

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company For)
Approval of its Electric Security Plan)
Including Related Accounting Authority; an)
Amendment to its Corporate Separation)
Plan; and the Sale or Transfer of Certain)
Generating Assets)

Case No. 08-917-EL-SSO

and)

In the Matter of the Application of Ohio)
Power Company for Approval of its Electric)
Security Plan Including Related Accounting)
Authority; and an Amendment to its)
Corporate Separation Plan)

Case No. 08-918-EL-SSO

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BRIEF ON ADOPTION OF AN INTERIM OR ALTERNATIVE PLAN
FROM CONSTELLATION NEWENERGY, INC.
AND
CONSTELLATION ENERGY COMMODITIES GROUP, INC.

I. Introduction and Summary of Positions

Now comes Constellation NewEnergy, Inc. and Constellation Energy
Commodities Group, Inc. (jointly "Constellation") and in accordance with the order and
rulings by the Hearing Examiner from the bench on November 17 and 26, 2008 present
their views as to the interim plan presented by Columbus Southern Power Company
("Columbus Southern Power") and Ohio Power Company ("Ohio Power") (jointly
"AEP") in Section V.E. of the AEP Application ("Interim Plan") and the January 1, 2009
Alternative Plan presented by Staff Witness J. Edward Hess on November 10, 2008
("Alternative Plan"). In addition, in keeping with the Attorney Examiner's ruling to

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include anticipated responses in lieu of reply briefs, Constellation addresses certain anticipated positions of other intervenors.

A. Summary of Positions

1. AEP's Position

On July 31, 2008, AEP filed an Electric Security Plan ("ESP") in accordance with the requirements of Sections 4928.141 and 4928.143, Revised Code. As part of that Application, AEP provided for an Interim Plan which would establish post Rate Stabilization ("RSP") authorized rates consisting of the current rates, terms, and conditions, plus a new ESP Rider. The new ESP Rider would be applicable to all tariff services and would capture the revenue which AEP would have otherwise earned had the long term ESP rates – when finalized – been made applicable as of the start of the ESP period on January 1, 2009.

2. Staff's Position

On November 10, 2008, the Staff via Direct Prepared Testimony of J. Edward Hess, proposed an alternative to the Interim Proposal to be effective on January 1, 2009, the Alternative Plan. The Alternative Plan differs from AEP's Interim Plan in that it would have fixed rates for the period beginning January 1, 2009 consisting of the current RSP rates plus a 7% increase in generation rates for Columbus Southern Power and an 11% increase in generation rates for Ohio Power. Unlike the Interim Plan, under the Alternative Plan when a long term ESP order is issued by the Commission there will be no true up or other retroactive revenue adjustment. The Alternative Plan also addressed ancillary issues such as the cost of line extensions, the expiration of the Regulatory

Transition Charge for Columbus Southern customers, and new rates for Ormet whose special contract authorized in Case No. 05-1057-EL-CSS expires on December 31, 2008.

3. Other Intervenor Positions

In response to the portion of Mr. Hess' testimony addressing the Alternative Plan, rebuttal testimony was filed by the Office of the Consumers' Counsel ("OCC"), the Ohio Energy Group ("OEG"), and Integrys Energy Services ("Integrys"). The OCC takes the position that neither the Alternative Plan nor the Interim Plan is needed since Senate Bill 221 provided that, if no order on the Application has been issued effective on January 1, 2009, the current rates remain in effect until the first plan has been authorized under either Section 4928.142, Revised Code (Market Rate Option) or Section 4928.143 (Electric Security Plan).¹ Several other parties support this position.

The OEG, though in opposition to AEP's long term ESP plan, supports AEP's Interim Plan and will accept the Alternative Plan with two specified amendments: (i) addition of a true up mechanism; and (ii) rejecting the Ormet rate treatment found in the Alternative Plan.² Similarly, while AEP favors its own Interim Plan, AEP would accept the Alternative Plan if there are three (3) major revisions. First, in addition to the Ohio Power generation rate increase of 11% and the Columbus Southern Power generation rate increase of 7% over current rates, AEP wants a Fuel Adjustment clause with automatic increases based upon fuel and purchased power increases over the Staff's baseline of similar fuel charges that exist in the current RSP rates. Second, AEP wants an increase in the Provider of Last Resort ("POLR") charge at half the proposed increase in the ESP Application during the Alternative Plan period. Finally, AEP requests a

¹ Rebuttal Testimony of Beth E. Hixon p. 6.

