BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters	)))))	Case No. 11-5906-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company	)))	Case No. 12-3133-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company	))	Case No. 13-0572-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company	))	Case No. 13-1286-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company	))	Case No. 13-1892-EL-FAC

APPLICATION FOR REHEARING OF OHIO POWER COMPANY

Pursuant to Section 4903.10, Ohio Revised Code ("R.C."), and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Ohio Power Company ("AEP Ohio" or the "Company") respectfully files this Application for Rehearing of the Public Utilities Commission of Ohio's ("Commission") December 4, 2013, Entry ("Entry"). The Commission's Entry is unreasonable and unlawful in the following respects:

I. It was unreasonable and unlawful for the Entry to direct the FAC Auditor to review and investigate double recovery allegations made in Case No 12-3254-EL-UNC as part of the FAC audit.

II. It is unreasonable and unlawful to direct the FAC Auditor to "audit its own audit consulting work."

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

As demonstrated by the Company's Application for Rehearing in Case No. 12-3254-EL-UNC ("CBP Case"), the Commission should not and need not defer resolution of intervenors' meritless double recovery allegations to another forum. The CBP Case is the appropriate place to address those issues, which were part of the record at hearing and have been fully briefed by the parties in that proceeding. Thus, the Commission should decide the double recovery allegations in the CBP Case – not these FAC proceedings – to the extent it is not an improper collateral attack that should be summarily dismissed. If the Commission determines that it needs to further consider the double recovery issues outside of the CBP Case, then it should establish a new, separate docket in which it addresses the issues. Finally, if the Commission wishes to pursue the issues as part of the FAC over AEP Ohio's objections, then it should retain a separate entity to review the issue – since the current Auditor either has a conflict or an appearance of a conflict.

ARGUMENT

I. It was unreasonable and unlawful for the Entry to direct the FAC Auditor to review and investigate double recovery allegations made in Case No 12-3254-EL-UNC as part of the FAC audit.

The OVEC and Lawrenceburg demand charges in question have long been recovered through the FAC and there is no prudence question relating to those FERC-approved contracts or recovery of the underlying costs in retail rates. Rather, the double recovery claim is that those

same costs are being recovered a second time through the Base Generation Rates that – during a transition period – will reflect blending of existing rates and the lower $188.88/MW-day charge first adopted in Case No. 10-2929-EL-UNC ("Capacity Case") for pricing wholesale capacity service associated with shopping load. Thus, it is not an FAC issue but is a collateral challenge of the capacity charge adopted in the *Capacity Case*. As such, it is not appropriate for the Commission to provide a "second bite at the apple" in these FAC cases. Further, it is unreasonable to simply incorporate broad allegations by general reference to pleadings in another case and without limiting the scope of the inquiry.

There are multiple limitations that should have been incorporated into the Entry to define the scope of the investigation. For example, there is significant potential for unlawful retroactive ratemaking absent a clarifying directive that the Auditor should only review the issue going forward. Specifically, the open-ended manner in which the double recovery issue has been left unresolved compounds the unreasonableness and unlawfulness of the decision. Regardless of what forum the Commission uses to address and resolve these allegations, there can be no consideration of them prior to the point in time when the FAC is unbundled into the Fixed Cost Rider ("FCR") and the energy-only auctions begin replacing portions of the FAC energy-related costs – which does not occur until April 2014. Any contrary or more expansive retrospective review would violate the prohibition against retroactive ratemaking and the filed-rate doctrine. *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). Nonetheless, AEP Ohio submits that the CBP Case, and not the Company's pending FAC audit, is the appropriate place to address these issues. If not addressed on rehearing in the CBP Case, then the issues should be taken up by the Commission in a separate docket rather than left for the Auditor's determination in these FAC proceedings.

