BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO POWER COMPANY'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

On June 29, 2015, the Office of the Consumers' Counsel (OCC) and the Ohio Manufacturers' Association Energy Group (OMAEG) filed applications for rehearing of the Commission's May 28, 2015 Second Entry on Rehearing (Entry on Rehearing). OCC contends on rehearing that the Commission's decision in its Entry on Rehearing, at 5-6 (¶ 10), to defer ruling on assignments of error pertaining to the establishment of a Power Purchase Agreement (PPA) Rider until a future entry is unlawful and unreasonable. OMAEG also contends in its application for rehearing that the Commission unreasonably determined that it may defer ruling on the parties assignments of error related to the PPA. In addition, OMAEG asserts on rehearing that the manner in which the Commission's Entry on Rehearing decided issues relating to the Distribution Investment Rider (DIR), Rider IRP[1], and the Basic Transmission Cost Rider (BTCR) was unreasonable and unlawful.

[1] As explained in AEP Ohio's June 29, 2015 Application for Rehearing, the original name of the interruptible tariff is "Interruptible Power – Discretionary" or "IRP-D", which has become a misnomer at this point given that it encompasses emergency and pre-emergency interruptions that are mandatory. Thus, in the Company's June 26,

Ohio Power Company ("AEP Ohio" or the "Company") does not agree with OCC's or OMAEG's challenges to the Commission's substantive conclusions regarding the PPA Rider plan. AEP Ohio agrees, however, with their positions on rehearing that it was inappropriate for the Commission to defer ruling on the assignments of error relating to the PPA Rider. Rather, for the reasons AEP Ohio provided in its June 29, 2015 application for rehearing, the Commission should promptly rule upon all outstanding assignments of error relating to the PPA Rider.

The Commission should deny OMAEG's arguments on rehearing regarding the DIR and BTCR, as the Commission has already fully considered the positions that OMAEG advances in its Opinion and Order and Entry on Rehearing in this case. The Commission should also deny OMAEG's request for rehearing related to Rider IRP, as it represents OMAEG's attempt to substitute its own judgment for the Commission's well-reasoned and supported decision.

A. Power Purchase Agreement (PPA) Rider

OCC and OMAEG both address the PPA Rider in their applications for rehearing. Although OCC opens its application by casting unwarranted aspersions on the PPA Rider itself, wrongly decrying it as a "bad deal for customers" that "unnecessarily enriches the Utility's shareholders,"[2] the assignments of error raised by OCC are procedural, not substantive. In its first assignment of error, OCC contends that the Commission has no authority under R.C. 4903.10 to defer ruling on the issues it raised previously with respect to the PPA Rider. (OCC App. at 3-4.) In its second assignment of error, OCC contends that, by failing to follow R.C.

2015, compliance tariff filing, it proposed to shorten the tariff name to IRP, which is also the reference used in its June 29, 2015 Application for Rehearing and in this Memorandum Contra.

[2] These aspersions are unwarranted for the reasons already described at length in AEP Ohio's April 6, 2015 Memorandum Contra Intervenor Applications for Rehearing. *See, e.g.*, AEP Ohio Mem. Contra at 18-26 (discussing the PPA rider's beneficial rate-stabilization impacts); *see also id.* at 38-41 (explaining why the PPA rider does not create an anti-competitive subsidy prohibited by R.C. 4928.02(H)).

4903.10's requirements, the Commission is trying to evade review of the merits of the PPA Rider issues, even as the Commission has "treated its 'non-final' Order on the PPA Rider as a final order in other proceedings, including the FirstEnergy [ESP] proceeding," and even as the Company has requested approval of an amended PPA application on the basis of that "non-final" Order. (*Id.* at 4-6.) For its part, OMAEG agrees that the Commission unreasonably deferred ruling on the Intervenors' assignments of error relating to the PPA Rider. (OMAEG App. at 4-8.) OMAEG contends that the Commission's indefinite deferral of the PPA Rider issues risks creating an "unwieldy and confusing" and "piecemeal" appellate process, even as (invoking the *Keco* doctrine) other rates related to other issues will have already been in place and charged to customers before the possibility of an appeal to the Ohio Supreme Court arises. (*Id.* at 7-8; *see also id.* at n. 16, citing *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus.)

