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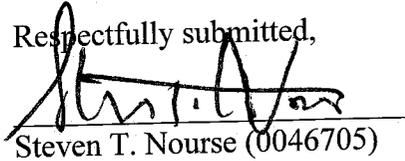
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## MEMORANDUM IN SUPPORT

### **I. Introduction**

There are now two appeals in two different docket numbers pending before this Court from the Commission's multiple entries and orders in *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 ("Capacity Charge Docket"). First, Industrial Energy Users-Ohio ("IEU") perfected an appeal in Case No. 12-2098 ("first appeal") from the Commission's December 12, 2012 Entry on Rehearing ("December 2012 Entry") in the *Capacity Charge* Docket.<sup>1</sup> Second, IEU lodged another appeal here in Case No. 2013-0228 ("second appeal") from the Commission's January 30, 2013 Entry on Rehearing ("January 2013 Entry") in the same *Capacity Charge* Docket.

IEU's second appeal is procedurally flawed and should be dismissed. The second appeal arises from an Application for Rehearing of the Commission's December 2012 Entry that the Commission itself has described as "procedurally improper." As the following discussion will show, the Commission's December 2012 Entry was the appealable "final order" that triggered this Court's jurisdiction to review the merits of the Commission's entries and orders in the *Capacity Charge* docket. By contrast, the Application for Rehearing that triggered the Commission's January 2013 Entry – the Entry from which *this* appeal was taken – represented an impermissible attempt to re-litigate matters that the Commission had already fully and finally determined in its December 2012 Entry. Instead of encouraging parties to needlessly delay the

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<sup>1</sup> By stating that IEU perfected its first appeal, OPCo is not confirming that each of the assignments of error contained in its Notice of Appeal was raised on rehearing before the Commission and is properly before this Court. Rather, OPCo agrees that IEU's Notice of Appeal in Case No. 2012-2098 was timely filed but reserves the right to argue on brief, if necessary, that specific claims raised in the Notice of Appeal are not properly before the Court.

appeals process by filing successive applications for rehearing in the Commission that raise no new substantive issues, this Court should dismiss this appeal as the product of an improper application for rehearing. The Court should then proceed to address the merits of the Commission's *Capacity Charge* entries and orders in the first appeal. Because IEU and the Commission have filed a Joint Motion in the docket of the first appeal<sup>2</sup> to consolidate that *proper* appeal with this *improper* one, Ohio Power has filed a memorandum opposing the Joint Motion for these and other reasons described more fully below.

**II. This second appeal should be dismissed because the first appeal (2012-2098) has already been taken from the Commission's final order in the Capacity Charge docket, and because this first appeal stems from a procedurally improper application for rehearing made by the Ohio Consumers' Counsel.**

**A. The Commission's December 2012 Entry on Rehearing was a final appealable order, and a proper appeal has already been perfected.**

This Court has jurisdiction to review a "final order" made by the Commission. R.C. 4903.13. For purposes of this statute, a Commission order is a "final order" if it affects a substantial right. *Cleveland, Columbus & Cincinnati Highway, Inc. v. Pub. Util. Comm.*, 141 Ohio St.634, 49 N.E.2d 759 (1943). Here, the Commission's December 2012 Entry was the "final order" properly triggering this Court's review of the merits of the Commission's entries and orders in the *Capacity Charge* Docket. To understand why the December 2012 Entry is the "final order" appropriately triggering this Court's appellate review of the *Capacity Charge* case, it is necessary to understand how that December 2012 Entry fits within a series of orders and entries on rehearing issued by the Commission in the underlying *Capacity Charge* Docket.

