

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INITIAL COMMENTS OF THE
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

On July 8, 2014, Ohio Power Company (AEP or the Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission) to adopt a final implementation plan for its Retail Stability Rider (RSR). In its Application, the Company proposes that the Commission adopt a plan providing for the continuation of a \$4.00/MWh RSR starting on June 1, 2015 and continuing until the deferral and carrying charges are fully recovered from customers. AEP further requests, inter alia, that (1) beginning on June 1, 2015, 100% of the RSR revenue will be applied to the balance of the capacity deferrals and applicable carrying charges, which are calculated at 5.34% annually; (2) the \$4/MWh RSR continue for 32 months following the expiration of the Company's current electric security plan (ESP); (3) that no adjustments to the deferral balance, excluding those identified pursuant to an audit process which the Company has specified and the reconciliation of revenues collected through the RSR allocated at \$1/MWh with the final deferral and carrying charge balance, will be made by the Commission.

On July 18, 2014, the Ohio Manufacturers' Association Energy Group (OMAEG) filed a motion to intervene in the proceeding, which the Attorney Examiner granted by entry dated October 30, 2014 (Entry). In addition to granting numerous parties' motions to intervene, the Entry set forth a procedural schedule governing the present phase of the proceeding, which directed interested parties to file comments on AEP's Application by December 1, 2014. OMAEG hereby submits its initial comments on the Company's proposal.

II. COMMENTS

A. **AEP's Application is premature, as the Company has not yet filed its shopping statistics as prescribed by the Commission.**

Despite its efforts to secure early approval for its continued implementation of the RSR, AEP's Application is premature, and therefore, should not be considered by the Commission at this time. The Commission previously directed, and the Attorney Examiner noted in the Entry that all determinations regarding future recovery of the capacity deferral balance would occur following the Company's filing of its actual shopping statistics at the end of the current ESP term.¹ At this point in time, it does not appear that the Company has filed its actual shopping statistics. Moreover, the term of the current ESP does not expire until May 31, 2015. Because neither of these conditions has occurred, Commission consideration of AEP's proposal at this point would be premature. The Commission should not consider the Application until the Company has filed its actual shopping statistics at the conclusion of the ESP term. Consequently, the Commission should either dismiss AEP's Application as untimely filed, or hold in abeyance any analysis of the Application until the Company has filed its actual shopping statistics.

¹¹ Entry at ¶ 3, citing *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Opinion and Order at 36 (August 8, 2012).

B. The Company has not demonstrated good cause for the deviation, in its Application, from a three-year amortization period for the remaining capacity deferral balance at the conclusion of the ESP term.

Despite recognizing that the Commission previously prescribed a three-year amortization period for any remaining capacity deferral balance at the conclusion of the ESP term, AEP brushes aside the Commission's directives in favor of a 32-month post-ESP collection period.² In support of this decision, the Company states that the 32-month collection period is "comparable to" the three-year collection period contemplated by the Commission.³ AEP offers no reason in its Application as to why an accelerated 32-month collection period is necessary. AEP likewise offers no reason why the amount proposed to be collected from customers should continue at \$4/MWh customers over a 32-month period, when the monthly impacts to customers may potentially be lessened if the full, Commission-prescribed three year collection period is utilized. Given that the Company has offered no legitimate reason why deviation from the three year period previously designated by the Commission is necessary, the Commission should deny its request.

C. The Federal Power Act preempts Commission regulation of compensation for wholesale capacity service.

The Commission is a creature of statute. It may exercise only that authority which has been conferred upon it by the General Assembly.⁴ Pursuant to the language of the Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the sale of electric energy at wholesale in interstate commerce.⁵ The Commission has previously stated that it "agree[s] that the provision of capacity for CRES providers by AEP-Ohio, pursuant

² Application at 3.

³ Id.

⁴ See *Tongren v. Public Utilities Commission of Ohio*, 85 Ohio St.3d 87, 88 (1999).

⁵ See 16 U.S.C. § 824(b).

to the Company's FRR capacity obligations, is not a retail electric service as defined by Ohio law."⁶ Further, the Commission has recognized that, "pursuant to the FPA, electric sales for resale and other wholesale transactions are generally subject to the exclusive jurisdiction of FERC."

Two recently issued decisions support the concept that state commissions do not have the authority to increase an electric utility's compensation for a wholesale service.⁷ As noted in the Third Circuit's recent decision in *PPL Energy Plus v. Solomon*, "the wholesale price for capacity is squarely, and indeed exclusively, within FERC's jurisdiction. FERC has determined that maintaining adequate resources bears a significant and direct effect on wholesale rates. Therefore, FERC regulates interstate sales of electric capacity as part of its approach to regulating electric energy rates."⁸

By means of the instant Application, AEP is seeking continuation, through recovery of deferred amounts, of the prices for capacity previously authorized by the Commission. As explained above, action by the Commission to establish prices for wholesale electric service, including compensation for wholesale capacity service, is preempted by the FPA. Consequently, any action by a state commission to increase the compensation received by an electric utility for wholesale generation service is preempted by the FPA. For this reason, the Commission lacks subject matter jurisdiction to grant the proposal sought by AEP in its Application.

⁶ See *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, Opinion and Order at 13 (July 2, 2012).

⁷ See *PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir., June 2, 2014); see also *PPL Energy Plus v. Solomon*, 766 F.3d 241 (3rd Cir, September 11, 2014).

⁸ *PPL Energy Plus v. Solomon*, 766 F.3d 241 at 250-51 (internal citations omitted).

III. CONCLUSION

As advanced by OMAEG in the arguments set forth above, the Commission has no authority to consider AEP's capacity shopping tax application, and notwithstanding this fact, its consideration of the Application at this point would be premature. Based upon its content and its timing, this matter is improperly before the Commission. As such, the Commission should grant the pending motion to dismiss the application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on December 1, 2014.

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Summary: Comments of the Ohio Manufacturers' Association Energy Group electronically filed by Ms. Rebecca L Hussey on behalf of OMAEG