Even with a prospective review of the double recovery issue, however, any examination of the arguments that there will be a double recovery of FCR costs through the reduced Base Generation Rates that incorporate the $188.88/MW-day rate are simply improper attempts to collaterally attack prior decisions of the Commission. The Ohio Supreme Court has described a collateral attack as "an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved." *Ohio Pyro, Inc. v. Ohio Dep't of Commerce*, 115 Ohio St. 3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 16. In addition to the doctrine of collateral attack, the related doctrines of *res judicata* and collateral estoppel are applicable to Commission proceedings and bar attempts of parties to re-litigate issues finally decided in prior proceedings. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985).[1]

In the case of SSO Base Generation Rates, such pricing is not, and has not been, cost-based since before 1999. As the Commission affirmatively adjudicated in AEP Ohio's Rate Stabilization Plan case ("RSP"), "electric generation service (after the MDP) shall not be subject to traditional cost-of-service supervision or regulation * * * ." *RSP*, Case No. 04-169-EL-UNC, Opinion and Order at16 (Jan. 26, 2005). *See also, id.* at 18 ("[W]ith the expiration of the MDP,

[1] As the Commission knows, both the Commission and the Ohio Supreme Court have recognized that *res judicata* is not a bar to a complaint filed under R.C. 4905.26 and that that statutory provision is broad enough to permit a collateral attack on approved rates. *See, e.g., Western Reserve Transit Authority v. Pub. Util. Comm.*, 39 Ohio St. 2d 16, 18-19, 313 N.E.2d 811 (1974). This proceeding, however, was not initiated under, and is not authorized by, R.C. 4905.25; thus, the narrow exception for complaint cases is inapplicable. Moreover, even where R.C. 4905.26 is implicated and permits a collateral attack through which the Commission determines that a utility's rate is unjust or unreasonable, any substitution of a new rate in place of the existing rate has prospective effect only. *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St. 3d 344, 347-348, 686 N.E.2d 501 (1997), *citing Keco Industries*, 166 Ohio St. 254. Thus, in addition to being an improper collateral attack barred by *res judicata*, opening up the recovery of authorized costs through the FAC to a date prior to the effective date of the FCR also is unlawful retroactive ratemaking.

generation rates are subject to the market (not the Commission's traditional cost-of-service rate regulation) * * * .") Moreover, in the Company's *ESP II* case, the Commission again rejected the argument that AEP Ohio's base generation rates must be cost-based to be justified "as there is not a statutory requirement, nor * * * a Commission mandate to require that [AEP Ohio] conduct a cost of service study." *ESP II*, Opinion and Order at 42 (Dec. 14, 2011). In that case, the Commission approved AEP Ohio's proposal to freeze base generation rates, established in the Company's *ESP I* proceeding, until all rates are established through a Competitive Bidding Process. *ESP II*, Opinion and Order at 15 (Aug. 8, 2012). The Commission approved those now-frozen base generation rates as just and reasonable and more favorable in the aggregate than expected results of an MRO in the Company's *ESP I* case. *See ESP I*, Opinion and Order at 72 (Mar. 18, 2009). Accordingly, any contention that the Company's adjudicated and approved Base Generation Rates will – after being reduced – double recover any particular costs plainly amount to a collateral attack on the Commission's prior decisions approving those Base Generation Rates. (*e.g.*, its *ESP I*, *ESP II* and *RSP* orders, which adjudicated that the FAC and Base Generation Rates are reasonable and found that the Base Generation Rates are not cost-based). Further, if the "logic" advocated by intervenors here is upheld on rehearing, the non-cost-based Base Generation Rates could be similarly characterized (improperly) as propagating double recovery for *any cost* recovered in *any other rate*. In reality, as set forth above, since before 1999, AEP Ohio's Base Generation Rates cannot be characterized as cost-based and, therefore, cannot properly be concluded as enabling the double recovery of any particular cost.

Separately, the question of what is the appropriate cost of capacity furnished to CRES providers during the term of the current ESP was litigated extensively and decided by the Commission in its *Capacity Case*. *See* Case No. 10-2929-EL-UNC. Of course, the demand

charges to be recovered in the FCR have been recovered through the FAC for several years. Under the intervenor's misguided theory of double recovery, the $188.88/MW-day capacity charge should have been even lower to account for demand charges already being recovered through the FAC. Consequently, any argument that recovery of the capacity costs supporting the $188.88/MW-day rate double recovers any portion of the FAC costs also clearly amounts to an improper collateral attack on the *Capacity Case* decision.

