BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	)))))	Case No. 11-346-EL-SSO Case No. 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 Case No. 11-350-EL-AAM

INITIAL BRIEF
BY
DUKE ENERGY COMMERCIAL ASSET MANAGEMENT, INC.
AND
DUKE ENERGY RETAIL SALES, LLC

I. Introduction

Ohio Power Company (OP) asks the Public Utilities Commission of Ohio (Commission) to approve a standard service offer (SSO), in the form of an electric security plan (ESP) that is more expensive than a market rate offer (MRO) and guarantees OP the receipt of a calculated level of generation revenues, on the premise that OP is in such a precarious financial position that a Commission-ordered revenue guaranty is critical to the retention of Ohio jobs, OP's investment in Ohio infrastructure, and even OP's continued existence.[1] Indeed, OP witness

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[1] Application at 10; Ex. 101, at 17-18; Tr. I at 173-176, 257-258, 304-309.

Robert Powers indicates that OP has already suffered "serious financial harm" as a result of the Commission's decisions in these, and related, proceedings.[2]

OP's critical need for a financial safety net, however, is not as certain as its witnesses contend. Neither Fitch Ratings nor Standard and Poors, for example, has downgraded AEP.[3] And evidence presented in these proceedings demonstrates that OP's return on equity has remained in excess of 12 percent for the period from 2009 through 2011.[4] The Commission should issue its decision on the basis of applicable legal standards, not OP's manufactured threats of doom and gloom.

It is also critical for the Commission to recognize what this case is not. OP's witnesses testified that the Commission had repeatedly, over many years, refused to allow it to price its generation services at market-based rates and that, therefore, the ESP that OP proposes here is designed as its transition to market – a market that would not even be reached during the term of the proposed ESP.[5] Unfortunately, this testimony is uninformed and the requested "transition" is illegal. In 2000, the Ohio legislature enacted Amended Substitute Senate Bill 3 (SB 3), which mandated utilities' unbundling of competitive (*i.e.*, generation) versus noncompetitive (*i.e.*, distribution) services and their move to pricing generation services on the basis of market rates. SB 3 provided for a limited period to transition to those market rates, ending, at the latest, on December 31, 2005.[6] Indeed, the Commission's approval of OP's rate stabilization plan, in Case No. 04-169-EL-UNC, made it abundantly clear that the rates so approved were market-based.[7] Since that rate stabilization plan went into effect, OP has been charging market-based rates for

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[2] Tr. I at 245-247.
[3] Tr. II at 457.
[4] FES Ex. 106.
[5] *See, e.g.*, Application at 3; OP Ex. 101, at 7-9.
[6] R.C. 4928.40
[7] IEU Ex. 119

generation services, as was mandated by SB 3 and by Amended Substitute Senate Bill 221 (SB 221), which followed. For the time covered by the proposed ESP, no transition to market is authorized by Ohio law and, indeed, allowances for transition costs are not allowable within the terms of an SSO.[8]

Duke Energy Commercial Asset Management, Inc. (DECAM), and Duke Energy Retail Sales, LLC (DER), respectfully urge the Commission to reject OP's proposed ESP or to modify it substantially, prior to approval, such that it comports with Ohio law.

II. Applicable Law

The law applicable to an application for approval of an SSO should not be in dispute. Generation services are, by law, subject to competition.[9] However, for the benefit of those consumers who choose not to purchase their generation from a competitive retail electric service (CRES) provider, an electric distribution utility (EDU) is required to provide an SSO, comprising all competitive retail electric services necessary to maintain essential electric service.[10] The EDU's choice, regarding the provision of an SSO, is only the format through which that SSO is provided: ESP or MRO.[11]

Although OP's application seeks approval of an SSO in the form of an ESP, an understanding of the MRO requirements remains critical, as ESP approval is based on a comparison with the results that would exist under an MRO.[12] For purposes of these proceedings, the important aspects of the MRO statute are that (a) the results are based on the market, as evidenced through auctions, and (b) the auction-based prices are phased into customer

