

In the Matter of the Application of)
Ohio Power Company for Authority to) Case No. 16-1852-EL-SSO
Establish a Standard Service Offer)
Pursuant to R.C. 4928.143, in the Form of)
an Electric Security Plan.)

**MEMORANDUM CONTRA AEP OHIO’S REQUEST FOR AN INTERIM
ORDER AND FOR A PROCEDURAL SCHEDULE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL,
OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP,
AND THE KROGER CO.**

I. INTRODUCTION

AEP Ohio proposes an enormous and costly “extension” of its current electric security plan (“ESP”) for which it inexplicably seeks approval on a procedural fast-track. AEP Ohio wants to circumvent the Ohio General Assembly and have the Public Utilities Commission of Ohio (“PUCO”) put its contractual entitlement to Ohio Valley Electric Cooperative (“OVEC”) power under cost-of-service regulation through an “interim” order. By doing so, AEP Ohio would have the PUCO deprive millions of Ohio consumers of the benefit of competition. This request for an “interim” order should be summarily rejected because it is unlawful. The PUCO cannot re-regulate (by interim order or otherwise) the OVEC entitlement.

AEP Ohio proposes an expedited procedural schedule for its unlawful proposal.

If the PUCO goes forward (and it should not), it should only do so under a reasonable

schedule such as that proposed jointly by several intervenors.¹ There is no reason to rush to judgement on this case. Further, expediting this case will deprive parties of their full and ample discovery rights (guaranteed by rule and law)² and will deprive the PUCO and the public of a full, complete record.

II. RECOMMENDATIONS

A. **AEP Ohio's proposed procedural schedule is unrealistic and punitive, and should be rejected in favor of the intervenors' proposed schedule.**

As part of the Stipulation approved in Case No. 14-1693-EL-RDR regarding AEP Ohio's proposed purchase power agreement ("PPA") proceeding, AEP Ohio agreed to file for an extension of its current ESP to modify and amend the ESP with a list of promises to parties in return for their signature on the PPA Stipulation.³ After the PPA Stipulation was adopted, AEP Ohio filed its application to modify and amend the current ESP on May 13, 2016 in Case No. 13-2385-EL-SSO. Initially, the PUCO ordered AEP Ohio to re-file its application by September 21, 2016 in a new docket.⁴ But AEP Ohio requested a continuance on filing its application until October 28, 2016.⁵ The PUCO granted this request.⁶ But then AEP Ohio sought even more time – this time until

¹ Office of the Ohio Consumers' Counsel ("OCC"), Ohio Manufacturers' Association Energy Group ("OMAEG"), and the Kroger Co. ("Kroger").

² See R.C. 4903.082; Ohio Admin. Code 4901-1-16.

³ See Case No. 14-1693-EL-RDR ("PPA Rider Case"), Stipulation (filed December 14, 2015).

⁴ *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, Entry at 3 (Sept. 7, 2016).

⁵ *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. 16-1852-EL-SSO, Ohio Power Company's Motion for Continuance and Request for Expedited Ruling (Sept. 16, 2016).

⁶ *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. 16-1852-EL-SSO, Entry (Sept. 19, 2016).

November 23, 2016.⁷ Again the PUCO granted this request.⁸ Finally, after more than six months past the original filing in Case No. 13-2385-EL-SSO, AEP Ohio filed an application to extend and modify its ESP.⁹ It is important to note that AEP Ohio did not re-file its May 13, 2016 application as instructed to do. Rather, AEP Ohio has filed an entirely new application with new testimony and new provisions. It is ironic that after delaying its own filing for over six months, AEP Ohio now seeks to rush these proceedings.

The proposed Amended ESP is “supported” by hundreds upon hundreds of pages of testimony and workpapers from nine witnesses. Notwithstanding this, AEP Ohio proposes an unrealistic, punitive procedural schedule¹⁰ and included additional, new provisions that modify the current ESP and that are beyond the scope of the PPA Stipulation promises.¹¹ During the holidays, and while another major ESP case is on the cusp of going to hearing,¹² AEP Ohio would have intervenors conduct discovery, evaluate the issues, identify and engage witnesses, and file testimony by January 25, 2017.¹³ Within the next short month, parties would have to prepare for depositions, coordinate schedules, depose what promises to be well-over twenty-five witnesses, *and*

⁷ *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. 16-1852-EL-SSO, Ohio Power Company’s Motion for Continuance and Request for Expedited Ruling (Oct. 20, 2016).

