

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

INDUSTRIAL ENERGY USERS-OHIO'S REPLY COMMENTS

Samuel C. Randazzo
(Counsel of Record)
(Reg. No. 0016386)
Frank P. Darr (Reg. No. 0025469)
Matthew R. Pritchard (Reg. No. 0088070)
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
(willing to accept service by e-mail)
fdarr@mwncmh.com
(willing to accept service by e-mail)
mpritchard@mwncmh.com
(willing to accept service by e-mail)

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Attorneys for Industrial Energy Users-Ohio

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I. INTRODUCTION

As Industrial Energy Users-Ohio (“IEU-Ohio”) demonstrated in its Initial Comments and its Motion to Dismiss, Ohio Power Company’s (“AEP-Ohio”) July 8, 2014 Application (“Capacity Shopping Tax Application”) should be dismissed because the Public Utilities Commission of Ohio (“Commission”) lacks jurisdiction to increase AEP-Ohio’s compensation for a wholesale generation-related service. If the Commission does not dismiss the Application, Initial Comments filed by the Ohio Hospital Association (“OHA”), the Retail Electric Supply Association (“RESA”), and the Office of the Ohio Consumers’ Counsel (“OCC”) correctly note that customers are at substantial risk of funding another windfall for AEP-Ohio. Accordingly, if the Commission does not grant IEU-Ohio’s pending Motion to Dismiss, IEU-Ohio supports the recommendation of OHA to stay review of the Capacity Shopping Tax Application until the Supreme Court of Ohio (“Court”) rules on the pending appeals. If the Commission nonetheless moves forward at this time and authorizes AEP-Ohio to begin billing and collection of the Capacity Shopping Tax, IEU-Ohio supports the

recommendations of RESA and OCC that the Commission authorize collection of the Capacity Shopping Tax subject to refund.

II. THE STAFF FAILS TO ADDRESS THE JURISDICTIONAL LIMITS ON THE COMMISSION'S AUTHORITY TO INCREASE THE COMPENSATION OF AEP-OHIO FOR A WHOLESALE GENERATION-RELATED SERVICE

Through the Capacity Shopping Tax Application, AEP-Ohio seeks to recover deferred above-market revenue that AEP-Ohio claims it is authorized to bill and collect as a result of two prior unlawful decisions of the Commission. AEP-Ohio anticipates that the amount it will defer will reach \$445 million pursuant to these unlawful decisions.

In its Initial Comments, the Commission Staff ("Staff") noted that it had "reviewed the Company's application in order to verify that the Company properly reordered all applicable charges, collections and deferrals" and during this review had discovered "an immaterial error pertaining to the carrying charges applied by the Company."¹ Upon AEP-Ohio's agreement to modify the immaterial error, Staff found "the Company's application to be reasonable and recommends the Commission adopt a final implementation plan as proposed in the Application."² Staff's implied position is that the Commission has jurisdiction to approve the Capacity Shopping Tax Application.

Staff's implied position that the Commission has authority to increase AEP-Ohio's compensation for a wholesale generation-related service is inconsistent with its position in its briefs in AEP-Ohio's pending electric security plan (ESP) case (Case Nos. 13-2385-EL-SSO, *et al.*) and Duke Energy Ohio Inc.'s ("Duke") pending ESP case (Case Nos. 14-841-EL-SSO, *et al.*). In these briefs, Staff argued that the Commission was

¹ Staff Initial Comments at 2.

² *Id.* at 3.

preempted by the Federal Power Act from increasing the compensation for wholesale electric services of AEP-Ohio and Duke.³ Staff correctly stated that the Commission was without jurisdiction to establish any generation-related rates outside of its authority in R.C. 4928.141 to 4928.144 (the Capacity Shopping Tax was authorized under R.C. Chapter 4905),⁴ and that the Commission was prohibited by R.C. 4928.02(H) from authorizing a non-bypassable generation-related charge to subsidize AEP-Ohio's generation business.⁵

Although Staff's arguments were related to AEP-Ohio's proposed Purchase Power Adjustment ("PPA") Rider and Duke's proposed Price Stability Rider, they apply equally to AEP-Ohio's request to implement a generation-related non-bypassable rider to collect the Capacity Shopping Tax. As the Commission previously determined⁶ and has argued in briefs filed with the Court,⁷ the Capacity Shopping Tax relates to a wholesale electric service, capacity service, and it is undisputed that this service is generation-related. IEU-Ohio's Motion to Dismiss and Initial Comments further address the Commission's lack of jurisdiction to approve the Capacity Shopping Tax Application

³ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.* Post-Hearing Brief Submitted by the Staff of the Public Utilities Commission of Ohio at 15-17 (July 23, 2014) ("Staff AEP Brief"); *In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, *et al.* Post-Hearing Brief Submitted by the Staff of the Public Utilities Commission of Ohio at 18-21 (Dec. 15, 2014) ("Staff Duke Brief").

⁴ Staff AEP Brief at 11; Staff Duke Brief at 15.

⁵ Staff AEP Brief at 12-14; Staff Duke Brief at 15-16.

⁶ *In the Matter of the Commission Review of the Capacity Shopping Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-SSO, Opinion and Order at 13 (July 2, 2012).

⁷ *State of Ohio, ex rel. Industrial Energy Users-Ohio, v. Pub. Util. Comm'n of Ohio*, Sup. Ct. Case No. 2014-1946, Motion to Dismiss Submitted on Behalf of Respondents, the Public Utilities Commission of Ohio, *et al.*, at 10 (Dec. 2, 2014).

on these grounds as well as others. Because the Commission lacks jurisdiction, it should grant IEU-Ohio's pending Motion to Dismiss.

