

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO POWER COMPANY'S MEMORANDUM CONTRA  
INTERVENORS' APPLICATIONS FOR REHEARING**

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**On behalf of Ohio Power Company**

## **I. Introduction**

On May 4, 2015, Industrial Energy Users-Ohio (IEU); The Kroger Co. (Kroger); and the Office of the Ohio Consumers' Counsel, Ohio Hospital Association, and Ohio Manufacturers' Association Energy Group (collectively, OCC/OHA/OMAEG) filed applications for rehearing of the Commission's April 2, 2015 Finding and Order in this case. Intervenors' applications for rehearing tread now-familiar ground and raise many of the same arguments regarding Ohio Power Company's (AEP Ohio or the Company) capacity deferrals that the Commission fully considered in the *Capacity Charge* case (Case No. 10-2929-EL-UNC), and when it approved the Company's Retail Stability Rider (RSR) in the *ESP II* proceeding (Case Nos. 11-346-EL-SSO, *et al.*).

As the Commission correctly recognized in its Finding and Order in this case, the limited purpose of this docket is to implement the RSR for the post-*ESP II* period "pursuant to R.C. 4928.144 and [the Commission's] final orders in the *Capacity Case* and the *ESP 2 Case*." Finding and Order at 11-12. Thus, the Commission correctly found that intervenor challenges related to those prior cases are untimely and outside the narrow scope of this proceeding. The Commission's Finding and Order was reasonable, well-reasoned, and consistent with its previous final orders. For these reasons, and as set forth in greater detail below, the Commission should deny intervenors' applications for rehearing.

## **II. Argument**

### **A. The Commission's Finding and Order complies with R.C. 4903.09.**

The Commission should reject OCC/OHA/OMAEG's argument that the Commission failed to rule on those intervenors' argument that the RSR should be collected subject to refund in violation of R.C. 4903.09. (*See generally* OCC/OHA/OMAEG AFR.)

The Commission adequately considered and addressed this argument in its Finding and Order. In discussing the parties' arguments, the Commission expressly noted that OCC and OHA requested, respectively, that AEP Ohio's collection of deferred capacity costs be made subject to refund or held in abeyance pending the Ohio Supreme Court's decision in the *ESP II* and *Capacity Charge* cases. Finding and Order at 7-8. The Commission denied those requests, noting that "any adjustment to AEP Ohio's deferred capacity costs that is necessitated by the outcome of any pending proceeding will be addressed at the proper time." *Id.* at 13. That intervenors do not agree with the Commission's decision on this issue does not mean that the Commission failed to adequately consider or address intervenors' arguments.

Ohio law and policy support the Commission's refusal to order AEP Ohio to collect the RSR subject to refund. The Court has repeatedly recognized that the only remedy available to parties challenging a Commission order to stop the order from becoming effective is to seek a stay under R.C. 4903.16. *See, e.g., Columbus S. Power Co.*, 138 Ohio St. 3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 56, citing *Columbus S. Power Co.*, 128 Ohio St.512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 17, *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). In the *ESP II* case, the Commission authorized the RSR under the phase-in statute and expressly authorized the Company to continue recovery, beyond the ESP II term, of the capacity deferral balance remaining at the end of the ESP II term through the RSR. That decision is and remains effective and is not subject to revision in this docket. Parties to that case, including OCC and IEU, sought a stay of that decision, which the Ohio Supreme Court denied for failure to comply with the statutory bond requirement. *See* S.Ct. Case No. 2013-0521, Entry (Oct. 22, 2014). After failing to obtain a stay due to their failure to satisfy that bond requirement, OCC/OHA/OMAEG now attempt to circumvent that ruling and the statutory

process and seek yet another bite at the apple through the imposition of refund conditions. But, as the Commission knows, the case through which a stay or any additional conditions on the Company's recovery of the deferral could be sought is *ESP II*, not here. Accordingly, the Commission should deny OCC/OHA/OMAEG's application for rehearing in its entirety.

**B. The Commission should again reject IEU's continued attempt to reiterate arguments that IEU has already made and the Commission has already rejected.**

Despite this docket's focused and distinct purpose, IEU continues to repeat almost verbatim a number of arguments that it already advanced in its Motion to Dismiss and Initial Comments in this docket, throughout the *ESP II* and *Capacity Charge* cases, and throughout the related appeals in those cases and to separate writ actions that IEU filed with the Ohio Supreme Court (S.Ct. Case Nos. 2012-1494, 2012-2098, 2013-228, 2013-521, 2014-1946). (*Compare* IEU AFR at 14-17, *with* IEU Initial Cmts. at 6-9 and IEU MTD at 7-10; *compare* IEU AFR at 18-21, *with* IEU Initial Cmts. at 9-13 and IEU MTD at 10-14; *compare* IEU AFR at 21-22, *with* IEU Initial Cmts. at 14 and IEU MTD at 15; *compare* IEU AFR at 22-24, *with* IEU Initial Cmts. at 22-24 and IEU MTD at 22-24; *compare* IEU AFR at 25-27, *with* IEU Initial Cmts. at 19-22 and IEU MTD at 20-22; *compare* IEU AFR at 29-33, *with* IEU Initial Cmts. at 25-29 and IEU MTD at 24-29; *compare* IEU AFR at 34-37, *with* IEU Initial Cmts. at 16 and IEU MTD at 18.) IEU has already advanced these arguments, and the Commission has already rejected them, multiple times. Rather than further waste the Commission's time and resources, AEP Ohio relies upon its September 3, 2014 Memorandum in Opposition to IEU's Motion to Dismiss and its December 16, 2014 Reply Comments in this case as if set forth fully herein. The Commission should decline to consider IEU's stale arguments yet again on rehearing.