⁸ *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. 16-1852-EL-SSO, Entry (Oct. 25, 2016).

⁹ See Ohio Power Company’s Application to Amend its Electric Security Plan (“Amended ESP”) (filed November 23, 2016).

¹⁰ See Amended ESP Application at 20-21.

¹¹ See *id.* at 3-5.

¹² See Case No. 16-0395-EL-SSO.

¹³ Needless to say, AEP Ohio’s proposed schedule short-circuits witnesses’ ability to integrate discovery responses into their testimony.

prepare for hearing.¹⁴ If past is prologue, there should be every expectation that the hearing will last a month – at least.¹⁵ Nonetheless, AEP Ohio would have the PUCO issue an Order by April 12, 2017.¹⁶

AEP Ohio's proposed procedural schedule is unjust, unreasonable, and should be rejected. R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery." It also directs the PUCO to ensure that parties are allowed "full and reasonable discovery" under its rules.¹⁷ Given the breadth, depth, and complexity of this full-blown, new ESP that goes beyond the scope of the promises in the PPA Stipulation, not to mention intervening events,¹⁸ AEP Ohio's proposed January 25, 2017, discovery cut-off and testimony due-date is unrealistic and punitive.

It is also unnecessary. The PUCO itself has acknowledged the need for a robust record in cases such as this.¹⁹ There is no reason to fast-track this case. There is every reason for the PUCO and intervenors to take their time and get it right based on a full, complete record.

Also, AEP Ohio correctly recognizes that its filing is an application for a new ESP and notes that "the [PUCO] is required to issue an order approving, or modifying and approving, an application for an ESP within 275 days."²⁰ Despite its incorrect claim that its proposal is "consistent with that requirement," AEP Ohio proposes a procedural

¹⁴ See Amended ESP Application at 21 (proposing February 28, 2017 hearing date).

¹⁵ The PPA Rider Case lasted a month, and FirstEnergy's ESP case lasted well-over a month. See Case Nos. 14-1693-EL-RDR and 14-1297-EL-SSO, respectively.

¹⁶ See Amended ESP Application at 21.

¹⁷ See also Ohio Admin. Code 4901-1-16.

¹⁸ The Holidays and DP&L's ESP.

¹⁹ See, e.g., Case No. 14-1693-EL-RDR, Hearing Transcript at Vol. XVIII, pp. 4431-4433 (comments by PUCO Chairman Haque).

²⁰ Amended ESP Application at 20.

schedule that requires the PUCO to issue a decision within a mere 140 days. AEP provides no explanation or justification for why the PUCO should rush its decision in half of the time allotted by statute.

On the other hand, the intervenors' proposed schedule (below) is more "consistent with" the statutory requirement and with reality. ESP cases are complex and take considerable time to resolve. The intervenors' schedule allows for the full development of a robust record and enables the PUCO to issue a decision within 275 days. To that end, the intervenors propose the following procedural schedule for the PUCO's consideration:

1. Technical Conference – December 14, 2016;
2. Discovery requests, except for deposition notices, served by March 6, 2017;
3. Intervenor Testimony – April 14, 2017;
4. Procedural Conference – April 28, 2017; and
5. Evidentiary Hearing – May 15, 2017.

B. AEP Ohio's attempt to re-regulate its OVEC entitlement and deprive consumers of lower prices that competition delivers is unlawful and should be rejected.

