

**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 RETAIL ENERGY SUPPLY ASSOCIATION**

I. Introduction

In accordance with the schedule established by the Attorney Examiner, the Retail Energy Supply Association (“RESA”)¹ hereby files its Initial Comments regarding the application by Ohio Power Company (“Ohio Power”) to continue its Retail Stability Rider (“RSR”) after June 1, 2015² (“Application”), until it completes collection of all amounts in its Deferred Capacity Account. RESA does not contest either the Public Utilities Commission of Ohio (“Commission”) establishment of a Deferred Capacity Account, nor the treatment of that account as a regulatory asset. The concern that RESA wishes to raise is the absence of a process to address what may be significant changes to the balance in the Deferred Capacity Account to due to possible remands by the Ohio Supreme Court and other Commission cases. Since the

¹ RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

² The current Deferred Capacity Account authority was established in *In the Matter of the Commission’s Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 23 (July 2, 2012). The Commission initiated recovery of those deferred amounts in *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 Nos. 11-346-EL-SSO et al., Opinion and Order at 36 (August 8, 2012) (“Second ESP cases”).

Commission's orders which established the Deferred Capacity Account and its collection method used a fixed time period with a fixed-rate formula, the Application provides for only financial audits and review by the Staff, at first blush, does not appear to be unreasonable. However, as detailed below, the proposed simple accounting approach is no longer adequate because of the ongoing review of the fuel adjustment clause ("FAC")³ and what may be other remands on the Deferred Capacity Account from the several pending appeals ongoing at the High Court. In sum, the Commission in this proceeding should, within the Opinion and Order which authorizes the Rider RSR after May of 2015, provide for a process both to hear claims and to adjust the dollar balance in the Deferred Capacity Account if the Commission finds merit based on its ruling in the FAC cases and High Court remands.

RESA believes that the pending FAC cases merit an amendment to the Deferred Capacity Account. If, as the Commission's outside auditor believes, the Deferred Capacity Account is overstated because it included capacity charges which were being paid contemporaneously by the retail customers, both the amounts for which there was double collection and any carrying charges associated with such capacity charges should be deducted from the Deferred Capacity Account dollar balance.

At the time of the double collection, there were very few shopping customers. Today, the majority of customers and the overwhelming majority of the load is shopping. The correct way to address the double collection is by adjusting the balance of the Deferred Capacity Account. RESA is not asking for the Commission to rule on the capacity double collection, only to provide for adjustments in any extension of the Rider RSR— because adjustments are foreseeable.

II. Procedural History

³ *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC et al. ("FAC Cases")

RESA is a broad and diverse group of retail energy suppliers who share the common vision that competitive retail energy markets deliver a more efficient, customer-oriented outcome than a regulated utility structure. Several RESA members are certified as competitive retail electric service (“CRES”) providers, are active in the Ohio retail electric and natural gas markets, and provide service to residential, commercial, industrial and governmental customers, including customers in Ohio Power’s service territory.

By Entry filed October 30, 2014, the Attorney Examiner established an intervention deadline of November 24, 2014. She also established deadlines for initial comments (December 1, 2014) and reply comments (December 16, 2014). A request for a hearing was denied at that time. RESA timely filed its motion to intervene on November 21, 2014.⁴ Moreover, RESA timely files these Initial Comments in accordance with the procedural schedule.

III. Background

In December 2010, the Public Utilities Commission of Ohio (“Commission”) initiated an investigation of Ohio Power’s capacity charge to CRES providers.⁵ In July 2012, the Commission established a capacity charge cap of \$188.89 per megawatt-day (“MW-day”) and also ordered Ohio Power to charge for capacity based on the Reliability Pricing Model (“RPM”). Inasmuch as the \$188.89 per MW-day was not expected to match the RPM, the Commission allowed Ohio Power to defer the difference in capacity costs⁶ which were not recovered during Ohio Power’s second electric security plan (“ESP”) period, to the extent that the total incurred

⁴ RESA’s motion to intervene remains pending.

