BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	))))	Case No. 10-2376-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 §4928.143, Ohio Rev. 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 Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.	))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.	)))	Case No. 10-344-EL-ATA
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
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	)))))	Case No. 11-4921-EL-RDR

RETAIL ENERGY SUPPLY ASSOCIATION'S MEMORANDM CONTRA TO THE APPLICATIONS FOR REHEARING FROM THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, APPALACHIAN PEACE AND JUSTICE NETWORK, FIRSTENERGY SOLUTIONS CORPORATION, AND INDUSTRIAL ENERGY USERS-OHIO

JANUARY 23, 2012

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INTRODUCTION

On September 7, 2011, the Retail Energy Supply Association ("RESA")[1], along with numerous other parties ("Signatory Parties"), signed a Stipulation as the basis of AEP Ohio's[2] second Electric Security Plan ("ESP II"). The Stipulation reflected thoughtful and extensive negotiations among Signatory and Non-Signatory parties alike. The Stipulation embodies a careful balance of a broad array of parties' interests, including industrial and commercial customers, municipalities, wholesale and retail suppliers, the Commission Staff, and AEP Ohio.

On December 14, 2011, the Commission issued an Opinion and Order in the above-captioned proceeding approving the Stipulation with certain modifications. Specifically, the Opinion and Order altered the base rate generation charges, the allocation of RPM pricing and the amount of GS-2 credit. Several parties to this proceeding, including Signatory and Non-signatory parties alike, have requested rehearing of the Opinion and Order as to both the changes to the Stipulation that the Commission made and to a host of changes to the Stipulation that the Commission did not make. RESA wishes to respond to these Applications for Rehearing.

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[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

[2] With the new year and the issuance of the Opinion and Order in this proceeding the Columbus Southern Power Company was merged into the Ohio Power Company. In the majority of the documents in this case the Applicant has been called AEP Ohio. To avoid confusion that is the way RESA will refer to the Applicant in this Memorandum Contra.

RESA's position is that the Commission should grant rehearing and approve the Stipulation as signed between the parties without modification, but providing clarification as to several matters raised by the RESA's Rehearing petition. RESA more specifically responds as follows:

I. Capacity Pricing

The Commission, in its Opinion and Order, approved the Stipulation's provision for a 42 month transition to a fully competitive market for capacity. This would include not only having AEP Ohio price capacity to CRES providers in its service area based on the multistate / multi supplier capacity auction conducted by PJM Interconnection (RPM-priced capacity), but having AEP Ohio place its Ohio capacity in the next PJM Interconnection ("PJM") Base Residual Auction (2015-2016 PJM Service year). In fact, the Commission even ordered AEP Ohio to provide the necessary notice to PJM due this March.[3]

This measured glide path from legacy generation-based capacity to competitively priced and supplied capacity was challenged by several parties. In their Applications for Rehearing, FirstEnergy Solutions ("FES") and Industrial Energy Users-Ohio ("IEU") have asserted that the capacity charges approved by the Commission are discriminatory and anticompetitive.[4] IEU further asserts that the Commission does not have jurisdiction to approve such capacity charges.[5] These arguments were rejected by the Commission in its Opinion and Order, and IEU has failed to present a reason or reasons for the Commission to change that decision.

The Commission recognized in its Opinion and Order the importance of a glide-path to a full competitive wholesale procurement for capacity and energy under the Stipulation, faster than can be achieved under the MRO alternative.[6] The Commission further recognized that the

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[3] Opinion and Order, p. 61.
[4] IEU Application for Rehearing ("IEU App."), pp. 25-29; FES Application for Rehearing, pp. 14-18.
[5] IEU App., pp. 25-27.
[6] Opinion and Order, 53.

agreement in the Stipulation to provide increasing percentages of AEP Ohio's load with RPM-priced capacity resolved the pending litigation at the Federal Energy Regulatory Commission ("FERC") and was part of a package that "could not otherwise be achieved in a fully litigated proceeding."[7] The Commission should reaffirm its approval of the capacity charges in the Stipulation, as it provides stability and certainty for CRES providers and customers alike, and creates a clear path to a fully restructured electricity market.

RESA further rejects IEU's contention that the Commission does not have the authority to approve the capacity charges contained in the Stipulation to be unfounded under Ohio law. IEU asserts that because there is "nothing in the Chapter 4928, Revised Code" specifically granting the Commission the power to alter capacity charges, the Commission is precluded from approving a capacity rate other than RPM-priced capacity.[8] IEU did not explain why it believed that the Commission's authority had to be contained in just Chapter 4928. The whole of Title 49 is devoted to public utilities. Chapter 4905 not only describes the Commission's duties, but provides its general grants of authority. Assuming that providing capacity is a utility service and AEP Ohio is a utility, then oversight of that utility service appears to fall within the Commission's jurisdiction and authority as granted by the General Assembly in Section 4905.05, Revised Code (Scope of Jurisdiction) and Section 4905.06, Revised Code (General Supervision).

