

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application for)
Approval of a Contract for Electric Service) Case No. 08-884-EL-AEC
Between Ohio Power Company and Globe)
Metallurgical, Inc.; and)

In the Matter of the Application for)
Approval of a Contract for Electric Service) Case No. 08-883-EL-AEC
Between Columbus Southern Power)
Company and Solsil, Inc.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Under R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the approximately 1.3 million residential electric customers Columbus Southern Power Company ("CSP") and Ohio Power Company ("OPC") (collectively, "AEP" or "Companies"), applies for rehearing of the July 31, 2008 *Order* ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-identified cases. The Order approves contracts with two customers filed July 16, 2008: 1) CSP and Solsil for a 60% discount from a Standard Service Offer ("SSO") generation rate benchmark and other terms and conditions; and 2) OPC and Global Manufacturing for reduction of 10% of the "otherwise applicable schedule for firm and interruptible," and other terms and conditions (collectively "Contracts"). The Contracts terms and conditions (including

¹ Order, page 2, paragraph 6.

addenda) include a ten year term ensuring that AEP recovers 100% of the discount authorized for Solsil and Globe, and prohibiting Solsil and Globe from participating in the PJM Interconnection, LLC ("PJM") Demand Response programs ("PJM DR") among other terms.


The Commission's Order is unjust, unreasonable and unlawful and should be abrogated and modified in the following particulars:

- A. The Commission Erred Because it had no Jurisdiction to Approve the Contract Language Preventing Participation in PJM Demand Response Programs. The Commission Lacked Jurisdiction Because, Inter Alia, the Federal Energy Regulatory Commission Determined, by Authorizing Tariffs, that the PJM Programs Would be Open to All Customers Including Solsil and Globe.
- B. In Approving the Contracts the PUCO Changed its Long-standing Policy and Precedent Regarding Economic Development Riders Without any Factual Record to Support its Decision.
- C. In Approving These Contracts, the Commission was Obligated to Ensure that the Economic Benefits Which Formed the Basis for These Contracts Would be Realized.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

Respectfully submitted,

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I. INTRODUCTION

² Ohio Revised Code Section 4928.02

not have jurisdiction to approve the contract language preventing Globe and Solsil from participating (except at the direction of American Electric Power which is not a signatory to either contract) in regional demand response programs ("PJM DR")³ authorized by the Federal Energy Regulatory Commission ("FERC").

The PUCO's Order authorized AEP to recovery of all the Delta Revenues, but deferred the determination of the recovery mechanism to its application made pursuant to R.C. 4928.141 (PUCO Docket Case Nos. 08-917-EL-SSO and 08-918-El-SSO).

The Commission's Order is unreasonable and unlawful and rehearing should be granted on this matter.

II. PROCEDURAL HISTORY

The procedural history of these cases is abbreviated. On July 16, 2008 the Companies filed special arrangements with two customers providing substantial rate discounts. On July 30, 2008 OCC intervened in the cases. On July 31, 2008 the Commission issued an Order approving the terms of the Contracts. OCC requests rehearing of the Order pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

III. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty (30) days after an order is issued by the Commission "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."⁴ The application for

³ PJM Interconnection, LLC Demand Response Programs.

⁴ Ohio Revised Code 4903.10.

rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”⁵

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”⁶ Furthermore, if the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***.”

Pursuant to R.C. 4903.221, OCC intervened in the cases, satisfying the statutory requirements⁷ for applying for rehearing. OCC has been as active as possible given the abbreviated fifteen-day pendency of these cases. OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

IV. ARGUMENT

A. The Commission Erred Because it had no Jurisdiction to Approve the Contract Language Preventing Participation in PJM Demand Response Programs. The Commission Lacked Jurisdiction Because, Inter Alia, the Federal Energy Regulatory Commission Determined, by Authorizing Tariffs, that the PJM Programs Would be Open to All Customers Including Solsil and Globe.

When the Energy Policy Act of 2005 (“EPAct 05”) was enacted, Congress delegated to FERC the task of establishing demand response programs in the wholesale

⁵ Id.

⁶ Id.

⁷ Id.

market.⁸ FERC has complied with this mandate, and the PJM DR Tariffs are one example. FERC did not impose limitations of who could participate in the PJM DR programs: they are open to all.

AEP has a long history of opposing its customers' participation in PJM DR.⁹ At present AEP is actively working in the PJM committee and Stakeholder processes to prohibit *all Ohio participation in such regional programs unless the PUCO specifically authorizes a customer to do so*¹⁰. This is contrary to one of the fundamental purposes of the Energy Policy Act in encouraging PJM's (and other regional transmission organization's or independent system operator's) demand response programs.

