BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	))))	Case No. 10-2929-EL-UNC

MEMORANDUM IN OPPOSITION OF DUKE ENERGY RETAIL SALES TO THE APPLICATIONS FOR REHEARING FILED BY OHIO POWER COMPANY AND OHIO ENERGY GROUP

I. INTRODUCTION

On July 2, 2012, the Public Utilities Commission of Ohio (Commission) issued its Opinion and Order (Order) in its review of the capacity charges of Ohio Power Company (OP).[1] Said review was undertaken, in part, to evaluate the state compensation mechanism, as provided for under PJM Interconnection, LLC's (PJM) Reliability Assurance Agreement. The Commission's review also focused on the charges by OP – a fixed resource requirement entity (FRR Entity) in PJM through May 31, 2015 – to competitive retail electric service (CRES) providers for capacity. In the Order, the Commission determined that the state compensation mechanism for capacity that is provided by an FRR Entity to PJM is to be based on that entity's costs to supply such capacity. Further, the Commission determined in the Order that the FRR Entity is only to charge the CRES providers at the final zonal capacity price (FZCP), or the "adjusted final zonal PJM [Reliability Pricing Model] rate in effect for the rest of the [Regional Transmission Organization] region for the current PJM delivery year," with such rate adjusted

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[1] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012).

annually.[2] The difference, the Commission ordered, is to be deferred by the FRR Entity for subsequent recovery.

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, OP filed its application for rehearing of the Order on July 20, 2012, and the Ohio Energy Group (OEG) filed its application for rehearing of the Order on July 26, 2012.

Duke Energy Retail Sales, LLC (DER), hereby files its memorandum contra the OP and OEG applications for rehearing. Although this memorandum contra focuses only on certain aspects of OP's application for rehearing, such limited scope should not be read as agreement with the remainder of the arguments made therein.

II. ARGUMENT – OHIO POWER

OP contends that the Commission erred in its determination that OP should charge CRES providers at the FZCP when the state mechanism allows for cost-based pricing of capacity. OP raises several arguments in asserting this conclusion.

First, OP disputes the Commission's authority to order this outcome. If recovery of costs is just and reasonable, OP argues, the Commission must allow a cost-based price to be charged to CRES providers. While DER does not dispute that the Commission is a creature of statute, with only such authority as is granted by statute, OP's error in this argument is clear. The Commission, in its Order, found that it is just and reasonable for OP to recover its costs, as such costs were calculated by the Commission, and the Commission is allowing OP to do exactly that. The Commission is allowing a portion of such costs to be recovered from CRES providers and the remainder of such costs to be recovered through a mechanism that is to be established in OP's pending electric security plan (ESP) proceedings. Nothing in Title 49 of the Revised Code prohibits the Commission from bifurcating the means of recovery of a just and reasonable

[2] Id, at page 23.

amount. OP complains that it is required by the Order to charge less than the just and reasonable rate. That is only half the story, as OP was further "authorized to defer its incurred capacity costs not recovered from CRES provider billings to the extent the total incurred capacity costs do not exceed $188.88/MW-day."[3] As OP will be made whole for supplying capacity, its argument is not well founded.

OP goes on, for its second rationale, to complain that the mechanism by which it is to recover the deferred portion of its capacity costs is not established in this proceeding. OP contends that this aspect of the decision should have been accomplished here, claiming that it was unreasonable to bifurcate the issue. But OP, itself, has invited (if not encouraged) the review of one issue in multiple dockets. Indeed, in its modified ESP filing, OP makes repeated reference to this proceeding, as well as its separate action for approval to transfer generating assets and its future, anticipated filing to establish a competitive bidding process for standard service offer supply.[4] Further, OP fails to understand that, procedurally, the Commission must consider the deferral mechanism in the context of OP's pending ESP application. This is not an error; it is a procedural necessity.

OP asserts, next, that the Commission's Order will harm customers and the state economy by "flooding the market with unsustainable competitive retail electric service."[5] While OP points to its own evidence to support its argument, it does not reference the plethora of witnesses who disagreed or the forceful cross-examination on these opinions. Neither does it note the fact that the other utilities in the state – also FRR Entities – charge CRES providers for

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[3] Id, at page 38.

[4] *See, e.g.,* Ohio Power Company's Modified Electric Security Plan Application, at 3, 5-6, 11-12 (March 30, 2012); Direct Testimony of William A. Allen, at 9 (March 30, 2012).

