

**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.	:	

**RESPONSE
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO
TO
RENEWED MOTION
OF
AMERICAN ELECTRIC POWER SERVICE CORPORATION
FOR EXPEDITED RULING**

July 30, 2012

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INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is frequently tasked with making complex determinations involving abstruse legal requirements, conflicting economic considerations, and major policy determinations with vast consequences for the industry and the country as a whole. Thankfully, this is not such a case.

This case is quite simple. Applicants signed a contract. They now find this contract terms not to their liking and ask this Commission to change those terms. This Commission has ruled previously that it will not reform contracts for parties generally and that it will not reform this contract specifically. That is all there is to it. AEP made a

deal and now it must live with the deal that it has made. Its motion seeks a way out of the obligation AEP created for itself and this Commission should not allow this out. The motion should be denied.

THE DEAL AEP MADE

As this Commission has previously found, AEP voluntarily entered into the Reliability Assurance Agreement (RAA).¹ Two portions of that agreement are relevant for present purposes. Section D.8 of Schedule 8.1 of the RAA provides:

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 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*.²

Section D.8 of Schedule 8.1 of the RAA further provides:

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

¹ The Commission approved a settlement agreement, which the AEP Ohio Companies signed, of the PJM RPM, which included the RAA and FRR Alternative. See *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at 75-78 (2006), order on reh'g, 119 FERC ¶ 61,318, reh'g denied, 121 FERC ¶ 61,173 (2007), aff'd *sub nom. Pub. Serv. Elec. & Gas Co. v. FERC*, D.C. Circuit Case No. 07- 1336 (Mar. 17, 2009) (unpublished). See also PJM RAA Schedule 17.

² *American Electric Power Service Corp.*, 134 FERC ¶ 61,039 (emphasis added).

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.³

These provisions are unambiguous. The words say what they say and mean what they mean.

These provisions of the RAA establish a bifurcated system for establishing capacity rates. In a state which has implemented retail choice, either the state has a mechanism to compensate the FRR entity for FRR capacity obligations by switching customers or it does not. If the state has such a mechanism, the RAA provides “...*such state compensation mechanism will prevail.*” If the state has no such mechanism, the FRR entity faces a choice. It may either collect charges at the auction price in the unconstrained portions of the region or it may petition this Commission under Sections 205 or 206.

The structure of the RAA is perfectly clear. As Ohio is a retail choice state,⁴ AEP's rights under the sections turn on whether or not the state has a mechanism to compensate AEP for capacity provided to switching customers. Ohio has such a mechanism and, under terms of the RAA, that mechanism prevails. AEP agreed to give up its ability to access this Commission through Section 205 or 206 in such circumstances. To grant AEP's renewed motion is to change the terms of the voluntary agreement embodied in the RAA. This the Commission should not do and the motion should be denied.

³ *American Electric Power Service Corp.*, 134 FERC ¶ 61,039 (emphasis added).

⁴ Ohio Revised Code Chapter 4928.

THE OHIO MECHANISM

Currently the capacity payment mechanism in force in Ohio is what is termed the “interim capacity pricing mechanism” proposed by AEP and adopted by the Ohio Commission on March 7, 2012, as a replacement for yet another, earlier mechanism. Under the two-tier capacity pricing mechanism, the first 21 percent of each customer class was entitled to tier-one, RPM-based capacity pricing. All customers of governmental aggregations approved on or before November 8, 2011, were also entitled to receive tier-one, RPM-based capacity pricing. For all other customers, the second-tier charge for capacity was \$255/megawatt-day (MW-day). This structure is in force today but will be superseded by a permanent mechanism which resulting from the Ohio Commission’s decision in its case number 10-2929 which is attached as attachment A to AEP’s renewed motion.

Determining a permanent compensation mechanism which strikes the right balance was no simple task. The Public Utilities Commission of Ohio (Ohio Commission) needed to find a level which would allow AEP a reasonable opportunity to earn a fair return on its investment while simultaneously allowing the development of a competitive market in the state. The Ohio Commission struggled long and hard to thread the needle. A full history of this effort can be found in the Ohio Commission’s order in its case 10-2929, which is attached to AEP’s renewed motion as attachment A, and that history will not be recounted here. Suffice it to say that the Ohio Commission held a month long (April 17 to May 15, 2012) live hearing with twenty five parties represented, and twenty five witnesses cross examined. Briefs and reply briefs were submitted and a decision ultimately reached on July 2, 2012.

The permanent mechanism set by the Ohio Commission is somewhat simpler. AEP will be permitted to charge the adjusted final zonal PJM RPM rate in effect for the rest of the region as that rate adjusts in June of 2013 and 2014. The Ohio Commission further determined that a compensatory rate for AEP would be \$188.88 per MW day and that the difference between this value and the amount being charged currently should be deferred on the company's books until a mechanism is established to collect that deferred differential. This collection mechanism will be established in another Ohio Commission case specifically 11-346. A decision in the Ohio Commission's 11-346 case will be made on or about August 8, 2012, at which time the permanent mechanism will replace the interim. In this way the Ohio Commission has struck the balance, both fully compensating AEP for its actual costs and allowing the development of a competitive market.

In sum, the Ohio Commission has devoted great resources to this endeavor. At all times relevant, there has been, is currently, and will continue to be a state mechanism to allow recovery of capacity costs.

