

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power)	
Company for Approval to Expire its)	Case No. 13-1937-EL-ATA
gridSMART Experimental Tariffs.)	

In the Matter of the Application of the Ohio)	
Power Company for Approval to Establish)	Case No. 17-1234-EL-ATA
Time-of-Use Rates.)	

**APPLICATION FOR REHEARING OF DIRECT ENERGY BUSINESS, LLC
AND DIRECT ENERGY SERVICES, LLC**

In accordance with R.C. 4903.10 and Ohio Admin. Code 4901-1-35, Direct Energy Business, LLC and Direct Energy Services, LLC (collectively, Direct) submit this Application for Rehearing of the July 14, 2021 Order. The Order is unreasonable and unlawful because:

A. The approved tariffs confer an unreasonable preference and advantage to AEP Ohio and subject CRES suppliers to an undue and unreasonable prejudice and disadvantage, in violation of R.C. 4905.35, R.C. 4928.02, and R.C. 4928.06.

B. The Commission violated R.C. 4903.09 by failing to explain its reasoning for approving Rider DLC.

The Commission should grant rehearing and correct these errors.

Respectfully submitted,

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company for Approval to Expire its gridSMART Experimental Tariffs.)	
)	Case No. 13-1937-EL-ATA
)	

In the Matter of the Application of the Ohio Power Company for Approval to Establish Time-of-Use Rates.)	
)	Case No. 17-1234-EL-ATA
)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The July 14, 2021 Order approving the tariffs filed with the Amended Application confers an unfair advantage to AEP in the market for Time-of-Use (TOU) and Direct Load Control (DLC) rate programs. The Commission should grant rehearing and issue an order rejecting the proposed tariffs or, alternatively, re-open this proceeding to fully consider Direct Energy's objections.

The Order recognizes four unassailable facts: (1) retail suppliers cannot offer TOU products without individual THEO and PLC values for customers with AMI meters; (2) AEP has exclusive access these values; (3) AEP committed in its gridSMART Phase 2 proceeding to implement system changes necessary to provide these values to CRES suppliers; and (4) AEP's systems remain incapable (for some unexplained reason) of providing these values to CRES suppliers in any useful fashion. Given these facts, the fair resolution here is to prohibit AEP from offering TOU rates until CRES suppliers have equal access to the information necessary to offer these rates.

The Order turns any semblance of fairness on its head. “In light of the limited TOU offerings available to customers, we agree with Staff that AEP Ohio should be required to maintain a TOU rate program.”¹ The Order sets aside the reason *why* TOU offerings are “limited”—because AEP is limiting them by withholding data from CRES suppliers. The Order states that the Commission will deal with AEP’s foot-dragging sometime in the future in a different case, but by then it will be too late. AEP will already have a head start in the market for TOU products. Should the Order stand, the damage to AEP’s competitors cannot be undone.

The Commission must consider all of the arguments for and against the Amended Application, not just those that favor one side. If the arguments *against* the application can be deferred to the gridSMART 3 proceeding, there is no reason arguments *for* the application cannot be deferred to that proceeding as well.

II. BACKGROUND

AEP’s gridSMART program was established as part of the Company’s first ESP in 2009. In 2010, the Commission approved a pilot program authorizing AEP to offer experimental time-of-use (TOU) rates and direct load control (DLC) rates for residential customers. These programs gave pilot area customers the ability to manage their energy usage and costs by reducing consumption or shifting it to off-peak periods.

As part of a retail market investigation in 2012, the Commission examined the benefits of Advanced Metering Infrastructure (AMI) and TOU rates.² The Commission found “that the

¹ Order ¶ 36.

² *In the Matter of the Commission’s Investigation of Ohio’s Retail Electric Service Market*, PUCO Case No. 12-3151-EL-COI, Entry at 5 (December 12, 2012).

EDU's time-differentiated rate pilot programs should be made available to SSO customers until the market sufficiently develops for CRES providers to begin offering this service.”³

In February 2017, the Commission approved a stipulation to implement AEP Ohio's gridSMART Phase 2. AEP's commitments in the gridSMART 2 Stipulation are clear. The stipulation “provides that the Company will work with Staff and CRES providers to administer a Time-of-Use (TOU) Transition plan.”⁴ “As part of the transitional period, the Company will enable CRES providers to provide rate-ready and bill-ready billing for time of use rates that meet the same criteria of AEP Ohio's SMART Shift and SMART Shift plus.”⁵ “AEP Ohio also commits to allowing CRES settlement using actual load data from TOU customers, and will add an AMI flag to the enrollment list to allow CRES providers to identify customers with an AMI meter.”⁶

It is undisputed that what was supposed to happen under the gridSMART 2 Stipulation did not happen. The limited coverage of the pilot coupled with the lack of bill quality data both played significant roles in limiting CRES participation in the pilot program and product offerings.

This proceeding involves an Amended Application for tariff approval of two-tier, “nontechnological” rates which, according to AEP, should be approved because the market for

³ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No.12-3151-ELCOI, Finding & Order at 37-38 (Mar. 26, 2014) (emphasis added).