First, on December 8, 2010, the Commission issued an entry ("Initial Entry") finding that an investigation was necessary in order to determine the impact of a proposed change to OPCo's

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<sup>2</sup> OPCo notes that the Motion to Consolidate was only filed in Case No. 2012-2098, according to the docket entries on the Clerk's electronic docket sheet for that case, although the face of the Joint Motion listed both appeals.

capacity charge assessed to competitive retail electric service (“CRES”) providers. By entry issued on March 7, 2012, the Commission later implemented an interim capacity pricing mechanism that had been proposed by OPCo (“Interim Relief Entry”). By entry issued on May 30, 2012, the Commission later approved an extension of this interim capacity pricing mechanism (“Interim Relief Extension Entry”) during the pendency of the underlying Commission proceedings. After a full hearing before the Commission’s Attorney Examiner, the Commission issued its lengthy July 2, 2012 Opinion and Order approving a capacity pricing mechanism for the Company (“Capacity Order”). The Commission’s Capacity Order prompted applications for rehearing from multiple parties who objected to various aspects of that Capacity Order, some of whom also objected to the Initial and/or Interim Entries that preceded it.

By entry on rehearing issued on October 17, 2012 (“Capacity Entry on Rehearing”), the Commission granted, in part, and denied, in part, applications to rehear the Initial Entry, Interim Relief Entry, and Capacity Order, and denied applications to rehear the Interim Relief Extension Entry. IEU, Ohio Consumers’ Counsel (“OCC”). OCC, IEU, and FirstEnergy Solutions Corp (“FES”) disagreed with certain aspects of the Commission’s Capacity Entry on Rehearing. Accordingly, those parties filed applications for rehearing of the Capacity Entry on Rehearing, which were then fully and finally denied in the Commission's December 2012 Entry. In this December 2012 Entry, the Commission made apparent its view that all rehearing arguments related to the Capacity Order had now been fully and finally resolved, thereby triggering this Court's appellate jurisdiction to review this “final order” of the Commission. The Commission stated:

For the above reasons, we find no error in our clarifications in the Capacity Entry on Rehearing, or in determining that arguments related to the mechanics of the deferral recovery mechanism should be resolved in the ESP 2 Case. Any other arguments raised on rehearing that are not specifically addressed herein have been

thoroughly and adequately considered by the Commission and are being denied. Accordingly, the Commission finds that the applications for rehearing filed by [IEU], OCC, and FES should be denied in their entirety.

December 2012 Entry, attached hereto as **Exhibit A**, at ¶ 29.

IEU perfected a timely notice of appeal to this Court from that December 2012 Entry in the first appeal, and both OPCo and OCC filed timely notices of cross-appeal.<sup>3</sup> On January 14, 2013, the Clerk of this Court filed its notice that the record from the underlying Commission proceedings had been filed. Thus, a *proper* appeal (the first appeal) has already been perfected from the Commission's December 2012 final order in the *Capacity Charge* Docket. Multiple parties, moreover, have filed cross-appeals, and the record in that appeal has already been filed with the Court. All parties from the underlying Commission proceedings (including FirstEnergy Solutions, who filed a cross-appeal in this docket, but chose not to perfect any appeal in Case No. 2012-2098) have thus already had ample opportunity to appear in this Court to lodge whatever appellate challenges they may have to the Commission's decision in the *Capacity Charge* Docket.

**B. OCC's Application for Rehearing of the December 2012 Entry was procedurally improper, as the Commission itself has agreed.**

The second appeal should be dismissed because it stems from the Commission's January 2013 Entry denying the Application for Rehearing that OCC filed on January 11, 2013 – *after* the December 2012 Entry (and final order) described above. In its January 11, 2013 Application for Rehearing, OCC asserted, in a single assignment of error, that the Commission unlawfully

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<sup>3</sup> IEU's invocation of this fully adequate appellate remedy demonstrates the failure of its Complaint for an extraordinary writ of prohibition filed against the Commission on August 31, 2012 in *State ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2012-1494. Both OPCo and the Commission have noted IEU's adequate remedy at law in separate motions to dismiss IEU's writ action that remain pending before this Court for decision.

and unreasonably clarified in its December 2012 Entry that there were reasonable grounds for complaint (under R.C. 4905.26) that the Company's proposed capacity charge may have been unjust or unreasonable. OCC's January 2013 Application for Rehearing was clearly improper, however, because the Application merely restated arguments that had *already been considered and rejected* by the Commission in its December 2012 Entry based on prior applications for rehearing. In opposing OCC's final rehearing application, OPCo argued that "OCC's current rehearing bid simply seeks a 'second bite at the apple' and should be summarily rejected." The Commission agreed, explaining 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.*