The main premise of the filed rate doctrine is that a utility can not charge other than the FERC-tariff conditions and rates for those areas in which FERC has jurisdiction.¹¹ This concept initially arose in the context of price discrimination cases, where one customer or one company was accorded a discriminatory or preferential price as compared with others.¹² The application of the filed rate doctrine soon evolved to bar state action that would not honor the federal determination of the terms and price for a

⁸ EPCA 05, Section 1252(e) DEMAND RESPONSE AND REGIONAL COORDINATION.—

(1) IN GENERAL.—It is the policy of the United States to encourage States to coordinate, on a regional basis, State energy policies to provide reliable and affordable demand response services to the public.

⁹ See, PJM Demand Response Steering Committee Agendas and Minutes (<http://www.pjm.com/committees/drsc/drsc.html>).

¹⁰ Id.

¹¹ *Montana-Dakota Utilities Co., v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

¹² *Pacific Gas & Electric Co., et al. v. Lynch, et al.*, 216 F. Supp. 2d 1016, 1033-34 (N.D. Cal. 2002), citing *Montana-Dakota Utilities*, 341 U.S. at 251-52.

wholesale transaction.¹³ The United States Supreme Court in *Nantahala* ruled that state commissions can not inquire into the reasonableness of the filed wholesale rate approved by FERC because the Supremacy Clause of the United States Constitution and the Federal Power Act combine to provide FERC exclusive authority over transmission service and establishing wholesale electric markets in interstate commerce.¹⁴ The FERC-approved “rate” in *Nantahala* comprised all of the rates, terms and conditions of the sale, including the quantity of power to be purchased. The Court affirmed the doctrine a few years later, barring states from reviewing the reasonableness of the costs underlying the FERC-approved rate, and from disallowing recovery of the costs associated with the wholesale power supplies purchased under a FERC approved tariff.¹⁵ The EPACT 05 expanded FERC’s jurisdiction to also include demand response programs.

As a matter of public policy, the PUCO should be encouraging customers to participate in demand response and not allowing utility-imposed restrictions to prevail. This is a mandate of SB 221:

Sec. 4928.02. It is the policy of this state to do the following throughout this state: *****(D)** Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;

As customers are faced with the ever increasing costs of electricity, demand response can play a significant role in reducing peak demand which can alleviate the need to construct or use peaking power or purchase power on the market when

¹³ *PGE v. Lynch*, 216 F. Supp. at 1034, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

¹⁴ *Nantahala*, 476 U.S. at 966.

¹⁵ *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 369-70 (1988).

prices are high. By allowing AEP to impose this restriction, it deprives all customers – including those who are being asked to subsidize the customers under the contracts – of the potential system-wide savings that could be achieved if demand response were available. Thus, this provision should be stricken from the contracts.

In the present context, when AEP's customers enter into a discounted rate contract for 10 years, the PUCO authorization of a ban on participation in PJM DR impermissibly interferes with FERC's jurisdiction. The PJM tariffs are open to all. The PUCO ban on such participation as a matter of course (for no stated reason)¹⁶ is unreasonable and unlawful, and the Order in this respect should be abrogated.

B. In Approving the Contracts the PUCO Changed its Long-standing Policy and Precedent Regarding Economic Development Riders Without any Factual Record to Support its Decision.

AEP filed the Applications for approval of the Contracts under R.C. 4905.31. The PUCO stated that its approval of the Contracts was not based upon its authority to approve economic development contracts; however neither the new provisions of SB 221 nor the existing provisions of the Ohio Revised Code Section 4928.02 authorize the PUCO to award special discount contracts.¹⁷ Special Discount contracts are exclusively addressed in R.C. 4905.31 and those standards must be applied in approving the Contracts.

¹⁶ The prohibition of Globe and Solsil from participating in PJM's Demand Response programs is not even discussed by the PUCO in the *Order*.

¹⁷ See Ohio Revised Code Section 4928.02(J).

The PUCO policy regarding economic development special contracts and the subsequent Delta Revenues has been in place for over 25 years.¹⁸ Before a special contract can be recommended for approval the contract must go through a comprehensive analysis by the PUCO Staff¹⁹ and allow other parties the opportunity to review the application -- if requested.

In this case, two parties intervened within fifteen days of the filing. In both instances the parties raised specific and substantive reasons for their intervention and questioned the proposed Contracts. The Commission approved the Contracts the very next day, rather than allowing the parties the opportunity to investigate their issues and provide evidence on the matter to the PUCO. The Staff's analysis and the parties' investigations should be offered as evidence and considered by the PUCO in rendering its decision.²⁰ The Commission would then be able to make a decision informed by the parties after completing an investigation and providing evidence to support their positions.

