

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)	
Ohio Power Company for Authority to)	Case No. 13-2385-EL-SSO
Establish a Standard Service Offer)	
Pursuant to §4928.143, Revised Code,)	
in the Form of an Electric Security Plan)	
)	
In the Matter of the Application of)	
Ohio Power Company for Approval of)	Case No. 13-2386-EL-AAM
Certain Accounting Authority)	

**REPLY BRIEF
OF
OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND**

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I. INTRODUCTION

In the above-captioned proceeding Ohio Power Company (“AEP Ohio” or “Company”) is seeking Commission approval of its Application for Authority to Establish a Standard Service Offer Pursuant to ORC §4928.143, in the Form of an Electric Security Plan (“Application” or “ESP”). After an extensive hearing and pursuant the Attorney Examiners’ order in this case, parties filed initial Post-Hearing Briefs on July 23, 2014. Ohio Environmental Council (“OEC”) and Environmental Defense Fund (“EDF”), filed a joint initial post hearing brief focusing on recommended modifications for certain Riders proposed by the Company in the ESP and opposition to AEP’s proposed PPA Rider’s potential for customer subsidized detriment to Ohio’s environment. Any omission by OEC and EDF, hereto, of specific reference to any intervenor’s brief or any specific issue expressed in any post-hearing brief filed in this docket shall not be construed as OEC/EDF’s support for or acquiescence to the argument of that intervenor or that issue.

II. ARGUMENT

A. Contrary to the Company’s assertions, modification of the Economic Development Rider to lessen the impact on customers is workable and furthers Ohio’s Energy Policy goals.

In OEC and EDF’s initial post hearing brief, we recommended modifying the Company’s Economic Development Rider (“EDR”) to require the Company to undertake a good faith effort to work with its reasonable arrangement customers to engage in all cost-effective energy efficiency programs. The Company, in its brief criticizes OEC and EDF’s recommendation as “not capable of implementation and, consequently, would render the EDR unworkable.”¹ The

¹ Initial Post Hearing Brief of AEP-Ohio at page 135.

Company questions why AEP Ohio's recovery through the EDR of revenues foregone pursuant to reasonable arrangement contracts should "depend on OEC/EDF's energy efficiency goals."²

First, it should be made clear that these are not OEC's and/or EDF's energy efficiency goals, but the goals and statutorily stated policy of the State of Ohio. We admit, that one of those policies *is* to "facilitate the state's effectiveness in the global economy,"³ which is the Company's *raison d'etre* for this rider to recoup revenue forgone due to its mercantile customer subsidy. However, so too is the policy goal of this state to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service,"⁴ and to "encourage innovation and market access for cost-effective supply- and demand-side retail electric service."⁵ The Company cannot simply pick and choose which policies to foster and which policies to cast to the wind.

While the Company is permitted, but is not required by the Commission or the Revised Code, to provide such subsidies to its largest of customers, it has chosen to do so through a combination of its benevolence and its desire support Ohio's role in the global economy. The Company for the same reasons should make sure that the balance of its customers that pay for this subsidy (who have their own role in Ohio's economy) are not being overcharged for the privilege of helping AEP's mercantile customers. While the aphorism "a rising tide lifts all boats" may hold water in support of the EDR to assist the facilitation of the state's global economic effectiveness, the Company has the similar policy motivation to make sure that its customers are not drowned by their share of the subsidy. Requiring the unique arrangement

² *Id.* at page 136

³ O.R.C. §4928.02(N).

⁴ O.R.C. §4928.02 (A).

⁵ O.R.C. §4928.02 (D).

customer to do its part to lower its electricity usage, and thus lower the amount of the subsidy's impact, can and will benefit all customers and further the policies of the state.

As we stated in the initial brief, our recommendation is a requirement for simple good faith effort to be shown by the Company, that its contractual partner (the unique arrangement customer) has engaged in all cost-effective energy efficiency measures in order to stabilize the impact on the Company's lost revenue (and ultimately the impact to its Customers). In reply to the Company's suggestion that OEC and EDF's proposal is so unworkable, we must beg to differ based on the Company's own experience with both the contractual relationships of the arrangements and energy efficiency.