On the one hand, AEP Ohio strenuously disagrees with OCC's and OMAEG's positions on the merits of the PPA Rider for the reasons detailed in the Company's April 6, 2015 Memorandum Contra various Intervenor applications for rehearing. AEP Ohio will not restate those arguments here. On the other hand, although AEP Ohio acknowledges the Commission's discretion to manage its dockets, the Company does share OCC's and OMAEG's concern about the Commission's decision in its Entry on Rehearing to indefinitely defer ruling on the Assignments of Error pertaining to the PPA Rider. The Commission has a duty to address the PPA Rider issues raised in the prior applications for rehearing one way or another and cannot simply defer those issues to some unknown future date. The Ohio Supreme Court confirmed this nearly a century ago. *State ex rel. The Columbus Gas & Fuel Co. v. Pub. Util. Comm.*, 122 Ohio St. 473, 475, 172 N.E.2d 284 (1930) ("It is the duty of the commission to hear matters pending

before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before that tribunal.") Indeed, as the Commission itself acknowledged in the context of AEP Ohio's first ESP proceeding, a writ of *procedendo* may lie in the Ohio Supreme Court if the Commission were to refuse to rule on the merits of all pending rehearing issues in a reasonable time. *State ex rel. Office of the Ohio Consumers Counsel, et. al. v. Schriber, et al.*, Supreme Court Case No. 09-0710, Motion to Dismiss Submitted on Behalf of Respondents, Alan R. Schriber, et al. (May 7, 2009) ("Relators also speculate that the Commission may delay ruling on the applications for rehearing and thereby delay an appeal. Should that occur, Relators would have a remedy through a *procedendo* action.") The Commission's deferral of the PPA Rider issues benefits no one, just as no one would benefit from additional litigation in the form of a *procedendo* action filed in the Ohio Supreme Court to compel an overdue decision on the merits of the PPA Rider. The best course for the Company, its customers, and Intervenors would be for the Commission to issue a timely decision on rehearing that addresses all pending rehearing issues.

B. Distribution Investment Rider (DIR)

The Company's proposal to include the DIR as part of *ESP III* was intended to continue reliability-impacting infrastructure investment and better align the Company's and customers' interests.[3] The Commission's Opinion and Order, however, significantly reduced the Company's proposal and adopted significantly lower DIR revenue caps than what the Company had proposed.

[3] In its *ESP II* Opinion and Order, the Commission found that "adoption of the DIR and the improved service that will come with the replacement of aging infrastructure will facilitate improved service reliability and better align the Company's and its customers' expectations." *In re Application of Columbus Southern Power Company and Ohio Power Company*, Case Nos. 11-346-EL-SSO et al. (*ESP II*), Opinion and Order at 46 (Aug. 8, 2012) ("*ESP II* Opinion and Order").

The Company's first rehearing request pointed out that in the course of reducing the Company's proposed annual revenue caps, the Commission stated that it had "determined the annual DIR amounts based on the level of growth of three to four percent as permitted for the DIR in the *ESP 2 Case*." (Opinion and Order at 47.) However, as the Company explained, the numbers reflected in the Opinion and Order did not account for that level of annual revenue growth. In reality, the Company explained, the annual DIR revenue caps that the Commission's Opinion and Order adopted would have resulted in 0% growth in distribution revenue for 2015, followed by 2.8% growth in 2016 and 3% growth in 2017. Consequently, in its first rehearing request the Company asked the Commission to increase the revenue caps in order to align them with the levels that the Commission had stated in its Opinion and Order that it intended to authorize.