January 2013 Entry, attached hereto as **Exhibit B**, at ¶ 13 (emphasis added; internal citation omitted). For this reason, this second appeal should be dismissed. This appeal arises not from any "final order" affecting substantial rights (such as the December 2012 Entry, which fully and finally resolved all procedurally proper applications for rehearing of the Commission's Capacity Order and prior entries and orders). Instead, it arises from the Commission's subsequent (and summary) denial of OCC's improper and unnecessary application for rehearing – an application that merely re-raised an issue that had already been fully and finally resolved. Upon issuance of a final order, a statutory appeal as of right may be filed and jurisdiction over the case transfers to the Court at that time. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 375

(2007) (under R.C. 4903.10, the Commission only continues to have jurisdiction over what would otherwise be a final order if rehearing is granted) The Commission no longer has jurisdiction to modify the final order.

**C. Proceeding to the merits of this appeal would encourage parties to needlessly delay this Court's appellate review of the Commission's final orders by filing successive, improper applications for rehearing such as OCC's and would improperly proliferate appeals before this Court in a vexatious manner.**

This second appeal should be dismissed, because allowing the appeal to proceed to the merits would reward the party (OCC) who filed the "procedurally improper" application for rehearing which led to the Commission's January 30, 2013 Entry on Rehearing quoted above. And doing so would encourage other parties in other Commission proceedings to needlessly delay appellate review of the Commission's final orders by filing seriatim, improper applications for rehearing such as OCC's. Neither OCC nor any other party to the underlying Commission proceedings was free to ignore or expand the sixty-day time period allowed for filing an appeal from a "final order" of the Commission by filing an additional application for rehearing which raises the same issues already before and decided by the Commission. Put another way, as the Commission itself explained, Ohio law does not allow parties to repeat, in a second application for rehearing, arguments that have already been considered and rejected by the Commission. *See* January 2013 Entry, at ¶ 13, citing R.C. 4903.10. If the law were otherwise, parties could interminably delay this Court's review of Commission orders by continuously lodging successive, "procedurally improper" applications for rehearing such as the one OCC filed *after* the Commission entered its final order in December 2012.

An application for rehearing *after rehearing* is permissible only as to *new matters determined on rehearing*, not to re-hash old matters previously resolved in a rehearing decision.

R.C. 4903.10. In *Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 533 N.E.2d 353 (1988), for example, this Court accepted a subsequent appeal where a new issue was introduced at the rehearing stage, resulting in a second evidentiary hearing as to that new issue, as well as a new Commission order that affected a party's rights. Here, by contrast, OCC's procedurally improper application for rehearing of the December 2012 Entry – which resulted in the Entry on appeal in this docket – presented no new issue for rehearing and resulted in no new order affecting any party's substantial rights. Instead of condoning OCC's "procedurally improper" application for rehearing by proceeding to hear the merits of this appeal arising from it, this Court should promptly dismiss the second appeal and proceed to the merits of the first appeal instead.

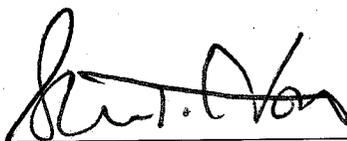
Dismissing the second appeal, moreover, would encourage efficiency and avoid a proliferation of appeals before this Court. This Court regularly confronts the unnecessary complexity that results when multiple appeals are filed from successive and unnecessary rehearing applications. Indeed, it occurred just a few months ago in a separate set of appeals from a Commission decision. *See* Sup.Ct. Case Nos. 2012-976 and 2012-1484. The Commission and parties could use additional guidance from the Court regarding this recurring scenario. In any case, one of the two appeals must be dismissed. In this case, OPCo submits that it should be the second appeal, since the December 12, 2012 Entry on Rehearing finalized the Commission's decision on all substantive issues.