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[8] R.C. 4928.141(A)
[9] R.C. 4928.03
[10] R.C. 4928.141(A)
[11] R.C. 4928.141(A)
[12] R.C. 4928.143(C)(1)

rates over a period of five years, being blended in decreasing percentages with the rates that would have been in place under the previous SSO of the EDU.[13]

Under the provisions of SB 221, the Commission is directed as to those matters that may be included in a legal ESP.[14] The Supreme Court of Ohio has held, unequivocally, that an ESP is limited to items listed in the law; it may include nothing else.[15] The legislature required that an ESP must be, in the aggregate, more favorable (for customers, not the EDU) than an MRO.[16]

It is also important to recognize that the ESP must further Ohio's state policies, as those policies are set forth in statute and administrative rules. For purposes of this application, the most critical policies are those that assure (a) the existence of effective competition by avoiding anticompetitive subsidization of a competitive service offered by an affiliate of the EDU and (b) the protection of consumers against unreasonable sales practices and market power.[17] And, in reading these policies, it must be recognized that an "affiliate," for purposes of the corporate separation standards, is specifically defined to include an internal portion of an EDU through which the EDU itself provides a competitive service.[18] Thus, where the EDU is providing generation services, which are statutorily identified as competitive services, the otherwise undifferentiated portion of the EDU must be deemed to be an affiliate. This is the essence of the functional separation that the Commission has authorized.[19] As a corollary of this point, the EDU itself, being by definition a provider of noncompetitive distribution service, cannot be one of the competitors in the marketplace. To allow it to "compete" would be tantamount to a complete

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[13] R.C. 4928.142
[14] R.C. 4928.143
[15] *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶ 35.
[16] R.C. 4928.143(C)(1)
[17] R.C. 4928.17(H) and (I); O.A.C. 4901:1-37-02(A) and (B); O.A.C. 4901:1-37-04
[18] O.A.C. 4901:1-37-01(A) provides that the Commission's affiliate standards apply to the internal "merchant function" of the utility. A merchant function should be understood to refer to a competitive service, as both refer to market activities.
[19] Case Nos. 99-1729-EL-ETP, 04-169-EL-UNC, 09-464-EL-UNC.

subsidization of its competitive activities and would make a mockery of the state's policy in favor of unbundling and corporate separation.

III. OP's Proposed ESP is Illegal

The ESP proposed by OP is illegal in several regards and should not be approved. In this Initial Brief, DER and DECAM will address some of the more egregious problems. However, the fact that the discussion is limited in scope should not be understood as agreement, by DER and DECAM, with the remainder of the proposed ESP.

A. Tiered Capacity Pricing is Illegal

Ignoring its long-standing practice of charging CRES providers for capacity at transparent, market-based rates, OP's application proposes two "tiers" of capacity rates, neither of which is based on anything at all.[20] The capacity pricing scheme proposed by OP should be rejected, both on the basis of jurisdiction and substance.

Capacity pricing is currently subject to Commission determination in an entirely separate proceeding, under which this Commission is evaluating the law and exerting its authority to establish a state mechanism for the pricing of capacity.[21] The rules of PJM Interconnection, Inc. (PJM), provide that its auction-based rates are the appropriate rates, unless a state mechanism exists. Thus, PJM rules allow the Commission to set such a mechanism.[22] However, PJM's rules do not allow a member utility, such as OP, to charge a rate other than one based on the state mechanism, where a state mechanism exists. Nor do those rules allow the Commission to authorize charges other than through a state mechanism. The Commission is determining the

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[20] Tr. V at 1401-1408.
[21] Case No. 10-2929-EL-UNC
[22] Tr. III at 793; IEU Ex. 125, at 25.

appropriate state mechanism for capacity charges. That mechanism will have to be followed by OP.