In its May 28, 2015 Entry on Rehearing, the Commission adjusted the annual DIR revenue caps to $145 million for 2015, $165 million for 2016, $185 million for 2017, and $86 million for January through May 2018. (Entry on Rehearing at 24.) The Commission found that "the adjusted caps shall reflect annual growth in the DIR, as a percentage of customer base distribution charges, of three to four percent, which was our objective in modifying the DIR annual revenue caps proposed by AEP Ohio for the EP 3 term so that they more closely track the progression from the *ESP 2 Case*." (*Id*.) In its second rehearing request, filed on June 29, 2015, while acknowledging the additional flexibility provided by the rehearing order with respect to DIR spending, the Company explained that the annual revenue caps authorized by that rehearing order still fell short of the Commission's stated intention of 3-4% annual growth in DIR revenues during ESP III. Consequently, in its second rehearing request the Company requested that the Commission further adjust the revenue caps by increasing them, in aggregate, by $23 million to

$86 million over the ESP III term in order to achieve the Commission's stated goal of a 3-4% annual revenue growth rate for the DIR.

In its second application for rehearing, OMAEG has presented no new arguments that the Commission has not already addressed and rejected. Rather, it simply has reiterated the position it advanced in its initial post-hearing brief, at 6-11, and in its initial application for rehearing, at 16-20, that no annual revenue increases should be permitted for the DIR over the term of ESP III. OMAEG continues to argue in its second rehearing request, at 8-10, as it did in its initial post-hearing brief, at 10, and in its initial rehearing request, at 16-20, that there is no record basis for allowing any annual revenue increases for the DIR during ESP III. Notably, at page 10 of its second application for rehearing, OEG actually admits that it is simply repeating the same arguments that it made on this issue in its first application for rehearing ("OMAEG contended in its March 27, 2015 Application for Rehearing that the DIR caps approved by the Commission in its [Opinion and] Order were not supported by record evidence [and] submits that the Commission's decision to increase the applicable DIR caps on rehearing was likewise erroneous, and . . . is unsupported by the record.") (internal citation omitted).

The Commission thoroughly considered OMAEG's criticisms regarding the record basis for allowing additional revenue increases for the DIR and its recommendation that the annual growth rate of revenue for the DIR during ESP III should be zero percent. Opinion and Order at 43, 44-46; Entry on Rehearing, at 21-22. The Commission found that OMAEG's arguments had no merit and rejected them. (Opinion and Order, at 47; Entry on Rehearing, at 24-25.) Accordingly, because OMAEG has raised nothing new in its second application for rehearing (and, indeed, admits that it hasn't raised anything new), and because the Commission already has

considered and rejected OMAEG's arguments in its Opinion and Order and its Entry on Rehearing, it should reject them again.

C. Rider Interruptible Power (IRP)

In its first application for rehearing, AEP Ohio requested that the Commission clarify that it did not intend to eliminate the existing provisions of AEP Ohio's Rider IRP that require customers to contract for not less than 1 MW of interruptible capacity and cap the total interruptible power contract capacity for all customers served under the IRP program at 525 MW (75 MW in the CSP rate zone and 450 MW in the OP rate zone). (*See* AEP Ohio's Application for Rehearing, at 44-45 (Mar. 27, 2015).) As AEP Ohio explained, and as OCC agreed, the restrictions in AEP Ohio's IRP-D tariff approved in *ESP II* are appropriate and serve to moderate the financial burden that the IRP program places on other customers, while still achieving the objective of providing reasonable interruptible capacity resources. (*Id.*; OCC's Memorandum. Contra at 28 (Apr. 6, 2015).) Notably, OMAEG did not oppose AEP Ohio's position on this issue during the first round of rehearing and has, therefore, arguably waived the argument. On rehearing, the Commission reviewed the information that AEP Ohio and OCC provided and correctly determined that the IRP program caps should be maintained and that the program should be available only to customers that are currently participating in it and should not be expanded to new customers. (Entry on Rehearing, at 9.)