### **III. Conclusion**

For the foregoing reasons, the Court should promptly dismiss this second appeal (Case No. 2013-0228) and proceed to the merits of the first appeal (Case No. 2012-2098), where the record from the underlying proceedings has already been submitted. Doing so will help assure

that no party can abuse the rehearing process at the Commission by filing successive, improperly duplicative applications for rehearing as OCC did below. If the Court denies this Motion to Dismiss, or declines to rule on it by the time that OPCo's cross-appeal must be filed in this docket, then OPCo reserves the right to perfect a cross-appeal in this case to preserve any and all appellate rights, as it has already done in the first appeal.

Respectfully submitted,



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# **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),<sup>1</sup> 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 (RAA) 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 within PJM; (2) the degree to which AEP-Ohio's capacity

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<sup>1</sup> 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.

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).<sup>2</sup>
- (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 accounting procedures to defer the incurred capacity costs

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<sup>2</sup> *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.*

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 (Capacity Entry on Rehearing).
- (9) On November 15, 2012, Industrial Energy Users-Ohio (IEU-Ohio) filed an application for rehearing of the Capacity Entry on Rehearing. The Ohio Consumers' Counsel (OCC) and FirstEnergy Solutions Corp. (FES) filed applications for rehearing on November 16, 2012. AEP-Ohio filed a memorandum contra the applications for rehearing on November 26, 2012.
- (10) In its first assignment of error, IEU-Ohio claims that the Capacity Entry on Rehearing is unlawful and unreasonable, because the Commission cannot rely on Section 4905.26, Revised Code, to apply a cost-based ratemaking methodology in establishing AEP-Ohio's capacity charge for its FRR obligations. Citing Section 4928.05(A)(1), Revised Code, IEU-Ohio contends that AEP-Ohio's capacity service is a competitive retail electric service that cannot be regulated by the Commission under Chapter 4905, Revised Code. IEU-Ohio adds that the Ohio Supreme Court has determined that the Commission cannot use its general supervisory powers to circumvent the statutory ratemaking process enacted by the General Assembly. IEU-Ohio also notes that Section 4905.26, Revised Code, is a procedural statute that does not delegate substantive authority to the Commission to increase a utility's rates. IEU-Ohio asserts that the Commission has found that rates can only be established under Section 4905.26, Revised Code, in limited circumstances, and in

accordance with other ratemaking statutes. According to IEU-Ohio, the determination as to whether a particular rate is unjust or unreasonable can only be made by reference to other provisions of Title 49, Revised Code. IEU-Ohio argues that the Commission neglected to identify any statutory ratemaking criteria for determining whether AEP-Ohio's prior capacity compensation was unjust or unreasonable. IEU-Ohio contends that there is no statute that authorizes the Commission to apply a cost-based ratemaking methodology to increase rates for a competitive retail electric service.

- (11) Similarly, OCC's first assignment of error is that the Commission erred in finding that it had authority under Section 4905.26, Revised Code, to initiate this proceeding and investigate AEP-Ohio's wholesale capacity charge. OCC points out that Section 4905.26, Revised Code, governs complaint proceedings that fall within the Commission's general authority under Chapter 4905, Revised Code. OCC contends that Chapter 4905, Revised Code, does not permit the Commission to establish a wholesale capacity charge or an SCM and, therefore, Section 4905.26, Revised Code, is not a source of authority that enables the Commission to investigate and fix AEP-Ohio's wholesale capacity rate. OCC adds that the various procedural requirements of Section 4905.26, Revised Code, were not followed by the Commission in the course of this proceeding. Specifically, OCC notes that the Commission did not find that there were reasonable grounds for complaint prior to the hearing, nor did it find that AEP-Ohio's existing capacity charge was unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.
- (12) Like IEU-Ohio and OCC, FES asserts that the Capacity Entry on Rehearing is unlawful and unreasonable, because it relied on Section 4905.26, Revised Code, as a source of authority to establish a cost-based SCM. FES contends that, although Section 4905.26, Revised Code, provides the Commission with authority to investigate and set a hearing to review a rate or charge that may be unjust or unreasonable, the statute does not confer jurisdiction to establish a cost-based rate. FES also disputes the

Commission's clarification in the Capacity Entry on Rehearing that the Commission is under no obligation with regard to the specific mechanism used to address capacity costs.

- (13) In its memorandum contra, AEP-Ohio notes that the Ohio Supreme Court has repeatedly held that the Commission has broad authority to change utility rates in proceedings under Section 4905.26, Revised Code. In response to IEU-Ohio's argument that the Commission authorizes rates under Section 4905.26, Revised Code, only in limited circumstances, AEP-Ohio asserts that Commission precedent indicates that is the case for self-complaint proceedings, but not for Commission-initiated investigations. AEP-Ohio also points out that IEU-Ohio and OCC offer no authority in support of their contention that Chapter 4905, Revised Code, does not permit the Commission to set wholesale rates. AEP-Ohio notes that nothing in Chapter 4905, Revised Code, limits its application to retail rates. AEP-Ohio further notes that the Commission has often regulated wholesale rates and that its orders have been upheld by the Ohio Supreme Court.
- (14) With respect to OCC's argument that the Commission failed to find that reasonable grounds for complaint exist in this case, AEP-Ohio replies that OCC's position is overly technical and without basis in precedent. AEP-Ohio notes that there is no requirement that the Commission must make a rote finding of reasonable grounds for complaint in proceedings initiated pursuant to Section 4905.26, Revised Code. AEP-Ohio believes that, in initiating this proceeding, the Commission implicitly found that there were reasonable grounds for complaint. Similarly, in response to OCC's and IEU-Ohio's argument that the Commission did not comply with Section 4905.26, Revised Code, because it failed to find that RPM-based capacity pricing is unjust or unreasonable, AEP-Ohio notes that the statute does not require the Commission to make such a finding. According to AEP-Ohio, the statute requires the Commission to conduct a hearing, if there are reasonable grounds for complaint that a rate is unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law. AEP-Ohio adds that the Commission

found in the Capacity Order and the Capacity Entry on Rehearing that RPM-based capacity pricing would produce unjust and unreasonable results.

- (15) In its second assignment of error, IEU-Ohio asserts that the Capacity Entry on Rehearing is unlawful and unreasonable, because the Commission cannot regulate a wholesale rate, pursuant to Section 4905.04, 4905.05, 4905.06, or 4905.26, Revised Code. Specifically, IEU-Ohio contends that the Commission's regulatory authority under Chapter 4905, Revised Code, extends only to the retail services provided by an electric light company, when it is engaged in the business of supplying electricity for light, heat, or power purposes to consumers within the state. IEU-Ohio notes that the Commission determined in the Capacity Order that the capacity service provided by AEP-Ohio to CRES providers is a wholesale transaction rather than a retail service.
- (16) In its memorandum contra, AEP-Ohio notes that IEU-Ohio's argument is contrary to its initial position in this case, which was that the Commission does have jurisdiction to establish capacity rates, pursuant to the option for an SCM under Section D.8 of Schedule 8.1 of the FERC-approved RAA. AEP-Ohio argues that IEU-Ohio's current position is based on an overly restrictive statutory interpretation. AEP-Ohio points out that the characteristics of an entity that determine whether it is a public utility subject to the Commission's jurisdiction do not necessarily establish the extent of, or limitations on, the Commission's jurisdiction over the entity's activities, which is a separate matter. AEP-Ohio reiterates that the Commission's authority under Section 4905.26, Revised Code, is considerable and encompasses regulation of wholesale rates in Ohio.
- (17) In its second assignment of error, FES argues that, even if the Commission has authority under Chapter 4905, Revised Code, to establish an SCM, the Commission must nonetheless observe the procedural requirements of Chapter 4909, Revised Code. FES asserts that the Capacity Entry on Rehearing is unreasonable and unlawful, because the Commission upheld a cost-based SCM without

adherence to the mandatory ratemaking formula of Section 4909.15, Revised Code, which requires determinations regarding property valuation, rate of return, and so forth.