STATE LAW RELIEF FOR AEP

AEP may be dissatisfied with the Ohio Commission's actions. Should it wish to challenge the Ohio Commission's actions, whether its power to act, or the procedure it used or the conclusions it reached, these are matters of state law and state law provides efficient and expeditious means to address these questions. Under state law all decisions of the Ohio Commission are subject to an appeal as of right to the highest Court in the

state, the Ohio Supreme Court.⁵ By statute, appeals of Ohio Commission decisions are to be heard out of order on the docket of the Supreme Court of Ohio.⁶ AEP has available to it the means to challenge the validity of the Ohio Commission's actions. Indeed it has already taken the first step in this process by filing an application for rehearing, a jurisdictional prerequisite to taking an appeal.⁷

In sum, if AEP has concerns about the state-law proceedings at the Ohio Commission, it has access to, and is taking the steps necessary to protect its interests in, these state-law matters. State law provides an efficient, speedy, and final means to resolve whatever concerns AEP has with the Ohio Commission's actions.

AEP MUST LIVE WITH ITS CONTRACT

It has long been a feature of Commission ratemaking that parties must live with the rates to which they have agreed by contract.⁸ This Commission is only empowered to change the terms of a freely entered agreement when required to protect the public interest. This is true even in circumstances where the Commission did not have the opportunity to review the rates established.⁹ Manifestly the public interest is served by

⁵ Ohio Revised Code Section 4903.12.

⁶ Ohio Revised Code Section 4903.20.

⁷ Ohio Revised Code Section 4903.11.

⁸ *United Gas Pipeline Co. v. Mobile Gas Service Corp.* 350 U.S. 332 (1956) (for Section 205 cases); *Federal Power Comm'n v. Sierra Pacific Power Co.* 350 U.S. 348 (1956) (for Section 206 cases).

⁹ *Morgan Stanley Capital Group v. Public Utility District #1* 554 U.S. 527 (2008).

preserving the RAA not by altering it. Even a cursory review of the Ohio Commission's order shows that it was quite intentionally crafted to simultaneously provide AEP with sufficient revenues to maintain its financial health and provide a payment level that will allow the development of a competitive market. As noted in the Ohio Commission decision, even at the \$145.79 level that was in force for AEP in the prior year, AEP was able to achieve an adjusted rate of return or over 11%.¹⁰ The permanent mechanism would provide AEP with compensation at the \$188.88 level, certainly assuring the company of adequate return on its investment. The Mobile-Sierra doctrine does not even require that contract rates be compensatory, rather they must merely be freely entered at arms length, but the Ohio Commission, in fulfilling its obligations, has assured that the rates do fully compensate AEP. As also noted in the Ohio Commission decision, this level should also provide sufficient headroom for competitors to enter. In short, the RAA is working exactly as it should. The public interest is protected. The Mobile-Sierra doctrine requires that AEP live with its own bargain. The Ohio Commission has assured that AEP's bargain is compensatory.

This Commission has already spoken on the matter as regards a Section 205 filing:

12. The AEP Ohio Companies, however, voluntarily signed the RAA, and, therefore, in fact, they have voluntarily relinquished such rights under *Atlantic City*, and the AEP Ohio Companies made this filing pursuant to the PJM RAA. Since the PJM RAA does not permit AEP to change a state imposed allocation mechanism, and AEP is a signatory to the RAA and does not have the right to change the PJM RAA unilaterally through a section 205 filing, this section 205 fil-

¹⁰

Attachment A to the Renewed Motion at page 35.

ing is not the appropriate vehicle for challenging the justness and reasonableness of Section D.8 of Schedule 8.1 of the PJM RAA.

13. Therefore, we find that, pursuant to the RAA, the AEP Ohio Companies are not permitted to submit their proposed formula rate, given the existence of a state compensation mechanism, and we will reject this filing.¹¹

While this Commission's decision in ER11-2183 did not reach the Section 206 question (it did not have to), the logic and conclusion is just the same. The Mobile-Sierra doctrine applies to Section 206 as well as Section 205.¹² Section D.8 of Schedule 8.1 of the RAA provides:

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.¹³

Again, the words of the single sentence of the section are clear. If there is no state compensation mechanism, the FRR entity has the choice of three things. It may accept the auction result, or file under Section 205, or file under Section 206. Just as this Commission has already found that this sentence indicates that AEP waived its ability to make

¹¹ *American Electric Power Service Corp.*, 134 FERC ¶ 61,039.

¹² *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

¹³ *American Electric Power Service Corp.*, 134 FERC ¶ 61,039 (emphasis added.).

a Section 205 filing (because there is a state compensation mechanism) the Commission should now find that, under the same sentence, AEP has waived the ability to make a Section 206 filing. The logic is exactly the same. That is what the sentence says.

In sum, AEP made a deal. Now it must, under this Commission's precedent, live with that deal.

SUMMARY

Within a very short time of the filing of this pleading, there will be a permanent state level compensation mechanism for AEP's provision of capacity to customers who shop for their energy supply. Under terms of the RAA that AEP voluntarily bargained for, this state established mechanism prevails. That was what AEP bargained for, that is what it must be given. AEP has had second thoughts. It no longer likes the terms it negotiated. That provides it no basis for relief from this Commission. As discussed above, the state compensation mechanism benefits the public, indeed it benefits AEP too. Under this Commission's precedent, the RAA must stand and AEP's motion be denied.

Respectfully submitted,

/s/ Thomas W. McNamee

Thomas W. McNamee

Public Utilities Section

180 East Broad Street

Columbus, OH 43215-3793

614.466.4396 (telephone)

614.644.8764 (fax)

thomas.mcnamee@puc.state.oh.us

On behalf of

The Public Utilities Commission of Ohio

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 July 30, 2012.

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Files	Security Level	Filename
	Public	PUCO Response 073012.pdf

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: Response submitted by Thomas McNamee on July 30, 2012 to the Federal Energy Regulatory Commission (FERC) on behalf of the Public Utilities Commission of Ohio to Renewed Motion of American Electric Power Service Corporation for Expedited Ruling to be filed in FERC Docket No. EL11-32-000. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio