

Bruce J. Weston (0016973)
Ohio Consumers' Counsel

Kyle L. Kern (0084199)
Assistant Consumers' Counsel
(Counsel of Record)

Melissa R. Yost (0070914)
Deputy Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Telephone: 614-466-9585
Fax: 614-466-9475
kern@occ.state.oh.us
yost@occ.state.oh.us

*Counsel for Cross-Appellant
Office of the Ohio Consumers' Counsel*

Attorney General of Ohio

William L. Wright (0018010)
Section Chief, Public Utilities Section
Werner L. Margard III (0024858)
Thomas W. McNamee (0017352)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Telephone: 614-466-4397
Fax: 614-644-8767
william.wright@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

*Counsel for Appellee
Public Utilities Commission of Ohio*

**MEMORANDUM OF CROSS-APPELLANT OHIO POWER COMPANY IN
OPPOSITION TO JOINT MOTION TO CONSOLIDATE CASE NOS. 2012-2098 AND
2013-0228 FOR THE PURPOSES OF BRIEFING**

On February 11, 2013, Appellant Industrial Energy Users-Ohio (“IEU”) and Appellee Public Utilities Commission of Ohio (“Commission”) filed a Joint Motion along with a request for expedited treatment. In the Joint Motion, IEU and the Commission seek to consolidate this appeal (“first appeal”) with Ohio Supreme Court Case No. 2013-0228 (“second appeal”). Alternatively, IEU and the Commission ask the Court to suspend the briefing schedule in this appeal until the Court rules on the Commission’s pending motion to dismiss it.

There is no reason to consolidate this first appeal with the second appeal, because the second appeal is improper and should be dismissed. That second appeal stems from an untimely, duplicative and improper application for rehearing filed by the Ohio Consumers’ Counsel (“OCC”). Ohio Power Company accordingly is separately moving for dismissal of the second appeal simultaneously with submission of this opposition to the motion to consolidate.

First, the second appeal should be dismissed because it stems from the Commission’s January 30, 2013 Entry on Rehearing (attached here as Exhibit A) denying OCC’s clearly improper Application for Rehearing. OCC’s application merely raised arguments that had *already been considered and rejected* by the Commission in its December 12, 2012 Entry on Rehearing. The Commission thus explained that OCC’s January 2013 Application for Rehearing should never have been filed in the first place:

In the December Capacity Entry on Rehearing, the Commission denied, in their entirety, the applications for rehearing of the October Capacity Entry on Rehearing that were filed by OCC, IEU-Ohio, and FES *** [.] *Section 4903.10, Revised Code, does not allow parties to repeat, in a second application for rehearing,*

*arguments that have already been considered and rejected by the Commission. *** The December Capacity Entry on Rehearing denied rehearing on all assignments of error and modified no substantive aspect of the October Capacity Entry on Rehearing, and OCC is not entitled to another attempt at rehearing. Accordingly, the application for rehearing filed by OCC on January 11, 2013, should be denied as procedurally improper.*

Id. at ¶ 13 (emphasis added; internal citation omitted). Because the second appeal arises out of an improper reconsideration request, it is a nullity and should be dismissed. The Joint Motion inexplicably asks this Court to consolidate this first appeal with the second appeal that the Commission itself has agreed stems from a “procedurally improper” application for rehearing.

Further, the second appeal should be dismissed because a contrary ruling would permit parties to generate multiple appeals – and unilaterally extend the deadline for seeking this Court’s review – simply by filing “procedurally improper” rehearing applications before the Commission. But Ohio law does not allow parties to repeat, in successive rehearing applications, arguments that have already been considered and rejected by the Commission. *See* Exhibit A, at ¶ 13. If the law were otherwise, then parties could interminably clog this Court’s docket with review of Commission orders by repeatedly lodging procedurally improper applications for rehearing such as OCC’s. Instead of condoning OCC’s procedurally improper application for rehearing by proceeding to hear the merits of the separate appeal arising from it, this Court should dismiss the second appeal and proceed to the merits of this first appeal.

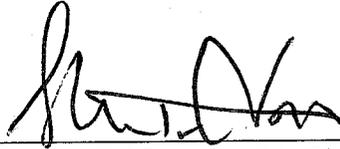
Moreover, the second appeal should be dismissed because the first appeal in this case has already been perfected from the Commission’s underlying capacity charge docket (Case No. 10-2929-EL-UNC), and the record has already been filed with this Court. All parties from the underlying Commission proceedings (including FirstEnergy Solutions Corp., who filed a cross-appeal in the procedurally improper 2013-0228 docket but chose not to do so in this docket) have

already had ample opportunity to appear in this docket and lodge whatever objections they may have to the Commission's orders. Allowing the second appeal to proceed, consolidating that appeal with this one, and thereby delaying the briefing schedule in this appeal, is simply unnecessary given that the Court already has before it in this docket a proper appeal from the underlying Commission orders. For these reasons, the Court should dismiss the second appeal¹ and deny the Joint Motion of IEU and the Commission to consolidate this (proper) appeal with that (improper) one.

