

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review
of the Capacity Charges of Ohio Power
Company and Columbus Southern Power
Company

Case No. 10-2929-EL-UNC

**OHIO POWER COMPANY'S MEMORANDUM IN PARTIAL OPPOSITION TO
MOTION TO DISMISS OF INDUSTRIAL ENERGY USERS – OHIO**

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MOTION TO DISMISS OF INDUSTRIAL ENERGY USERS – OHIO**

Ohio Power Company (dba AEP Ohio) has long advocated in this proceeding and others that the fixation of wholesale capacity charges is a federal matter within the jurisdiction of the Federal Energy Regulatory Commission. To be sure, the Company continues to maintain that establishment of wholesale rates to be charged to CRES providers for the provision of capacity for resale to retail customers in AEP Ohio's service territory is a matter governed by federal law. But the issue presented in the motion to dismiss filed by the Industrial Energy Users – Ohio (IEU) is whether the Commission has jurisdiction under Ohio law, presuming in this context that the Commission is not preempted under federal law. As IEU notes in its motion to dismiss:

A separate issue is raised regarding whether the Commission is preempted from setting a capacity rate. The Commission, however, need not address that issue if it determines that state law does not provide the necessary rate making authority to set the rate under the current legal and factual posture of this case.

IEU Memorandum in Support at 6 (note 20).

AEP Ohio offers this memorandum in partial opposition to point out the contradictory arguments offered by IEU concerning these issues. As discussed below, IEU's present posture regarding jurisdiction is severely undercut by its previous arguments regarding Ohio law and the Commission should not entertain conflicting positions or permit such result-oriented gamesmanship at different stages of the same proceeding.

The timing of IEU's motion is also suspect. This proceeding has been open for more than 15 months; there have been thousands of pages of testimony filed and heard; there have been numerous pleadings and arguments presented; an imposing amount of discovery conducted; and evidentiary hearings have been conducted and are set to restart. In short, the Commission and the parties have invested tremendous resources into this proceeding and IEU's eleventh hour argument should be viewed with great skepticism at this point.

In bizarre fashion, IEU concludes its motion to dismiss by requesting that the Commission (at 10-11) issue an order directing AEP Ohio to return to RPM pricing for capacity upon determining that it has no jurisdiction. On the contrary, if the Commission determines that it has no jurisdiction over this proceeding based on the lack of authority under Ohio law as argued in IEU's motion to dismiss, it must revoke the interim State Compensation Mechanism it purported to establish in the December 8, 2010 Entry in this case and revoke or nullify its orders previously issued in the case. There can be no partial dismissal of the case based on jurisdictional concerns; it must be full and complete dismissal such that the proceeding has no impact or effect. The resulting impact of such a dismissal with prejudice *vis-à-vis* RPM pricing based on the RAA would be a matter for FERC, whose pathway would be clear to consider the Company's request in its proceedings in FERC Docket No. ER11-2183 and Docket No. EL11-32 (or any successor proceedings in the future) to establish just and reasonable wholesale capacity charges in accordance with federal law.

Further, AEP Ohio submits that the thrust of IEU's arguments appear to be merit arguments that are not threshold subject matter jurisdiction claims. Issues regarding how

the case is disposed on the merits are not threshold subject matter jurisdictional matters that have to be addressed at this time. IEU presents extensive arguments (at 6-9) about whether the provision of wholesale capacity should be considered a competitive service or noncompetitive retail service. Besides the fact that the issue in this case involves a wholesale service not a retail service, the competitive classification of capacity supporting shopping load within AEP Ohio's service territory is not a threshold jurisdictional matter. IEU itself uses those classification arguments (at 9-10) to argue about the applicable form of economic regulation and the appropriate method for establishing capacity charges. For example, IEU claims (at 7) that if capacity is competitive service, the Commission is without authority to set the prices by traditional economic regulation, except in the context of an SSO proceeding. On the other hand, IEU argues (at 6-7) that if capacity is noncompetitive, it must be priced based on the traditional ratemaking principles and procedure. Setting aside what AEP Ohio may think about the substance of IEU's legal propositions on this topic, it is evident that the issues raised by IEU regarding the appropriate pricing method are not threshold subject matter jurisdiction issues but are merit issues that should not be decided now.¹ The dismissal motion also raises such collateral matters as comparable and nondiscriminatory access (at 7) and corporate separation (at 8-9). In sum, the thrust of IEU's motion to dismiss raises merit arguments that should not be addressed at this time.

¹ Further, even if one were to accept IEU's articulated legal views, it may be that the Commission will ultimately approve the capacity charges being presented for approval in AEP Ohio's pending SSO proceeding, which IEU concedes (at 8) is permissible based on R.C. 4928.141, .142 and .143. Alternatively, the Commission could certainly determine in this proceeding that the proposed capacity charges are a "first filing" of rates for a service not previously addressed in a PUCO-approved tariff, which IEU also acknowledges (at 6, note 22) would not even require a hearing, let alone an application of a rate base, rate-of-return method.

With respect to the arguments characterized by IEU as jurisdictional, IEU must think the Commission has a short memory. Though it currently advocates dismissal based on a claim that the Commission lacks jurisdiction, IEU has previously defended the Commission's jurisdiction and aggressively urged the Commission to exercise it. There can be no distinction or explaining away IEU's prior positions in this regard – since the arguments have been made in this very proceeding and involved the same question of law. While AEP Ohio does not necessarily agree with IEU's prior arguments, those prior statements and positions are relevant here and must be considered by the Commission in evaluating IEU's current position. The Commission should not entertain flip-flopping positions or permit such result-oriented gamesmanship.