In addition to the lack of authority for the Commission to authorize any rate other than the state mechanism and the inability of the utility to charge anything other than the rate under the state mechanism, the proposal is also substantively insupportable. OP has proposed tiered capacity rates, with the first tier being priced at $146 per MW-day and the second tier being priced at $255 per MW-day.[23] Neither of these rates is pegged to PJM's auction-based rates, which change over time, or even to any party's calculation of OP's cost of capacity.[24] They are merely arbitrary rates that OP has pulled out of the air. Such a request flies in the face of basic ratemaking principles. The Commission is charged with setting fair, just, and reasonable rates. Only where the ratemaking process and bases are transparent is it possible to accurately determine whether rates live up to those criteria. Here, no justification exists on which to base a determination of whether the proposed rates are reasonable. OP simply asks the Commission to blindly accept the proposed amounts as appropriate capacity charges.

The Commission should deny OP's request to charge CRES providers for capacity at arbitrary, unjustified rates.

B. The Retail Stability Rider is Not Allowable

OP has proposed to charge all of its customers, whether the customers buy generation services from OP or from a competitive supplier, a surcharge that is in the nature of a make-whole payment. As described in the testimony of OP witness William Allen, the Retail Stability Rider (RSR) is a mechanism that is designed to "replace" a portion of the generation revenue that OP would allegedly "lose" by allowing CRES providers to purchase capacity from OP at

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[23] OP Ex. 101, at 15.
[24] Tr. I at 280, 281, 283; Tr. V at 1401-1408.

anything less than what OP calculates as its "cost" of capacity. The proposed RSR would be calculated so that OP's non-fuel generation revenues would be absolutely guaranteed, for the life of the ESP.[25] According to this witness's testimony, the total dollar value that OP projects will be collected through the RSR over the life of the ESP is more than a quarter of a billion dollars.

The RSR should be rejected. As discussed above, the Supreme Court of Ohio has explicitly stated that an ESP may only include those items that are set forth in the authorizing statute, as adopted in SB 221.[26] Nothing in that statute allows the EDU to collect a guaranteed stream of generation revenues to make it "whole" for offering capacity – a competitive service – to CRES providers at less than its embedded costs. Thus, on its face, the RSR is illegal.

Beyond that surface illegality, it is also important to evaluate the rationale that OP attempts to use in order to justify the existence of the RSR. OP suggests that it is providing an extra benefit to CRES providers by allowing capacity to be priced at less than OP's embedded cost. This suggestion ignores two critical facts. First, as discussed above, the Commission is in the process of establishing a state capacity pricing mechanism. OP cannot, under the PJM tariff, charge a different price than one calculated pursuant to that mechanism; nor does the Commission have the power to allow it to do so. Thus, no capacity pricing "differential" can justify the existence of the RSR.

Second, as the Commission is well aware and as discussed at some length by witnesses in these proceedings, OP recovered its generation asset costs in its electric transition plan (ETP) proceeding, to the extent recoverable.[27] In the stipulation approved in OP's electric transition plan case, OP (and its then-affiliate Columbus Southern Power Company) specifically stated that

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[25] OP Ex. 116, at 13.
[26] *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶ 35.
[27] IEU Ex. 124, at 4-16.

they would not "impose any lost revenue charges (generation transition charges (GTC)) on any switching customer."[28] The passage of twelve years does not make this promise any less clear and should not make the Commission any less sure of the need to enforce it. The RSR is an attempt by OP to assure the collection of those very same revenues, which, but for the RSR, would be "lost."

Finally, the RSR, as designed by OP, is an unlawful subsidy. Generation is not regulated in the state of Ohio and has not been for over a decade. Yet OP proposes a rider that is expressly – and admittedly – designed to ensure recovery of a fixed level of generation revenues.

The Commission should abide by the Supreme Court's narrow interpretation of the law, should recognize the limit of its jurisdiction to establish only a state mechanism for charging capacity rates, should see through the illegal effort by OP to renege on its decade-old promise through this proposed guaranty of generation revenues, and should understand this rider as an illegal subsidy on its face. The RSR must be denied.

