

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**COMMENTS OF
THE OHIO HOSPITAL ASSOCIATION**

I. INTRODUCTION

On July 8, 2014, Ohio Power Company (“AEP Ohio”) filed an application requesting approval to continue the implementation of its retail stability rider (“RSR”). This filing was preceded by the July 2, 2012 approval of a capacity pricing mechanism for AEP Ohio in Case No. 10-2929-EL-UNC (“Capacity Case”). The Commission modified AEP Ohio’s RSR in the its August 8, 2012, Opinion and Order in Case No. 11-346-EL-SSO, et al. (“ESP Order”) which, in part, was intended to enable the Company to begin to recover the deferred amount of its capacity costs, consistent with the Commission’s directives in the Capacity Case.

In its application, AEP Ohio seeks approval of a final implementation plan to continue the RSR beginning on June 1, 2015, at which point the current ESP term will end, and continuing over a collection period of 32 months, until the remaining capacity deferral and carrying charge balance is fully recovered.

By Entry dated October 30, 2014, the attorney examiner set forth a procedural schedule setting deadlines for parties to intervene and file comments. The Ohio Hospital Association timely filed its motion to intervene and now submits the following comments.

II. COMMENTS

The Commission should dismiss AEP Ohio's application or, at a minimum, hold this case in abeyance until the appeals of the Commission's orders authorizing the deferral balance in question have run their course. If the Commission authorizes AEP Ohio to begin collecting the deferral balance from ratepayers, and the underlying orders are subsequently determined to be unlawful, ratepayers may be left with no recourse against the unjust enrichment of AEP Ohio—the harm to ratepayers could be irreparable. On the other hand, a delay in the collection of these deferral balances until after the Commission's actions have been found lawful will cause AEP Ohio no harm because carrying charges will fully compensate AEP Ohio for any delay. This asymmetry of risk compels the delay in the collection of the deferral balance.

In the pending appeals¹ of the Capacity Case and the ESP Order, the “twin” cases giving rise to the deferral balance, oral arguments have yet to be scheduled in either case (as of the date of submission). It will be at least several months before the outcome of those appeals will be known. Without addressing the merits of the arguments on appeal, it is nevertheless clear that these appeals involve the novel and unprecedented actions by the Commission pertaining to competitive wholesale generation services. Adding to this circumstance, federal law addressing state interference in the inherently *interstate* subject of wholesale generation prices has been clarified by two different circuit courts of

¹ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Sup. Ct. Case No. 2013-0228, *et al.*; *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*, Sup. Ct. Case No. 2013-0521.

appeals² since the Commission issued its ESP Order. Both these federal decisions implicate the ability of AEP Ohio and the jurisdiction of Commission to second-guess the FERC-sanctioned process for determining AEP Ohio's wholesale generation costs and revenues.

Ohio law states that “rates set by the commission are lawful until such time as this court later finds that the commission erred in setting that rate.” *In Re Application of Columbus Southern Power Company, et al.*, 138 Ohio St. 3d 448, at p. 25; 2014-Ohio-462, 8 N.E.3d 863; 2014 Ohio LEXIS 256, citing *Keco Industries*, 166 Ohio St. 254. Thus if the basis of the deferral balance is later found to be unlawful, principles against retroactive ratemaking could prevent Ohio courts from ordering a refund of the amount collected. *Id.* Once the deferral balance is collected from ratepayers, they cannot be made whole if the Commission is later reversed on state law grounds. Yet nothing compels the Commission to act at this point in time, and the availability of carrying charges provides an adequate remedy to AEP Ohio for any delay in the start of collection. Again, this clear asymmetry, coupled with the appellate circumstances of the Commission's underlying orders, compels a delay in the Commission's authorization of a collection of that deferral.

III. CONCLUSION

For all the foregoing reasons, the OHA urges the Commission to dismiss this matter, or alternatively hold it in abeyance until such time as the legal challenges to the orders giving rise to the collection of the deferral balance have been resolved.

² *PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014); *PPL Energy Plus, LLC, et al., v. Lee A. Solomon, et. al.*, 766 F.3d 241, 2014 U.S. App. LEXUS 17557 (3rd Cir. 2014).

Respectfully submitted on behalf of
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments was served upon the parties of record listed below *via* electronic mail this 1st day of December 2014.



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Summary: Comments of The Ohio Hospital Association electronically filed by Teresa Orahood
on behalf of Thomas O'Brien