

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of</b>	)	
<b>Ohio Power Company to Adopt a</b>	)	<b>Case No. 14-1186-EL-RDR</b>
<b>Final Implementation Plan for the</b>	)	
<b>Retail Stability Rider</b>	)	

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OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO THE  
MOTION FOR PROCEDURAL SCHEDULE OF  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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**OVERVIEW**

Ohio Power Company (dba AEP Ohio) filed its Application in this case to implement one specific aspect of the Commission’s decision in the *ESP II* proceeding (Case Nos. 11-346-EL-SSO et al.). On September 2, 2014, the Office of the Ohio Consumers’ Counsel (OCC) filed a motion for procedural schedule seeking to establish a full litigation/hearing schedule, including an evidentiary hearing and adequate time for discovery. While OCC’s current motion attempts to portray the *ESP II* decision as broadly leaving open whether, when and how AEP Ohio collects the capacity deferrals, the reality is that the narrow purpose of this docket is to verify the accurate capacity deferral balance and finalize the Retail Stability Rider (RSR) rate for the post-ESP term collection period. The Motion for Procedural Schedule filed by the OCC is without merit and should be rejected. If the Commission does establish a full litigation schedule, it should limit the scope of the proceeding (including the scope of discovery) and provide for a more expedited schedule than proposed by OCC.

**A. OCC inappropriately wants to use this narrow proceeding to re-litigate and challenge determinations made in the *ESP II* decision, which is final and pending on appeal before the Supreme Court.**

As a threshold matter, OCC is simply wrong in claiming – as a premise for its procedural request – that the *ESP II* decision did not already determine that the RSR would be utilized after the ESP term to collect the then-remaining deferral balance.

Moreover, OCC's request (p. 3) that the Commission convert the RSR to being "collected subject to refund" starting June 1, 2014 is tantamount to a stay request under R.C.

4903.16. But only the Supreme Court can grant a stay over the RSR at this point in time – indeed, such a stay request (filed by OCC and others) is pending before the Court in Case No. 2013-521 and the Commission does not have jurisdiction to consider issuing the same relief.

The *ESP II* decision approved the RSR, with two distinct components: (1) to provide revenue to AEP Ohio during the ESP term as a measure of financial stability given other aspects of the ESP package, including but not limited to fixed SSO generation rates, and (2) to recover the capacity charge deferrals resulting from the Commission's prior decision in the *Capacity Charge* proceeding (Case No. 10-2929-EL-UNC). (*ESP II*, Opinion and Order at 36.) With respect to item two regarding recovery of the capacity deferrals, the Commission provided that, during the term of the ESP, \$1/MWh of the RSR charge would be used to amortize and recover the capacity deferral; at the end of the ESP term, the remaining capacity deferral balance would be amortized and recovered through continuation of the RSR over a three-year period unless a different recovery period was ordered by the Commission. (*Id.*) In authorizing the recovery of the capacity deferral over the full period (ESP term plus three years), the Commission invoked and relied upon the phase-in statute, R.C. 4928.144. (*Id.* at 52.) That statute requires the Commission to establish a nonbypassable charge for recovery of the costs incurred equal to the amount not collected, plus carrying charges. And that is exactly what the Commission did in the *ESP II* decision.

Thus, the post-ESP collection of the capacity deferrals can no longer be subject to debate before the Commission. Like the Company's Phase-In Recovery Rider (PIRR) that recovered fuel costs incurred during the *ESP I* term for a three-year period following the *ESP I* term, capacity costs being incurred during the *ESP II* term are also being recovered through the RSR over a three-year period following the *ESP II* term (inclusive of carrying charges and less the \$1/MWh collected during the *ESP II* term). In both instances, the Commission relied upon R.C. 4928.144 and had to ensure that the amount recovered after the ESP term through the nonbypassable charge equals the amount not collected during the ESP term, plus carrying charges on that amount.

While OCC's pending motion attempts to portray this proceeding as AEP Ohio proposing capacity deferral recovery over three years starting June 1, 2015, that key determination has already been made and challenges of those aspects of the *ESP II* decision are pending on appeal before the Supreme Court. Indeed, OCC has characterized the *ESP II* decision in its brief before the Supreme Court as follows:

As part of its electric security plan, Ohio Power received approval to collect, inter alia, a "retail stability rider" charge ("RSR") and a capacity charge. Together these charges permit Ohio Power to collect over \$1 billion from all of its customers over the next several years.

OCC First Merit Brief (Case No. 2013-521) at 2. The OCC went on to clarify that the \$1 billion of approvals from *ESP II* decision was calculated as \$508 million for the RSR and \$647 million for the capacity charge deferrals. *Id.* More directly, in that same brief the OCC went on to state (p. 8) that the *ESP II* decision "approved the recovery of the capacity deferrals from retail customers as part of the RSR." Consequently, OCC is flatly incorrect in presently claiming that the Commission has not already determined that the RSR would be utilized after the ESP term to collect the then-remaining deferral balance –

not only did the Commission actually make that determination, but it has become final and is pending on appeal before the Supreme Court. And it is disingenuous for OCC to now “do a 180” in its characterization of the Commission’s decision in order to argue that the *ESP II* decision did not authorize recovery of the capacity deferrals.