- (18) AEP-Ohio responds that the Commission already rejected, in the Capacity Entry on Rehearing, the argument that a traditional base rate case was required under the circumstances. AEP-Ohio notes that, although the Commission may elect to apply Chapter 4909, Revised Code, following a complaint proceeding, there is no requirement that it must do so. AEP-Ohio also points out that the Commission has not adjusted retail rates in this case.
- (19) In its second assignment of error, OCC contends that the Commission unlawfully and unreasonably determined that OCC's arguments in opposition to the deferral of capacity costs were prematurely raised in this proceeding and should instead be addressed in the ESP 2 Case. OCC asserts that, in declining to resolve OCC's arguments in the present case, the Commission violated Section 4903.09, Revised Code, and unreasonably impeded OCC's right to take an appeal. OCC notes that the Commission has not yet ruled on its application for rehearing in the ESP 2 Case, which has delayed the appellate review process, while AEP-Ohio has nevertheless begun to account for the deferred capacity costs on its books to the detriment of customers.
- (20) In response, AEP-Ohio notes that the Commission has already rejected OCC's argument and found that issues related to the creation and recovery of the deferral are more appropriate for consideration in the ESP 2 Case, in which the Commission adopted the retail stability rider (RSR), in part to compensate the Company for its deferred capacity costs. AEP-Ohio adds that, because the Commission did not adjust retail rates in the present case, and the RSR was adopted in the ESP 2 Case, there is no harm resulting from the Commission's decision in this docket.
- (21) In the Capacity Entry on Rehearing, the Commission clarified that our initiation of this proceeding for the purpose of reviewing AEP-Ohio's capacity charge was

consistent with Section 4905.26, Revised Code.<sup>3</sup> In relevant part, the statute provides that, upon the initiative or complaint of the Commission that any rate or charge is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, if it appears that reasonable grounds for complaint are stated, the Commission must schedule, and provide notice of, a hearing. The Ohio Supreme Court has found that the Commission has considerable discretion under the statute, including the authority to conduct an investigation and fix new utility rates, if the existing rates are unjust and unreasonable. See, e.g., *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006); *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117 (1987); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979). The Court has also stated that utility rates may be changed by the Commission in a complaint proceeding under Section 4905.26, Revised Code, without compelling the utility to apply for a rate increase under Section 4909.18, Revised Code. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006). The Commission, therefore, disagrees with the arguments of IEU-Ohio, FES, and OCC that are counter to this precedent.

- (22) Further, we find no requirement in Ohio Supreme Court precedent or anywhere else that the Commission must first invoke Chapter 4909, Revised Code, or some other ratemaking authority, prior to fixing new utility rates, if the Commission finds that the existing rates are unjust and unreasonable following a proceeding under Section 4905.26, Revised Code. As noted above, precedent is to the contrary.
- (23) With respect to IEU-Ohio's interpretation of Commission precedent, we disagree that rates can only be established under Section 4905.26, Revised Code, in limited circumstances. The Commission precedent cited by IEU-Ohio is inapplicable here, as it specifically pertains to self-complaint proceedings initiated by a public utility. In *the Matter of the Self-Complaint of Suburban Natural Gas*

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<sup>3</sup> Capacity Entry on Rehearing at 9-10, 13, 29, 54.

*Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, Opinion and Order, at 6 (August 15, 2012).