IV. The Proposed ESP Fails in the Comparison to an MRO

The Commission has no power to approve an ESP unless, in the aggregate, it is "more favorable" than the expected results under an MRO. OP is in error with regard to the outcome of this test.

Due to the inclusion of extremely high capacity rates, the MRO results were, similarly, vastly inflated. OP witness Laura Thomas attempts to meet OP's burden of proving that the proposal meets the statutory test.[29] Her analysis, however, is flawed in several regards. The biggest dollar impact of her errors comes from her inclusion of the difference between OP's calculation of the embedded cost of capacity and the tiered capacity charges that OP proposes.

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[28] Find Exhibit reference – at para IV, page 3.
[29] OP Exhibit 114

Notwithstanding this attempted inclusion of almost a billion dollars in the comparison, cost-based capacity could not be a legal charge unless the Commission determined that an EDU's embedded generation asset costs should serve as the state mechanism for capacity charges. Such an outcome in the ongoing capacity case does not seem likely, in light of the ETP cases that were decided more than a decade ago. Similarly, the tiered rates that Ms. Thomas compares to the undeniably illegal cost-based number are similarly not permissible. Thus, the dollar value of the benefit that Ms. Thomas claims (net of the also illegal RSR) must be excluded from her calculations.

The second SSO price error involves the final, five-month period of the proposed ESP, during which period OP anticipates pricing its generation services on the basis of an energy-only auction, plus capacity at the continuing tiered rates. An MRO's auction prices, as noted earlier, must be phased into ratepayers' charges through a blend with the pre-existing ESP, which blend reduces over time. Ms. Thomas makes her comparison with MRO results by assuming that the final five-month period is not blended, as she deems that the results would be arithmetically identical, since the energy portion would be bid out. However, witness North shows this to be a false conclusion. As Mr. North demonstrated through his testimony, not only are the prices under the proposed ESP less favorable than the prices would be under an MRO, the difference adds up to an amount approaching a billion dollars over the life of the ESP.[30]

Beyond the negative financial impact of the proposed ESP on ratepayers, it is also noteworthy that approval of OP's application would not result in OP being at a market rate during the term of this ESP. Rather, OP does not even propose full market pricing until after this ESP has terminated. It asks for a transition to market; but the transition period that was allowed

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[30] DER Ex. 104.

by the Ohio General Assembly ended more than seven years ago. This proposal is not more favorable, in the aggregate, than the expected results under an MRO. It should be rejected.

V. The Proposed ESP Fails to Advance State Policy

Both SB 3 and SB 221 included carefully crafted provisions that detail the policies of the state of Ohio.[31] The Commission's rules, promulgated under the authority of the provisions of Chapter 4928 of the Revised Code, require ESPs to advance state policy, as set forth in divisions (A) through (N) of R.C. 4928.02.[32] Although OP's testimony addressed state policy, it certainly did not do so comprehensively, only touching on certain of the policy requirements.[33] Thus, under the Commission's own rules, OP's application is deficient on its face.

More problematic, however, is the impact that this proposal would have on the state's policy of ensuring effective competition by avoiding anticompetitive subsidies. OP's witness Powers suggested that the proposed ESP would actually promote competition, as a result of its "accelerated path to competition" and the provision of "discounted capacity." It is undeniable, however, that competition could easily be put into place much more quickly than OP has proposed doing.[34] And, even under the MRO statute, the Commission has the power to order a move to fully competitive pricing in less time than is proposed by OP.[35] Certainly OP's delayed move to competition is not an effort to promote competition.

The so-called "discounted capacity" is also not a competitive boon. If OP were allowed by this Commission to charge tiered capacity rates as it suggests, those over-market payments by

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[31] R.C. 4928.02
[32] O.A.C. 4901:1-35-03(C)(8)
[33] *See* OP Ex. 118, at 3-7.
[34] *Cf. In the matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549, *et al.*
[35] R.C. 4928.142(E).

competitive players would, in the near term, financially support OP, the noncompetitive EDU in the territory. That is precisely the outcome that state policy requires assurance against.