⁵ *In the Matter of the Commission’s Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012). During the investigation, the Commission approved and confirmed the merger of Columbus Southern Power Company into Ohio Power Company, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC (March 7, 2012).

⁶ Referred to in these comments as the “Deferred Capacity Account”

capacity costs do not exceed the \$188.89 per megawatt-day.⁷

One month later, in August 2012, the Commission approved Ohio Power's modified second ESP.⁸ Among the components of the approved second ESP was the RSR for customer stability and certainty while Ohio Power moved toward competitive market pricing.⁹ The Commission allowed Ohio Power to recover \$508 million under the RSR and established that the RSR rate would be (a) \$3.50 per megawatt-hour ("MWh") from August 2012 through May 2014 and (b) \$4.00 per MWh from June 2014 through May 2015. Additionally, the Commission ordered that, during the second ESP, \$1.00 of the \$3.50/\$4.00 RSR amounts collected be applied to the *Capacity Case* deferral.¹⁰ Moreover, the Commission stated the following:

At the conclusion of the modified ESP, the Commission will determine the deferral amount and make appropriate adjustments based on [Ohio Power's] actual shopping statistics and the amount that has been collected towards the deferral through the RSR, as necessary. * * * Any remaining balance for this deferral that remains at the conclusion of this modified ESP shall be amortized over a three year period unless otherwise ordered by the Commission.¹¹

In addition, Ohio Power's second ESP included energy-only auctions for which the Commission reviewed and approved a competitive bid procurement process.¹² Among the determinations, the Commission approved an unbundling of Ohio Power's FAC into two reconcilable riders (Fixed Cost Rider and Auction Phase-In Rider).¹³ Several parties alleged in that case that certain capacity-related costs are being double-recovered by Ohio Power – once

⁷ *Capacity Charges*, supra, Opinion and Order at 23 and 33.

⁸ *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 Nos. 11-346-EL-SSO et al., Opinion and Order (August 8, 2012) ("Second ESP cases").

⁹ *Id.* at 35.

¹⁰ *Id.* at 36.

¹¹ *Id.* at 36.

¹² *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support Its Standard Service Offer*, Case No. 12-3254-EL-UNC, Opinion and Order (November 13, 2013).

¹³ *Id.* at 16.

through the FAC and/or the new Fixed Cost Rider, and another time through the deferred capacity amounts.¹⁴ The Commission has ordered an audit of Ohio Power's FAC and included specifically an inquiry into the allegation of double recovery.¹⁵

Ohio Power's second ESP will expire at the end of the May 2015 billing cycle.

IV. Ohio Power's Current Application

On July 8, 2014, Ohio Power filed the instant application seeking to continue its RSR and apply 100% of the revenue under its RSR to the Deferred Capacity Account, along with carrying charges, from June 1, 2015, until the amounts are fully recovered. Ohio Power proposes an annual 5.34% carrying charge. Ohio Power projects that the deferral amount still to be recovered will be nearly \$433 million at the time the second ESP expires. Ohio Power proposes a RSR rate of \$4.00 per MWh for the collection period (except the rate will decrease when the final amounts are collected), and suggested a recovery period of 32 months (through January 2018). Ohio Power also proposed providing quarterly updates to the Staff, and a financial audit prior to the start of the collection period (to confirm the deferral balance).¹⁶

V. A Final, Definitive Determination of the Amount of Deferred Capacity Costs to be Included in Rider RSR Cannot be Made at This Time

RESA does not dispute that the Commission established a Deferred Capacity Account nor treated it as a regulatory asset. As discussed in the Introduction section, the problem is that the FAC Cases and possible remands from the Supreme Court may require a future review and adjustment of the Deferred Capacity Account, and whether providing for such a process is needed in the order which authorizes the Rider RSR after May 2015. If the Commission, as the outside auditor has done, finds there was double collection of capacity costs then the deferred amount in

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 16; Entry on Rehearing (January 22, 2014) at 10. The audit is occurring in *FAC Cases*, *supra*.