- (24) Additionally, we find no merit in the argument that the procedural requirements of Section 4905.26, Revised Code, were not followed in this case, which was initiated by the Commission in response to AEP-Ohio's FERC filing. In the Initial Entry, the Commission noted that this proceeding was necessary to review and determine the impact of the proposed change to AEP-Ohio's capacity charge.<sup>4</sup> We believe that the Initial Entry provided sufficient indication of the Commission's finding of reasonable grounds for complaint that AEP-Ohio's capacity charge may be unjust or unreasonable. We agree with AEP-Ohio that there is no precedent requiring the Commission to use rote words tracking the exact language of the statute in every complaint proceeding. In any event, to the extent necessary, the Commission clarifies that there were reasonable grounds for complaint that AEP-Ohio's proposed capacity charge may have been unjust or unreasonable. Also, as previously discussed, the Commission may establish new rates under Section 4905.26, Revised Code, if the existing rates are unjust and unreasonable, which is exactly what has occurred in the present case. In the Interim Relief Entry, the Commission determined that RPM-based capacity pricing could risk an unjust and unreasonable result for AEP-Ohio and subsequently confirmed, in the Capacity Order, that such pricing would be insufficient to yield reasonable compensation for the Company's capacity service.<sup>5</sup>
- (25) We find no merit in the parties' arguments that the Commission is precluded from regulating wholesale rates under Chapter 4905, Revised Code, or Section 4905.26, Revised Code, in particular, and the parties offer no precedent in support of their position. Neither Section 4905.26, Revised Code, nor any other provision of Chapter 4905, Revised Code, prohibits the Commission from initiating a review of a wholesale rate. For its part, IEU-

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<sup>4</sup> Initial Entry at 2.

<sup>5</sup> Interim Relief Entry at 16-17; Capacity Order at 23; Capacity Entry on Rehearing at 18, 31.

Ohio contends that the Commission's regulatory authority under Chapter 4905, Revised Code, is limited to an electric light company engaged in the business of supplying electricity to consumers (*i.e.*, as a retail service). Because the Commission determined that the capacity service provided by AEP-Ohio to CRES providers is a wholesale, not retail, transaction, IEU-Ohio believes that the Commission's reliance on Section 4905.26, Revised Code, as well as Sections 4905.04, 4905.05, 4905.06, Revised Code, is unreasonable and unlawful. However, from the outset of this proceeding, the Commission clearly indicated that the review of AEP-Ohio's proposed capacity charge would be comprehensive in scope and include consideration of other related issues, including the impact on retail competition and the degree to which the Company's capacity costs were already being recovered through retail rates.<sup>6</sup>

(26) Next, we find no error in our clarification that, although the Commission must ensure that the jurisdictional utilities receive just and reasonable compensation for the services that they render, the Commission is under no obligation with regard to the specific mechanism used to address capacity costs.<sup>7</sup> We did not find, as FES contends, that the Commission's ratemaking powers are unbounded by any law. Rather, we clarified only that the Commission has discretion to determine the type of mechanism implemented to enable a utility to recover its capacity costs, and that the recovery mechanism may take the form of an SCM, rider, or some other mechanism.

(27) In its remaining arguments, IEU-Ohio contends that AEP-Ohio's capacity service is a competitive retail electric service, rather than a wholesale transaction, and again disputes our reliance on the Commission's general supervisory powers under Sections 4905.04, 4905.05, and 4906.06, Revised Code, as authority to establish the SCM. These arguments were already rejected by the Commission in the Capacity Entry on Rehearing,<sup>8</sup> and IEU-Ohio has

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<sup>6</sup> Initial Entry at 2.

<sup>7</sup> Capacity Entry on Rehearing at 28.

<sup>8</sup> Capacity Entry on Rehearing at 28-29.

raised nothing new for our consideration with respect to these issues.

- (28) Finally, we do not agree with OCC that it was unreasonable and unlawful, or in violation of Section 4903.09, Revised Code, to find that arguments regarding the mechanics of the deferral recovery mechanism should be raised and addressed in the ESP 2 Case. The Commission did not outline the mechanics of, or even establish, the deferral recovery mechanism in the Capacity Order. Rather, we indicated that an appropriate recovery mechanism for AEP-Ohio's deferred costs would be established, and any additional financial considerations addressed, in the ESP 2 Case.<sup>9</sup> Although numerous parties, including OCC, attempted to predict how the deferral mechanism would be implemented and what its impact would be on ratepayers, the Commission continues to find that it would have been meaningless to address such anticipatory arguments in the Capacity Entry on Rehearing. We, therefore, find no error in having determined that OCC's claims of unfair competition, unlawful subsidies, double payments, and discriminatory pricing were premature, given that the Commission had not yet determined how and from whom AEP-Ohio's deferred capacity costs would be recovered.<sup>10</sup> The Commission notes that we thoroughly addressed OCC's other numerous arguments with respect to the deferral of capacity costs in the Capacity Entry on Rehearing.
- (29) For the above reasons, we find no error in our clarifications in the Capacity Entry on Rehearing, or in determining that arguments related to the mechanics of the deferral recovery mechanism should be resolved in the ESP 2 Case. Any other arguments raised on rehearing that are not specifically discussed herein have been thoroughly and adequately considered by the Commission and are being denied. Accordingly, the Commission finds that the applications for rehearing filed by IEU-Ohio, OCC, and FES should be denied in their entirety.