While the Commission's rules governing rehearing petitions do not require parties to be logically consistent in their legal positions within a proceeding, such inconsistencies are often indications of a flaw in the legal reasoning. The matter at bar includes as part of this case docket 10-2929-EL-UNC. In that preceding, IEU's contention, as well as RESA and the other intervenors, was that the Commission had jurisdiction over AEP Ohio's provision of capacity and

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[7] Opinion and Order, 55.
[8] IEU App., 26.

that the Commission could, and more importantly should, set the price for CRES capacity service.[9] In fact, it was only AEP Ohio's position in the 10-2929-EL-UNC docket that the Commission's approval of the RPM-priced capacity rate does not qualify as state-set rate mechanism. The Commission in its December 8, 2010 Entry in Case No. 10-2929-EL-UNC found that it did have authority and set the capacity price. The Commission's authority to set the capacity price that AEP Ohio charges CRES providers until the time AEP Ohio enters the Base Residual Auction is well established. The Commission does not lose its jurisdiction simply because its decision on what that price should be is no longer acceptable to the IEU.

FES and IEU additionally argue that the RPM set-asides place an unreasonable limitation on shopping and essentially "cap" shopping at the RPM set-aside percentages.[10] IEU cites the testimony of Constellation witness Fein and RESA witness Ringenbach in support of this argument.[11] As noted by RESA in its reply brief, IEU's reliance of Fein and Ringenbach's testimony for this assertion is unwarranted.[12] Although both witnesses stated the two-tiered capacity prices would tend to limit shopping, neither stated they would prevent shopping above the RPM percentages or act as a hard cap on shopping. As noted by Mr. Fein, while it may be tough to conduct retail sales the first year, the amount of RPM pricing available increases every year as part of the glide-path.[13] Further, as noted by Exelon witness Mr. Dominguez, establishing the capacity prices provides clarity on what the capacity component is going to be, which will

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[9] "As recognized in the December 8 Entry and explained above, the Commission adopted a compensation mechanism for capacity in the ESP Order. Therefore, pursuant to the controlling language in PJM's tariff, Ohio's specified compensation mechanism prevails and AEP Ohio is precluded from proposing any change to such compensation." (emphasis added) Comments of the Industrial Energy Users, Case No. 10-2929-EL-UNC, January 7, 2011, p. 9.

[10] IEU App., pp. 30-36; FES App., 28-30.
[11] IEU App., pp. 33; FES App., 28-30.
[12] RESA Reply Brief, p. 17.
[13] Tr. Vol. VI, p. 991.

encourage investment by CRES providers.[14]

II. The Commission's Modifications to Appendix C

Appendix C, also referred to in its most current form as the Detailed Implementation Plan ("DIP"), contains a fair and non-discriminatory plan for implementing and allocating RPM-priced capacity set-asides. Like other portions of the settlement, Appendix C is the result of extensive negotiation and collaboration among Signatory and Non-Signatory parties alike and represents a careful balance of the parties' interests. In its Opinion and Order, the Commission made several significant modifications to Appendix C that have upset this balance and have limited the effect of the "glide-path" to a competitive market. FES, IEU and the Ohio Consumers' Counsel and Appalachian Peace and Justice Network ("OCC") have argued that these modifications do not go far enough, and have requested additional modifications to Appendix C.

Specifically, FES, IEU and the OCC want to expand the Commission's modification so that governmental aggregation authorized after establishment of the RPM pricing queue would receive priority to RPM pricing.[15] While it is true that the FES, IEU and OCC position would create additional RPM pricing beyond the glide path limits, it is also true that if the residential set aside is not fully subscribed, as it is not today, letting new residential governmental aggregated sign ups to claim RPM pricing from other buckets has the effect of not only jumping them ahead of commercial and industrial customers who are waiting in the queue.