² Rebuttal Testimony of Stephen J. Baron p. 2-3.

provision that would result in the termination of any demand response contracts between Standard Service Offer ("SSO") customers and anyone other than AEP that are entered into during the Alternative Plan period.

II. Legal Requirement for an Interim or Alternative Plan

Section 4928.141(A), Revised Code requires that as of January 1, 2009, all electric distribution utilities ("EDUs") must offer on a comparable and nondiscriminatory basis a default SSO which includes electric generation service. The statute then limits the generation sources for the SSO to either those authorized via an ESP plan filed under Section 4928.143, Revised Code or a Market Rate Option ("MRO") filed under Section 4928.142, Revised Code. AEP has only made an application for an ESP pursuant to Section 4928.143, Revised Code. The AEP Application was filed on July 31, 2008. The statutory deadline for the Commission to rule on an ESP application is 150 days from the date of filing.³ Since 150 days from the date of filing falls on a Sunday, the deadline for the Commission to issue an order is Monday, December 29, 2008.

Although Section 4928.143, Revised Code is clear that the Commission "shall" issue an order on an EDU's ESP application within the 150-day deadline, it is instructive to note that the statute does not require that an ESP plan be in place – in whole or in part within 150 days. Thus, the General Assembly has given the Commission wide discretion as to the content of an ESP order. The Commission may reject an application, approve an application, or approve an application with modifications. The criteria for making a decision to approve, approve with modifications, or reject an ESP plan rests on whether the Commission finds that the ESP application complies with certain requirements in

³ Section 4928.143 (C)(I) provides in part "The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date..."

Section 4928.143, Revised Code, including whether the ESP is “more favorable in the aggregate than the expected results of a MRO.” Further, the statute places the burden of proof on the EDU.

Section V.E. of the Application provides for an interim ESP rate as part of the ESP plan. Section 4928.143, Revised Code does not prohibit a utility from asking for a phased implementation and does not prohibit the Commission from establishing a phased approach. Thus, it appears that the Commission has the authority to enter an Interim Order and only rule on this interim rate issue at this time, so long as the ruling is issued within the 150 day limit. Further, if the Commission finds that, based upon the hearing record, AEP has not met its burden of proof to implement the interim plan as requested, then the Commission could either reject or modify the Interim Plan. If the Commission does modify an ESP order, then AEP is not required to accept the order and can withdraw the application and re-file. The statute though is quite clear that, should the utility not accept the Commission’s order, the current rates would stay in effect until the Commission approved a subsequent filing and the EDU accepted such an order.⁴

In sum, while the General Assembly clearly mandated the Commission to issue an order in 150 days from the Application, it gave the EDU the freedom to design the ESP plan and conferred broad discretion on the Commission to modify the ESP plan. In the instant proceeding, it seems clear that the Commission could bifurcate its ruling on the ESP plan and just issue an order for an Interim ESP rate at this time. Further, the Commission could find that AEP did not meet its burden of proof and accept the modifications suggested in the Staff Alternative Plan or changes suggested herein by Constellation.

⁴ Section 4928.143 (C)(2)(a), Revised Code.

III. AEP Interim Plan

As discussed above, AEP proposes an Interim Plan in which current RSP rates and service terms remain in place plus the addition of a new ESP Rider that would take effect upon authorization of a long term ESP plan by a subsequent Commission Order. The new ESP Rider would be designed to collect back revenues which would have been collected by AEP had the long term ESP plan been authorized by the Commission in time to be implemented by January 1, 2009. The Interim Plan does not appear to foreclose any options that would otherwise be available to the Commission as it considers its ultimate ruling regarding a long term ESP order. In other words, the Commission could authorize the Interim Plan and subsequently find no increase at all and set the ESP Rider at zero.