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<sup>9</sup> Capacity Order at 23.

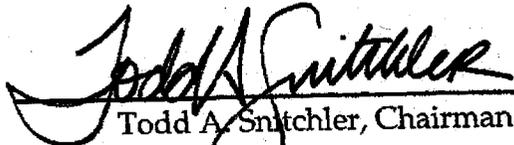
<sup>10</sup> Capacity Entry on Rehearing at 50-51.

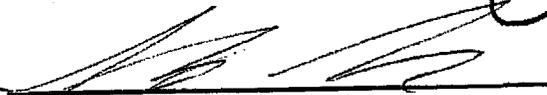
It is, therefore,

ORDERED, That the applications for rehearing filed by IEU-Ohio, OCC, and FES be denied in their entirety. 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

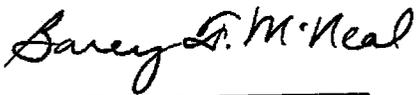
  
Andre T. Porter

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Cheryl L. Roberto

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Lynn Slaby

SJP/sc

Entered in the Journal **DEC 12 2012**



Barcy F. McNeal  
Secretary

# **EXHIBIT B**

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),<sup>1</sup> 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

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<sup>1</sup> 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).<sup>2</sup>
- (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

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<sup>2</sup> *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*

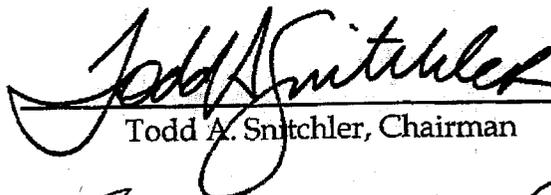
*Adjustment of their Interim Emergency and Temporary Percentage of Income Payment Plan Riders, Case No. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006), at 4.* The December Capacity Entry on Rehearing denied rehearing on all assignments of error and modified no substantive aspect of the 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.

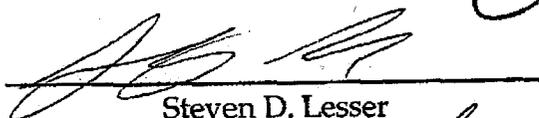
It is, therefore,

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

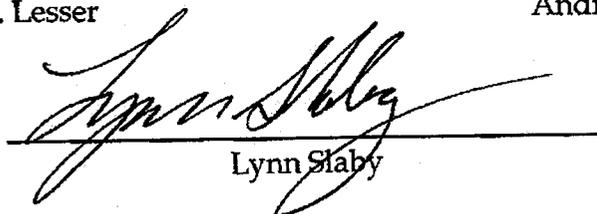
ORDERED, That a copy of this entry on rehearing be served upon all parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Steven D. Lesser

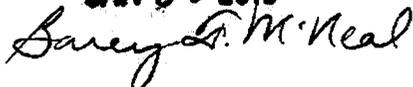
  
Andre T. Porter

  
Lynn Slaby

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Entered in the Journal

~~JAN 30 2013~~



Barcy F. McNeal  
Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion to Dismiss and Memorandum in Support, submitted on behalf of Proposed Intervenor Ohio Power Company, was served via regular U.S. mail, postage prepaid, upon the following parties of record, this 21st day of February, 2013.

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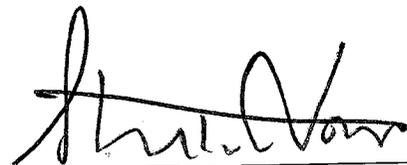
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