

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)	Case No. 11-346-EL-SSO
Establish a Standard Service Offer Pursuant)	Case No. 11-348-EL-SSO
to Section 4928.143, Revised Code, in the)	
Form of an Electric Security Plan.)	
In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

**THE OHIO SCHOOLS’
MEMORANDUM CONTRA AEP OHIO’S APPLICATION FOR REHEARING**

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I. INTRODUCTION

AEP Ohio¹ concocted a grand scheme in its separate Capacity Charge Case² and this electric security plan (“ESP”) proceeding. In the Capacity Charge Case, it asked the Commission to approve an exorbitant cost-based capacity charge of \$355/MW-day and then, in the ESP case, asked the Commission to approve a discount to the capacity charge, with the discounted portion to be recovered from customers through the non-bypassable retail stability rider (“RSR”). With rationale so circular it makes your head spin, AEP Ohio claimed that imposing the RSR on all customers was necessary in order for it to provide this “benevolent” capacity discount, and that the discount, in turn, made the ESP more favorable in the aggregate than the market rate option (“MRO”).

¹ Ohio Power Company and Columbus Southern Power Company merged effective December 31, 2011. Ohio Power Company is the surviving entity and will be referred to as “AEP-Ohio” or “the Company.”

² See Case No. 10-2929-EL-UNC (“*Capacity Charge Case*”).

However, AEP Ohio's scheme fell apart because, in the Capacity Charge Case, the Commission reduced the requested wholesale capacity charge from \$355/MW-day to \$188.88/MW-day. The Commission further ordered AEP Ohio to charge competitive retail electric service ("CRES") providers the reliability pricing model ("RPM") price for capacity (currently \$20.01/MW-day), with the difference between the RPM price and the cost-based capacity charge (\$188.88/MW-day) to be deferred pursuant to Section 4905.13, Ohio Rev. Code, and recovered through a mechanism to be established in the ESP proceeding.

The order in the Capacity Charge Case effectively eliminated AEP Ohio's proposed capacity cost discount for consumers in the ESP proceeding. With the discount eliminated, the ESP became quantifiably less favorable than the MRO to the tune of \$386 million. Moreover, with the discount eliminated, the Commission also eliminated AEP Ohio's underlying justification for the RSR, and the Commission was forced to approve the RSR, and ultimately the ESP, on the insufficient, non-quantitative basis that the RSR permitted AEP Ohio to go to market two years and three months earlier than if the MRO were adopted. The end result of these proceedings is that AEP Ohio will be permitted to recover unlawful stranded wholesale capacity costs and, incredibly, its retail customers will have to pay for them. The Ohio Schools, and other consumers in these proceedings, whom the slightly earlier transition to market apparently is intended benefit, do not believe that the earlier transition is worth their paying an extra \$386 million, and have filed their own applications for rehearing contesting the August 8, 2012, order.

It is against this backdrop that AEP Ohio does not seriously object to the dramatically restructured ESP, but primarily seeks modifications to bolster its own financial position and its posture on Wall Street, as well as to attempt to insulate the Commission's orders from successful

appeals and extraordinary actions already pending before the Ohio Supreme Court.³ In doing so, AEP Ohio raises ten grounds for rehearing of which the Ohio Schools⁴ will address two:⁵

- A. The Commission Should Establish a “Backstop” Remedy Up Front to Address the Contingency of a Successful Challenge to the RSR.**
- B. The Commission Should Consolidate this ESP Proceeding with the Capacity Charge Case for Purposes of Rehearing.**

For the reasons that follow, each ground for rehearing is unreasonable and unlawful and must be denied.

II. ARGUMENT

- A. IT IS UNREASONABLE AND UNLAWFUL TO ORDER A “BACKSTOP” CAPACITY CHARGE OF \$188.88/MW-DAY IN THE EVENT OF A SUCCESSFUL CHALLENGE TO THE RSR.**

The Commission defined straightforward issues in the Capacity Charge Case:

- 1. Does the Commission have jurisdiction to establish a state compensation mechanism?
- 2. Should the state compensation mechanism for AEP Ohio be based on the Company’s capacity costs or on another pricing mechanism such as RPM-based auction prices?
- 3. What should the resulting compensation be for AEP Ohio’s FRR capacity obligations?

See Capacity Charge Case Opinion and Order issued July 2, 2012, at 9 (“Order”). In the Order, the Commission adopted a cost-based state compensation mechanism, and set that cost at \$188.88/MW-day. The Commission further ordered AEP Ohio to charge CRES providers the

³ On August 31, 2012, IEU Ohio was the first party to seek review of these proceedings by filing a complaint for writs of prohibition and mandamus with the Ohio Supreme Court.

⁴ Joint Intervenor Buckeye Association of School Administrators, Ohio Association of School Business Officials, Ohio School Boards Association and Ohio Schools Council are collectively referred to as the “Ohio Schools.”