III. THE COMMISSION SHOULD DISMISS THE APPLICATION OR STAY THIS PROCEEDING UNTIL THE SUPREME COURT ACTS ON THE PENDING APPEALS AND THE COMMISSION COMPLETES ITS REVIEW OF THE POTENTIAL DOUBLE RECOVERY OF GENERATION-RELATED CHARGES; IF IT GRANTS AUTHORIZATION OF THE CAPACITY SHOPPING TAX, IT SHOULD IMPOSE CONSUMER SAFEGUARDS

Additionally, approval of the Capacity Shopping Tax Application would cause irreparable injury to retail customers if the Commission acts prematurely. In its Initial Comments, the OHA identified the significant impact that the appeals related to the Capacity Shopping Tax could have regarding AEP-Ohio's ability to recover the Capacity Shopping Tax.⁸ Therefore, the OHA urges the Commission to either dismiss or defer ruling on the Capacity Shopping Tax Application until the Court has issued decisions in the appeals related to the Capacity Shopping Tax.⁹ The ongoing audit of AEP-Ohio's double-recovery of certain purchase power costs, as noted by RESA,¹⁰ also warrants a stay of this proceeding pending final resolution of the audit.

If the Commission, however, moves forward, it should do so subject to the recommendations of RESA and OCC that the Capacity Shopping Tax be subject to audit and future reconciliation so that customers are protected and the Commission can

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*, Sup. Ct. Case No. 2013-0521; *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Sup. Ct. Case Nos. 2013-0228 & 2012-2098.

⁹ OHA Initial Comments at 2-3.

¹⁰ RESA Initial Comments at 1-2, 6-7.

flow through the Court's decisions and its own decision regarding the double-recovery audit.¹¹

IV. **CONCLUSION**

In sum, the Commission lacks jurisdiction to approve the Capacity Shopping Tax Application under Ohio and federal law and therefore IEU-Ohio again urges the Commission to grant IEU-Ohio's pending Motion to Dismiss. If the Commission does not dismiss the Application, it should defer ruling on the Application until the Court issues decisions in the appeals related to the Capacity Shopping Tax and the Commission has resolved double-recovery issues outlined in the Initial Comments of RESA and OCC. At a minimum, if the Commission proceeds and approves the Capacity Shopping Tax Application it should do so subject to reconciliation and refund to prevent another customer-funded windfall for AEP-Ohio.

Respectfully submitted,

/s/ Matthew R. Pritchard

Samuel C. Randazzo (Counsel of Record)
(Reg. No. 0016386)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

Attorneys for Industrial Energy Users-Ohio

¹¹ RESA Initial Comments at 1-2, 6-7; OCC Initial Comments at 15.

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Reply Comments* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 16th day of December 2014, via electronic transmission.

/s/ Matthew R. Pritchard

Matthew R. Pritchard

Steven T. Nourse (Reg. No. 0046705)
Matthew J. Satterwhite (Reg. No. 0071972)
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com
mjsatterwhite@aep.com

ATTORNEYS FOR OHIO POWER COMPANY

David F. Boehm (Reg. No. 0021881)
Michael L. Kurtz (Reg. No. 0033350)
Jody Kyler Cohn (Reg. No. 0085402)
Boehm, Kurtz & Lowry
36 E. Seventh St., Suite 1510
Cincinnati, OH 45202
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com

ATTORNEYS FOR THE OHIO ENERGY GROUP

Richard L. Sites (Reg. No. 0019887)
General Counsel & Senior Director of
Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien (Reg. No. 0066249)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

ATTORNEYS FOR THE OHIO HOSPITAL ASSOCIATION

Kimberly W. Bojko (Reg. No. 0069402)
Rebecca L. Hussey (Reg. No. 0079444)
Jonathan A. Allison (Reg. No. 0062720)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Hussey@carpenterlipps.com
Allison@carpenterlipps.com

ATTORNEYS FOR THE OMA ENERGY GROUP

Mark S. Yurick (Reg. No. 0039176)
Devin D. Parram (Reg. No. 0082507)
TAFT STETTINIUS & HOLLISTER LLP
65 East State Street, Suite 1000
Columbus, OH 43215
myurick@taftlaw.com
dparram@taftlaw.com

ATTORNEY FOR THE KROGER CO.

Maureen R. Grady (Reg. No. 0020847)
Terry L. Etter (Reg. No. 0067445)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Maureen.grady@occ.state.oh.us
etter@occ.state.oh.us

**ATTORNEY FOR THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL**

M. Howard Petricoff (Reg. No. 0008287)
Counsel of Record
Gretchen L. Petrucci (Reg. No. 0046608)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43216-1008
mhpetricoff@vorys.com
glpetrucci@vorys.com

**ATTORNEY FOR THE RETAIL ENERGY SUPPLY
ASSOCIATION**

Joseph M. Clark
Counsel of Record
Direct Energy
21 East State Street, 19th Floor
Columbus, OH 43215
joseph.clark@directenergy.com

**ATTORNEY FOR DIRECT ENERGY SERVICES,
LLC, DIRECT ENERGY BUSINESS, LLC AND
DIRECT ENERGY BUSINESS MARKETING, LLC**

Werner Margard
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
werner.margard@puc.state.oh.us

**ATTORNEY FOR THE STAFF OF THE PUBLIC
UTILITIES COMMISSION OF OHIO**

Sarah Parrot (Reg. No. 0082197)
Greta See
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
Greta.See@puc.state.oh.us
sarah.parrot@puc.state.oh.us

ATTORNEY EXAMINERS

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