⁴ *In The Matter of the Application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project*, 13-1939-EL-RDR, Opinion and Order ¶29 (Feb. 1, 2007).

⁵ *Id.*

⁶ *Id.*

TOU products is not “sufficiently competitive” because CRES do not offer TOU products.⁷ The filing also proposes to continue AEP’s “Smart Cooling” (Rider DLC) tariff.

The Order approves the Amended Application. “In light of the limited TOU offerings available to customers, we agree with Staff that AEP Ohio should be required to maintain a TOU rate program.”⁸ The Order recognizes that “unless the wholesale settlement process is updated to calculate individual THEO and PLC values for all customers with AMI meters (as opposed to only those customers who participated in the pilot program), it is unlikely that CRES providers will be able to develop TOU products and services for the competitive market.”⁹ The Order directs AEP to “amend its pending gridSMART Phase 3 application in Case No. 19-1475-EL-RDR by filing supplemental testimony that addresses a timeline to update the wholesale settlement systems and processes needed to calculate and settle individual THEO, NSPL, and PLC values for all customers with AMI meters, as well as the estimated cost of implementation.”¹⁰

The Order expressly declines to address how AEP’s failure to follow through on commitments made in the gridSMART Phase 2 stipulation should factor into the Commission’s decision. “[W]e agree with Staff that the pending gridSMART Phase 3 proceeding is the appropriate forum for resolution of the wholesale settlement system and process issues identified by Staff, Direct Energy, and IGS, and which must be addressed to facilitate the continued

⁷ *In the Matter of the Application of the Ohio Power Company for Approval to Establish Time-of-Use Rates*, Case No. 17-1234-EL-ATA, Amended Application (May 1, 2020). “Nontechnological” refers to rates that reflect default load auction prices for defined on-peak and off-peak periods.

⁸ Order ¶ 36.

⁹ *Id.*

¹⁰ *Id.* ¶ 38.

development of the retail market in Ohio and to maximize the benefits of AEP Ohio's AMI deployment for customers.”¹¹

III. ARGUMENT

In deciding a contested proceeding, the Commission must “explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.” *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 519 (2011). A Commission directive that “lacks evidence and sound reasoning” renders an order unlawful and unreasonable. *In re Ohio Edison Co.*, 157 Ohio St. 3d 73, 78 (2019). As discussed below, the Order fails to meet this standard.

A. The approved tariffs confer an unreasonable preference and advantage to AEP and subject CRES suppliers to an undue and unreasonable prejudice and disadvantage, in violation of R.C. 4905.35, R.C. 4928.02, and R.C. 4928.06.

The Order recognizes AEP's violation of the gridSMART 2 Stipulation. The decision to kick the can on what to do about it and, in the meantime, give AEP a head start in the TOU market, is legally and logically untenable.

“The public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.” R.C. 4928.06(A). These policies include “[e]nsuring the availability of unbundled and comparable retail electric service;” “[e]ncourag[ing] innovation and market access for cost-effective supply- and demand-side retail electric service;” “[e]nsur[ing] effective competition in the provision of retail electric service by avoiding anticompetitive subsidies;” “[e]ncourag[ing] cost-effective, timely, and efficient access to and sharing of customer usage data with customers and competitive suppliers to promote customer choice and grid modernization,” and “[e]”nsur[ing] that a customer's data is provided in a

¹¹ *Id.*

standard format and provided to third parties in as close to real time as is economically justifiable in order to spur economic investment and improve the energy options of individual customers.”

R.C. 4928.02(B),(D), (H), (O) and (P).

The Order disregards these policies. “A PUCO order is unlawful if it is inconsistent with relevant statutes or with the state or federal constitutions.” *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 393 (2006).

It is fair to assume that AEP wants to offer TOU products because it sees the potential for this market to grow. TOU products cannot be offered without access to specific kinds of data from AMI meters. AEP has exclusive access to, and control of, these meters and associated data. Regardless of whether AEP admits to a desire to corner the market for TOU products, it certainly has the ability to do so. The mere existence of market power should cause the Commission to raise its antennae. “[T]he commission has authority under Chapters 4901. to 4909. of the Revised Code, *and shall exercise that authority*, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.” R.C. 4928.06 (E)(1) (emphasis added).

The Order observes there are currently “limited TOU offerings,” but never addresses why this is so or why this matters.¹² No statute requires an electric utility or CRES supplier to offer TOU rates, so whether 0 or 100 plans exist is not really relevant. To the extent the Commission’s policy is to encourage more TOU offerings, the Order does not serve this policy at all. AEP will remain the exclusive provider and the Order implicitly encourages AEP to keep the necessary metering data to itself.

¹² Order ¶ 36.

The Commission's desire for more TOU offerings must be taken into consideration with other important regulatory policies. Chief among these are statutory mandates to ensure fair competition and nondiscrimination. *See* R.C. 4905.35, R.C. 4928.02, R.C. 4928.06(E)(1). A *necessary* policy objective (competition) should not be sacrificed to achieve an objective that is merely *desirable* (more TOU offerings).