As an example of IEU's inconsistent arguments, in opposing AEP Ohio's January 7, 2011 Application for Rehearing in this proceeding, IEU's January 14, 2011 Memorandum in Opposition cited the Commission's prior rejection of a similar claim that it lacked a delegation of authority from the Ohio General Assembly to decide matters involving participation in demand response programs covered by federal law, using the following quotation from the *ESP I* decision:

The Commission finds that the General Assembly has vested the Commission with broad authority to address the rate, charges, and service issues of Ohio's public utilities as evidenced in Title 49 of the Revised Code. ... We are not convinced ... that a specific act of the General Assembly is necessary to grant the Commission the authority to determine whether or not Ohio's retail customers are permitted to participate in the RTO's demand response programs.

IEU Memorandum in Opposition at 9 (citing *ESP I*, March 18, 2009 Opinion and Order at 57-58).

In further opposing AEP Ohio's rehearing request, IEU went on to more

specifically state that, while it believes that the December 8, 2010 Entry in this case “does not operate to exercise federal jurisdiction, *the General Assembly has delegated jurisdiction to the Commission* to determine whether an electric utility has violated or failed to comply with any provisions of Sections 4928.01 to 4928.10, Revised Code, or any rule or order adopted or issued thereunder.” *Id.* (citing to Section 4928.16(A)(2), Revised Code) (emphasis added). Even more aggressively, IEU stated that “Section 4928.05(A)(2), Revised Code, *requires* the Commission to exercise its jurisdiction with respect to the delivery of electricity “... so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.” *Id.* (emphasis added). Moreover, IEU also strenuously asserted that “[t]he General Assembly has also directed the Commission to use its delegated authority to secure the consumer [benefits] and other benefits identified in Section 4928.02, Revised Code.”

Finally in regard to AEP Ohio’s rehearing request, IEU’s January 14, 2011 memorandum in opposition concluded as follows (at 9-10): “Where an EDU such as OP or CSP files an application with FERC that is precluded by language approved by FERC and the application seeks to secure an undue competitive advantage by imposing a redundant, noncomparable and discriminatory charge on CRES suppliers, *the Commission has plenty of authority to do the right thing and an affirmative duty to do so.*” (Emphasis added.) In sum, IEU has strenuously argued against a lack of jurisdiction in this same docket and maintained that the Commission has plenty of authority to address the capacity charge issues.

IEU's merit brief opposing the Stipulation's two-tiered capacity pricing also conflicts with its current argument. In advocating that the Commission should strike down the two-tiered capacity pricing and implement an RPM-based pricing mechanism, IEU argues as follows:

The state energy policy and its implementation through various sections in Chapter 4928 requires the Commission to ensure that rates are not discriminatory. Section 4928.02(A), Revised Code, provides that it is the State's policy to "[e]nsure the availability to consumers of ... nondiscriminatory ... retail electric service." Section 4928.40(D), Revised Code, states that "no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service." *Thus, the policy of the State to ensure non-discrimination and comparability in pricing applies whether one is addressing retail or wholesale transactions.*

IEU November 10, 2011 Merit Brief at 43-44 (emphasis added). IEU went on to conclude that "[g]iven the state's policies that strongly support competition and comparable and non-discriminatory pricing of wholesale and retail electric service, the Stipulation effects a result that the Commission cannot authorize." *Id.* at 45. In its Reply Brief, IEU also argued as follows:

State law is clear that undue price discrimination is a *violation of both statute and state energy policy*. * * * Thus, adopting these portions of the Stipulation will result in rates for similarly-situated customers or CRES suppliers that are not comparable and nondiscriminatory, a *direct violation of substantive provisions of both Ohio utility law and the state energy policy*.

IEU November 18, 2011 Reply Brief at 35 (emphasis added).

IEU has submitted hundreds of pages of testimony, pleadings and argument in this case advancing the notion that the Commission should decide the case on its merits. Moreover, many of IEU's prior arguments directly conflict with its current position advanced in its motion to dismiss. Based on its prior conflicting positions in this

proceeding, IEU should be equitably estopped from presenting such arguments at this stage in the proceedings. *Frantz v. Bd. Of Pharmacy*, 51 Ohio St.3d 143, 145-146 (private litigants are estopped from reversing their litigation position after others have detrimentally relied upon their prior position).² Because the Commission and parties have detrimentally relied on parties such as IEU advocating the Commission's jurisdiction for more than a year and throughout the course of extensive litigation, IEU should not be permitted to raise this last-minute argument in an attempt to revert to RPM pricing just before June 1, 2012 when the price plummets to historically low levels. Rather, the Commission should use IEU's prior arguments against it in rejecting its motion to dismiss and considering its credibility on the issues in the case.

² As referenced above, AEP Ohio disagrees that IEU's dismissal arguments raise matters of subject matter jurisdiction. Therefore, such arguments are subject to waiver and estoppel principles.

CONCLUSION

IEU's dismissal request is disingenuous and untimely. The positions taken by IEU throughout this proceeding belie its present claim that the Commission lacks jurisdiction. The Commission could deny the dismissal request for those reasons alone. If the Commission does agree with the argument that it lacks jurisdiction under Ohio law to establish wholesale capacity charges, however, the Commission cannot issue an order directing AEP Ohio to implement RPM-based capacity charges as requested in the motion to dismiss. Rather, if the Commission dismisses, it must do so with prejudice and after revoking or nullifying its prior orders which purport to establish an interim State Compensation Mechanism.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ohio Power Company's Memorandum in Partial Opposition has been served upon the below-named counsel and Attorney Examiners by electronic mail to all Parties this 13th day of April, 2012.



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Summary: Memorandum in Partial Opposition to Motion to Dismiss of IEU-Ohio electronically filed by Mr. Steven T Nourse on behalf of American Electric Power Service Corporation