More recently, OCC joined a request for stay in the *ESP II* appeal (S.Ct. Case No. 2013-521) that raises many of the same arguments challenging the capacity charge deferral recovery through the RSR. (S.Ct. Case No. 2013-521 August 5, 2014 Joint Motion for Stay at 11-16.) The Commission has not only rejected OCC’s arguments in its own decisions, but has defended those decisions through continued disagreement with OCC in merit briefs and other pleadings before the Court. Indeed, on August 15, 2014 – just a couple weeks before OCC filed its motion in this case – AEP Ohio *and the Commission* both opposed the stay request and defended the Commission’s decision in adopting the RSR. (S.Ct. Case No. 2013-521 August 15, 2014 Memo Contra of PUCO.)

Because the Commission in its *ESP II* decision already authorized the post-ESP recovery of the capacity deferrals through continued collection of the RSR, the Company’s recovery of the capacity deferrals through the RSR has already been fully and finally adjudicated before this Commission and must be implemented absent any reversal or remand by the Court. Hence, the only issues in this docket relate to a financial audit-style verification of the capacity deferral amount and finalization of the post-ESP rate designed to collect the deferral plus carrying charges. OCC’s collateral attacks on the *Capacity Charge* and *ESP II* decisions should not be entertained in this case – either through discovery or re-litigation of the issues.

Unlike OCC's overbroad and improper request to re-litigate threshold jurisdictional issues already adjudicated in the *Capacity Charge* decision, the *ESP II* order did contemplate, in finalizing the deferral recovery plan, that a subsequent review of the shopping statistics and verification of the quantity of capacity provided by AEP Ohio during the *ESP II* term to support shopping customer load, would be appropriate. Of course, AEP Ohio remains a fixed resource requirements (FRR) entity in the PJM capacity market through May 2015 and the capacity charge adopted by the Commission will apply through that date. The Commission ordered the Company to maintain its actual monthly shopping percentages on a month-by-month basis through the term of the ESP. (*ESP II*, Opinion and Order at 36.) Thus, the narrow purpose of this case is to implement those focused provisions of the *ESP II* decision and provide a vehicle for reviewing the capacity shopping quantities and associated deferrals provided by the Company in order to finalize the default plan outlined in that order of recovering the capacity deferrals over three years commencing June 2015.

**B. OCC's full-blown litigation and hearing schedule is unjustified and will cause undue delay.**

As the Supreme Court has long recognized, there is no right to an evidentiary hearing before the Commission unless it is required by statute. *City of Cleveland v. Pub. Util. Comm.*, 67 Ohio St.2d 446, 453 (1981). The Court has also acknowledged that the Commission is vested with broad discretion to manage its dockets and to decide how it may best proceed to manage the orderly flow of its business. *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). In this case, there is no compelling reason to conduct an evidentiary hearing. OCC has not demonstrated reasonable grounds or any basis to contest the Company's accounting in

support of the capacity deferral balance. And if a financial audit is conducted by staff or an independent auditor, it remains to be seen whether any dispute will exist about the deferral balance or carrying charge calculations. Accordingly, the Commission could simply approve (subject to a financial audit) the continuation of the \$4/MWh charge based on the current deferral balance and adopt a comment cycle for soliciting input about the final rate design of the post-ESP RSR.

**C. If the Commission does adopt a full-blown litigation and hearing schedule, it should limit the scope of discovery and expedite the hearing process.**

As demonstrated in Parts A and B above, OCC has an inappropriate and overbroad interpretation of the proper scope of this proceeding and its full-blown litigation schedule is unnecessary. If the Commission does decide to adopt a full litigation schedule, however, it should limit the scope of discovery to matters: (a) relating to verification of the capacity deferral as presented by the Company in its Application, and (b) relating to the rate design of the RSR for recovery of the capacity deferral (including carrying charges) over the three-year period beginning June 1, 2015.

It would be unfair, burdensome and a waste of resources to subject the Company to boundless discovery in this case. Based on the overbroad claims made by OCC in its motion (and by IEU based on the contents of its motion to dismiss), it is already obvious that the intervenors plan to use this case to improperly re-litigate their challenges to the Commission's *Capacity Charge* and *ESP II* decisions that are pending before the Supreme Court. Thus, if OCC's request for an evidentiary hearing process is going to be entertained, the Commission should explicitly define the limited scope of the proceeding.

Finally, if the Commission adopts a full litigation and hearing process for this narrow proceeding, it should provide for a more expedited schedule so that the case is

submitted by the end of the year, rather than extending it into 2015. For example, the Commission could provide for Company testimony by the end of October, Staff/intervenor testimony by the end of November and an evidentiary hearing in December. But in order to establish an effective and efficient schedule, the issues need to be affirmatively limited so that intervenors do not burden the proceeding with extraneous issues.

### **CONCLUSION**

OCC's procedural request should be disposed of in the manner described above.

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 Opposition has been served upon the below-named counsel by electronic mail this 17<sup>th</sup> day of September, 2014.

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Summary: Memorandum in Opposition electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company