The Order not only fails to confront the obvious imbalance of market power; it invites AEP to abuse it. AEP is permitted to implement TOU rates now but the concerns about anticompetitive behavior have been punted to later. In the meantime, CRES suppliers who wish to compete with AEP for TOU customers cannot do so—not because they don't want to, but because AEP cannot or will not disclose the meter data needed by suppliers to offer TOU programs. CRES suppliers necessarily face “undue or unreasonable prejudice or disadvantage” in the offering of TOU products, which is contrary to R.C. 4905.35(A).¹³

CRES suppliers *want* to offer TOU products but need AEP's cooperation to do so. If AEP is unwilling to cooperate with CRES suppliers, the Commission should be unwilling to cooperate with AEP. The Commission should grant rehearing and deny AEP's request to offer TOU rates.

B. The Commission violated R.C. 4903.09 by failing to explain its reasoning for approving Rider DLC.

“R.C. 4903.09 requires the commission to set forth the reasons for its decisions and prohibits summary rulings and conclusions that do not develop the supporting rationale or record.” *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608, 67

¹³ “No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.”

N.E.3d 734, ¶ 55. Unfortunately, this is exactly what the Commission did with the Rider DLC issue.

The gridSMART Phase 2 Stipulation explicitly states that AEP’s “Smart Cooling” (Rider DLC) tariff expires, regardless of the Commission’s determination regarding the sufficiency of the CRES TOU market: “If the Commission deems that the CRES programs are not sufficiently competitive, the Commission shall grant the Company’s 13-1937 application” to expire its gridSMART experimental tariffs, including the Experimental Residential Time-of-Day Service, Experimental Direct Load Control (DLC) Rider, Experimental Critical Peak Pricing Service, Experimental Residential Real-Time Pricing Service, and Experimental Small General Service Time-of-Day schedules.¹⁴

The Staff Report, consistent with the gridSMART Phase 2 Stipulation, recommends termination of Rider DLC: “[O]nce an amended application is approved by the Commission in Case No. 17-1234-EL-ATA, then staff recommends that the pending application to expire the experimental TOU and DLC rates in Case No. 13-1937-EL-ATA be approved, as well.”¹⁵ Even AEP, in a June 15, 2021 letter filed in this case, indicated that it did not object to withdrawal and termination of Rider DLC.¹⁶

Notwithstanding, the Commission approved “AEP Ohio’s amended application in Case No. 13-1937-EL-ATA to expire its gridSMART experimental tariffs, with the exception of the DLC Rider” yet gave no explanation *why* the DLC Rider, alone, should continue.

¹⁴ See gridSMART Phase 2, Opinion and Order ¶ 31; Stipulation at 8-9; *also* see Order ¶ 8 (“including the”)

¹⁵ Staff Report at 6.

¹⁶ Order ¶ 21.

Continuing AEP's "Smart Thermostat" (DLC) program does not advance the transition toward a competitive market for dynamic time-varying products.¹⁷ In fact, it acts as a barrier, thus harming the competitive market. First, Rider DLC is not available for shopping customers, only SSO customers. There is no reason why customers who wish to control their usage through DLC should be forced to purchase generation service from AEP. Second, the gridSMART 2 Stipulation calls for expiration of Rider DLC regardless of the "competitiveness" of the TOU market.¹⁸ Finally, no evidence or comment was offered to counter Staff's recommendation. AEP did not comment on the value of the program, only that it should continue because "there are no alternative tariffs for this program."

"PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *MCI Telecommunications*, 32 Ohio St.3d at 312, 513 N.E.2d 337 quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 34, 111 Ohio St. 3d 300, 309, 856 N.E.2d 213, 225. This scenario was contemplated and discussed during Settlement and the program was slated to end when the other tariffs expire. The Commission failed to provide any reasonable explanation for continuing the DLC program, thus violating R.C. 4903.09. Accordingly, the Commission should amend its Order to expire the DLC tariff.

¹⁷ The DLC program allows the Company to install and utilize smart thermostat devices and the load control switch(es) to reduce a customer's energy use during load management events, and is available on a voluntary basis for those non-shopping residential customers with AMI meters. See *P.U.C.O. NO. 20*, Original Sheet No. 316-3.

¹⁸ *Id.*

IV. CONCLUSION

For these reasons, Direct respectfully requests that the Commission grant this application for rehearing and correct the errors identified herein.

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CERTIFICATE OF SERVICE

I certify that this Application for Rehearing and Memorandum in Support of Direct Energy Business, LLC and Direct Energy Services, LLC was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on August 13, 2021. The Commission's e-filing system will electronically serve notice of the filing of this document on the parties subscribed to these proceedings. Additionally, notice was provided to the parties listed below.

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Summary: Application for Rehearing and Memorandum in Support electronically filed by Mr. Lucas A. Fykes on behalf of Direct Energy Business, LLC and Direct Energy Services, LLC