From Constellation's perspective, AEP's Interim Plan has two (2) flaws. First, it forces customers to buy electric power and energy without knowing what the true cost of that electric generation will be. For customers who are taking service from a Competitive Retail Electric Supplier ("CRES"), a retroactive price adjustment on electric power and energy already used and invoiced distorts the true cost of the generation. This makes price comparisons impossible and will have a negative effect on customer choice and competition. It also harms non-shopping customers because it makes budgeting more difficult as some amount of money will need to be set aside to pay the ultimate bill.

The other problem with the Interim Plan is that it fails to affirm the right of all retail customers to participate in PJM demand response programs. As detailed in the Rebuttal Testimony of Integrys witness Mr. Wolfe, the sign-up period for PJM's Interruptible Load for Reliability Program ("ILR") is January 5, 2009 through March 2, 2009. The term of the ILR program corresponds with the PJM planning year of June 1,

2009 through May 31, 2010.⁵ Since the record is unlikely to close until the second week of December to be followed by Trial and Reply briefs, it is highly probable that an Opinion and Order on the entirety of the Application will not be issued until late January 2009. Further, a final appealable order could not come for an additional 30 days after entry of an Opinion and Order to allow for the statutorily mandated period for rehearing petitions.⁶

It is in the best interest of both the retail customers of Ohio Power and Columbus Southern who want to participate in the PJM ILR program as well as other Ohio customers in the PJM zone who benefit in an emergency by the ILR program that the Commission make clear that it will take no action to impair contracts by retail customers to participate in the PJM ILR program during the 2009-2010 PJM planning year. Constellation is concerned that ambiguity on this point could have a chilling effect on sign up for demand response programs.

Finally, as it relates to the length of any interim rate plan, Constellation would be opposed to the Interim Plan if it were to continue for any great length of time. However, if the Commission specifically limits the Interim Plan to a limited number of monthly billing cycles (no more than 3 or 4), Constellation's concerns regarding the length of the interim rate plan would be somewhat relieved.

IV. Alternative Plan

The Staff offered the Alternative Plan apparently out of concern that customers would be buying electric power and energy at an undetermined price under the AEP

⁵ Rebuttal Testimony of Samuel R. Wolfe at p. 3.

⁶ Section 4903.10, Revised Code.

Interim Plan. The Alternative Plan has the advantage of rate certainty over the Interim Plan in that no retroactive adjustments will be made to the generation price for electric power and energy. Several Intervenors though object to the interim rates proposed by the Staff as being set too high,⁷ and request modification to the rates. Constellation takes no position on those changes suggested by Intervenors and supports the concept of fixed rates that are not subject to retroactive price changes.

AEP also objects to the rates proposed under the Alternative Plan but unlike Intervenors, AEP argues that the rates are too low. Specifically, AEP witness Mr. Baker testified that since Columbus Southern Power and Ohio Power's POLR charges were lower than other utilities, that in addition to the 7% and 11% increases in generation rates, all customers should also have their POLR charge substantially increased during the few months of the Alternative Plan.⁸ This position lacks legal, factual and public policy support.

First, since the POLR charge, unlike the cost of generation,⁹ is a utility service it should be based on cost of service. The record in this case is devoid of any information which shows actual costs of AEP to provide POLR service under either the Alternative Plan or the longer term ESP. Further, during the two or three months of the Alternative Plan, it is unlikely that Columbus Southern or Ohio Power will experience any customers returning from a CRES provider to AEP's SSO under Section 4928.14. This is because, according to the latest Commission published market monitoring reports,¹⁰ there are no

⁷ See Rebuttal Testimony of Beth E. Hixon p. 11-12 and Stephen J. Baron p. 2-3.

⁸ Rebuttal Testimony of J. Craig Baker p. 7-8.

⁹ Section 4928.03, Revised Code defines generation as a competitive service and thus is not subject to utility cost of service pricing. POLR service is a noncompetitive service because it can only be offered by the electric distribution company, thus it is subject to cost of service analysis under Section 4909.18, Revised Code.