The PUCO's twenty-five year precedent is that special contracts must provide for a reasonable split of the Delta Revenues because both AEP and its customers will equally receive benefits from the Agreement and accordingly should share the associated costs.²¹ AEP's Contracts as proposed and approved by the PUCO do not meet the criteria for a

¹⁸ See *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment B).

¹⁹ *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment B).

²⁰ R.C. 4903.09.

²¹ *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment B).

reasonable incentive rate proposal nor do they fairly account for the Delta Revenues as discussed below.

1. AEP's application does not comply with PUCO's policy for discounted contracts.

The PUCO has a written policy on the criteria that economic recovery initiatives must meet. The PUCO's policy lists at least eight basic criteria that must be met:

- i. The term of the rate initiative is short-term; i.e. five years.
- ii. The short run marginal revenue derived from the application of the rate incentive is greater than the short run marginal cost of providing service.
- iii. The rate incentive applies primarily to increases in usage and load from that which occurred on an historical, or base level.
- iv. Incremental usage and load occurs in combination with increased short-term customer production, and corresponding increases employment and local economic activity.
- v. The proposing utility reasonably satisfies utility specific regulatory reporting requirements for identifying and quantifying the short-term effects of the specific proposed initiative.
- vi. The application of a rate incentive does not discriminate against other customers and does not adversely affect other customer services and rates.
- vii. The rate initiative, terms and conditions of the proposal are understandable and are administratively convenient to apply.²²

²² *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment B).

- viii. The economic recovery rate program contract revenue deficiency should be recovered on a shared or “split” basis.²³

OCC should be allowed to evaluate and analyze whether the Contracts meet these criteria, including an analysis of any discriminatory treatment these Contracts provide to similarly situated companies. In addition, the relationship of the proposed 10 percent to 60 percent discounts for generation service to the increased productivity of Solsil and Globe – if any – should be evaluated and determined by the Commission. In addition the Commission should also evaluate how AEP’s Contracts will affect the rates other customers will pay.

In accordance with the PUCO economic development policy, there are at least two criteria that AEP’s Contracts violate. The Contracts’ 10 year terms are too long and the PUCO has no record upon which to determine that full recovery of the Delta Revenue costs is equitable.

First, the PUCO Staff’s policy requires “The term of the rate initiative is short-term; i.e. five years.”²⁴ AEP’s Contracts doubles the contract term to ten years. Adding an additional five years to the program without any concurrent review of the increase in load and jobs created throughout the life of the agreement does not comply with the Commission’s policy.²⁵

Second, the PUCO should not allow AEP to retain more than half the Delta Revenues consistent with the PUCO’s policy:

Staff recommends that the Economic Recovery Rate Program contract revenue deficiency be recovered on a shared or “split”

²³Id. at page 6 of 11.

²⁴ *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment B).

²⁵ Id.

basis; a portion to be recovered by the general customers and remainder contributed by the utility. In the Staff's opinion, it is equitable that both the benefits and the costs of the economic recovery be distributed to both customers and the company.²⁶ (emphasis added).

In determining the appropriate Delta Revenue split between Companies and customers for these contracts the Commission determined (and has applied for many years) "that a 50/50 split properly recognizes that both the company and its customers benefit from the company's policy of providing economic incentive rates to certain customers to attract new business in the utility's service territory."²⁷ The 50/50 sharing of the cost of Delta Revenues is consistent with other decisions which addressed the issue.²⁸ In its Order, the PUCO changes this important policy determination by adopting a split of revenues that requires the AEP to pay nothing and the customers to pay everything – a 0% - 100% sharing of the cost of Delta Revenues. When the PUCO changes a long-standing policy, OCC should be able to offer evidence about the change in policy and advocate a policy that is in the interests of residential customers. OCC would like to discover why AEP also should receive a benefit (recovering 100% of Delta Revenues)²⁹ from Contracts – something that the PUCO has not previously permitted. There should be a factual record supporting this decision.

²⁶ Ohio Electric Innovative Rates Program, page 6 of 11 (June 28, 1983). (Emphasis added) (Attachment B).

²⁷ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, 91-418-EL-AIR. Opinion and Order at 110 (May 12 1992).

²⁸ See *Ohio Edison Company*, Case No. 89-1001-EL-AIR, Opinion and Order at 40-41. (August 16, 1990), at 40-41 and *Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR, Opinion and Order at 18-19 (January 31, 1989).

²⁹ Order at page 4 paragraph 10.

