

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

American Electric Power Service	:	
Corporation	:	
	:	Docket No. EL11-32-000
v.	:	
	:	
PJM Interconnection, L.L.C.	:	

**PROTEST
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

April 25, 2011

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INTRODUCTION

On April 4, 2011, American Electric Power Service Corporation (AEP) filed a complaint pursuant to Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2006) and Rule 206 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure, 18 C.F.R. § 385.206 (2010). AEP's complaint seeks modifications to Schedule 8.1, Section D.8 to the PJM Interconnection, L.L.C. (PJM) Reliability Assurance Agreement (RAA). AEP's complaint is in response to FERC's order issued on January 20, 2011, in Docket No. ER11-2183.

On April 5, 2011, FERC issued its Notice of Complaint establishing a comment due date of April 25, 2011. Pursuant to FERC's Rule 214, Part 38, Rules of Practice and Procedure, 18 C.F.R. § 385, the Public Utilities Commission of Ohio (Ohio Commission or PUCO) filed a timely motion to intervene on April 12, 2011, and is a party to this

docket. The Ohio Commission hereby submits its Protest in response to AEP's complaint.

BACKGROUND

On January 20, 2011, FERC issued its Order Rejecting Formula Rate Proposal¹ in Docket No. ER11-2183-000. It rejected AEP's filing because the Ohio Commission has adopted a state compensation mechanism. In addition, FERC observed that AEP voluntarily signed the RAA and, consequently, has voluntarily relinquished its rights to make such a filing because the PJM RAA does not permit AEP to change a state imposed allocation mechanism. FERC's decision also states that AEP does not have the right to change the PJM RAA unilaterally through a section 205 filing. AEP's 206 filing in this proceeding indicates that its complaint is necessitated by FERC's interpretation of the RAA.

DISCUSSION

A. The FERC's decision in ER11-2183 is dispositive.

The Ohio Commission requests the FERC to either dismiss the complaint or stay the case pending the completion of proceedings at the state level. This is necessary because the FERC's decision in ER11-2183 is dispositive of the issues here, the Ohio Commission is uniquely positioned to consider the issues, and there are currently proceedings pending at the Ohio Commission which will address the issues herein. Thus,

¹ 134 FERC ¶ 61,039.

dismissing or staying the instant case would be more efficient, it would save the FERC's time and effort while still allowing the FERC to examine the situation again if there is some concern remaining after action by the Ohio Commission. The FERC's decision in ER11-2183 is dispositive.

As noted above, on December 8, 2010, the Ohio Commission expressly adopted the use of the RPM auction price as its state compensation mechanism.² AEP disputed the existence of such a mechanism, but on January 20, 2011, the FERC, as a part of its Order, stated that "it is uncontroverted that such a [compensation] mechanism has now been adopted by the Ohio Commission."³ Accordingly, the FERC agrees that under Section D.8 of Schedule 8.1 of the RAA, a state imposed compensation mechanism prevails in instances where the state jurisdiction requires the load serving entity (LSE) to

² *In the Matter of Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 10-2929-EL-UNC (Entry) (December 8, 2010).

³ *American Electric Power Service Corporation*, Docket No. ER11-2183 (Order Rejecting Formula Rate Proposal, 134 FERC ¶ 61,039, at 4) (January 20, 2011).

compensate the FRR entity.⁴ The Ohio Commission maintains that its actions are within the parameters established by PJM's RAA tariff and that there is no need for the FERC to revisit its already established interpretation of the tariff.⁵

In its January 20th Order, the FERC also stated that, "making a section 205 filing applies only when no state compensation mechanism exists; the adverbial phrase in Section D.8 of Schedule 8.1 of the RAA, "in the absence of state compensation mechanism," qualifies the remainder of that sentence and therefore conditions the right to make a section 205 filing."⁶ Furthermore, because AEP voluntarily signed the RAA, the FERC

⁴

Schedule 8.1 reads as follows:

In a state regulatory jurisdiction that has implemented retail choice, the FRR Entity must include in its FRR Capacity Plan all load, including expected load growth, in the FRR Service Area, notwithstanding the loss of any such load to or among alternative retail LSEs. In the case of load reflected in the FRR Capacity Plan that switches to an alternative retail LSE, where the state regulatory jurisdiction requires switching customers or the LSE to compensate the FRR Entity for its FRR capacity obligations, such state compensation mechanism will prevail. In the absence of a state compensation mechanism, the applicable alternative retail LSE shall compensate the FRR Entity at the capacity price in the unconstrained portions of the PJM Region, as determined in accordance with Attachment DD to the PJM Tariff, provided that the FRR Entity may, at any time, make a filing with FERC under Sections 205 of the Federal Power Act proposing to change the basis for compensation to a method based on the FRR Entity's cost or such other basis shown to be just and reasonable, and a retail LSE may at any time exercise its rights under Section 206 of the FPA.

