

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Power Company for Authority to Establish)	
a Standard Service Offer Pursuant to R.C.)	Case No. 13-2385-EL-SSO
4928.143, in the Form of an Electric)	
Security Plan.)	

In the Matter of the Application of Ohio)	
Power Company for Approval of Certain)	Case No. 13-2386-EL-AAM
Accounting Authority.)	

**MEMORANDUM CONTRA OF
CONSTELLATION NEWENERGY, INC.
AND
EXELON GENERATION, LLC**

I. Introduction

In December 2013, Ohio Power Company (“Ohio Power”) filed an application seeking approval of a third electric security plan to commence in June 2015. On February 25, 2015, the Public Utilities Commission of Ohio (“Commission”) issued a decision approving the application with significant modifications. Ten applications for rehearing were filed on March 27, 2015. Constellation NewEnergy, Inc. and Exelon Generation, LLC (collectively “Constellation”) have been active parties in these proceedings and hereby respond to one assignment of error raised in the application for rehearing filed by Ohio Power and several assignments of error raised by the Industrial Energy Users – Ohio (“IEU”). Specifically, Constellation responds to Ohio Power’s allegation that the Commission erred by refusing to implement the power purchase agreement (“PPA”) rider as filed.¹ The Commission rejected

¹ In this Memorandum Contra, Constellation is not addressing the Commission’s placeholder ruling as it was not part of Ohio Power’s Rider PPA argument on rehearing. Constellation did address the placeholder ruling in its March 27, 2015 Application for Rehearing.

Ohio Power's proposed Rider PPA regarding OVEC after properly weighing the evidence in the record and none of Ohio Power's arguments on rehearing warrants a reversal.

Second, Constellation responds to IEU's assignments of error 13 through 16, which challenge the Commission's approval of the Basic Transmission Cost Rider ("BTCR") as a replacement for the current Transmission Cost Recovery Rider. The BTCR will establish a rider that allows Ohio Power to recover directly from retail customers certain non-market-based transmission charges, as permitted by Ohio law. It will appropriately allow competitive retail electric service ("CRES") provider rates to be based on market-related transmission costs and it will not cause customers to pay twice for transmission costs. Finally, the BTCR will actually increase price transparency as customers will know the exact cost of the PJM transmission fees as they are incurred.

II. Power Purchase Agreement Rider

Ohio Power claims that, for four reasons, the Commission wrongly denied implementation of Rider PPA. On examination, none of these reasons merits granting rehearing.

A. The current evidentiary record does not support a finding that Ohio Power's Rider PPA meets the statutory requirements or that Rider PPA is reasonable.

The Commission thoroughly examined the evidence presented by numerous parties on the issue of Rider PPA. Nearly all parties oppose Rider PPA, and collectively presented substantial evidence and persuasive arguments in opposition. The Ohio Consumers' Counsel and the IEU experts projected that the Rider PPA would actually inflate the cost of capacity for retail customers by more than some \$82 million.² The Commission Staff also found no benefit in the Rider PPA,³ and similar views were presented by experts from other interveners.⁴ Given

² Opinion and Order at 23. *See also*, OCC Exs. 15 and 15A and IEU Exs. 1A and 1B.

³ Staff Ex. 18 at 9-10, 15; Staff Initial Brief at 2-25.

the strength, scope and intensity of the opposing testimony, it is not surprising that the Commission concluded that “[w]hat is unclear, based on the record evidence, is how much the proposed PPA rider would cost customers and whether customers would even benefit from the financial hedge.”⁵ Ohio Power has the burden of proof in establishing all key provisions of the Electric Security Plan.⁶ As for Rider PPA, that burden was not met and the proposed Rider PPA was appropriately rejected.⁷ In fact, The Commission was charitable in allowing Ohio Power at some future time to revisit the subject with a new proposal and establish a new supportive record.

In addition to the factual reasons for rejecting Rider PPA presented by the Commission in its Opinion and Order, Constellation has pointed out in its application for rehearing that the Commission should have also found that Rider PPA as presented in the application runs afoul of the corporate separation plan required by Section 4928.17, Revised Code. When designing its Rider PPA, Ohio Power never investigated if there were other power plants or financial alternatives that were more likely to produce greater rate stability at lower costs than the OVEC units. If the purpose of Rider PPA is to achieve rate stability, then Rider PPA must be designed to optimally achieve that goal. By intentionally limiting the capacity contracted for in Rider PPA to just affiliated power plants, Ohio Power may have compromised the best interest of the ratepayers for the best interest of an affiliate. Simply put, if optimal rate stability is not the design criteria for Rider PPA, then the design criteria appears to be a just solution for selling

⁴ Direct Energy Ex. 1 at 8-9; Constellation Ex. 1 at 11-24; IGS Ex. 1 at 3-6; Kroger Ex. 1 at 8-9; and RESA Ex. 3 at 13.

⁵ *Id.*

⁶ Section 4928.143(C)(1), Revised Code.

⁷ That statutory basis is Section 4928.143(B)(2)(d), Revised Code, which states that an electric security plan may provide for or include “[t]erms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.”

OVEC generation. Similarly, in addition to being rejected for failing to meet the factual burden of showing that proposed Rider PPA is of benefit to the ratepayers, on rehearing the Commission should find that subsidies which proposed Rider PPA provides for OVEC wholesales sales are prohibited by federal law.⁸

B. Ohio Power is asking the Commission to reverse its consideration/weighting of the evidence, but presented nothing to demonstrate that the Commission erred in weighing the evidence in the first place. Ohio Power just disagrees with the outcome.

Ohio Power cites to portions of the record and claims that Rider PPA's hedge effect will take place to truly promote rate stability.⁹ However, the Commission weighed the evidence differently. Even if Rider PPA *might* offset to some extent the volatility in the wholesale market at some point in time, it does not mean that Rider PPA is appropriate, is reasonable or should be approved for the ESP III or years thereafter. The Commission should again reject Ohio Power's self-serving and myopic view of the evidentiary record. As Constellation has argued before, Rider PPA is not a just and reasonable proposal – it will only guarantee cost recovery for Ohio Power. The alleged benefits to customers are speculative at best, and virtually no customer wants to pay for years to have the opportunity for possible future benefits.

In addition to asking the Commission to reweigh the evidence, Ohio Power asks the Commission to make two explicit rulings:¹⁰

- To reiterate and confirm that it was prudent for Ohio Power to have entered into the OVEC contract.
- To incorporate that prudence determination for the full term of the OVEC contract (through 2040).

Neither of these rulings should be made in these proceedings. The Commission rejected proposed Rider PPA and the Commission should not make extraneous prudence

⁸ Constellation Application for Rehearing at 13-16.

⁹ Ohio Power Application for Rehearing at 16-17.

¹⁰ *Id.* at 19.

determinations.¹¹ Moreover, Constellation notes that Ohio Power has completely ignored the Commission's directive that Ohio Power pursue the transfer or divestiture of the OVEC contractual entitlement.¹² Ohio Power has been expected to pursue the transfer or divestiture of the OVEC contractual entitlement for years.¹³ The Commission should not make prudence findings as to the OVEC agreement when it is not necessary, proposed Rider PPA has been rejected, and Ohio Power has been directed to transfer/divest the entitlement.

C. Ohio Power received a "clear and decisive ruling on the PPA rider" – the proposal was properly rejected by the Commission on February 25, 2015.

Ohio Power contends that the Commission has unreasonably deferred approval of OVEC generation in a PPA rider until several other matters are resolved – pending PJM market reforms, environmental regulations and current federal litigation.¹⁴ What the Commission actually stated was that it did not find that Rider PPA will actually promote rate stability or that it is in the public interest.¹⁵ Then, the Commission noted uncertainty exists with those other matters, which was a factor in the Commission rejecting Rider PPA.

There was no error for the Commission to also recognize and take into consideration that pending PJM market reforms, environmental regulations and/or current federal litigation could have an impact on Rider PPA. Rider PPA will not operate in a vacuum. If these other matters will cause wholesale market prices to increase as Ohio Power states in its Application for Rehearing,¹⁶ the impact is for Rider PPA to likely be a charge to Ohio Power's customers for

¹¹ It is ironic that Ohio Power wants the Commission's express endorsement of the OVEC agreement (the Inter-Company Power Agreement) when Ohio Power's president testified that the OVEC agreement is outside the Commission's jurisdiction. Tr. Vol. I at 32-33.

¹² Opinion and Order at 27.

¹³ *In the Matter of the Application of Ohio Power Company for Approval of Full Legal Corporate Separation and Amendment to its Corporate Separation Plan*, Case No. 12-1126-EL-UNC, Findings and Orders (October 17, 2012 and December 4, 2013).

¹⁴ Ohio Power Application for Rehearing at 19.

¹⁵ Opinion and Order at 24.

¹⁶ Ohio Power Application for Rehearing at 19.

many years to come. That certainly is relevant for evaluating the Rider PPA proposal and for finding that Rider PPA is not in the public interest. The Commission did not defer approval of OVEC in a PPA rider until those other matters are resolved. The Commission reached a just and reasonable outcome and this argument should be rejected.

D. Staggering and laddering of the standard service offer auctions, as well as fixed-price retail contracts, have been effective rate stability tools used by the Commission and customers.

Ohio Power contends that its additional tool for rate stability – proposed Rider PPA – should not be rejected when the existing tools (staggering and laddering of the standard service offer (“SSO”) auctions and fixed-price retail contracts) are flawed and limited.¹⁷ Regardless of Ohio Power’s claims about the flaws and limitations of other rate-stability tools, the Commission correctly recognized that the Rider PPA proposal was not sufficient based on the evidence of record. Nothing argued by Ohio Power about the SSO auctions or fixed-price contracts justifies approval of Rider PPA, especially when the Commission found that Rider PPA would not promote rate stability or certainty.