OMAEG now advances two challenges to the Commission's IRP decision for the first time as part of the second round of rehearing. First, it argues that the Commission failed to articulate the basis for its decision that the IRP program should be continued only for currently participating customers. (OMAEG Application for Rehearing. at 12.) Second, it posits that the IRP rate should be expanded to new customers in order to promote economic development in the

state. (*Id.* at 13.) Significantly, however, OMAEG does not challenge the Commission's decision to maintain the 1 MW per customer minimum interruptible load commitment and the 525 MW aggregate cap for all customers that has been in place since the IRP program's creation in *ESP II*.

As for OMAEG's first argument, AEP Ohio submits that the Commission amply explained the basis for its Entry on Rehearing in the decision. The Commission explained, on page 7 of the Entry on Rehearing, that AEP Ohio and OCC pointed out that the 1 MW and 525 MW caps (which OMAEG does not challenge on rehearing) are appropriate to provide a reasonable limit on the costs to other customers associated with the IRP credit. The Commission noted the same argument by AEP Ohio on page 8 of the decision. Finally, the Commission discussed the reasoning behind its decision at length on page 9 of the Entry on Rehearing. Simply put, OMAEG's contention that the Commission "did not elaborate about the manner in which the record supports" its decision (*see* OMAEG App. at 12) is misplaced.

By its second argument, OMAEG asks the Commission to substitute OMAEG's judgment for its own. The Commission has already weighed the policy considerations applicable to the IRP program, including the cost of modifications to the program on firm customers. The Commission's Entry on Rehearing strikes an appropriate balance between the IRP program's policy objectives and those cost considerations. The Commission should decline to revisit this issue again on rehearing.

D. Basic Transmission Cost Rider (BTCR)

The Commission likewise should decline to revisit OMAEG's arguments regarding the BTCR again on rehearing. OMAEG's position merely rehashes arguments that Industrial Energy Users – Ohio (IEU) advanced in the last round of rehearing and in post-hearing briefing.

As AEP Ohio explained in response to IEU's double-billing concerns, and as the Commission itself noted in its Opinion and Order, customers have existing means to address double-billing issues if they arise. The Commission has already directed AEP Ohio, CRES providers, and Staff "to work together to ensure that customers do not pay twice for the same transmission related expenses." (Entry on Rehearing at 32, citing Opinion and Order at 68.) And, as the Commission has noted, nothing precludes customers from taking steps to address double-billing issues, if they arise, with their CRES providers, or by seeking the Commission's assistance, either formally or informally. *Id.*

Moreover, it is neither workable for the Company, CRES providers, and Staff to implement the process that OMAEG seeks within 30 days after the Commission decides this round of applications for rehearing, nor necessary for the Commission to order them to do so. The Commission has already directed that AEP Ohio, CRES providers, and Staff work together to address any double-billing issues, and they are doing so. There is no reason to impose an arbitrary deadline on a process that is already underway as previously ordered.

CONCLUSION

For the foregoing reasons, AEP Ohio urges the Commission to deny OMAEG's requests for rehearing regarding the Commission's determinations in its Entry on Rehearing concerning the DIR, Rider IRP, and the BTCRR. In addition, although AEP Ohio fundamentally disagrees with OCC's and OMAEG's positions on the merits regarding the authority of the Commission to authorize the PPA Rider, it agrees with those parties' request that the Commission grant rehearing of its decision in that Entry on Rehearing to indefinitely defer addressing arguments regarding the lawfulness of its decision in its Opinion and Order to approve the Company's PPA Rider on a zero cost, placeholder, basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *Ohio Power Company's Memorandum Contra Applications for Rehearing* was served upon counsel for all other parties of record in this case, on this 9th day of July, 2015.

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Summary: Memorandum Contra Applications for Rehearing electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company