⁵

American Electric Power Service Corporation, Docket No. ER11-2183 (Order Rejecting Formula Rate Proposal, 134 FERC ¶ 61,039, at 4) (January 20, 2011).

⁶

Id.

determined that the company essentially relinquished its right to make a section 205 filing and consequently rendered a challenge under section 206 of the FPA moot.⁷ AEP's complaint in this proceeding fails to present an adequate argument that would allow them to make a section 205 or 206 filing under the FPA.⁸ Therefore, the Ohio Commission maintains that the FERC's initial order rejecting AEP's formula rate proposal in Docket No. ER11-2183-000 is appropriate and incontrovertible; consequently, the Ohio Commission requests a dismissal of the company's complaint filed in this docket.

B. The Ohio Commission is uniquely positioned to analyze the problem.

Although Ohio is a retail choice state, its regulatory structure is a hybrid of some complexity. Ohio law provides two mechanisms to set charges for standard service and provider of last resort service obligations. One would allow the standard service to be priced through an auction process. The second, and the one selected by AEP, is termed an electric security plan, in which rates are determined through a negotiated process. One component of the rates established in the AEP plan is a provider of last resort charge to

⁷ *American Electric Power Service Corporation*, Docket No. ER11-2183 (Order Rejecting Formula Rate Proposal, 134 FERC ¶ 61,039, at 5, n. 11) (January 20, 2011).

⁸ *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.*, Docket No. EL11-32-000.

be paid by shopping customers. This rate includes elements of retail capacity costs.⁹ Determining the portion of this charge which reflects capacity is a part of the ongoing proceedings at the Ohio Commission currently. The existence of this charge is not surprising. Although Ohio is a retail choice state, per statute the Ohio Commission retains very significant involvement with generation. Retail capacity remains a regulated service.¹⁰ Recovery of retail capacity costs is permitted through electric security plans like the one for AEP.¹¹ Additionally, some new generation construction or significant additions to existing plant could be subject to non-bypassable cost recovery.¹² Generating plant cannot be transferred without the approval of the Ohio Commission.¹³ There is even a mandatory annual review of the utility's earnings from its entire operation to determine whether it is over earning.¹⁴ Thus, the Ohio Commission has the tools necessary under its state law authority to provide a complete review of AEP's proposal. The Ohio Commission is uniquely well positioned to ensure that AEP is correctly compensated for its plant investment and to prevent double recovery.

⁹ *In the Matter of the Application of the Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Asset*, PUCO Case No. 08-917-EL-SSO, and, *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, PUCO Case No. 08-918-EL-SSO (Opinion and Order at 38-40) (March 18, 2009).

¹⁰ Ohio Rev. Code Ann. §§ 4928.01(A)(1) and 4928.04(A) (West 2011).

¹¹ Ohio Rev. Code Ann. § 4928.143(B)(2)(g) (West 2011).

¹² Ohio Rev. Code Ann. § 4928.143(B)(2)(b) and (c) (West 2011).

¹³ Ohio Rev. Code Ann. § 4928.17(E) (West 2011).

¹⁴ Ohio Rev. Code Ann. § 4928.143(F) (West 2011).

C. The Ohio Commission has two current proceedings that will address the problem.

On December 8, 2010, the Ohio Commission issued an entry in Case No. 10-2929-EL-UNC¹⁵ inviting comments from interested persons concerning AEP's capacity charges to the State of Ohio's CRES providers. The Ohio Commission's entry observes that currently the PUCO-approved rates for Columbus Southern Power Company and Ohio Power Company (collectively, AEP Ohio) includes, among other things, recovery of capacity costs through provider-of-last-resort charges to certain retail shopping customers.¹⁶ These rates are based on the continuation of the current FRR mechanism and the continued use of PJM's reliability pricing model's three-year auction results. The Ohio Commission's December 8, 2010 entry also invited comments from interested persons concerning the following issues: (1) what changes to the current Ohio Commission mechanism are appropriate to determine the AEP Ohio Companies' Fixed Resource Requirement (FRR) capacity charges to the State of Ohio's CRES providers; (2) the degree to which the AEP Ohio Companies' capacity charges are currently being recovered through retail rates approved by the Ohio Commission or other capacity charges; and (3) the impact the AEP Ohio Companies' capacity charges will have on CRES pro-

¹⁵ *In the Matter of the Commission's Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, PUCO Docket No. 10-2929-EL-UNC (Entry) (December 8, 2010).

