

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.)

ENTRY ON REHEARING

The Commission finds:

- (1) On November 1, 2010, American Electric Power Service Corporation (AEPSC), on behalf of Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or the Company),¹ filed an application with the Federal Energy Regulatory Commission (FERC) in FERC Docket No. ER11-1995. On November 24, 2010, at the direction of FERC, AEPSC refiled the application in FERC Docket No. ER11-2183 (FERC filing). The application proposed to change the basis for compensation for capacity costs to a cost-based mechanism, pursuant to Section 205 of the Federal Power Act and Section D.8 of Schedule 8.1 of the Reliability Assurance Agreement (RAA) for the regional transmission organization, PJM Interconnection, LLC (PJM), and included proposed formula rate templates under which AEP-Ohio would calculate its capacity costs.
- (2) By entry issued on December 8, 2010, in the above-captioned case, the Commission found that an investigation was necessary in order to determine the impact of the proposed change to AEP-Ohio's capacity charge (Initial Entry). Consequently, the Commission sought public comments regarding the following issues: (1) what changes to the current state compensation mechanism (SCM) were appropriate to determine AEP-Ohio's fixed resource requirement (FRR) capacity charge to Ohio competitive retail electric service (CRES) providers, which are referred to as alternative load serving entities within PJM; (2) the degree to which AEP-Ohio's capacity

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of CSP into OP, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

charge was currently being recovered through retail rates approved by the Commission or other capacity charges; and (3) the impact of AEP-Ohio's capacity charge upon CRES providers and retail competition in Ohio. Additionally, in light of the change proposed by AEP-Ohio in the FERC filing, the Commission explicitly adopted as the SCM for the Company, during the pendency of the review, the current capacity charge established by the three-year capacity auction conducted by PJM based on its reliability pricing model (RPM).

- (3) On January 27, 2011, in Case No. 11-346-EL-SSO, *et al.*, AEP-Ohio filed an application for a standard service offer in the form of a new electric security plan (ESP), pursuant to Section 4928.143, Revised Code (ESP 2 Case).²
- (4) By entry issued on March 7, 2012, in the above-captioned case, the Commission implemented an interim capacity pricing mechanism proposed by AEP-Ohio in a motion for relief filed on February 27, 2012 (Interim Relief Entry).
- (5) By entry issued on May 30, 2012, the Commission approved an extension of the interim capacity pricing mechanism through July 2, 2012 (Interim Relief Extension Entry).
- (6) By opinion and order issued on July 2, 2012, the Commission approved a capacity pricing mechanism for AEP-Ohio (Capacity Order). The Commission established \$188.88/megawatt-day as the appropriate charge to enable AEP-Ohio to recover its capacity costs pursuant to its FRR obligations from CRES providers. However, the Commission also directed that AEP-Ohio's capacity charge to CRES providers should be the RPM-based rate, including final zonal adjustments, on the basis that the RPM-based rate will promote retail electric competition. The Commission authorized AEP-Ohio to modify its accounting procedures to defer the incurred capacity costs

² *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 11-346-EL-SSO and 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 and 11-350-EL-AAM.*

not recovered from CRES providers, with the recovery mechanism to be established in the ESP 2 Case.

- (7) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.
- (8) By entry on rehearing issued on October 17, 2012, the Commission granted, in part, and denied, in part, applications for rehearing of the Initial Entry, Interim Relief Entry, and Capacity Order, and denied applications for rehearing of the Interim Relief Extension Entry (Capacity Entry on Rehearing).
- (9) On November 15, 2012, Industrial Energy Users-Ohio (IEU-Ohio) filed an application for rehearing of the Capacity Entry on Rehearing. The Ohio Consumers' Counsel (OCC) and FirstEnergy Solutions Corp. (FES) filed applications for rehearing on November 16, 2012. AEP-Ohio filed a memorandum contra the applications for rehearing on November 26, 2012.
- (10) In its first assignment of error, IEU-Ohio claims that the Capacity Entry on Rehearing is unlawful and unreasonable, because the Commission cannot rely on Section 4905.26, Revised Code, to apply a cost-based ratemaking methodology in establishing AEP-Ohio's capacity charge for its FRR obligations. Citing Section 4928.05(A)(1), Revised Code, IEU-Ohio contends that AEP-Ohio's capacity service is a competitive retail electric service that cannot be regulated by the Commission under Chapter 4905, Revised Code. IEU-Ohio adds that the Ohio Supreme Court has determined that the Commission cannot use its general supervisory powers to circumvent the statutory ratemaking process enacted by the General Assembly. IEU-Ohio also notes that Section 4905.26, Revised Code, is a procedural statute that does not delegate substantive authority to the Commission to increase a utility's rates. IEU-Ohio asserts that the Commission has found that rates can only be established under Section 4905.26, Revised Code, in limited circumstances, and in

accordance with other ratemaking statutes. According to IEU-Ohio, the determination as to whether a particular rate is unjust or unreasonable can only be made by reference to other provisions of Title 49, Revised Code. IEU-Ohio argues that the Commission neglected to identify any statutory ratemaking criteria for determining whether AEP-Ohio's prior capacity compensation was unjust or unreasonable. IEU-Ohio contends that there is no statute that authorizes the Commission to apply a cost-based ratemaking methodology to increase rates for a competitive retail electric service.

- (11) Similarly, OCC's first assignment of error is that the Commission erred in finding that it had authority under Section 4905.26, Revised Code, to initiate this proceeding and investigate AEP-Ohio's wholesale capacity charge. OCC points out that Section 4905.26, Revised Code, governs complaint proceedings that fall within the Commission's general authority under Chapter 4905, Revised Code. OCC contends that Chapter 4905, Revised Code, does not permit the Commission to establish a wholesale capacity charge or an SCM and, therefore, Section 4905.26, Revised Code, is not a source of authority that enables the Commission to investigate and fix AEP-Ohio's wholesale capacity rate. OCC adds that the various procedural requirements of Section 4905.26, Revised Code, were not followed by the Commission in the course of this proceeding. Specifically, OCC notes that the Commission did not find that there were reasonable grounds for complaint prior to the hearing, nor did it find that AEP-Ohio's existing capacity charge was unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.
- (12) Like IEU-Ohio and OCC, FES asserts that the Capacity Entry on Rehearing is unlawful and unreasonable, because it relied on Section 4905.26, Revised Code, as a source of authority to establish a cost-based SCM. FES contends that, although Section 4905.26, Revised Code, provides the Commission with authority to investigate and set a hearing to review a rate or charge that may be unjust or unreasonable, the statute does not confer jurisdiction to establish a cost-based rate. FES also disputes the

Commission's clarification in the Capacity Entry on Rehearing that the Commission is under no obligation with regard to the specific mechanism used to address capacity costs.

- (13) In its memorandum contra, AEP-Ohio notes that the Ohio Supreme Court has repeatedly held that the Commission has broad authority to change utility rates in proceedings under Section 4905.26, Revised Code. In response to IEU-Ohio's argument that the Commission authorizes rates under Section 4905.26, Revised Code, only in limited circumstances, AEP-Ohio asserts that Commission precedent indicates that is the case for self-complaint proceedings, but not for Commission-initiated investigations. AEP-Ohio also points out that IEU-Ohio and OCC offer no authority in support of their contention that Chapter 4905, Revised Code, does not permit the Commission to set wholesale rates. AEP-Ohio notes that nothing in Chapter 4905, Revised Code, limits its application to retail rates. AEP-Ohio further notes that the Commission has often regulated wholesale rates and that its orders have been upheld by the Ohio Supreme Court.
- (14) With respect to OCC's argument that the Commission failed to find that reasonable grounds for complaint exist in this case, AEP-Ohio replies that OCC's position is overly technical and without basis in precedent. AEP-Ohio notes that there is no requirement that the Commission must make a rote finding of reasonable grounds for complaint in proceedings initiated pursuant to Section 4905.26, Revised Code. AEP-Ohio believes that, in initiating this proceeding, the Commission implicitly found that there were reasonable grounds for complaint. Similarly, in response to OCC's and IEU-Ohio's argument that the Commission did not comply with Section 4905.26, Revised Code, because it failed to find that RPM-based capacity pricing is unjust or unreasonable, AEP-Ohio notes that the statute does not require the Commission to make such a finding. According to AEP-Ohio, the statute requires the Commission to conduct a hearing, if there are reasonable grounds for complaint that a rate is unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law. AEP-Ohio adds that the Commission

found in the Capacity Order and the Capacity Entry on Rehearing that RPM-based capacity pricing would produce unjust and unreasonable results.

- (15) In its second assignment of error, IEU-Ohio asserts that the Capacity Entry on Rehearing is unlawful and unreasonable, because the Commission cannot regulate a wholesale rate, pursuant to Section 4905.04, 4905.05, 4905.06, or 4905.26, Revised Code. Specifically, IEU-Ohio contends that the Commission's regulatory authority under Chapter 4905, Revised Code, extends only to the retail services provided by an electric light company, when it is engaged in the business of supplying electricity for light, heat, or power purposes to consumers within the state. IEU-Ohio notes that the Commission determined in the Capacity Order that the capacity service provided by AEP-Ohio to CRES providers is a wholesale transaction rather than a retail service.
- (16) In its memorandum contra, AEP-Ohio notes that IEU-Ohio's argument is contrary to its initial position in this case, which was that the Commission does have jurisdiction to establish capacity rates, pursuant to the option for an SCM under Section D.8 of Schedule 8.1 of the FERC-approved RAA. AEP-Ohio argues that IEU-Ohio's current position is based on an overly restrictive statutory interpretation. AEP-Ohio points out that the characteristics of an entity that determine whether it is a public utility subject to the Commission's jurisdiction do not necessarily establish the extent of, or limitations on, the Commission's jurisdiction over the entity's activities, which is a separate matter. AEP-Ohio reiterates that the Commission's authority under Section 4905.26, Revised Code, is considerable and encompasses regulation of wholesale rates in Ohio.
- (17) In its second assignment of error, FES argues that, even if the Commission has authority under Chapter 4905, Revised Code, to establish an SCM, the Commission must nonetheless observe the procedural requirements of Chapter 4909, Revised Code. FES asserts that the Capacity Entry on Rehearing is unreasonable and unlawful, because the Commission upheld a cost-based SCM without

adherence to the mandatory ratemaking formula of Section 4909.15, Revised Code, which requires determinations regarding property valuation, rate of return, and so forth.

- (18) AEP-Ohio responds that the Commission already rejected, in the Capacity Entry on Rehearing, the argument that a traditional base rate case was required under the circumstances. AEP-Ohio notes that, although the Commission may elect to apply Chapter 4909, Revised Code, following a complaint proceeding, there is no requirement that it must do so. AEP-Ohio also points out that the Commission has not adjusted retail rates in this case.
- (19) In its second assignment of error, OCC contends that the Commission unlawfully and unreasonably determined that OCC's arguments in opposition to the deferral of capacity costs were prematurely raised in this proceeding and should instead be addressed in the ESP 2 Case. OCC asserts that, in declining to resolve OCC's arguments in the present case, the Commission violated Section 4903.09, Revised Code, and unreasonably impeded OCC's right to take an appeal. OCC notes that the Commission has not yet ruled on its application for rehearing in the ESP 2 Case, which has delayed the appellate review process, while AEP-Ohio has nevertheless begun to account for the deferred capacity costs on its books to the detriment of customers.
- (20) In response, AEP-Ohio notes that the Commission has already rejected OCC's argument and found that issues related to the creation and recovery of the deferral are more appropriate for consideration in the ESP 2 Case, in which the Commission adopted the retail stability rider (RSR), in part to compensate the Company for its deferred capacity costs. AEP-Ohio adds that, because the Commission did not adjust retail rates in the present case, and the RSR was adopted in the ESP 2 Case, there is no harm resulting from the Commission's decision in this docket.
- (21) In the Capacity Entry on Rehearing, the Commission clarified that our initiation of this proceeding for the purpose of reviewing AEP-Ohio's capacity charge was

consistent with Section 4905.26, Revised Code.³ In relevant part, the statute provides that, upon the initiative or complaint of the Commission that any rate or charge is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, if it appears that reasonable grounds for complaint are stated, the Commission must schedule, and provide notice of, a hearing. The Ohio Supreme Court has found that the Commission has considerable discretion under the statute, including the authority to conduct an investigation and fix new utility rates, if the existing rates are unjust and unreasonable. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006); *Allnet Communications Services, Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117 (1987); *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153, 156-158 (1979). The Court has also stated that utility rates may be changed by the Commission in a complaint proceeding under Section 4905.26, Revised Code, without compelling the utility to apply for a rate increase under Section 4909.18, Revised Code. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 400 (2006). The Commission, therefore, disagrees with the arguments of IEU-Ohio, FES, and OCC that are counter to this precedent.

- (22) Further, we find no requirement in Ohio Supreme Court precedent or anywhere else that the Commission must first invoke Chapter 4909, Revised Code, or some other ratemaking authority, prior to fixing new utility rates, if the Commission finds that the existing rates are unjust and unreasonable following a proceeding under Section 4905.26, Revised Code. As noted above, precedent is to the contrary.
- (23) With respect to IEU-Ohio's interpretation of Commission precedent, we disagree that rates can only be established under Section 4905.26, Revised Code, in limited circumstances. The Commission precedent cited by IEU-Ohio is inapplicable here, as it specifically pertains to self-complaint proceedings initiated by a public utility. *In the Matter of the Self-Complaint of Suburban Natural Gas*

³ Capacity Entry on Rehearing at 9-10, 13, 29, 54.

Company Concerning its Existing Tariff Provisions, Case No. 11-5846-GA-SLF, Opinion and Order, at 6 (August 15, 2012).

- (24) Additionally, we find no merit in the argument that the procedural requirements of Section 4905.26, Revised Code, were not followed in this case, which was initiated by the Commission in response to AEP-Ohio's FERC filing. In the Initial Entry, the Commission noted that this proceeding was necessary to review and determine the impact of the proposed change to AEP-Ohio's capacity charge.⁴ We believe that the Initial Entry provided sufficient indication of the Commission's finding of reasonable grounds for complaint that AEP-Ohio's capacity charge may be unjust or unreasonable. We agree with AEP-Ohio that there is no precedent requiring the Commission to use rote words tracking the exact language of the statute in every complaint proceeding. In any event, to the extent necessary, the Commission clarifies that there were reasonable grounds for complaint that AEP-Ohio's proposed capacity charge may have been unjust or unreasonable. Also, as previously discussed, the Commission may establish new rates under Section 4905.26, Revised Code, if the existing rates are unjust and unreasonable, which is exactly what has occurred in the present case. In the Interim Relief Entry, the Commission determined that RPM-based capacity pricing could risk an unjust and unreasonable result for AEP-Ohio and subsequently confirmed, in the Capacity Order, that such pricing would be insufficient to yield reasonable compensation for the Company's capacity service.⁵
- (25) We find no merit in the parties' arguments that the Commission is precluded from regulating wholesale rates under Chapter 4905, Revised Code, or Section 4905.26, Revised Code, in particular, and the parties offer no precedent in support of their position. Neither Section 4905.26, Revised Code, nor any other provision of Chapter 4905, Revised Code, prohibits the Commission from initiating a review of a wholesale rate. For its part, IEU-

⁴ Initial Entry at 2.

⁵ Interim Relief Entry at 16-17; Capacity Order at 23; Capacity Entry on Rehearing at 18, 31.

Ohio contends that the Commission's regulatory authority under Chapter 4905, Revised Code, is limited to an electric light company engaged in the business of supplying electricity to consumers (*i.e.*, as a retail service). Because the Commission determined that the capacity service provided by AEP-Ohio to CRES providers is a wholesale, not retail, transaction, IEU-Ohio believes that the Commission's reliance on Section 4905.26, Revised Code, as well as Sections 4905.04, 4905.05, 4905.06, Revised Code, is unreasonable and unlawful. However, from the outset of this proceeding, the Commission clearly indicated that the review of AEP-Ohio's proposed capacity charge would be comprehensive in scope and include consideration of other related issues, including the impact on retail competition and the degree to which the Company's capacity costs were already being recovered through retail rates.⁶

- (26) Next, we find no error in our clarification that, although the Commission must ensure that the jurisdictional utilities receive just and reasonable compensation for the services that they render, the Commission is under no obligation with regard to the specific mechanism used to address capacity costs.⁷ We did not find, as FES contends, that the Commission's ratemaking powers are unbounded by any law. Rather, we clarified only that the Commission has discretion to determine the type of mechanism implemented to enable a utility to recover its capacity costs, and that the recovery mechanism may take the form of an SCM, rider, or some other mechanism.
- (27) In its remaining arguments, IEU-Ohio contends that AEP-Ohio's capacity service is a competitive retail electric service, rather than a wholesale transaction, and again disputes our reliance on the Commission's general supervisory powers under Sections 4905.04, 4905.05, and 4906.06, Revised Code, as authority to establish the SCM. These arguments were already rejected by the Commission in the Capacity Entry on Rehearing,⁸ and IEU-Ohio has

⁶ Initial Entry at 2.

⁷ Capacity Entry on Rehearing at 28.

⁸ Capacity Entry on Rehearing at 28-29.

raised nothing new for our consideration with respect to these issues.

- (28) Finally, we do not agree with OCC that it was unreasonable and unlawful, or in violation of Section 4903.09, Revised Code, to find that arguments regarding the mechanics of the deferral recovery mechanism should be raised and addressed in the ESP 2 Case. The Commission did not outline the mechanics of, or even establish, the deferral recovery mechanism in the Capacity Order. Rather, we indicated that an appropriate recovery mechanism for AEP-Ohio's deferred costs would be established, and any additional financial considerations addressed, in the ESP 2 Case.⁹ Although numerous parties, including OCC, attempted to predict how the deferral mechanism would be implemented and what its impact would be on ratepayers, the Commission continues to find that it would have been meaningless to address such anticipatory arguments in the Capacity Entry on Rehearing. We, therefore, find no error in having determined that OCC's claims of unfair competition, unlawful subsidies, double payments, and discriminatory pricing were premature, given that the Commission had not yet determined how and from whom AEP-Ohio's deferred capacity costs would be recovered.¹⁰ The Commission notes that we thoroughly addressed OCC's other numerous arguments with respect to the deferral of capacity costs in the Capacity Entry on Rehearing.
- (29) For the above reasons, we find no error in our clarifications in the Capacity Entry on Rehearing, or in determining that arguments related to the mechanics of the deferral recovery mechanism should be resolved in the ESP 2 Case. Any other arguments raised on rehearing that are not specifically discussed herein have been thoroughly and adequately considered by the Commission and are being denied. Accordingly, the Commission finds that the applications for rehearing filed by IEU-Ohio, OCC, and FES should be denied in their entirety.

⁹ Capacity Order at 23.

¹⁰ Capacity Entry on Rehearing at 50-51.

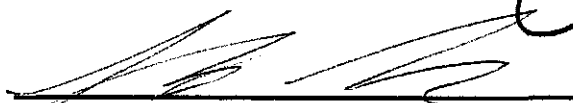
It is, therefore,

ORDERED, That the applications for rehearing filed by IEU-Ohio, OCC, and FES be denied in their entirety. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record in this case.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser

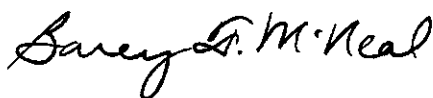

Andre T. Porter


Cheryl L. Roberto


Lynn Slaby

SJP/sc

Entered in the Journal **DEC 12 2012**


Barcy F. McNeal

Barcy F. McNeal
Secretary