II. It is unreasonable and unlawful to direct the FAC Auditor to "audit its own consulting work."

Even if the Commission proceeds with the double recovery investigation over AEP Ohio's objection (hopefully at least after clarifying and limiting the scope), it is improper to encompass the issues within this FAC audit proceeding. The Commission's chosen FAC Auditor could not, and would not, be an independent reviewer of those arguments. The Commission's FAC Auditor, EVA, provided expert testimony on behalf of Staff, one of the litigants in the *Capacity Case*. *See Capacity Case,* Staff Ex. 103. Specifically, Emily Medine of Energy Ventures Analysis ("EVA") and Ralph Smith of Larkin & Associates PLLC ("Larkin") were the witnesses in the *Capacity Case* advocating Staff's litigation position and they are the same firms/people involved in the ongoing FAC Audit work. Consequently, the Auditor in the pending FAC audit proceeding was an adversary of AEP Ohio regarding capacity cost issues that were the subject of vigorous and contentious litigation in the *Capacity Case*. Thus, while AEP Ohio does not contest EVA's experience and credentials as a fuel auditor, it would simply not be appropriate to assign to that Auditor the responsibility of evaluating the double recovery allegations that have developed through subsequent litigation. *See, e.g., In the Matter of the Regulation of Electric Fuel Component Contained within the Rate Schedules of the Dayton Power & Light Co.,* Case No. 86-07-EL-EFC, Opinion and Order, 1987 Ohio PUC LEXIS 107,

*70-71 (Feb. 18, 1987) (admonishing parties and auditors in fuel clause cases, in a case where the auditor undertook an engagement to provide expert testimony against DP&L on behalf of an adverse party in a subsequent proceeding, "to avoid even the appearance of a conflict of interest" as was alleged in that case because "[s]uch situations, no matter how amenable to the type of mitigation displayed in [that] case, will henceforth be intolerable to this Commission"). Due to EVA's prior role as an advocate adverse to AEP Ohio regarding closely related subject matter, it would be an impossible task to maintain the appearance of, let alone actual, impartiality on these issues.

The Commission's admonition in the DP&L EFC case (cited above) is cogent and applicable to this case. According to the intervenors' misguided theory of double recovery against AEP Ohio, the $188.88/MW-day capacity charge should have been even lower to account for demand charges already being recovered through the FAC. Thus, a new audit of the double recovery issue in the upcoming FAC proceeding by EVA would be a second review of EVA's own financial and managerial consulting work in the *Capacity Case*. Instead, the Commission should either reject the double recovery theory on rehearing or further adjudicate the issue outside of the FAC. It would not be appropriate and, at the very least, would utterly fail to convey independence and fair play if the Commission allows EVA to "audit its own consulting work."

AEP Ohio submits that it presents either an actual conflict of interest or an appearance of conflict to ask/allow the Auditor to re-evaluate its own work or "audit its own consulting work" – especially given that the prior work was done as an advocacy piece with expert testimony submitted by both EVA and Larkin. One cannot possibly be considered objective and independent when reviewing or auditing one's own work. Moreover, if the Auditor ends up

supporting a finding of double recovery now, it would be saying that it failed to discover the double recovery when it recommended that the Company recover $188.88/MW-day in the *Capacity Case* and would now like to remedy its prior failings. That result is also inappropriate and violates due process and *res judicata* in these proceedings.

Thus, if the Commission intends to further pursue the double recovery issues and to do so as part of these FAC proceedings, it should retain a separate independent auditor to do so.

CONCLUSION

For the reasons set forth above, the Commission should grant this Application for Rehearing and modify its December 4, 2013, Entry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the parties of record in these proceedings by electronic service this 3rd day of January, 2014.

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Summary: App for Rehearing of Ohio Power Company electronically filed by Mr. Yazen Alami on behalf of Ohio Power Company