

**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.)	

**RETAIL ENERGY SUPPLY ASSOCIATION'S MEMORANDUM CONTRA
INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS**

April 17, 2012

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Pursuant to Ohio Administrative Code 4909-1-12, now comes the Retail Energy Supply Association¹, (“RESA”) and hereby submits this memorandum contra to the Motion to Dismiss (“Motion”) filed in this proceeding on April 10, 2012 by the Industrial Energy Users-Ohio (“IEU”).² RESA is a party of record to this proceeding.

I. Introduction

IEU has asked this Commission to “...dismiss this proceeding by which Ohio Power Company (“OP”)³ seeks to set a formula based rate for capacity on the basis that the Public Utilities Commission of Ohio (“Commission”) lacks authority to set such a rate for generation capacity service sold to Competitive Retail Electric Service (“CRES”) providers in OP’s service territory.”⁴ IEU’s view is the Commission has no authority to set the capacity charges that Ohio Power Company (“AEP Ohio”) charges to CRES providers and their customers. For the reasons detailed below, RESA believes the Commission is well within its authority to not only conduct an investigation into the capacity rates that AEP Ohio is charging competitive retail electric supply

¹ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus; Reliant Energy Northeast LLC and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² A Correction to the Motion to Dismiss and Memorandum in Support with filed April 11, 2012.

³ Ohio Power Company is also referred to in this proceeding as AEP Ohio.

⁴ Motion to Dismiss (“MTD”).

("CRES") providers directly, and retail customers indirectly, but that the Commission has broad authority as to the design of utility rates. Specifically, the facts as presented in this case will demonstrate that the Commission, as part of the Electric Security Plan ("ESP") authorized in Case Nos. 08-917-EL-SSO, *et al.*, set a capacity rate. Setting a capacity rate in an ESP, which applies to shopping customers as well as non shopping customers, is authorized under Section 4928.143(B)(2)(d), Revised Code. The Commission under its plenary, supervisory authority over rates and service terms charged by electric distribution utilities⁵ can initiate an investigation, and if it finds after hearing that the capacity rate is no longer just and reasonable, the Commission can change that rate.

As of this writing, AEP Ohio has pre-filed testimony from five witnesses, intervenors have pre-filed testimony from twelve witnesses, and the Staff has filed expert testimony from two witnesses in this proceeding. The expert testimony of these interested parties recommends that the Commission adopt capacity rates ranging from \$16.75 to \$355 per megawatt (MW) day for 2012. Since this is a Commission-ordered investigation, the Commission is confined to setting a rate that the record supports as just and reasonable. Because the interested parties are about to embark on two weeks of scheduled testimony, RESA requests that the Attorney Examiners take this opportunity to confirm that the purpose of this proceeding is to review all of the capacity rates proposed in this docket, not simply those proposed by AEP Ohio, and select a just and reasonable rate based on the record.

II. Procedural History

Since the matter at bar is one in which both federal and state mandates apply, an explanation of the Commission's authority requires a description of the procedural history which

⁵ Section 4905.04, .05 and .06 Revised Code

led to the establishment of a State Compensation Mechanism to set the capacity rate. AEP Ohio's load is part of the regional electricity market operated by the regional transmission organization PJM Interconnection, LLC ("PJM"). PJM operates a capacity market called the Reliability Pricing Model ("RPM") in which PJM requires load serving entities ("LSEs"), such as AEP Ohio, to supply adequate capacity to meet PJM's forecasted demand and reserve margin. The RPM has a capacity auction, the Base Residual Auction ("BRA"), which sets rates for capacity at the market price three years prior to the delivery year.

Those LSEs that choose not to participate in the RPM auctions may satisfy their capacity obligation in another way: the Fixed Resource Requirement ("FRR") Alternative. This allows an LSE to submit a capacity plan setting a fixed capacity resource requirement for its load rather than participating in the RPM auction. An LSE's capacity supply, under either the FRR Alternative or the RPM auction, is governed by the Reliability Assurance Agreement ("RAA"), a tariff approved and adopted by the Federal Energy Regulatory Commission ("FERC").