Moreover, the Commission has correctly found that the staggering and laddering of the SSO auctions and fixed-rate retail contracts provide a significant hedge against price volatility.¹⁸ These tools have been used well over the years. Ohio Power is again arguing that the Commission did not weigh the evidence correctly. As stated earlier, even if Rider PPA *might* offset to some extent the volatility in the wholesale market at some point in time, it does not mean that Rider PPA is appropriate, is reasonable or should be approved for the ESP III or years thereafter. The Commission appropriately rejected proposed Rider PPA.

¹⁷ Ohio Power Application for Rehearing at 22.

¹⁸ Opinion and Order at 24.

III. Basic Transmission Cost Rider

IEU raised several arguments in opposition to the adoption of the BTCR in its assignments of error 13 through 16.

A. The BTCR is not outside the Commission's jurisdiction.

IEU claims in assignment of error 13 that the Commission does not have jurisdiction to authorize the BTCR.¹⁹ Constellation addresses this jurisdiction issue. Constellation takes no position on the rate design of the BTCR or how the actual transmission costs are allocated among the retail customer or customer classes also contained in IEU's 13th assignment of error. However, the jurisdiction question is directly answered in Section 4928.05(A)(2), Revised Code, which states in part:

Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

This statutory provision expressly allows for the establishment of a transmission-related rider like the BTCR. It is clear that the Commission can approve the BTCR.

B. The BTCR does not reduce transmission options available to customers or frustrate price signals.

IEU argues that having certain transmission costs recovered through the non-bypassable BTCR will eliminate the shopping customer's ability to elect the manner in which it pays those

¹⁹ IEU Application for Rehearing at 53-56. IEU further questions the BTCR on that grounds that it will interfere with customers' ability to directly contract with PJM and will allocate costs differently. Constellation does not address those issues.

costs.²⁰ That argument is flawed. The BTCR will move cost-recovery for certain transmission costs that are not market-based to Ohio Power, instead of having those costs recovered by the CRES providers. IEU overlooks that the BTCR is placing the cost recovery of these non-market-based costs in the proper hands – those of Ohio Power. As a result, market-based offers from CRES providers will be based on market costs, and not include a host of other non-market related costs. This will actually heighten price transparency as retail customers can see exactly what these PJM established non-market-based costs are specifically. It is for these reasons that Constellation has supported the BTCR.

C. The Commission has not failed to allow customers to ensure that they do not pay twice for the transmission expenses.

IEU complains that, when the Commission ordered Ohio Power, CRES providers and Staff to work together to ensure that customer are not billed twice for the same transmission-related expenses, it unreasonably excluded customers.²¹ IEU even claims that there is an incentive for Ohio Power and CRES providers to do nothing. That claim has no factual basis. The Commission has ordered Ohio Power to work with CRES providers. CRES providers have every incentive not to improperly bill their customers. Doing such would harm the business relationship between CRES providers and customers and it would also damage the CRES business reputation. Moreover, the BTCR is comparable to Duke Energy Ohio and FirstEnergy's electric distribution utilities' transmission riders and in those situations the utilities and CRES providers worked together to avoid any double-billing of the involved transmission charges. No issues developed between the utilities and CRES providers, or with their customers. There is no reason to believe that, suddenly in the case of Ohio Power, the utility will not be able to work with the CRES providers to ensure that there is no double-billing.

²⁰ IEU Application for Rehearing at 56-57.

²¹ IEU Application for Rehearing at 58-59.

In addition, nothing in the Commission's decision prevents customers from following-up directly with their CRES providers to ensure that their contracts and bills do not include the transmission charges being recovered through the BTCR, upon its effect. The Commission can appropriately monitor the situation for Ohio Power and no changes to the decision are needed on rehearing in this regard.

D. The Commission did not shift the burden of proof as to the BTCR.

Ohio Power put forth a proposal, with its own testimony in support.²² Constellation presented evidence in support of the BTCR.²³ However, other parties presented evidence in opposition, including IEU who recommended a change in the rate design.²⁴ The Commission weighed the evidence and accepted Ohio Power's proposal. It never shifted the burden of proof to IEU or any other party opposing the BTCR. The Commission simply was not persuaded by IEU's arguments or its rate design recommendation. No error occurred and this argument should be rejected.

IV. Conclusion

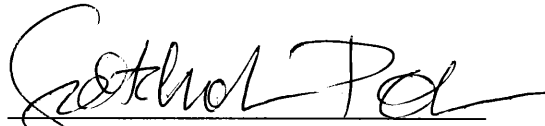
For all of the foregoing reasons, the Commission should reject Ohio Power's first assignment of error and reject IEU's assignments of error 13-16 to the extent addressed above.

²² Ohio Power Ex. 1 (Application) at 12-13; Ohio Power Ex. 13 (Moore Direct Testimony) at 7-8.

²³ Constellation Ex. 1 at 6, 27-30.

²⁴ IEU Exs. 1A and 1B at 28-33.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "M. Howard Petricoff", written over a horizontal line.

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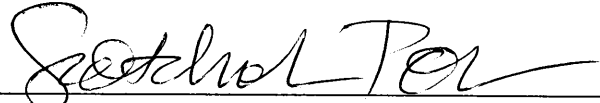
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