Finally, Ohio Power Company does not oppose the Joint Movants' alternative request to suspend the briefing schedule pending a decision on the dismissal request, given the present circumstances. Since there is now a motion to dismiss in both appeals involved here, the Court will need to determine which appeal should go forward and which should be dismissed. Once that is determined, merits briefing should commence.

¹ As previously indicated, Ohio Power Company is separately filing a motion to dismiss in the second appeal.

Respectfully submitted,



Steven T. Nourse (0046705)
(Counsel of Record)

Matthew J. Satterwhite (0071972)
AMERICAN ELECTRIC POWER CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: 614-716-1608
Fax: 614-716-2950
stnourse@aep.com
mjstatterwhite@aep.com

James B. Hadden (0059315)
Daniel R. Conway (0023058)
L. Bradfield Hughes (0070997)
Christen M. Blend (0086881)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Telephone: 614-227-2270
Fax: 614-227-1000
dconway@porterwright.com
bhughes@porterwright.com
cblend@porterwright.com

*Counsel for Cross-Appellant
Ohio Power Company*

EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review)
of the Capacity Charges of Ohio Power) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company.)

ENTRY ON REHEARING

The Commission finds:

- (1) On November 1, 2010, American Electric Power Service Corporation (AEPSC), on behalf of Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or the Company),¹ filed an application with the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER11-1995. On November 24, 2010, at the direction of FERC, AEPSC refiled the application in FERC Docket No. ER11-2183 (FERC filing). The application proposed to change the basis for compensation for capacity costs to a cost-based mechanism, pursuant to Section 205 of the Federal Power Act and Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement for the regional transmission organization, PJM Interconnection, LLC (PJM), and included proposed formula rate templates under which AEP-Ohio would calculate its capacity costs.
- (2) By entry issued on December 8, 2010, in the above-captioned case, the Commission found that an investigation was necessary in order to determine the impact of the proposed change to AEP-Ohio's capacity charge (Initial Entry). Consequently, the Commission sought public comments regarding the following issues:
(1) what changes to the current state compensation mechanism (SCM) were appropriate to determine AEP-Ohio's fixed resource requirement (FRR) capacity charge to Ohio competitive retail electric service (CRES) providers, which are referred to as alternative load serving entities

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of CSP into OP, effective December 31, 2011. *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.

within PJM; (2) the degree to which AEP-Ohio's capacity charge was currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charge upon CRES providers and retail competition in Ohio. Additionally, in light of the change proposed by AEP-Ohio in the FERC filing, the Commission explicitly adopted as the SCM for the Company, during the pendency of the review, the current capacity charge established by the three-year capacity auction conducted by PJM based on its reliability pricing model (RPM).

- (3) On January 27, 2011, in Case No. 11-346-EL-SSO, *et al.*, AEP-Ohio filed an application for a standard service offer in the form of a new electric security plan (ESP), pursuant to Section 4928.143, Revised Code (ESP 2 Case).²
- (4) By entry issued on March 7, 2012, in the above-captioned case, the Commission implemented an interim capacity pricing mechanism proposed by AEP-Ohio in a motion for relief filed on February 27, 2012 (Interim Relief Entry).
- (5) By entry issued on May 30, 2012, the Commission approved an extension of the interim capacity pricing mechanism through July 2, 2012 (Interim Relief Extension Entry).
- (6) By opinion and order issued on July 2, 2012, the Commission approved a capacity pricing mechanism for AEP-Ohio (Capacity Order). The Commission established \$188.88/megawatt-day as the appropriate charge to enable AEP-Ohio to recover its capacity costs pursuant to its FRR obligations from CRES providers. However, the Commission also directed that AEP-Ohio's capacity charge to CRES providers should be the RPM-based rate, including final zonal adjustments, on the basis that the RPM-based rate will promote retail electric competition. The Commission authorized AEP-Ohio to modify its

² *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 and 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 and 11-350-EL-AAM.*

accounting procedures to defer the incurred capacity costs not recovered from CRES providers, with the recovery mechanism to be established in the ESP 2 Case.

- (7) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.
- (8) By entry on rehearing issued on October 17, 2012, the Commission granted, in part, and denied, in part, applications for rehearing of the Initial Entry, Interim Relief Entry, and Capacity Order, and denied applications for rehearing of the Interim Relief Extension Entry (October Capacity Entry on Rehearing).
- (9) On December 12, 2012, the Commission issued an entry on rehearing, denying applications for rehearing of the October Capacity Entry on Rehearing that were filed by the Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), and FirstEnergy Solutions Corp. (FES) (December Capacity Entry on Rehearing).
- (10) On January 11, 2013, OCC filed an application for rehearing of the December Capacity Entry on Rehearing. AEP-Ohio filed a memorandum contra on January 22, 2013.
- (11) In its single assignment of error, OCC asserts that the Commission unlawfully and unreasonably clarified in the December Capacity Entry on Rehearing that there were reasonable grounds for complaint, pursuant to Section 4905.26, Revised Code, that AEP-Ohio's proposed capacity charge in this case may have been unjust or unreasonable. OCC contends that the Commission's clarification attempts to cure an error after the fact, is not supported by sufficient evidence, and is procedurally flawed. According to OCC, the Commission's clarification is not supported by its findings in the Initial Entry. OCC argues that the Commission has not satisfied the requirements of Section 4905.26, Revised Code, and, thus, has no jurisdiction in this case to alter AEP-Ohio's capacity charge.