The FRR Entity will supply capacity for its entire load, including that load served by an alternative LSE (such as a CRES provider), requiring the alternative LSE to pay the capacity rates set by the RAA. An exception to this rule is that if the CRES provider/alternative LSE elected to supply its own capacity, it could avoid the FRR capacity charges. However, this election must be made three years in advance, consistent with the timing of the BRA. At this point in time, no current CRES providers have made such an election, and in order to avoid AEP Ohio's requested price increases, or any other capacity price increases imposed by the Commission, CRES providers must have made this election no later than November 2010. As a result, CRES providers and their customers *must* take capacity service from AEP Ohio at the rates set under the RAA.

The capacity rates that CRES providers and their customers pay the FRR Entity are laid out in Schedule 8.1, Section D.8 of the RAA. The tariff states that if the state regulatory jurisdiction has implemented retail choice, and the state requires switching customers or the CRES provider to compensate the FRR Entity for its FRR capacity obligations, such “state compensation mechanism” (“SCM”) will prevail. If no SCM has been established, the capacity rate will be set at the RPM price, or the FRR Entity can file an application pursuant to Section 205 of the Federal Power Act at the FERC to set a cost-based rate.

In 2007, AEP Ohio elected to be an FRR Entity under Section 8.1 of the RAA.⁶ Since that date, alternative LSEs operating in AEP Ohio’s service territory (CRES providers) have been charged for capacity based upon the prevailing RPM auction price. Ohio is a retail choice state as is referenced in Schedule 8.1, Section D.8 of the RAA, and thus may set the SCM. The Public Utilities Commission of Ohio (the “Commission”), at least implicitly, approved the RPM-based price as the capacity price charged to CRES providers and shopping customers as part of AEP Ohio’s first ESP at Case Nos. 08-917-EL-SSO, et al (“ESP I”). As noted above, no CRES providers made the election to supply their own capacity, and must take capacity from AEP Ohio at the rates set by the Commission.

As the number of shopping customers increased, AEP Ohio attempted to change the capacity rate charged to shopping customers by filing an application at the FERC in Docket No. ER11-2183 requesting compensation for capacity costs through a cost-based mechanism under Section D.8 of Schedule 8.1 of the RAA. In response, the Commission in its December 8, 2010 order in this docket explicitly adopted the RPM-based capacity price as the SCM for shopping

⁶ However, AEP Ohio has given notice to PJM as of April 2012 that it intends to participate in the BRA for delivery years 2015-2016. As a result, AEP Ohio’s status as an FRR Entity will expire on May 31, 2012 and capacity will be available to CRES providers and/or their customers at the RPM auction price.

customers, making clear that this rate was, and has been, the SCM, precluding AEP Ohio's request at the FERC. The FERC recognized the Commission's authority to set the SCM by Order dated January 20, 2011 in ER11-2183, in which the FERC found "...the Ohio Commission has adopted such a state mechanism and we therefore reject the AEP Ohio Companies' filing."⁷

The Commission, pursuant to the December 8, 2010 order, opened this docket for investigation of AEP Ohio's capacity charges. By entry on August 11, 2011, the Commission set a procedural schedule and evidentiary hearing to determine the SCM.⁸ Concurrently, the Commission and interested parties were considering AEP Ohio's second electric security plan ("ESP II"), which incorporated new capacity charges for both shopping and non-shopping customers.⁹

This procedural history demonstrates the unique nature of this proceeding and AEP Ohio's provision of capacity. The FRR Alternative under PJM's tariff, as approved by FERC, recognizes that FRR Entities, such as AEP Ohio, may be the sole provider of capacity for its service territory. The tariff recognizes that under such circumstances, retail states (such as Ohio) may set the cost for the provision of capacity to CRES and their customers. The FERC, in approving this tariff and by Order¹⁰, has expressly adopted and recognized such a state compensation mechanism as the capacity charge. Because no CRES providers have opted to self-supply in AEP Ohio's service territory, AEP Ohio's provision of capacity is an essential service for both shopping and non-shopping customers alike.

⁷ Order, p. 4. The Order additionally noted that because the state set the SCM, AEP Ohio did not have the right to file a Section 205 application for a cost-based rate.

⁸ December 8, 2010. The Commission put up for consideration the "appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism."

⁹ See Case Nos. 11-346-EL-SSO et al.

¹⁰ See Order, January 20, 2011, ER11-2183.