In the unmodified Stipulation, RPM-priced capacity was initially allocated by percentage of load to each customer class (residential, commercial and industrial),[16] and any unclaimed capacity in each class was to be reallocated on a first-come, first-serve basis, to any customer regardless of class, beginning in 2012. Instead, the Commission has ordered that the class

[14] Tr. Vol. VI, p. 1014.
[15] IEU App., pp. 43-45; FES App., pp. 38-44; OCC and APJN Application for Rehearing ("OCC App."), pp. 15-17.
[16] Adjusted for accounts that were flowing before September 7, 2011.

distinctions remain in place throughout the glide-path period, so that RPM-priced capacity set asides may only be available to customers in that particular class. Thus, a member of one class that is in the queue waiting for RPM-priced capacity, will be denied RPM-priced capacity if the set-aside for that class is full, even though not all the RPM price capacity is allocated.

The Commission further limited the availability of RPM-priced capacity by providing that the load of communities that approved a governmental aggregation program in the November 8, 2011 election will qualify for RPM-pricing provided that the community or its CRES provider complete the necessary governmental aggregation process by December 31, 2012.[17] FES, IEU, and the OCC further argue that the Commission did not go far enough, and should modify its ruling to include governmental aggregation communities that approved a program before November 2011, and after November 2011. These modifications further upset that careful balance of Appendix C by reserving RPM-priced capacity that would have been allocated to customers waiting in the queue, to governmental aggregation communities.

The underlying purpose of the two-tiered capacity pricing, as implemented by Appendix C, is to provide a glide-path to the competitive market. Appendix C ensures that no RPM-pricing will be "stranded", by allocating any unused RPM-priced capacity to customers waiting in the queue. This first-come, first-serve allocation of RPM-pricing most closely reflects the competitive market by allocating the RPM-priced capacity to the parties that most highly value the RPM-priced capacity. The allocation scheme is fair and non-discriminatory as it supports the purpose of restructuring the electricity market by allocating electricity pricing based on its value as determined by the customer who acts first, rather than by arbitrary class distinctions.

The Signatory Parties signed the Stipulation in reliance on this allocation of RPM-priced capacity in order to prevent this highly-valued capacity from being stranded. Altering the operation

[17] Opinion and Order, 54.

of Appendix C undermines the parties' expectations and intentions. While RESA does not support any of the Commission's modifications to Appendix C, RESA understands the Commission's distinction of extending RPM-priced capacity to those communities that passed governmental aggregation on the November ballot, but did not have the opportunity to complete the process in order to take advantage of RPM-priced capacity. If the Commission does decide to retain this modification of the Stipulation, the Commission should reject the assertions of FES, IEU, and OCC, and limit the RPM-priced capacity receiving this privilege only to those communities who passed ballot initiatives during the November 2011 election. Further, the Commission should collapse the customer distinguished buckets as of January 1, 2011. This will allow any community who passed a ballot in November 2011 sufficient time to meet the December 31, 2012 deadline to complete the governmental aggregation process,[18] so that any unused RPM-priced capacity may be allocated on a first-come first-serve basis, regardless of class, as of January 1, 2013. Allocating unclaimed RPM-priced capacity to customers in the queue, regardless of class, will reinforce the purpose behind Appendix C, and the glide-path to a competitive market, while maintaining the careful balance of interests of the diverse parties to the Stipulation provided for in Appendix C.

FES has also requested a number of clarifications and changes be made to Appendix C in anticipation of future implementation problems.[19] While RESA fully supports Appendix C as unmodified in the Stipulation, RESA recognizes that problems in applying the provisions of Appendix C are inevitable. Rather than making adjustments to Appendix C in an attempt to preempt unknown and potentially unforeseeable problems, as requested by FES in its Application

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[18] This would include certification of the aggregation group, development of a suitable plan with pricing, and opportunity for residents in the affected communities to opt out.
[19] FES App., pp. 46-48.

for Rehearing,[20] RESA requests that the Commission set up a process for addressing problems, disputes, and/or concerns that arise in applying Appendix C to allocate RPM-priced capacity to those customers in the queue.[21] Changing Appendix C in rehearing, then applying the changes, and then taking disputes is a lengthy process and means that the January billing cycle, which is affected by the allocation of RPM pricing, will not be resolved until deep into the second quarter of 2012. RESA's proposal for a Commission-established review of RPM allocation related problems would allow parties and nonparties an opportunity to resolve any discrepancies in applying Appendix C hopefully in the first quarter of the year. Such a process will help to smoothly and efficiently enforce the terms of the Stipulation and ensure that the proper parties receive RPM-priced capacity and avoid stranded RPM-priced capacity.