As if that problem were not enough, it becomes even more blatant after January 1, 2014, when OP anticipates having transferred its generating assets to an affiliate (familiarly known as Genco). After that time, OP proposes to have Genco – an entirely unregulated, competitive entity – sell power (until the end of 2015) and capacity to OP to serve the load, with capacity being priced at the above-market, second-tier rate. Correspondingly, OP would funnel all generation-related revenues from the sale of energy and capacity (at higher than market rates) through to Genco. This subsidy, allowing the competitive, unregulated Genco to receive above-market capacity revenues from the regulated EDU, flies in the face of the policies of this state and would have a serious negative impact on the ability of unaffiliated CRES providers to compete in the territory of OP. The proposed contract with Genco is an illegal violation of Ohio's corporate separation laws.[36]

Furthermore, as it is described by OP witnesses, the proposed contract with Genco violates FERC standards applicable to affiliate, wholesale transactions, which standards require proof that the utility has not provided a preference to its affiliate but, rather, has chosen the lowest-cost supplier.[37] The contemplated contract pricing has not been benchmarked to market and OP did not solicit from other, non-affiliated entities terms pursuant to which they would provide these services.[38] But OP ignores these illegalities and instead seeks Commission approval of the concepts underlying this undisclosed affiliate agreement in an effort to ease the approval process at the FERC.

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[36] The Genco contract would also not be appropriate for consideration at this time, being many months premature. According to testimony of OP witness Graves, it also would not meet the standards of FERC. Tr. III at 812-813.
[37] *Boston Edison Company Re: Edgar Electric Energy Company,* 55 FERC ¶ 61382.
[38] Tr. V at 1473, 1507-1509.

OP sees itself as a competitor, but it is not. OP is an EDU – a regulated utility serving as the generation provider of last resort for its distribution customers. The plan for pricing that generation must support the ability of unaffiliated entities to compete. This plan does not suffice.

VI. Recommendations

DER and DECAM respectfully recommend that the Commission reject the proposed ESP in these proceedings. In the event, however, that the Commission deems it appropriate to modify and approve the ESP, several issues should be taken into consideration, in addition to those discussed herein.

It is vitally important to the development of the competitive market in OP's certified territory that generation assets be transferred as quickly as possible and full auctions – for both energy and capacity – begin immediately. This approach to the provision of provider-of-last-resort generation services has been used successfully in the FirstEnergy and Duke Energy territories, resulting in the development of vigorous wholesale and retail competition. There is no legal impediment to this approach. Neither FERC requirements nor the PJM tariff prohibits this result with regard to a fixed resource requirement entity, as is evident from the successful experience of these other Ohio utilities.

Additionally, in order to encourage the positive outcome of such auctions, DER and DECAM suggest that the Commission require the immediate provision of all auction documents and procedures, for Commission approval. Without such items being appropriately finalized, it would impossible to assure the participation of bidders and, therefore, a beneficial result for customers.

Finally, as discussed by DER witness Walz, it is important for the Commission to mandate a variety of changes in the OP's practices, in order to allow CRES providers to operate efficiently. These changes include items such as information availability, the removal of switching charges, the termination of the ninety-day notice provision and minimum stay requirements, and deletion of charges for pre-enrollment customer lists. Improvements such as these, as have been agreed to by other utilities in Ohio, will remove some of the barriers to competition that have resulted in vastly lower shopping percentages in OP's territory than are found elsewhere in this state.[39]

Respectfully submitted,
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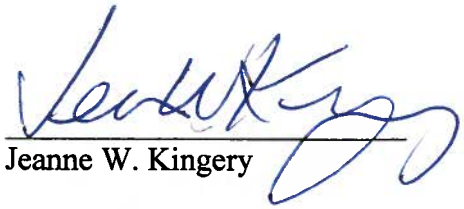
[39] *See* DER Ex. 101, *passim.*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered via U.S. mail (postage prepaid), personal, or electronic mail delivery on this the 29th day of June, 2012, to the following:



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