It is in these unique circumstances that the Commission has exercised its authority under Ohio's retail law to consider the rates to be charged for the essential capacity service provided by AEP Ohio to CRES providers and shopping customers. For the reasons discussed below, the Commission has both the substantive and procedural authority to determine that rate in this case.

III. The Commission has the jurisdiction and authority under state law to set the State Compensation Mechanism.

IEU asserts that the Commission lacks both substantive and procedural authority to set the SCM under Ohio law. RESA's position is that the Commission has the substantive authority to set the SCM under Ohio law, and that this docket is the proper procedural mechanism to do so, affording all interested parties an opportunity to be heard on what is a just and reasonable capacity rate.

IEU notes that electricity services fall within one of two categories: competitive and noncompetitive.¹¹ IEU states that regardless of whether the capacity generation service provided to shopping customers is a competitive or noncompetitive service, the Commission does not have the authority to set those rates.¹² Under IEU's view, non-competitive services must be set by cost of service standards under Chapter 4909, Revised Code requiring that the EDU submit an application, and any application to increase the rates of non-competitive services "...must follow the rate base rate of return method to evaluate the utility's revenue requirement (in total) and determine if additional compensation is warranted."¹³

IEU asserts that if the service is deemed competitive, the Commission does not have jurisdiction to set rates using traditional economic regulation.¹⁴ IEU admits the Commission does

¹¹ R.C. § 4928.05(A).

¹² MTD, 6.

¹³ IEU fn. 22; See R.C. § 4928.05(A)(2).

¹⁴ MTD, 7-8.

have authority to set rates for a competitive service through a standard service offer (“SSO”), under Sections 4928.141, 142, 143, Revised Code.¹⁵ IEU states that the Commission cannot, however, set the SCM through an SSO¹⁶ because an SSO applies only to *default service*, not service by CRES providers.¹⁷ Additionally, IEU argues that even if the capacity charges are considered under the SSO statutes, AEP Ohio has failed to meet procedural requirements for an SSO.¹⁸

This convoluted argument fails for two reasons. First, as described in more detail below, the Commission has this authority under its general supervisory power. Furthermore, Section 4928.143 (B)(2)(d), Revised Code permits the Commission to include capacity costs in an ESP and allows those costs to apply to more than just default generation service. Additionally, IEU’s argument fails because the scope of this proceeding is clearly broader than the rate proposed by AEP Ohio in its application at the FERC. For these reasons, the Commission should deny IEU’s motion to dismiss. This hearing should be permitted to proceed to determine a capacity rate that is just and reasonable.

“The attorney examiner now determines that a procedural schedule for hearing should be adopted in order to establish an evidentiary record on a state compensation mechanism. Interested parties should develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism.”¹⁹

A. The Commission has the authority to set the State Compensation Mechanism pursuant to its General Supervisory Powers.

¹⁵ See 4928.05(A); §§ 4928.141, 142, 143.

¹⁶ §§ 4928.141, 142, 143.

¹⁷ MTD, 8.

¹⁸ MTD, 8, 10.

¹⁹ March 23, 2012 Entry; see also August 11, 2011, ¶6.

AEP Ohio, as an EDU, is subject to the Commission's general supervisory authority under Sections 4905.04, 4905.05, 4905.06, Revised Code. Section 4905.04 provides that the Commission is "...vested with the power and jurisdiction to supervise and regulate public utilities..." and "to require all public utilities to furnish their products and render all services exacted by the commission or by law...." Section 4905.06, Revised Code provides that the Commission "has general supervision over all public utilities within its jurisdiction... and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises...."

Pursuant to this broad statutory authority, the Commission may open dockets to review charges and rates, as it has done here. Consideration of AEP Ohio's capacity rate falls squarely within the general supervisory power of the Commission. In fact, the Commission recognized that the capacity rate is subject to its general supervisory powers in its earlier entries in this case, stating that "Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction."²⁰

B. The Commission has the authority to set the State Compensation Mechanism pursuant to Sections 4928.141, 143, Revised Code.

Not only does the Commission have broad authority pursuant to its general supervisory powers, but Section 4928.143, Revised Code allows the Commission to set rates for certain competitive services through an electric security plan ("ESP"). As part of the ESP, the Commission may allow the EDU (here, AEP Ohio) to collect the following charges, without limitation:

"Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental

²⁰ See December 8, 2010 Entry; "Section 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction." ¶2.

power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.” Section 4928.143(B)(2)(d).