To consumers' benefit, the Federal Energy Regulatory Commission ("FERC") stepped in and halted AEP Ohio's plans to implement the PPA Rider. Unwilling to test its affiliate PPA at FERC, AEP Ohio set its sights more narrowly. Next it proposed a similar, albeit smaller, subsidy for hundreds of megawatts – the OVEC output – with consumers' money. At least that proposal had the "benefit" that the OVEC entitlement would have to be bid competitively into the wholesale markets with (in theory) PUCO oversight of bidding practices. And the proposal left untouched the standard service offer ("SSO") auction competitive bidding process. But that proposal places AEP Ohio at a

substantial risk that the OVEC-only PPA will be declared unlawful under recent Supreme Court precedent.²¹

So now AEP has pivoted. AEP asks the PUCO to ignore the General Assembly's directives in S.B. 3 allowing consumers to benefit from a competitive market and, instead, take steps to re-regulate AEP Ohio's OVEC entitlement. Under its new proposal, captive customers of AEP would pay for power produced by OVEC through cost-of-service regulation.²² So instead of all SSO customers' needs being fulfilled by a competitive auction, the majority of SSO customers' needs would be supplied by AEP Ohio's portion of the high-cost, inefficient OVEC units. This displaces competition and returns AEP Ohio to a traditional, vertically integrated load serving entity – the very thing that the state of Ohio moved away from with S.B. 3.²³ AEP Ohio asks the PUCO to make this monumental shift in Ohio's utility structure, practice, and policy via an “interim” order under a rushed timeline.²⁴

To date, Ohio's utilities have resisted providing SSO service through a market rate offer. But at least consumers have benefited from utilities including in their ESP applications a competitive bidding process for some (if not all) the SSO generation auctions. Now AEP Ohio wants to eliminate that competition. Rather than competitively bidding *all* of its SSO load, as it has done in the past, it proposes to competitively bid

²¹ See, e.g., *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Oh. S. Ct. 2016-1608, Slip Opinion (April 21, 2016).

²² See, e.g., Amended ESP Application at 4, 7, 9; Direct Testimony of William A. Allen (filed November 23, 2016).

²³ See, e.g., *id.*; see also Direct Testimony of David Weiss (filed November 23, 2016).

²⁴ See, e.g., Amended ESP Application.

only a small fraction of the required load.²⁵ The rest of the load will be served by OVEC's generating units.²⁶ And OVEC's high-costs costs would simply be passed on to consumers – straight cost-of-service, re-regulation of generation.²⁷

It is axiomatic that the PUCO, as a creature of statute, has only that authority conferred on it by the General Assembly.²⁸ The PUCO does not have the authority to reintroduce cost-of-service regulation of generation in contravention of S.B. 3. Further, to date, the competitive bidding process to fulfill SSO service obligations has worked to consumers' benefit.²⁹ Given utilities' unwillingness to file a market rate offer, the PUCO should not (and cannot) put the kybosh on the vestige of competition that the utilities are (at least, until now) willing to entertain. And certainly, the PUCO should not countenance such a wholesale change in structure, practice, and policy by way of an "interim" order.

The PUCO should not entertain AEP Ohio's efforts at re-regulation. Such efforts are unlawful. Nonetheless, if the PUCO does permit AEP Ohio to present its unlawful proposal, it should at the very least permit parties, including the intervenors here, adequate time to thoroughly prepare to fully participate in an evidentiary hearing on the AEP proposal. This means that the procedural schedule adopted must provide for full

²⁵ See, e.g., Direct Testimony of David Weiss (filed November 23, 2016).

²⁶ See *id.*

²⁷ See Direct Testimony of William A. Allen (filed November 23, 2016).

²⁸ See, e.g., *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835, citing *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 O.O.3d 96, 423 N.E.2d 820; *Werlin Corp. v. Pub. Util. Comm.* (1978), 53 Ohio St.2d 76, 7 O.O.3d 152, 372 N.E.2d 592; *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.* (1975), 43 Ohio St.2d 175, 72 O.O.2d 98, 331 N.E.2d 730.

²⁹ See, e.g., Case No. 14-1693-EL-RDR, Prefiled Testimony of Hisham M. Choueiki (filed October 9, 2015).

discovery, an evidentiary hearing, and thorough vetting before charging customers one penny under AEP's unlawful scheme.

III. CONCLUSION

This is a very important case for consumers. It should not be rushed. The PUCO should not – it cannot – turn back the clock on the law. It should not approve AEP Ohio's re-regulation efforts – not on a final and not on an interim basis. If the PUCO entertains AEP Ohio's unlawful proposal (it should not), then it should at the very least reject AEP Ohio's proposed procedural schedule, in favor of the intervenors' more balanced and reasonable schedule proposed here.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 8th day of December 2016.

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