The Company believes that holding it responsible for making sure that its contractual partner is keeping up with its side of a bargain is unworkable and misdirected. Respectfully, however, we must point out to the Company and the Commission that it is the distribution utility that is regulated by the Commission – not the subsidized customer. Thus, in order to keep some semblance of Commission oversight of customer costs, the requirement must be on the Company to police its own contract with the mercantile customer. Also, it is the distribution utility that wishes to recoup its revenue back from customers that it had forgone through its self-initiated contractual EDR subsidy. Therefore, since the Company chose to subsidize the mercantile customer and wants to get its money back, it is the Company who should bear the burden of showing the Commission that it has not simply given this revenue away imprudently. If the Commission believes that the Company has not performed a good-faith effort to make sure its contractual partner has implemented energy efficiency, and thus rejects recoupment, the Company should get that lost revenue back from the recalcitrant customer.

What the Company refuses to acknowledge is that, in essence, its role under this rider is as a broker -- taking money from the vast majority of its customers and investing it in these economic development projects. The onus must be on the Company, acting in such a fiduciary role, to make sure that the investments are sound and the potential of a dividend is a real one. A simple term or condition can be included in the reasonable arrangement, enforceable by the Company, to make sure that the investment is not being wasted. If the customer is not holding up its end of the bargain, and the Commission rejects the recoupment from the balance of AEP-Ohio's customers, then the Company would be well in its rights to recoup the revenue back from the mercantile customer based on a breach of contract. Such a provision is a prudent way to maintain the Company's role as a caretaker of *all* of its customer funds.

Furthermore, despite the Company's presumed lack of knowledge of the concept of "all cost-effective energy efficiency,"⁶ six years of very successful implementation of energy efficiency portfolios shows that the Company understands the efficiency savings quite well. If upon its good-faith enforcement of the arrangement, the Company finds that the customer is not implementing energy efficiency in a way to lessen the financial impact to the subsidizing customers, the Company can utilize its panoply of successful energy efficiency programs to assist the customer to find savings.

To pivot the attention of the Commission away from basis of our proposal, the Company, in its brief, mischaracterizes OEC/EDF Witness Roberto's testimony. The Company suggests that Ms. Roberto's recommendation is based on a belief that "reasonable arrangements customers like Timken do not know how to make cost-effective investments over the appropriate term in any asset, including energy efficiency measures."⁷ This is not the case, and not Ms.

⁶ See Initial Post Hearing Brief of AEP- Ohio at page 136

⁷ *Id.*

Roberto's testimony. It is merely that the incentive for cost-effective investments in energy efficiency are moot if the electricity (and costs) otherwise saved is being subsidized by other rate-payers. Our modest proposal merely provides a semblance of customer equity. While we agree that there is no statutory duty to pursue all cost effective energy efficiency⁸ (just as there is no statutory duty to subsidize large customers), there is an equal amount of support under the state's energy policy goals for both a utility facilitating economic stability and ensuring reasonable electricity costs to all customers.

OEC and EDF, again, urge the Commission to require the recommended modification to the Company's EDR.

B. Proper cost recovery related improvements to the Company's gridSMART® Rider should be included, separate from gridSMART® Phase 2 implementation docket

The Company argues that since OEC and EDF proposed similar improvements to AEP's gridSMART® Phase 2 implementation in Docket No. 13-1939, that "the Commission will properly consider them in that proceeding."⁹ While we acknowledge that OEC and EDF provided recommendations in both dockets, as our initial brief in this case explains, a limited number of those recommendations we have chosen to advance in this case. The limited number of recommendations that OEC and EDF proposed in this case includes those modifications that will enhance transparency and prudence vis-à-vis cost recovery under the gridSMART® Rider. Unlike more programmatic recommendations advanced in Docket No. 13-1939,¹⁰ here OEC and EDF recommend annual reporting of performance metrics on the results of the Phase 2

⁸ *Id.*

⁹ *Id.* at page 89.

¹⁰ See *In the Matter of In the matter of the application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Ride*. PUCO Case No. 13-1939-EL-RDR, Initial Comments of the Environmental Law & Policy Center, Environmental Defense Fund, and Ohio Environmental Council (November 1, 2013).

deployment plan to allow the Commission and other stakeholders to determine the program's cost-effectiveness. The recommendations made by OEC and EDF look to improve the transparency and analysis of the prudence and cost effectiveness of the gridSMART® Rider. Thus, as expressed in our initial post-hearing brief, our recommendations should be adopted by the Commission its order in this proceeding.

C. AEP has not met its burden of proof vis-à-vis its Proposed PPA Rider in the face of wide spread and diverse opposition

OEC and EDF, in our initial brief, criticized the Company's proposed Power Purchase Agreement Rider as having direct negative consequences on the environment, customers, and electric competition. We further averred that there was no legal basis for such a generation related charge under Ohio Law. OEC and EDF were certainly not alone in these sentiments that the proposed PPA is unlawful, unreasonable, and bad public policy.

i. Intervenors and Staff nearly unanimously oppose the Company's PPA rider as unlawful, unreasonable, and bad public policy.

The Company, in its initial brief, makes many claims to support the validity of its PPA Rider. The Company claims that the PPA will “have no adverse impact on the SSO auction or the ability of CRES providers to compete for customers on a level playing field;”¹¹ that the Commission gave the Company a perpetual exemption from its corporate separation plan for OVEC generation related costs;¹² and the PPA will stabilize customer rates by providing a hedge against market volatility.¹³ However, none of these explanations of possible benefits of the PPA

¹¹ Initial Post Hearing Brief of AEP-Ohio at page 23

¹² *Id.* at page 24.

¹³ *Id.* at page 22.

go to support the Company's burden to prove that there is a legal basis for this generation related non-bypassable charge.

The Company also, as an expected last ditch effort to support the PPA's validity, tries to hang its hat on protecting jobs and supporting the state's economy. The Company asserts that OVEC provides over \$40 million of economic benefit in a six county region and over \$100 million of economic benefit in Ohio.¹⁴ But as the OMA points out, the jobs component is a red herring – the jobs and the \$100 million dollars of economic support to southern Ohio will not disappear.¹⁵ We agree with OMA. Whether the distribution customers of AEP-Ohio pay for the OVEC plants, or whether the costs are more appropriately covered by shareholders and/or the generation affiliate of AEP, the economic benefits are unaffected. Again, this too fails to support the Company's burden of proof.

The Company does attempt claim a statutory basis for the PPA Rider by asserting that the “ESP statute enables the PPA rider under R.C. §4928.143(B)(2)(d) as a term, condition or charge relating to customer shopping with the effect of stabilizing rates.”¹⁶ However, as OCC clearly points out, AEP Ohio's proposed PPA Rider would not have the “effect of stabilizing or providing certainty regarding retail electric service,” and thus does not qualify for ratemaking treatment under R.C. 4928.143(B)(2)(d).¹⁷ Similarly, Ohio Partners for Affordable Energy (“OPAE”), representing the low income consumers of AEP Ohio's territory, called the PPA “unlawful, discriminatory, anti-competitive and unnecessary” and will “significantly increase costs of electricity.”¹⁸ OPAE further points out that it is not a hedge, and that the Ohio SSO auction serves that hedge role through the fixed price contracts, transparency of the

¹⁴ Initial Post Hearing Brief of AEP-Ohio at page 24.

¹⁵ Initial Post Hearing Brief of OMA at page 15.

¹⁶ Initial Post Hearing Brief of AEP Ohio at page 27.

¹⁷ Initial post hearing brief of OCC at page 45.

¹⁸ Initial Post Hearing Brief of OPAE at page 39.

Commission’s process for auctions, and staggering of the procurement of products.¹⁹ Simply put, the PPA creates price uncertainty and works against the hedge argument of the Company.²⁰

Most significantly, the experts at the Commission Staff provide numerous examples of how this proposed PPA rider is not permitted under Ohio law. Staff first points to the fact that, despite the Company’s attempt to dress the PPA up as a financial hedge only, this is a generation charge.²¹ While an ESP is permitted to contain riders to cover costs for “fuel to generate the electricity supplied under the offer” and the “cost of purchased power supplied under the offer,” as the Staff explains, that provision does not pertain to a wires-only company like AEP Ohio under ESP III.²² What is more, as IEU points out, the PPA “would not be utilized to provide physical generation supply to AEP Ohio customers.”²³

Secondly, the Staff, similar to OEC/EDF, show that AEP’s proposed PPA generation related asset subsidy violates R.C. §4928.02(H). Staff points out that the Commission has previously opined on the importance of complying with §4928.02(H) as it relates to plant closure costs. In the *Sporn* Case, the Commission ruled that there is no statutory justification for a distribution company to charge customers for plant closures under R.C. §4928.143.²⁴ Staff thus recommends that under the instruction of the *Sporn* decision, the Commission here should similarly reject the attempt to “recover competitive, generation-related costs through its non-competitive, distribution rates, in contravention of the statute.”²⁵ We agree. The present PPA proposal is undoubtedly analogous to *Sporn*, only here the Company is looking to forestall

¹⁹ *Id.* at page 42-43.

²⁰ *Id.* at page 41.

²¹ Initial Post Hearing Brief of Staff at page 12.

²² *Id.*

²³ Initial Post Hearing Brief of IEU at page 5.

²⁴ *Id.* at page 14.

²⁵ *Id.*

market forced closures, by forcing distribution customers to pay for generation-based life support.

Coupled with OEC and EDF's initial brief's argument that the PPA fails as a generation based rider proposal (as it truly is) under the ESP statute²⁶, the above arguments of Staff and customer intervenors show that the burden on AEP has not been met as to the legal basis for the Rider.

ii. *The future of Ohio's Competitive Electricity Market is in jeopardy under the PPA Rider*

A competitive market is not only good for customers' financial bottom-line, but good for development of clean energy options and innovation in supply- and demand-side services like demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure that benefit customers and the state as a whole. We lament, however, about the future of such economic and environmental benefits of the market at both the micro and macro level.

We agree with Staff that AEP-Ohio was meant to meet the finish line of a fully established competitive electric market" at the conclusion of ESPII.²⁷ Now we see that the Company wants to move the finish line. We must agree with the Commission Staff that the PPA Rider conflicts with the Commission's goal of moving to a fully competitive market.²⁸ The Staff bases this on the contention that the guaranteed revenue stream for its generation assets,

²⁶ See. Initial post hearing brief of OEC/EDF at pages 12-15.

²⁷ Initial Post Hearing Brief of Staff at page 3.

²⁸ Initial Post Hearing Brief of Staff at page 2.

irrespective of market forces, will move AEP – Ohio in the exact opposite direction of market-based competition.²⁹ Perhaps put at its simplest way by Ohio Consumers’ Counsel (“OCC”):

“Per R.C. 4928.38, as of the end of its market development period, the utility is to be “fully on its own in the competitive market.” But AEP Ohio does not want to be “fully on its own in the competitive market.” It wants to collect from customers’ costbased revenue for its OVEC assets.”³⁰

What is just as problematic for not only the future of competition for customers of AEP Ohio under this PPA (or this ESP) but for other Ohio customers, is how this PPA scheme is laying the precedential groundwork for an unraveling of the Commission’s jurisdiction. The proposed PPA creates a blue-print to circumvent the competitive market structure, and simultaneously circumvent the Commission’s oversight and jurisdiction. As Staff points out, the Commission’s role in regulating the prudence of AEP-Ohio’s generation related costs will be very limited or nonexistent since the PPA will be subject to the FERC jurisdiction and **not** the Commission.³¹ This blue-print has already been reproduced in the Electric Security Plan Applications for Duke Energy Ohio and the First Energy Companies.³² The Commission must not allow this dismissal of the statutory authority of the Commission or the statutory requirements of the distribution utility to stand – the legal and practical ramifications to Ohio’s competitive market hang in the balance.

The Ohio Hospital Association’s initial brief puts this rider in its best context: “Beware of Greeks bearing gifts.”³³ Like the Trojan Horse of the *Aeneid*, the gift of a financial hedge

²⁹ *Id* at page 4.

³⁰ Initial Post Hearing Brief of OCC at page 70.

³¹ Initial Post Hearing Brief of Staff at page 7.

³² See *In the matter of the application of Duke Energy Ohio, Inc. for authority to establish a Standard Service Offer in the form of an electric security plan, accounting modifications and tariffs for generation service and to amend its Certified Supplier Tariff*, PUCO # 20. PUCO Case No. 14-841-EL-SSO; See also *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*. PUCO Case No. 14-1297-EL-SSO.

³³ Initial Post Hearing Brief of OHA at page 4.

against great volatility of the electricity market that maintains economic development is alluring, but in reality the “gift” is wrought with danger, uncertainty, and ultimate loss to the recipient.

iii. The PPA Rider’s support of coal-fired generation facilities puts environment and customers at unnecessary risk

OEC and EDF further contend in our initial brief, that this PPA rider is bad policy due to its direct impact on the environment and the state’s ability to comply with nationwide goals to mitigate climate change.³⁴ Thus, we must disagree with the Company that the OVEC and expanded PPA will provide significant flexibility in formulating a compliance strategy.³⁵ Unsupported statements, such as those by Witness Vegas’s belief referenced in the Company’s brief, that the PPA rider could represent a very valuable tool in the state’s portfolio of options . . . to meet compliance requirements³⁶, are no substitute for the real consequences of the PPA in regard to the GHG rules. By keeping aging coal-plants running , buttressed by ratepayer dollars limits the options for Ohio’s compliance by skewing any market based approach and requiring costly heat rate efficiency and other retrofits on these subsidized plants. Ohio’s compliance path, its environment, and its energy customers would be best served by supporting (not circumventing) competitive procurement of renewable energy and energy efficiency necessary.

Our concerns and arguments were echoed by other intervenors who found the Company’s hedge argument less than convincing under a carbon constrained regulatory climate. As OPAE states, the GHG rules will likely undermine any ability for these coal plants to serve as a hedge against volatility.³⁷ ELPC stated that the GHG, coal ash, effluent limitation guidelines, and other rules undermine any ability for the aging OVEC coal plants to serve as a stable volatility hedge

³⁴See Initial Post Hearing Brief of OEC/EDF at pages 15-18.

³⁵ Initial Post Hearing Brief of AEP-Ohio at page 68.

³⁶ *Id.* at page 69.

³⁷ Initial Post Hearing Brief of OPAE at page 40.

in the manner proposed by AEP, and simply a significant gamble for customers.³⁸ ELPC rightly suggests, and we agree, that, “these aging plants face more upward pressure on costs than other generation, as evidenced by widespread coal-plant retirements around the country, and are therefore less suited to AEP’s purported hedging purpose than other generation options.”³⁹ The market, ultimately, should be the arbiter of whether these facilities survive. Yet, as ELPC puts it, the OVEC generation facilities are “dangerous and risky for customers, and the record demonstrates that OVEC generation is likely to be inherently more volatile than market generation.”⁴⁰

As OEC and EDF stated in our brief, this PPA’s true goal is not to stabilize costs for customers, but regulatory costs for shareholders. OPAE and ELPC, too, and more eloquently perhaps, summed up the true goal of the PPA Rider by stating that “the PPA shifts the risk of the profitability of the OVEC plants onto the customers and away from the company”⁴¹ and “AEP could keep uneconomic OVEC plants running indefinitely, with customers footing the bills for power that costs more than other resources on the market.”⁴² The Commission therefore should forestall this attempt to shift the risks to customers, and reject the proposed PPA Rider.

II. CONCLUSION

Based on applicable Ohio law, the arguments of Ohio Environmental Council and Environmental Defense Fund in the joint initial post hearing brief and this brief, the Commission should approve the riders addressed by OEC and EDF with recommended modifications, and reject the Company’s proposed PPA Rider.

³⁸ Initial Post Hearing Brief of ELPC at page 11.

³⁹ *Id* at page 11.

⁴⁰ Initial Post Hearing Brief of ELPC at page 11.

⁴¹ Initial Post Hearing Brief of OPAE at page 43.

⁴² Initial Post Hearing Brief of ELPC at page 15

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by electronic mail this 15th day of August, 2014.

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