The SCM, and associated capacity charge, falls under this section as it is a “charge relating to limitations on customer shopping for retail electric generation service, bypassibility, standby, back-up, or supplemental power service...” and has “the effect of stabilizing or providing certainty regarding retail electric service.”²¹ Thus, the Commission has the substantive authority under Section 4928.143 of the Revised Code to set the SCM for CRES providers and their customers. The Commission has recognized this authority by adopting the RPM-based price in AEP Ohio’s ESP I, and explicitly setting that price as the SCM in this docket.²²

IEU asserts that this section can only apply to service provided to non-shopping or default customers, not customers served by CRES providers.²³ However, this subsection is not constrained or limited to non-shopping customers. The General Assembly was explicit that the Commission had broad regulatory authority to maintain stability and fulfill the energy policy detailed in Section 4928.02, Revised Code. Section 4928.143(B)(2)(d), Revised Code specifically provides that the utility may collect “charges” on a number of items that would “have the effect of stabilizing or providing certainty regarding retail electric service.” The term “retail electric service” is defined in Section 4928.01, Revised Code broadly to include both shopping and non-shopping customers.²⁴ It follows that Section 4928.143(B)(2)(d) is broad enough to grant authority to set rates for shopping and non-shopping customers alike.²⁵

²¹ R.C. § 4928.143(B)(2)(d).

²² See December 8, 2010 Entry.

²³ MTD, 8.

²⁴ R.C. § 4928.01(A)(27)(“any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the power of consumption. For the purposes of this chapter, retail electric service includes one or more of the following ‘service components’: generation service, aggregation

Because AEP Ohio is the only entity that can provide capacity to shopping and non-shopping customers alike, and will remain so until June, 2015, capacity provided by AEP Ohio is an *essential service* to both shopping and non-shopping customers alike, as neither shopping nor non-shopping customers can look elsewhere to receive capacity supply. Thus, although capacity is a competitive service that is priced in PJM's RPM auction at a market price, in these limited circumstances, it is the type of essential service contemplated by the General Assembly in adopting Section 4928.141(A), Revised Code.

Further, this essential service is a *retail electric service* provided to consumers as generation capacity is a "service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the power of consumption."²⁶ Although IEU characterizes this service as a "sale for resale", it is in fact a consumer transaction constituting retail electric service.²⁷ As the facts in this case will show²⁸, the capacity rate for shopping customers is determined by AEP Ohio on a customer by customer basis. As a result, those customers allocated RPM capacity under the current Two-Tier capacity construct²⁹ will pay that rate regardless of which provider supplies the competitive retail electric service. The capacity

service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, and billing and collection service.").

²⁵ IEU cites to Section 4928.141(A) as limiting the SSO to default service only. See p. 10, fn. 33 ("The SSO is defined as 'all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.' Section 4928.141(A), Revised Code."). As noted by the Ohio Supreme Court, Senate Bill 221 is a broad statute, and IEU must cite to "specific legal authority that prohibits" such rates in the ESP. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 524 (Ohio 2011)(rejecting IEU's argument that traditional cost based rate making cannot be selectively used to determine competitive costs under the ESP, where IEU cited no specific authority in Senate Bill 221).

²⁶ R.C. § 4928.01(A)(27).

²⁷ MTD, 10. RESA does not read IEU's motion to dismiss to assert that the FERC's jurisdiction preempts the Ohio Commission's jurisdiction in this instance. To the extent IEU is making this argument, RESA notes that the FERC has already recognized that the Ohio Commission may determine the rate through the SCM in its January 20, 2011 Order in ER11-2183. If IEU is in fact challenging the Ohio Commission's jurisdiction as being preempted by the FERC's jurisdiction, RESA believes that issue is best resolved in the FERC proceeding in Docket No. ER11-2183.

²⁸ See Depo. of Bill Allen, filed Friday, April 13, 2012.