¹⁰ Commission Website – Market Monitoring Report 1st Qtr. 2008.

customers taking service from a CRES in the Ohio Power service territory and less than 1% taking service from a CRES in the Columbus Southern service territory. Without any meaningful quantity of customers that could even seek to return to SSO service, there cannot and should not be any costs to AEP for standing ready to provide POLR service.

Even if there were customers returning, the factual basis for the claim that AEP's POLR charge is substantially less than those of other EDUs is questionable. Mr. Baker based his cost comparison of POLR charges on the testimony presented by the Ohio Consumers' Counsel (Janine Migden) to the General Assembly during the debate on Senate Bill 221.¹¹ Mr. Baker testified that Duke Energy Ohio's POLR is three times the POLR charged by AEP and FirstEnergy's POLR is over twenty times that charged by AEP.¹² The OCC's General Assembly testimony though showed that AEP's POLR was fundamentally different from Duke's POLR or FirstEnergy's POLR. According to the OCC's General Assembly testimony, Duke and FirstEnergy have POLR fees that may be bypassable, while AEP's is non-bypassable.¹³

In the instant proceeding, Constellation has taken the position that POLR fees should only be paid by customers who return to SSO, as opposed to charging all customers a POLR fee for the right to take service from a CRES provider.¹⁴ It is inaccurate to compare the nominal rates of a POLR charge which is non-bypassable with one that is bypassable without adjusting for the fact that a lower rate charged to more people could produce more revenue than a higher rate charged to fewer customers. The

¹¹ Rebuttal Testimony of J. Craig Baker p. 7 – 8.

¹² *Id.* at 8.

¹³ The Attorney Examiner took administrative notice of the Consumers' Counsel's testimony to the General Assembly which was distributed at the hearing. Comparison among POLR rates is found at Attachment A of the testimony.

¹⁴ See Direct Prepared Testimony of David Fein p. 12.

testimony of the OCC before the General Assembly as well as Mr. Mark Frye's testimony in the instant proceeding indicates that AEP's POLR charge currently is non-bypassable.¹⁵ Further, the tariffs proposed as part of the Application maintain the POLR charge as a non-bypassable charge.¹⁶

In terms of public policy, the General Assembly in Section 4928.02, Revised Code makes it the energy policy of the state to encourage multiple suppliers and multiple energy options for customers. A mandatory POLR charged to a shopping customer that has not returned to SSO is a financial disincentive and is in direct conflict with encouraging multiple suppliers and energy options for consumers. It is a fee that is paid to secure capacity when the customer is covering all of its capacity requirements as part of the generation purchase.

There is one change to the Alternative Plan that Constellation believes is required. Since Mr. Hess' Direct Prepared Testimony is silent on the ability of retail customers of Ohio Power and Columbus Southern Power to sign up for ILR or the other PJM demand response programs during the interim period, the Commission should specifically state that retail customers can participate in the PJM demand response programs for the 2009 - 2010 PJM Planning year. Failure to do so could have the unintended consequence of suppressing enrollment because of the uncertainty surrounding the ability of retail customers to participate in such programs in the 2009-2010 PJM Planning year.

V. Conclusion

For all reasons detailed in the foregoing brief, Constellation requests that whether the Commission approves the Interim Plan called for in Section V.E. of the Application,

¹⁵ See Direct Prepared Testimony of Mark Frye, p.7.

¹⁶ See Direct Prepared Testimony of David Roush, exhibit DMR 9 and DMR 10.


or the Alternative Plan offered by the Staff, or simply maintains the current RSP rates, such an Interim Order should specify the following:

- (1) that it will not accept the increased POLR charge proposed by AEP;
- (2) that all retail customers are free to enroll in PJM's demand response programs and participate for the entire term of the 2009-10 PJM planning year;
- (3) Is otherwise consistent with the recommendations made by Constellation as outlined herein and in its testimony; and
- (4) Grants such further or different relief as the Commission deems just and reasonable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 3rd day of December, 2008 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.



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