¹⁶ *In the Matter of the Application of the Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Asset*, PUCO Case No. 08-917-EL-SSO, and, *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, PUCO Case No. 08-918-EL-SSO (Opinion and Order at 38-40) (March 18, 2009).

viders and retail competition in the State of Ohio. Although the state compensation mechanism has implicitly been in place since the inception of AEP-Ohio's current Standard Service Offer,¹⁷ on December 8, 2010, the Ohio Commission expressly adopted, as its state compensation mechanism, the AEP Ohio Companies' charges established by the reliability pricing model's three-year capacity auction conducted by PJM. AEP-Ohio has argued intently that the Ohio Commission does not have the authority to regulate in this instance, however, the company has been an active participant in the Ohio Commission's intrastate proceeding.¹⁸

In a separate proceeding, on January 27, 2011, AEP Ohio filed with the Ohio Commission an application to establish a Standard Service Offer in the form of an Electric Security Plan (ESP).¹⁹ The direct testimony in this proceeding of witness Laura J. Thomas indicates that AEP Ohio requests approval of capacity charges to CRES providers that serve retail load located in the State of Ohio. Witness Thomas' testimony states that the cost reflected in the capacity component is based on the rates provided in AEP-Ohio's Initial Comments filed in PUCO Case No. 10-2929-EL-UNC on January 7, 2011. The rates identified in the 10-2929-EL-UNC proceeding are set equal to \$299.81/MW-

¹⁷ *Supra*, n.1.

¹⁸ *In the Matter of Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 10-2929-EL-UNC (Entry) (December 8, 2010).

¹⁹ *In the Matter of the Application of the Columbus Southern Power Company and the Ohio Power Company of Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, PUCO Case No. 11-346-EL-SSO (Application) (January 27, 2011).

day and \$387.78/MW-day for Columbus Southern Power and Ohio Power Company, respectively.²⁰ The Ohio Commission asserts that AEP's application at the PUCO to establish these charges is contrary to the company's section 206 complaint in this investigation because the company's unsolicited filing to the Ohio Commission recognizes the Ohio Commission's jurisdiction.

D. The proposed tariff amendments must be rejected.

AEP, citing the Horton Affidavit, argues that the drafters of the FRR provisions originally intended to defer to a state compensation mechanism only when a state would be compensated through state-approved *retail* charges assessed directly to switching *retail* customers. Additionally, AEP contends that, absent a state-approved retail compensation mechanism, FRR Entities would be compensated by CRES providers through *wholesale* rates approved by the FERC.²¹ Contrary to AEP's argument, as stated earlier, the Ohio Commission maintains that under Section D.8 of the RAA a state compensation mechanism prevails in instances where the state jurisdiction requires the LSE to compensate the FRR entity. The Ohio Commission's stance is appropriately supported by the FERC in its Order Rejecting AEP's Formula Rates.²²

²⁰ *In the Matter of the Commission's Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power*, Case No. 10-2929-EL-UNC (Ohio Power Company's and Columbus Southern Power Company's Initial Comments at 4, Att. 1) (January 7, 2011).

²¹ *American Electric Power Service Corporation v. PJM Interconnection, L.L.C.*, Docket No. EL11-32-000 (Complaint at 14) (April 4, 2011).

²² *American Electric Power Service Corporation*, Docket No. ER11-2183 (Order Rejecting Formula Rate Proposal, 134 FERC ¶ 61,039, at 4, n. 8) (January 20, 2011).

Contrary to the Horton Affidavit, the Ohio Commission maintains that the original authors of the disputed tariff language, in an attempt to prevent double recovery of capacity charges from both the retail and federal jurisdictions, astutely possessed the foresight to anticipate the situation at hand when a vertically integrated FRR company (or, in Ohio's case, a company subject to a hybrid form of regulation) has intertwined capacity charges at the retail level), and accounted for such situation by including the disputed tariff language. The situation still exists in Ohio, and the disputed tariff language is necessary to prevent double recovery of the capacity charges from both the retail and federal jurisdictions. The Ohio Commission is best positioned to ensure that the proper capacity charges are allocated at the retail level consistent with the tariff. Allowing AEP to unilaterally amend the tariff when Ohio is operating under a hybrid regulatory model would hinder the Ohio Commission's ability to establish retail rates or from ensuring that there is not double recovery of the capacity charges. For these reasons, AEP's proposed tariff amendments must be summarily rejected.

CONCLUSION

The FERC should either dismiss this complaint or stay the proceeding until the state proceedings have been completed. The Ohio Commission is in the best position to examine the recoverability of these matters and has ongoing proceedings in which to do so. This approach would save the FERC substantial time and duplicative effort. If any problem or concern would arise, the FERC always retains its fundamental jurisdiction to resolve wholesale issues.

/s/ Thomas W. McNamee

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On behalf of
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing have been served in accordance with 18 C.F.R. Sec. 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Thomas W. McNamee

Thomas W. McNamee

Dated at Columbus, Ohio this April 25, 2011.

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Filing Party/Contacts	Filing Party	Signer (Representative)	Other Contacts (Principal)
	Public Utilities Commission of Ohio	thomas.mcnamee@puc.state.oh.us	daniel.shields@puc.state.oh.us

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Summary: Objection /Protest submitted to the Federal Energy Regulatory Commission on behalf of the Public Utilities Commission of Ohio on April 25, 2011 by Thomas McNamee to be filed in FERC Docket No. EL11-32-000, In re American Electric Power Service Corporation v. PJM Interconnection, LLC electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio