

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company to Update its)	Case No. 13-1406-EL-RDR
Transmission Cost Recovery Rider.)	

INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS

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Pursuant to Rule 4901:1-36-03(F), Ohio Administrative Code (“O.A.C.”), Industrial Energy Users-Ohio (“IEU-Ohio”) hereby submits its Comments to Ohio Power Company’s (“AEP-Ohio”) Application to adjust its Transmission Cost Recovery Rider (“TCRR”) rates filed in this proceeding on June 17, 2013 (“Application”).

I. BACKGROUND

Section 4928.05(A)(2), Revised Code, and Rule 4901:1-36-02, O.A.C., allow AEP-Ohio to implement a retail rider to recover transmission charges imposed on AEP-Ohio by PJM Interconnection, L.L.C. (“PJM”). Pursuant to Rule 4901:1-36-03(B), O.A.C., AEP-Ohio’s TCRR is updated on an annual basis. The Application requests that the Public Utilities Commission of Ohio (“Commission”) authorize new TCRR rates, which in total represent a \$58 million, or 33%, increase over AEP-Ohio’s current TCRR rates.¹ AEP-Ohio states that its requested increase is due to higher projected costs and an outstanding under-recovery of approximately \$47.3 million, including carrying charges.² Including the under-recovery, AEP-Ohio requests that the Commission authorize a total revenue requirement of approximately \$231 million.

¹ Application at 4.

² *Id.*

AEP-Ohio indicated in its Application that the under-recovery is due mainly to three factors: (1) a PJM tariff change in December 2012 that caused AEP-Ohio to incur approximately \$11 million in Black Start Service charges that had not been forecasted; (2) implementation of the current TCRR rates created a regulatory lag of about \$7 million; and, (3) AEP-Ohio had inadvertently omitted from the current TCRR charges approximately \$23 million of PJM Reactive Supply charges, including carrying costs at AEP-Ohio's long-term debt rate that dates back to 2011.³ Regarding the third item, AEP-Ohio indicated that as a result of an accounting misclassification, the Reactive Supply charges were not recorded to their proper account and, as a result, AEP-Ohio had failed to request an increase in the TCRR rates from July 2011 through March 2013.⁴

II. ARGUMENT

A. The Commission should reject AEP-Ohio's unlawful and unreasonable request to increase future TCRR rates to account for revenue that AEP-Ohio, through its own fault, failed to previously request authorization of from the Commission

The Commission should reject AEP-Ohio's request to increase its future TCRR rates to account for \$23 million, inclusive of carrying charges, for which AEP-Ohio failed to request authorization during its previous updates to its TCRR rates. The doctrines of *res judicata* and collateral estoppel prevent AEP-Ohio from seeking to open the Commission's prior orders to increase its future revenue to account for revenue AEP-Ohio failed to request in prior TCRR proceedings. Additionally, if the Commission determines that *res judicata* and collateral estoppel do not apply (as it has done in

³ *Id.*

⁴ *Id.* at 4-5.

cases of clerical errors) then according to Commission precedent, AEP-Ohio could only include in future TCRR rates the portion of the \$23 million related to the current TCRR period which began in November 2012.

1. The doctrines of *res judicata* and collateral estoppel bar the inclusion of the entire \$23 million in future TCRR rates

“[R]es judicata and collateral estoppel ... operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.”⁵ The Commission approved AEP-Ohio's TCRR rates for the period of July 2011 through June 2012 in its Order dated June 22, 2011.⁶ The Commission authorized AEP-Ohio's TCRR rates for the current period in October 2012. AEP-Ohio did not request recovery of the Reactive Supply charges in either its Application approved by the Commission in June 2011 or in its Application approved by the Commission in October 2012.⁷ Accordingly, AEP-Ohio is precluded by the doctrines of *res judicata* and collateral estoppel from requesting increased revenue over the next 12 months to make up for revenue it did not seek in 2011 and 2012.

⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10 (1985); see also *In the Matter of the Complaint of Warren J. Yerian v. Buckeye Rural Electric Cooperative, Inc.*, Case No. 05-886-EL-CSS, Entry at 3 (Aug. 24, 2005) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, Case No. 11-2473-EL-RDR, Finding and Order (June 22, 2011).

⁷ *In the Matter of the Application of Ohio Power Company to Update Its Transmission Cost Recovery Rider*, Case No. 12-1046-EL-RDR, Finding and Order (Oct. 24, 2012).

2. If the Commission allows the inclusion of any of the historic Reactive Supply charges, Commission precedent limits the total amount eligible for inclusion in future TCRR amounts to the portion of the \$23 million associated with the current TCRR period that began in November 2012

Additionally, the Commission has held that it is inappropriate to adjust future rates to reconcile with over- or under-collections from before the current audit period, unless the mistake was a simple clerical error:

The Ohio Supreme Court's decision in *Consumers' Counsel* is the pivotal opinion on this topic. In the Commission case that gave rise to *Consumers' Counsel*, the Commission had considered the effect of a Commission rule that was defective in its application. *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Cleveland Electric Illuminating Company and Related Matters*, Case No. 83-38-EL-EFC, Opinion and Order (February 2, 1984). Although the Commission had intended to allow electric utilities to recover up to 100 percent of system loss costs, rather than limiting them to recovery through base rates, the actual effect of the rule was to allow more costs than actually incurred. For about a two-year period, the company in question had properly calculated its system loss costs under the rule, thereby recovering more than its actual costs. When the Commission considered the issue, it discussed the question of how far back it could go in remedying the problem. The Commission determined that it was limited to the audit period involved in that case, based on precedent, fundamental fairness, and the desire to achieve finality in decisions. This determination was upheld on rehearing. On appeal to the Supreme Court of Ohio, the court affirmed the Commission's order, based on the application of the doctrines of *res judicata* and collateral estoppel. The court pointed out that OCC could have challenged the computation for the earlier period by appealing or requesting a rehearing of the previous order of the Commission. Thus, the court found that the previous case is 'insulated from attack.' *Consumers' Counsel*, *supra* at 10.

In 1987, the issue of out-of-period corrections again came before the Commission. *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of Columbus Southern Power Company and Related Matters*, Case No. 87-102-EL-EFC, Opinion and Order (November 10, 1987) and Entry on Rehearing (December 29, 1987). During the audit, the utility company discovered that an error had been made during the preceding audit period. The error resulted from a verbal miscommunication and caused the company not to recover costs that were properly recoverable. The parties argued at length about the application of the rule from *Consumers' Counsel*. The Commission

reached a different result, allowing the out-of-period correction. It distinguished this circumstance from the one in *Consumers' Counsel*, explaining that, in *Consumers' Counsel*, the Commission had previously considered the methodology and had approved it, specifically finding that the company complied with then-existing Commission rules. Thus, the Commission noted, *res judicata* properly applied. In *Columbus Southern*, however, the Commission concluded that the problem arose because of a simple clerical error. The Commission noted that, of course, it had never considered or approved a clerical error. Thus, the Commission recognized that clerical errors made in prior audit periods can be considered in subsequent GCR proceedings.⁸

The Commission concluded that the analysis of whether an out-of-period error can be corrected hinges on whether the error was a simple clerical error or if it was something more:

The critical, underlying question, then, is whether the prior years' errors, identified by [the utility], are clerical errors or whether, based on their nature, their repetition over a period of years, [the utility's] actions to attempt to prevent them, the Commission's instructions regarding internal reviews, or other factors, these mistakes have risen beyond the level of clerical errors.⁹

From the face of AEP-Ohio's Application, it appears that AEP-Ohio's errors are more than the simple verbal clerical error recognized in *Columbus Southern*. AEP-Ohio's errors were not the result of a verbal miscommunication; they were the result of AEP-Ohio's failure to record its charges from PJM in the proper account.¹⁰ AEP-Ohio's errors have persisted on a monthly basis (AEP-Ohio misclassified each bill from PJM) for a period of years, dating back to 2011.¹¹ Thus, AEP-Ohio's error is not a simple verbal miscommunication; rather, the error occurred through AEP-Ohio's repeated failure to properly account for PJM's bills, as it now believes it should have. Based

⁸ *In the Matter of the Long-Term Forecast Report of The Cincinnati Gas & Electric Company and Related Matters*, Case Nos. 03-118-GA-FOR, *et al.*, Entry at 8-9 (Dec. 10, 2004).

⁹ *Id.*

¹⁰ Application at 5.

¹¹ *Id.*

upon the Commission precedent discussed above, AEP-Ohio would be limited to adjusting prospective TCRR rates for errors from the current period; if any adjustments are allowed at all (*res judicata* and collateral estoppel prevent the inclusion of any of the prior Reactive Supply charges).

Just as customers were prevented from reaching back to offset prospective rates for amounts over-collected from before the current audit period, AEP-Ohio should not be permitted to increase the TCRR for amounts it failed to timely seek in the prior audit period and on which the Commission has already ruled. According to the Court's and Commission's precedent, the Commission should not increase AEP-Ohio's prospective rates to account for AEP-Ohio's failure to properly account for the Reactive Supply charges and to seek recovery of the charges through the Commission's prior orders; AEP-Ohio is now barred by the doctrines of *res judicata* and collateral estoppel from seeking future recovery of these Reactive Supply charges. Further, AEP-Ohio's error is beyond a simple clerical error and, therefore, if the Commission allows AEP-Ohio to include the prior Reactive Supply charges in prospective TCRR rates, the Commission should limit the adjustments to Reactive Supply charges from the current period, *i.e.*, starting November 2012.

B. If the Commission allows AEP-Ohio to increase its prospective TCRR rates related to AEP-Ohio's failure in prior TCRR proceedings to request recovery of Reactive Supply charges, then the Commission should deny AEP-Ohio's request to recover carrying charges related to the Reactive Supply charges

If the Commission rejects IEU-Ohio's prior arguments and allows AEP-Ohio to increase its TCRR rates to account for AEP-Ohio's failure in prior TCRR proceedings to request rates that reflected Reactive Supply charges, then the Commission should at a minimum reject AEP-Ohio's proposal to include carrying charges on these amounts.

But for AEP-Ohio's own errors, there would not have been any carrying charges as the revenue AEP-Ohio now seeks to collect would have been collected over prior periods.

Furthermore, AEP-Ohio should have filed an interim application to adjust its TCRR rates as soon as it realized a large under-recovery was possible. AEP-Ohio's failure to do so violates Rule 4901:1-36-03(E), O.A.C., and serves as an additional basis for the Commission to deny recovery of carrying charges associated with the Reactive Supply charges, if the Commission rejects IEU-Ohio's argument in Section I.A.1 above and allows their collection. That Rule provides "[i]f at anytime during the period between annual update filings, the electric utility or staff determines that costs are or will be substantially different than the amounts authorized as the result of the electric utility's previous application, the electric utility should file, on its own initiative or by order of the commission, an interim application to adjust the transmission cost recovery rider **in order to avoid excessive carrying costs** and to minimize rate impacts for the following update filing."

Because carrying charges associated with the Reactive Supply charges is a result of AEP-Ohio's own errors and a violation of Rule 4901:1-36-03(E), O.A.C., the Commission should not allow AEP-Ohio to recover any carrying charges associated with the historic Reactive Supply charges, if the Commission allows their inclusion in future TCRR rates at all.

C. The Commission should deny carrying charges on the portion of AEP-Ohio's under-recovery related to an increase in Black Start Service charges because AEP-Ohio failed to comply with Rule 4901:1-36-03(E), O.A.C.

The Commission should deny recovery of the unreasonable carrying charges caused by AEP-Ohio's failure to file an interim application to update its TCRR in

accordance with Commission Rule 4901:1-36-03(E), O.A.C. As discussed above, that Rule requires AEP-Ohio to file an interim application to adjust TCRR rates when it determines that a large under-recovery is possible to prevent excessive carrying charges from accruing.

As AEP-Ohio's Application acknowledges, \$11 million of AEP-Ohio's under-recovery stemmed from "a PJM tariff change in December 2012."¹² Thus, AEP-Ohio was on notice, no later than December 2012, that the potential for an under-recovery would exist. AEP-Ohio's failure to file an interim application has caused excessive carrying charges that the Commission should not allow AEP-Ohio to recover from customers. Finally, AEP-Ohio was well aware of the Commission's rule and requirement to file an interim application as IEU-Ohio raised this very issue in IEU-Ohio's November 21, 2012 Application for Rehearing filed in AEP-Ohio's TCRR proceeding last year.¹³

D. The Commission can best minimize customer rate impacts by adopting IEU-Ohio's recommendations above

At page 7 of its Application, AEP-Ohio states, "[a]s always, the Company is receptive to exploring alternative recovery options in an effort to promote rate stability and to mitigate rate impacts." AEP-Ohio does not offer what these alternative options may be and, in fact, there is no reason for the Commission to grant the unreasonable and unlawful increases that AEP-Ohio is requesting. Rather, the Commission can mitigate the TCRR rate impacts by rejecting AEP-Ohio's request to increase its TCRR

¹² Application at 4.

¹³ *In the Matter of the Application of Ohio Power Company to Update Its Transmission Cost Recovery Rider*, Case No. 12-1046-EL-RDR, IEU-Ohio's Application for Rehearing and Memorandum in Support at 4, 7 (Nov. 21, 2012).

for the historic Reactive Supply charges and carrying charges improperly included in its Application, as well as the unjustified carrying charges associated with the increase in Black Start Service charges. Additionally, before the Commission considers “alternative recovery options,” AEP-Ohio should be required provide a detailed explanation of what may be proposed and the bill impacts of that proposal. Only in this manner will the Commission comply with the rights of the customers to notice, comment, and hearing required by law and Commission rules.¹⁴

The Ohio Supreme Court has held due process in a Commission proceeding occurs **when** a party is given: (1) “ample notice;” (2) “permitted to present evidence through the calling of its own witnesses;” (3) permitted to “cross-examin[e] the other parties’ witnesses;” (4) introduce exhibits; (5) “argue its position through the filing of posthearing briefs;” and (6) “challenge the PUCO’s findings through an application for rehearing.”¹⁵ Further, the Court has held that the Commission must, in order to comply with the law, provide “in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.”¹⁶

Therefore, if the Commission does not summarily deny AEP-Ohio’s request to recover the historic Reactive Supply charges and unwarranted carrying charges associated with the Reactive Supply charges and Black Start Service charges, it should require AEP-Ohio to set out its proposal to mitigate the impact of its unreasonable increase and permit parties to address the proposal.

¹⁴ Section 4903.09, Revised Code; Rule 4901:1-36-03(F), O.A.C.

¹⁵ *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2006-Ohio-1386 at ¶ 53.

¹⁶ *Tongren v. Pub. Util. Comm.* 85 Ohio St.3d 87, 89 (1999).

III. CONCLUSION

For the reasons discussed herein, the Commission should reduce AEP-Ohio's requested revenue requirement to remove the improper inclusion of \$23 million associated with Reactive Supply charges, and should further reduce AEP-Ohio's requested revenue requirement to remove the excessive carrying charges associated with the December 2012 increase in Black Start Service charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Comments* was served upon the following parties of record this 29th day of July 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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