¹⁶ The Application does not provide for non-financial accounting adjustments, nor does the Application provide for participation of stakeholders other than the Staff.

the Deferred Capacity Account must be adjusted as well as the interest (carrying charges) imputed for the amount of the double collection. Further, since there are several appeals still pending at the Ohio Supreme Court, it is foreseeable that other amendments to the Deferred Capacity Account may be required.

- A. The Commission must reserve the right to make adjustments in the future to any deferred capacity cost amount that it authorizes in this case for recovery through the new RSR, commencing June 1, 2015, based on the possible outcomes in the *Audit Cases* and other cases.**

Although Ohio Power has deferred dollars in the Deferred Capacity Account and its Second ESP will end in May 2015, the Commission should recognize the appeals from the *Capacity Charges* and *Second ESP* cases are still pending at the Ohio Supreme Court.¹⁷ As a result, the outcome of those appeals could have a direct bearing on the Deferred Capacity Account balance and recovery of those amounts. The Commission should expressly condition any authorized recovery in this case of amounts in the Deferred Capacity Account on the decision in those appeals, which may require adjustments.

Outside of this proceeding, the Commission is reviewing Ohio Power's recovery of certain capacity costs. The Commission selected an outside auditor to analyze whether Ohio Power is double-recovering capacity costs as related to power purchased from Ohio Valley Electric Corporation ("OVEC") and the Lawrenceburg Generating Station ("Lawrenceburg") through the Riders FAC and FCR, as well as in the deferred capacity amount. In October 2014, the auditor filed its report, stating that (1) the deferred capacity amount is calculated from company's overall revenue requirement, which includes the Lawrenceburg and OVEC demand/capacity charges; and (2) the FCR is recovering from customers the Lawrenceburg and

¹⁷ Supreme Court Case Nos. 2013-228 and 2013-521, respectively.

OVEC fixed costs.¹⁸ The Commission will certainly be reviewing the audit report and establishing a procedural schedule to accomplish such. It is not known at this time what the outcome will be. What is known, however, is that a ruling in the *Audit Cases* could have a bearing on the amount of deferred capacity costs that AEP will be permitted to recover.¹⁹ Thus, the Commission should specifically reserve in this case the right to adjust the deferred capacity amount when it rules in those cases.

In making such a reservation, the Commission must also expressly reject Ohio Power's proposal to adjust only the capacity deferrals and carrying charge balance by reconciling revenues collected through the RSR allocated at \$1.00/MWh with the final deferral/carrying charge balance as confirmed by a financial audit conducted as of May 31, 2015.²⁰ Similarly, the Commission should expressly reject Ohio Power's proposal to adjudicate a recommended adjustment based on a financial audit conducted as of May 31, 2015.²¹ Any decision that the Commission issues in the *Audit Cases* should not be subject to another financial audit or further adjudication here.

B. Any concerns over retroactive ratemaking should be dismissed.

It is possible that parties may argue that subsequent changes to the Deferred Capacity Account, the mechanism for which RESA asks the Commission order in this proceeding, will constitute retroactive ratemaking and be impermissible. Section 4928.144, Revised Code, authorizes the Commission to phase in rates or prices established in an electric security plan.²² The Commission began recovery of the Deferred Capacity costs in Ohio Power's second ESP

¹⁸ *Audit Cases, supra*, Baker Tilly Audit Report at 3, 6, 13-14, 19.

¹⁹ RESA urges the Commission, if it finds that double-recovery is occurring as the Auditor is saying, to require that the overpaid amounts be applied to the deferral capacity balance to pay it "down."

²⁰ Paragraph 4(f) of the Application.

²¹ Paragraph 4(e) of the Application.

²² Section 4928.144 allows the Commission to "authorize any just and reasonable phase-in of any electric distribution utility rate * * * as the commission considers necessary to ensure rate or price stability for consumers."

through the RSR, and is now being asked to continue that recovery through the RSR. In the second ESP, the Commission concluded that “[a]ny remaining balance for this deferral that remains at the conclusion of this modified ESP shall be amortized over a three year period unless otherwise ordered by the Commission.”²³ The Commission is being asked to determine the details for that remaining recovery. This should be considered part and parcel to the design discretion that the Commission has in order to phase-in the rate. Any claim that this action constitutes retroactive ratemaking should be rejected.

