission correct the energy credit based on the numerous flaws that Mr. Allen and others pointed out *at the time of the Commission's Capacity Charge decision*.[5] But in addition to this, as confirmation that this is a proper result, Mr. Allen also notes that, in certain respects, AEP Ohio's criticisms of Staff's energy credit calculation turned out to be true. For instance, as confirmation that AEP Ohio's criticism of Staff's fuel cost projections were valid, Mr. Allen notes that *actual* fuel prices were higher than Staff had estimated (thus vindicating AEP Ohio's criticism). *See* Allen Testimony at 16-17, Ex. WAA-REM-2.

The Commission can reach AEP Ohio's proposed resolution on the energy credit issue by merely accepting the input arguments AEP Ohio made during the *Capacity Charge* proceeding, and without examining the actual data provided by Mr. Allen. But that actual data provides the Commission another data point, and confirmation that AEP Ohio's energy credit arguments were

[5] Critically, moreover, if the Commission were to limit evidence related to the energy credit issue in this proceeding to information "known at the time the decision was made" – i.e., at the time the Commission issued its July 2, 2012 *Capacity Charge* Opinion and Order – then this ruling would need to be applied consistently to *all* parties, so that Intervenors' witnesses would also be prohibited from relying on any so-called "after-the-fact" evidence. Thus, although AEP Ohio believes that Mr. Allen's testimony provides helpful confirmation of the validity of AEP Ohio's criticisms of Staff's energy credit calculation (and thus the challenged portions of Mr. Allen's testimony should not be stricken, as discussed herein), it is notable that Intervenors' complaints about AEP Ohio's requested expedited schedule would have even less merit if the Commission were to prohibit "after-the-fact" evidence, since that would even further streamline the issues in these proceedings.

valid. Thus, it is helpful for the Commission in reaching a decision in this proceeding, and it should not be stricken.

CONCLUSION

For the foregoing reasons, AEP Ohio's Motion for a Consolidated Resolution should be granted, and OEG/OCC's Motion to Strike should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing Reply in Support of Motion for a Consolidated Resolution of Multiple Proceedings was sent by, or on behalf of, the undersigned counsel to the following parties of record this 29th day of June, 2016, via electronic transmission.

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Case No(s). 10-2929-EL-UNC, 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

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