III. Corporate Separation/Divestiture of Generation

IEU and FES in their Applications for Rehearing have requested that the Commission require AEP Ohio to provide additional information with regard to its request for corporate separation and transfer of its generation assets. IEU and FES further request a full evidentiary hearing on these matters.[22] IEU further argues that the Commission's approval of corporate separation in its Opinion and Order, without requiring additional information and an evidentiary hearing, is in violation of Commission rules and is unreasonable and unlawful.[23] RESA again emphasizes the importance of AEP Ohio receiving Commission approval of its request for full legal corporate separation and divestiture of its generation assets. Further, the Stipulation requires that AEP Ohio receive approval of full legal corporate separation and transfer of AEP Ohio's generation assets prior to giving notice to PJM of its intent to participate in the 2015-2016 Base

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[20] Id.
[21] See the Petition for Rehearing by RESA p 9.
[22] FES App., pp. 33-35.
[23] IEU App., p. 66.

Residual Auction and prior to AEP Ohio's termination and/or modification of the AEP East Pool Agreement.[24] As a result, the Commission should reaffirm its statement in the Order that the Commission had approved AEP Ohio's request for corporate separation plan and generation divestiture.[25] In confirming this approval, the Commission should again emphasize that AEP Ohio must give notice to PJM in March of 2012 of its intent to participate in the 2015-2016 BRA, and proceed with the Pool termination and/or modification process. Additional concerns expressed by some of the parties as to the specific units to be transferred and the value of such units should be addressed in the 11-5333-EL-UNC case docket.

IV. The "In the Aggregate" Test

FES and IEU have stated in their Applications for Rehearing that the Commission improperly concluded that the Stipulation, as modified and approved, was more favorable in the aggregate that the results would otherwise be under an MRO (the "*in the aggregate*" test).[26] FES focuses on the Commission's purported failure to include the costs of the Pool Modification Rider ("PMR") and failure to use AEP Ohio's fuel cost estimate for 2012-2014 in calculating the ESP side of the *in the aggregate* test.[27] FES further dismisses the benefit of the ESP transitioning to market faster than the MRO, as FES believes it is possible for AEP Ohio to fully transition to market in only two years under the MRO.[28] FES asserts that overall, the Commission's assessment under the *in the aggregate test* fails to account for a difference between the MRO and ESP of $402 million.[29] IEU, on the other hand, argues that the Commission's assessment under the *in the aggregate test* is incorrect because the Commission failed to account for the last 12 months

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[24] Stipulation, IV(1)(q).
[25] Opinion and Order, 61.
[26] IEU App., pp. 10-23; FES App., pp. 3-14.
[27] FES App., pp. 3-9.
[28] Id. at p. 11.
[29] Id. at p. 9.

of the ESP, years 2015-2016.[30] IEU argues that this failure to include years 2015-2016 is a fatal flaw because prices are expected to rise in future years, making the blended MRO price in years 2015-2016 more beneficial than an ESP. IEU asserts that under its calculations, the Commission's modified stipulation is $300 million more expensive than the MRO alternative.

IEU and FES's applications for rehearing demonstrate the limited value of a strict numeric test in comparing the predicted outcomes of the ESP to the MRO and ultimately determining the reasonableness of the ESP. Not only do IEU and FES have very differing views for why the Commission's calculations in the *in the aggregate* were incorrect, but IEU and FES's numerical outcomes differ by over $100 million.[31] RESA finds these distinctions to further emphasize that applying the statutory *in the aggregate* test as a solely numerical analysis is too imprecise and uncertain to be conclusive. Thus, the reasonableness of the ESP in comparison to the MRO should be determined by measuring a number of factors in the Stipulation including the qualitative benefits. The Stipulation, as *unmodified*, is more favorable than the MRO because of it numerous qualitative benefits, which are recognized by the Commission.

As noted by the Commission, the Stipulation offers a number of important qualitative benefits that are not otherwise available under the MRO. Most importantly, the Stipulation provides for a glide-path transition to a fully competitive electric market. This transition occurs earlier under the Stipulation than is otherwise possible under an MRO, while at the same time providing stability and certainty to customers and CRES providers in AEP Ohio's footprint. The Commission should ensure that the significant qualitative benefit of a glide-path to a competitive market is maintained in the Stipulation by preventing stranded RPM-priced capacity and allocating RPM-priced capacity to those parties that most value it.

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[30] IEU App., pp. 12-15.
[31] Id. at p. 11.

CONCLUSION

WHEREFORE, RESA respectfully requests that the Commission deny the non-signatory's requests for re-hearing, and grant re-hearing on the issues identified by RESA in its initial Application for Rehearing and modify its December 14, 2011 Opinion and Order accordingly.

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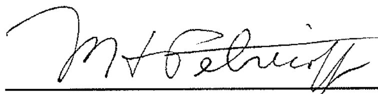
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 23rd day of January, 2012 by electronic mail, upon the persons listed below.



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