⁵ The Ohio Schools’ failure to address each ground for rehearing is not an indication that they agree with AEP Ohio’s positions.

RPM price for capacity (currently \$20.01/MW-day), with the difference between the RPM price and the cost-based capacity charge (\$188.88/MW-day) to be deferred pursuant to Section 4905.13, Ohio Rev. Code, and recovered through a mechanism to be established in the ESP proceeding. Order, at 23.

AEP Ohio now seeks, on rehearing in this *ESP proceeding*, to change the Commission's determination made in the separate *Capacity Charge Case*. Specifically, AEP Ohio asks the Commission to rule in this proceeding that, if the RSR is rejected by the Ohio Supreme Court, AEP Ohio be permitted to recover the full \$188.88/MW-day in capacity costs from CRES providers "back to the date of the rehearing decision." AEP Ohio Application for Rehearing, at 26.

1. AEP-Ohio's Request to Set a "Backstop" Capacity Charge in this ESP Proceeding is an Unlawful Request for Rehearing of the Capacity Charge Case Order.

The issue as to the level of AEP Ohio's capacity costs was expressly reserved for, litigated in, and decided in, the Capacity Charge Case. Order, at 9. Section 4903.10, Ohio Rev. Code, provides in part:

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing *in respect to any matters determined in the proceeding*. Such application shall be filed *within thirty days* after the entry of the order upon the journal of the commission. (Emphasis supplied.)

Because the level of the capacity charges was determined in the Capacity Charge Case, and *not determined in the ESP proceeding*, AEP Ohio's request for rehearing violates Section 4903.10, Ohio Rev. Code. Granting such request would be unlawful.

Moreover, AEP Ohio's request to modify the determination made in the Capacity Charge Case was not made until September 7, 2012, more than the 30 days after the issuance of the order

in the Capacity Charge Case on July 2, 2012. Thus, pursuant to Section 4903.10, Ohio Rev. Code, AEP Ohio's request for rehearing is untimely. Nevertheless, AEP Ohio appears to suggest that combining the records in the two cases would permit it to seek rehearing of the Capacity Charge Case order in this ESP proceeding.⁶ Procedurally combining the records in the Capacity Charge Case and the ESP proceeding cannot cure the untimely request, which is statutory. Moreover, AEP Ohio already has filed its application for rehearing in the Capacity Charge Case and fundamental fairness and due process prohibit it from taking a second bite at the apple.

2. *AEP Ohio's Requested "Backstop" Capacity Charge Would Create Instability and Uncertainty in Retail Electric Service.*

The Commission approved the RSR in this proceeding on the basis that it would provide stability and certainty to retail electric service under Section 4928.143(B)(2)(d), Ohio Rev. Code. Adopting AEP Ohio's request for a "backstop" capacity charge would be the antithesis of stability and certainty for consumers. If adopted, consumers would have no certainty as to what their rates would be, particularly if the backstop rates were implemented and CRES providers were required to pay the delta between RPM (\$20.01) and the cost-based rate (\$188.88) "back to the date of the rehearing decision." As the Ohio Schools have demonstrated throughout these proceedings, CRES providers would be able to pass these charges through to consumers under existing contracts. Passing through such charges "back to the date of the rehearing decision" would lead to "rate shock" and place unreasonable hardships on shopping customers.

⁶ AEP Ohio argues that "...the Commission should modify the combined decisions (in this proceeding and the [Capacity Charge Case] which is also pending on rehearing) to provide for a reconciliation of the [state compensation mechanism] to \$188.88/MW-day..." AEP Ohio Application for Rehearing, at 26.

B. CONSOLIDATION OF THE CAPACITY CHARGE CASE AND THE ESP PROCEEDING WOULD BE UNREASONABLE AND UNLAWFUL.

AEP Ohio also requests that the Capacity Charge Case and this ESP proceeding be consolidated for purposes of rehearing. Disturbingly, in an affront to the parties' due process rights, AEP Ohio seeks to combine the records of the two proceedings such that the evidence admitted in both proceedings could be used to support the Commission's findings in either case. AEP Ohio Application for Rehearing, at 48. To support its position, AEP Ohio advances three arguments: (1) consolidation of the records for rehearing and a single order will benefit the Ohio Supreme Court on review, and would "reinforce the record support for the Commission's decisions;⁷" (2) procedural timelines for appeal would be the same in both proceedings, and (3) consolidation would have no downside as the parties to the Capacity Charge Case are a subset of the parties to the ESP proceeding.

The Commission made clear in its entry of March 7, 2012, at page 17, in the Capacity Charge Case that the Capacity Charge Case would proceed independently of the ESP proceeding. Specifically, the Commission stated:

Although AEP-Ohio believes that the present [capacity charge] case may be resolved under its modified application for an ESP, the Commission believes that resolution of this case should no longer be delayed. Our decision today temporarily modifying the state compensation mechanism will allow the Commission to fully develop the record to address the issues raised in this proceeding.

Hearing commenced in the Capacity Charge Case on April 17, 2012; the evidentiary record was closed on May 15, 2012; merit briefs were filed on May 23, 2012; the Commission's order was issued on July 2, 2012; and applications for rehearing were filed August 1, 2012. The

⁷ AEP Ohio Application for Rehearing, at 49.

ESP proceeding commenced on May 17, 2012; the evidentiary record was closed on June 15, 2012; and the Commission's order was issued on August 8, 2012.

1. *AEP Ohio's Request for Consolidation is Procedurally Defective and Unlawful.*

Section 4903.10, Ohio Rev. Code, provides in part:

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing ***in respect to any matters determined in the proceeding***. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. (Emphasis supplied.)

As a threshold matter, Section 4903.10, Ohio Rev. Code, permits requests for rehearing of any matters determined in this proceeding. Whether the Capacity Charge Case and this ESP proceeding should be consolidated for rehearing was neither placed in issue, nor decided by the Commission in this proceeding. AEP Ohio's request is procedurally defective as it should be raised my motion,⁸ and would be unlawful pursuant to Section 4903.10, Ohio Rev. Code, if granted.

2. *Consolidation is Unnecessary for Ohio Supreme Court Review.*

AEP Ohio advances the uninspiring argument that consolidation of the two records will assist the Ohio Supreme Court's review upon appeal. The Ohio Schools are content that the Commission will issue clear orders in both the Capacity Charge Case and this ESP proceeding and that the experienced counsel prosecuting and defending the appeals will be able to explain the Commission's decisions to the Court on brief and in oral argument. If AEP Ohio, after review of the imminent entries on rehearing, continues to believe that consolidation is necessary to assist the Court in its decision making, its proper course is to ask the Court to consolidate the

⁸ AEP Ohio apparently has realized its procedural error and filed a motion to consolidate in both proceedings on September 12, 2012.

two cases for oral argument, and let the Court determine, for itself, whether it needs this assistance.

3. *Consolidation is Not Required to Coincide the Procedural Timelines for Appeal.*

AEP Ohio also argues that consolidation would permit the decisions in both cases to be issued on the same date; thus, the timelines for appeal would coincide, presenting an efficient prosecution of appeals. The Ohio Schools note that the Commission already has delayed its issuance of the entry on rehearing in the Capacity Charge Case and already has the discretion to issue each entry on rehearing on the same date, which will provide the same efficiencies for appeal. In any event, issuance of the entries on different dates present no unusual inefficiencies as the Court is accustomed to considering multiple and related appeals. As stated previously, if AEP Ohio believes there would be undue inefficiencies, its appropriate course of action is to ask the Ohio Supreme Court to consolidate the cases for oral argument.

4. *Consolidation of the Cases for Evidentiary Purposes Would have a Downside, as it Would Prejudice the Ohio Schools' Due Process Rights.*

AEP Ohio claims that consolidation would have no downside, as the parties in the Capacity Charge Case are a subset of the parties in the ESP proceeding. AEP Ohio apparently is suggesting that it is permissible to take administrative notice in the *prior* Capacity Charge Case of evidence admitted in the *later* ESP proceeding, if the parties are the same.

The doctrine of administrative notice requires that the parties have prior knowledge of, and an adequate opportunity to explain and rebut, the facts administratively noticed. *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St. 3d 184, 186 (“*Allen*”).

As stated previously, the evidentiary hearing in the Capacity Charge Case ended on May 15, 2012; initial briefs were filed on May 23, 2012; the Commission’s decision issued on July 2,

2012; and applications for rehearing were filed on August 1, 2012. The ESP proceeding's evidentiary hearing did not commence until May 17, 2012, and did not conclude until June 15, 2012. AEP Ohio did not give opposing parties notice of any facts to be administratively noticed from the ESP proceeding by the time the initial briefs were filed or the Commission issued its July 2, 2012, order in the Capacity Charge Case. Indeed, AEP Ohio still has not provided the specific evidence for which it seeks notice in the Capacity Charge Case. Thus, the opposing parties have not been provided an adequate opportunity to explain or rebut evidence from the ESP proceeding as to its use in the Capacity Charge Case. To take notice of such evidence, after briefing and rehearing pleadings have been completed in the Capacity Charge Case, is prejudicial to the Ohio Schools' due process rights.

III. CONCLUSION

For the foregoing reasons, AEP Ohio's grounds for rehearing are unreasonable and unlawful and must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Ohio Schools' Memorandum Contra AEP Ohio's Application for Rehearing* was served by electronic mail this 17th day August, 2012, upon the following.

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Summary: Memorandum Contra AEP Ohio's Application for Rehearing electronically filed by Mr. Dane Stinson on behalf of Buckeye Association of School Administrators and Ohio Association of School Business Officials and Ohio School Board Association and Ohio Schools Council