The Ohio Supreme Court recently rejected a retroactive ratemaking claim related to the recovery from all customers of under-recovered transmission costs. In that case, it was argued that, by making the recovery of certain transmission costs non-bypassable over a longer-than-normal period of time, shopping customers were responsible for costs previously incurred to serve non-shopping customers. The Ohio Supreme Court cited the statutory authority for a phase-in and ruled that the collection of deferred rates through a non-bypassable rate was permissible.²⁴

Additionally, the Commission should reject any claim that the Commission cannot reserve the ability to adjust the Deferred Capacity Account (i.e., applying the double-recovered funds to pay down the capacity deferral amount) because to do so would constitute retroactive ratemaking at the time of the future adjustment. In September 2014, the Ohio Supreme Court rejected retroactive ratemaking claims by Ohio Power after the Commission’s adjusted 2009 fuel costs by applying the proceeds from a 2008 settlement to the 2009 fuel costs, as opposed to 2008 fuel costs.²⁵ The Court reasoned that, even though the 2008 settlement agreement was executed

²³ *Second ESP cases, supra*, at 36.

²⁴ *In re Application of Ohio Power Co.*, Slip Opinion No. 2014-Ohio-4271 (October 7, 2014).

²⁵ *In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.*, Slip Opinion No. 2014-Ohio-3764 (September 3, 2014).

before the FAC audit period and the start of an ESP, the settlement proceeds affected Ohio Power's cost to provide electricity during 2009. As a result, a nexus existed, which was a justifiable basis for reviewing the 2008 settlement and applying it to fuel costs.

Moreover, the "black letter" law precluding retroactive ratemaking involves entirely different circumstances that are inapplicable. The Ohio Supreme Court has repeatedly determined that utility ratemaking is prospective and a utility's collection of an approved rate is not unlawful even when the Commission decision establishing that rate is later overturned.²⁶ Here, the Commission has not approved a rate for the recovery of deferred capacity costs after May 2015 and thus, reserving the right at this time to make a prospective adjustment to the RSR rate will have a prospective effect on revenues collected in the future. There is no retroactive ratemaking involved.

C. Rider PPA

Similarly, the Commission should recognize that possible rulings related to Ohio Power's proposed Power Purchase Agreement Rider ("Rider PPA") could also have a bearing on the amount of deferred capacity costs that AEP will be permitted to recover. Specifically, Ohio Power seeks to include OVEC costs, including capacity costs, in its Rider PPA.²⁷ The PJM year June to May on which the ESP calendars are based is different than the OVEC calendar year which will serve as the basis for calculating the Rider PPA. Further, the Rider PPA is looking back at the previous calendar year's costs and revenues. Thus, there could be overlap between

²⁶ *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462 (February 13, 2014); *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 1997-Ohio-112, 686 N.E.2d 501; *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 141 N.E.2d 465.

²⁷ *In the Matter of the Application of 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 Nos. 13-2385-EL-SSO et al.

capacity costs in the Rider PPA which look back at the prior calendar year, and PJM year which only looks forward, but starts in June of 2015.

As noted above, the purpose of the RSR is and was for customer stability and certainty while Ohio Power moved toward competitive market pricing. However, the proposed PPA is the exact opposite and amounts to re-regulation of generation service pricing for all customers, including customers taking service from a CRES provider, despite the Commission's clear move to auction-based generation service pricing for default service customers and the right for customers to choose a market-based price under Ohio law.

VI. Conclusion

WHEREFORE, RESA respectfully requests that the Commission reserve the right to make future adjustments to any deferred capacity cost amount that it authorizes in this case for recovery through the new RSR, commencing June 1, 2015, based on the possible outcomes in other cases, as identified above.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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