[5] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, OP Application for Rehearing, at page 61 (July 20, 2012).

capacity at the PJM FZCP, without flooding the state with unsustainable competition or damaging the state's economy in any way. Indeed, as the Commission correctly observed, "RPM-based capacity pricing has been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and CRES providers on a level playing field."[6]

OP further argues that the Commission erred in requiring it to charge the FZCP with respect to those customers who have already switched to CRES providers. In doing so, however, OP fails to produce any evidence that the contracts to which such shopping customers are subject prohibit renegotiation of pricing for generation supply. Instead, OP urges the Commission to revise its finding with only a generic statement that customers have switched suppliers and an unsubstantiated assumption about relevant, and controlling, contract terms. The Commission should note that OP's witnesses testified to their lack of knowledge of the terms of contracts between customers and CRES suppliers.[7]

OP, finally, asserts that the Commission should not have relied on state policies that are set forth in R.C. 4928.02 in concluding that OP shall charge CRES providers consistent with the FZCP. OP, however, misconstrues the Commission's analysis. The Commission found that the provisions of R.C. 4928.141, *et seq.*, did not apply to determine the state compensation mechanism applicable to FRR Entities. But this was not the only issue subject to Commission review in this proceeding. Rather, the impact of OP's capacity charge on retail competition in Ohio was also subject to review.[8] And that issue cannot be addressed without consideration of the policies of the state as set forth in R.C. 4928.02. Thus, the Commission did not err in seeking to effectuate state policy in concluding that CRES providers are to be charged the FZCP.

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[6] Id, Opinion and Order, at page 23 (July 2, 2012).

[7] Id, Tr. III at 694-695; Tr. V at 889-891.

[8] Id, Entry (December 8, 2010).

III. ARGUMENT – OHIO ENERGY GROUP

The primary thrust of OEG's argument, much like the OP argument discussed above, is that the Commission erred in granting OP authority to defer the difference between the approved, cost-based recovery by the FRR Entity and the required charge to CRES providers equal to the FZCP. In making this argument, OEG repeatedly describes the amount that is to be deferred as the CRES providers' responsibility and further claims that the Commission's Order is resting on a "fundamental misconception."

DER and DECAM agree that there is a fundamental misconception, but it is at OEG's doorstep, not the Commission's. OEG misconstrues the nature of a deferral. Utilities are required to account for their incurred costs according to the uniform system of accounts established by the Commission pursuant to R.C. 4905.13. Only upon the Commission's approval may a utility alter its method for accounting for particular costs. In the Order, the Commission has instructed OP on precisely how to account for the otherwise unrecovered costs that it incurs in respect of the provision of capacity to support the load of customers who purchase their generation from CRES suppliers. Specifically, where OP incurs such costs in excess of the FZCP (that is, the difference between the FZCP and $188.88/MW-day), such excess costs are to be deferred for subsequent recovery. The means of recovery are not addressed in this proceeding. Critically, the deferral is a deferral of costs incurred by the FRR Entity.

OEG, on the other hand, refers to the deferral as if it were a deferral of amounts owed to the utility. "What is being deferred is not money ratepayers owe the utility, but money the unregulated CRES providers owe the utility."[9] OEG is wrong. What is deferred is not an amount owed; it is an amount incurred but not recovered.

[9] Id, OEG Application for Rehearing, at page 2.

It is also noteworthy that OEG bases its argument on an assumption that the deferred amount represents an obligation of CRES providers. OEG complains that retail customers should not have to pay OP for "obligations that the unregulated CRES providers owe... ."[10] In making this argument, OEG fails to account for the fact that it is the Commission's Order that determines who owes what to whom. The Commission has specifically ordered that the CRES providers not be charged more than the FZCP. The difference is therefore not the CRES providers' obligation; the CRES providers do not "owe" that amount to OP. OEG cannot complain that the Commission is moving a payment obligation from CRES providers to customers when that obligation has not been place on the CRES providers to begin with.

OEG relies on an almost 20-year old opinion for an assertion that the Commission has no "general ratemaking authority to order a deferral or phase-in of money which the utility is entitled to recover from retail consumers."[11] OEG attempts to parlay the Court's review of discreet facts into a general lack of deferral authority on the part of the Commission. But the Court did not reach such a broad conclusion. Rather, the Supreme Court of Ohio, in responding to an argument by the utility that it had a right to certain revenues under the law and its receipt of those revenues could not be delayed, concluded that the Commission must fix rates that will provide the utility with appropriate annual revenues.[12] Importantly, the Court did not find that the Commission is legally barred from authorizing deferrals. Indeed, the Commission's history is replete with orders allowing the deferral and subsequent recovery of various costs incurred by utilities. Further, it cannot be said, with any degree of reasonable certainty, that OP will be deprived of appropriate revenues because of the Commission's Order; thus OEG's reliance upon a decision that is factually inapposite fails to justify rehearing of the Commission's Order.

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[10] Id.

[11] Id, at page 3, citing *Columbus Southern Power Co. v. Pub. Util. Comm.*, (1993). 67 Ohio St.3d 535.

[12] *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d at 540.

IV. CONCLUSION

DER respectfully requests that the Commission issue an order on rehearing, denying OP's and OEG's claimed errors.

Respectfully submitted,

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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 30th day of July, 2012, to the following parties.

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Summary: Memorandum in Opposition of Duke Energy Retail Sales, LLC to the Applications for Rehearing filed by Ohio Power Company and Ohio Energy Group electronically filed by Dianne Kuhnell on behalf of Spiller, Amy B. and Kingery, Jeanne W. and Duke Energy Retail Sales, LLC