²⁹ By Order, dated March 7, 2011 in this case, the Commission granted AEP Ohio's motion for relief setting the capacity rate at the Two-Tier capacity construct until June 1, 2012.

service provided by AEP Ohio is a service that is arranged for “ultimate consumers in this state.”³⁰ Thus, the capacity rate charged to CRES providers and their customers is a competitive retail electric service that is necessary to maintain essential electric service to consumers, and is within the authority of this Commission.

C. The Commission’s Review of the Capacity Rates in this Docket is Procedurally Proper.

Procedurally, the Commission’s actions in opening this docket to review the capacity rates are proper. Pursuant to its plenary general supervisory power, Section 4903.09, Revised Code, allows the Commission to set a hearing to consider contested rates—which it has done by setting a hearing schedule in its August 11, 2011 Entry. Additionally, neither Section 4928.141 nor Section 4928.143 prevents the Commission from reviewing the capacity rates in this manner.

Finally, the unique posture of this case must be considered. The Commission is determining, for a limited time period prior to 2015, what the capacity rate should be for shopping customers. The authority for this is recognized in the statutory provisions relating to the SSO. The Commission thus has both the procedural and substantive power to set the SCM capacity rate for CRES providers and their customers, and it is RESA’s position that the Commission should use that authority to set a transparent, market-based rate in this case.

IV. IEU’s motion to dismiss is procedurally improper and should be denied.

IEU’s motion to dismiss is improper. IEU has asked that this Commission “dismiss this proceeding by which Ohio Power Company (“OP”) seeks to set a formula based rate for capacity on the basis that the Public Utilities Commission of Ohio (“Commission”) lacks authority to set such a rate for generation capacity service sold to Competitive Retail Electric Service (“CRES”)

³⁰ R.C. § 4928.01(A)(27).

providers in OP's service territory."³¹ IEU appears to assume that the purpose of this docket is to consider AEP Ohio's application in this tribunal to change the capacity rate to a cost-based rate. While AEP Ohio's application at the FERC³² arguably spurred this proceeding, the purpose of this proceeding is the *Commission's* review of the capacity charges and is not dependant on an application or submission by AEP Ohio at this tribunal.

Although AEP Ohio has opined on what the capacity rate should be, and numerous other parties oppose that requested outcome, AEP Ohio's position is not a basis for dismissing this case and stripping the Commission of its authority. RESA does not acquiesce in AEP Ohio's view of the proper capacity mechanism, but maintain the price should be set at the market rate of RPM. Nonetheless, the purpose of this proceeding is for the Commission to consider comments by all parties, and determine what pricing mechanism is most suitable for the SCM. To the extent IEU or any other party believes AEP Ohio's method for determining the capacity price is not proper, that issue should be addressed on the merits in this case.

IEU's motion to dismiss is also improper at this point in the proceeding because there are factual issues to be addressed and cannot be determined without a hearing. In order to grant a motion to dismiss, "it must appear beyond doubt that [the parties] can prove no set of facts warranting relief."³³ As this docket was initiated by the Commission in order to consider the appropriate SCM, IEU is essentially asserting that the Commission can demonstrate no set of factual circumstances in which they have the authority to set the SCM. RESA recognizes that the application of the SCM is a unique regulatory issue, that to the RESA's knowledge has not been considered this or any jurisdiction, and there are a number of factual issues that need to be

³¹ MTD.

³² See November 24, 2011 Application in ER11-2183.

³³ *O'Brien v. Univ. Community Tenants Unions, Inc.* (1975), 42 Ohio St. 2d 242, syllabus.

determined in this record. The very nature of the SCM capacity charge as applied by AEP Ohio to CRES providers and their customers is in large part a factual issue that is essential to determining the Commission's role in setting the charge, and what the charge may be. As a result, it is premature for the Commission to dismiss this case, summarily determining that it is without authority to consider the SCM, without full development of the evidentiary record.

V. Conclusion

WHEREFORE, RESA respectfully requests that the Commission deny IEU's motion to dismiss and affirm its statutory authority to review the capacity rate and determine the appropriate State Compensation Mechanism on the merits during this hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served this 17th day of April, 2012 via electronic mail on the following persons.

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Summary: Memorandum Retail Energy Supply Association's Memorandum Contra Industrial Energy Users-Ohio's Motion to Dismiss electronically filed by M HOWARD PETRICOFF on behalf of Retail Energy Supply Association