**C. The Commission acted within its discretion in declining to address intervenors' preemption arguments.**

The Commission declined to address intervenor comments arguing that it should reject AEP Ohio's application in this docket on federal preemption grounds, finding that such issues "are best reserved for judicial determination." Finding and Order at 13. IEU argues that the Commission erred in declining to address this argument because the Commission has not declined to do so in other cases. (IEU AFR at 27-29.) But the Commission acted well within its discretion in doing so, and IEU offers no basis for forcing the Commission to reach this thorny constitutional issue.

As an initial matter, implicit in the Commission's approval of AEP Ohio's application in this case is the determination that the Commission's actions are not preempted here. Moreover, as AEP Ohio noted in its reply comments, the Commission fully adjudicated intervenors' preemption arguments in the *Capacity Charge* and *ESP II* cases; thus, those arguments, like the others IEU repeats on rehearing, are barred by the doctrines of *res judicata* and collateral estoppel. (See AEP Ohio Reply Cmts. at 4, n.1, citing *Office of the Consumers' Counsel*, 16 Ohio St.3d at 10 ("OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to re-litigate the issue of the RFC rate which was previously determined to be proper. . . . This question was directly at issue in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question.").) Additionally, as the Commission noted in its Finding and Order, FERC agrees that the Commission is not preempted; it approved an appendix to the Reliability Assurance Agreement that specifically references the Commission's decision asserting jurisdiction over AEP Ohio's wholesale capacity pricing in the *Capacity Charge* case. See Finding and Order at 13, n.1, citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,164, at P 24 (2013).

The Commission's decision not to consider intervenors' preemption arguments is also consistent with Commission precedent. The Commission has long presumed that statutes are constitutional and, therefore, has often left questions of constitutionality to the courts. *See, e.g., In re Rules Promulgated Under Section 4935.03, Revised Code*, Case No. 86-1140-GE-ORD, Entry ¶ 3 (Feb. 3, 1987) (“[E]nactments of the General Assembly are presumed to be constitutional, and since there has been no Ohio Supreme Court case declaring Section 4935.03, Revised Code, invalid, the Commission must presume that the statute is constitutional. The Commission has no authority to find a statute enacted by the Ohio General Assembly unconstitutional.”). The same principles apply here. The Commission was well within its discretion to decline to address intervenors' preemption arguments, and IEU offers no reason to revisit that decision.

Because the Commission acted within its discretion in declining to address intervenors' preemption arguments, the Commission need not address IEU's argument that jurisdictional challenges do not constitute collateral attacks. (*See* IEU AFR at 37-38.) Regardless of whether such challenges are a collateral attack in this case or are barred by *res judicata* and collateral estoppel (and, as set forth above and in AEP Ohio's reply comments, the Company submits that they are), the Commission is under no obligation to consider them and acted properly in declining to do so here. Accordingly, the Commission should disregard IEU's arguments on this issue.

**D. The Commission acted within its discretion in continuing the rate design for AEP Ohio's collection of the capacity deferrals through the RSR established in the *ESP II* case, but AEP Ohio does not oppose Kroger's rate design proposal, as long as any change is revenue neutral.**

The Commission was correct in noting that it has previously considered and established the RSR's rate design in the *ESP II* case. *See* Finding and Order at 14. The record evidence before the Commission in that proceeding supported the Commission's decision. It was appropriate for the Commission to leave the RSR's rate design unchanged because the purpose of this proceeding is limited to the verification of the capacity deferral amount authorized for collection through the RSR in *ESP II* and the finalization of post-ESP rates designed to collect that deferral plus carrying charges.

In its application for rehearing, Kroger advances several arguments to support its position that the Commission should reconsider Kroger's rate design proposal and modify the RSR accordingly. (*See generally*, Kroger AFR.) As it noted in its reply comments, as long as any change is revenue neutral, AEP Ohio does not oppose Kroger's proposal that the capacity deferrals which were allocated to customers on the basis of demand, be recovered from customers on that basis beginning on June 1, 2015. Nonetheless, the Company continues to defer to the Commission as to this issue.

**III. Conclusion**

For the reasons set forth above, the Commission should deny intervenors' applications for rehearing to the extent set forth in this memorandum contra.

Respectfully submitted,

/s/ Steven T. Nourse

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**Counsel for Ohio Power Company**

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the *Memorandum Contra of Ohio Power Company* has been served upon the below-named counsel by e-mail this 14th day of May, 2015.

*/s/ Steven T. Nourse*  
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