OCC also notes that reasonable grounds for complaint must exist before the Commission orders a hearing, pursuant to Section 4905.26, Revised Code. OCC emphasizes that the Commission did not find reasonable grounds for complaint in the Initial Entry, but rather made its clarification two years later in the December Capacity Entry on Rehearing. OCC adds that the Commission's clarification is inconsistent with its earlier procedural ruling directing the parties to develop an evidentiary record on the appropriate capacity pricing mechanism for AEP-Ohio. OCC believes that reasonable grounds for complaint were intended to be developed through the evidentiary hearing.

OCC further argues that the Commission did not properly determine, upon initiation of this proceeding, that AEP-Ohio's capacity charge may be unjust and unreasonable. Accordingly, OCC believes that the Commission lacked jurisdiction to modify AEP-Ohio's capacity charge. Finally, OCC asserts that the Commission failed to find that RPM-based capacity pricing is unjust and unreasonable, as required before a rate change is implemented, pursuant to Section 4905.26, Revised Code.

- (12) In its memorandum contra, AEP-Ohio responds that OCC's application for rehearing merely raises arguments that have already been considered and rejected by the Commission. AEP-Ohio adds that the Commission properly clarified in the December Capacity Entry on Rehearing that there were reasonable grounds for complaint under Section 4905.26, Revised Code, in this proceeding.
- (13) In the December Capacity Entry on Rehearing, the Commission denied, in their entirety, the applications for rehearing of the October Capacity Entry on Rehearing that were filed by OCC, IEU-Ohio, and FES (December Capacity Entry on Rehearing at 11-12). Section 4903.10, Revised Code, does not allow parties to repeat, in a second application for rehearing, arguments that have already been considered and rejected by the Commission. *In the Matter of the Applications of The East Ohio Gas Company d.b.a. Dominion East Ohio and Columbia Gas of Ohio Inc. for*

Adjustment of their Interim Emergency and Temporary Percentage of Income Payment Plan Riders, Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006), at 4. The December Capacity Entry on Rehearing denied rehearing on all assignments of error and modified no substantive aspect of the October Capacity Entry on Rehearing, and OCC is not entitled to another attempt at rehearing. Accordingly, the application for rehearing filed by OCC on January 11, 2013, should be denied as procedurally improper.

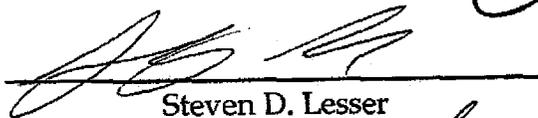
It is, therefore,

ORDERED, That the application for rehearing filed by OCC on January 11, 2013, be denied. It is, further,

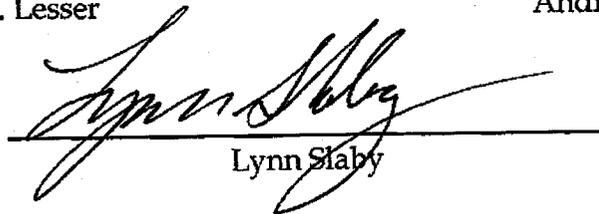
ORDERED, That a copy of this entry on rehearing be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser

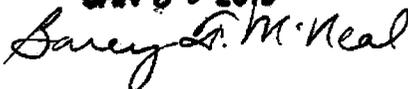

Andre T. Porter


Lynn Slaby

SJP/sc

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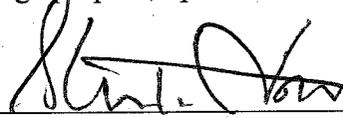
JAN 30 2013



Barcy F. McNeal
Secretary

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memorandum of Cross-Appellant Ohio Power Company in Opposition to Joint Motion to Consolidate Case Nos. 2012-2098 and 2013-0228 for the Purposes of Briefing*, submitted on behalf of Cross-Appellant Ohio Power Company, was served via regular U.S. mail, postage prepaid, upon the following parties of record, this 21st day of February, 2013.



Counsel for Cross-Appellant Ohio Power Company

Samuel C. Randazzo (0016386)
Frank P. Darr (0025469)
Joseph E. Olikier (0086088)
Matthew R. Pritchard (0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

*Counsel for Appellant,
Industrial Energy Users – Ohio*

Michael DeWine (0009181)
Attorney General of Ohio

William L. Wright (0018010)
Section Chief, Public Utilities Section
Werner L. Margard III (0024858)
Thomas W. McNamee (0017352)
Assistant Attorneys General
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793

*Counsel for Appellee
Public Utilities Commission of Ohio*

Bruce J. Weston (0016973)
Ohio Consumers' Counsel

Kyle L. Kern (0084199)
Assistant Consumers' Counsel
Melissa R. Yost (0070914)
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800

*Counsel for Cross-Appellant
Office of the Ohio Consumers' Counsel*