The PUCO's approval of AEP's request for full recovery has policy and ratemaking ramifications. AEP negotiated a deal with Globe and Solsil that provides AEP a substantial new revenue base without incurring any additional costs resulting from the rate discounts granted.³⁰ In this type of negotiation, AEP can give significant – even unwarranted -- discounts to Globe and Solsil because the effects of those Contracts are borne entirely by customers, including residential customers.

The Contracts and the PUCO's Order provide no explanation why AEP should be rewarded with full recovery of the Delta Revenues. In addition, without exposure to any cost-risk, AEP has no incentive to negotiate a fair rate. Without exposure to a cost-risk AEP has an incentive to give whatever discount is necessary to get the deal done and retain the customers' load. By striking a deal – any deal -- AEP gets the revenue, Globe and Solsil get a discount and the other AEP customers are left – without any voice in the matter -- to bear the full costs of the Delta Revenues (that were never contemplated by long-standing PUCO policy or precedent). In this particular case, AEP negotiated an unprecedented 60% discount in rates that is going to impose a costly burden on other customers. There needs to be clear parameters with respect these Contracts.

“When the language [of a statute] ***clearly expresses the legislative intent, the court need look no further [.]” because “at that point the interpretative effort is at an end, and the statute must be applied accordingly.”³¹ R.C. 4905.31 authorized the Commission to approve these special contracts provided the requirements of the statute are met. When

³⁰ *Application* at 2.

³¹ *Time Warner v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 237, citing *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101.

R.C. 4905.31 was amended in SB 221, neither the requirements for Contracts nor the Delta Revenue split was changed. Eliminating a long-standing Commission policy without the authorization of the General Assembly or a record of evidence justifying such a change is error.

2. The Commission erred when it failed to comply with R.C. 4903.09 and provide findings of fact and written opinions that were supported by record evidence.

In its Order the Commission makes “findings of fact,” that are not supported by any record of evidence. In doing so the Commission violates the requirements of R.C. 4903.09.

Under R.C. 4903.09, the PUCO’s opinions must be based upon findings of fact: “[T]he commission shall file, with the records of such cases, finding of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” To meet the requirements of this statute, the PUCO’s Order must show, in sufficient detail, *the facts in the record* upon which the order is based, and the reasoning followed in reaching the conclusion.³²

The PUCO, however, made findings without having facts in the record to support such findings. Where the order of the Commission is manifestly against the weight of the evidence -- *or there is no evidence* -- the Ohio Supreme Court has overturned the judgment of the Commission.³³ The PUCO here should grant rehearing on these issues and should ultimately reverse its Order, based on the evidence offered into the record in this proceeding.

³² *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 2 Ohio St.3d 306.

³³ *Motor Service Co. v. Pub. Util. Comm.* (1974), 39 Ohio St.2d 5.

C. In Approving These Contracts, the Commission was Obligated to Ensure that the Economic Benefits Which Formed the Basis for These Contracts Would be Realized.

AEP asks customers to pay a sizeable portion of the contracting parties' electric bill. AEP in its Application and the PUCO in its Order described the economic development benefits that will accrue to the local economy. Customers are entitled to assurances that these benefits will materialize and customers will get what they pay for. This requires benchmarks that must be met. The contracting parties should be required to offer proof of achieving the new jobs that it claims will result from the discounted rate. If Globe and Solsil do not achieve their projections the amount of the discount should be refunded back to customers. This is a request for corporate accountability. It is a request for nothing more than what the companies represent will occur. As more and more of these contracts are negotiated on the backs of struggling families, these same families are entitled to be assured that the jobs and other benefits are in fact created. The Commission had a duty to impose, as a condition of approval, periodic reviews of the progress of these two companies to ensure that the investment made by the ratepayers is providing the benefits promised and if not, customers are entitled to a refund.

V. CONCLUSION

The Commission doubled the increase AEP's customers will have to pay for Delta Revenues as part of their electricity costs when it approved the Contracts. The increase results from the elimination of the Delta Revenue split of the Contracts' discount between Companies and customers. The Commission made this decision contrary to long-standing Commission Policy, without any evidentiary record, without legal authority, and without any opportunity for parties to offer an evidentiary record challenging AEP's

proposed increase in what customers will have to pay. The Commission's actions were unreasonable and unlawful because the Commission approved Contracts and did not comply with the provisions of the Ohio Revised Code 4905.31, including the Commission's own precedent. The order violated the Supremacy Clause of the U.S. Constitution when it banned Solsil and Globe from participating in PJM DR Programs. For these reasons, the Commission should "abrogate or modify" its Order, pursuant to R.C. 4903.10, and reject the Contracts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served via first class U.S. Mail service, postage prepaid, upon the persons listed below, on this 2nd day of September, 2008.



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