BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters	))))	Case No. 11-5906-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company	)))	Case No. 12-3133-EL-FAC
In the Matter of the Fuel Adjustment Clause for Ohio Power Company	))	Case No. 13-572-EL-FAC
In the Matter of the Fuel Adjustment Clause for Ohio Power Company	))	Case No. 13-1286-EL-FAC
In the Matter of the Fuel Adjustment Clause for Ohio Power Company	))	Case No. 13-1892-EL-FAC

MEMORANDUM CONTRA OF OHIO POWER COMPANY TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO COMPEL

I. INTRODUCTION

OCC has filed a motion to compel seeking to force Ohio Power Company (AEP Ohio) to produce information that is irrelevant to the issues presented here and beyond the scope of this proceeding. Specifically, OCC seeks to obtain discovery of information regarding the revenues collected through the Retail Stability Rider (RSR) during the ESP II term. The scope of this investigation is to determine the extent, if any, to which the Company has double-recovered demand charges under the Lawrenceburg and OVEC purchased power contracts through both: (1) the Fuel Adjustment Clause (FAC), which was subsequently unbundled into the Fixed Cost Rider (FCR), and (2) the State Compensation Mechanism (SCM) established by the Commission

to compensate AEP Ohio for provision of capacity service to support shopping load in the Company's service territory. Discovery of collected RSR revenues in this case is inappropriate because: (a) the investigation here – as to whether any portion of the Lawrenceburg/OVEC demand charges recovered in the FAC/FCR were also recovered through the $188.88/MW-day capacity rate under the adopted SCM – will necessarily subsume any double recovery questions about the capacity deferral balance because the deferrals are merely unrecovered portions of the $188.88/MW-day capacity rate; (b) the capacity deferral balance recovered through the RSR will be audited in another proceeding, as the Commission has already made clear, and those distinct issues are beyond the scope of this case; (c) the RSR revenues are not probative of anything about double recovery since the capacity deferral balance is only one component of the RSR and collected revenues do not relate directly or exclusively to capacity deferrals; and (d) any review or refund of the financial stability component of the RSR would constitute unlawful retroactive ratemaking under the established precedent of the Supreme Court of Ohio. Accordingly, the information sought by OCC can be used for no lawful or relevant purpose in this docket and OCC's motion to compel should be denied.

II. STANDARD OF REVIEW

Under Rule 4901-1-16(B), O.A.C., a "party may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding and which appears to be reasonably calculated to lead to the discovery of admissible evidence." *In the Matter of the Complaint of the Cleveland Electric Illuminating Co. v. Medical Center Co. et al.*, Case No. 95-458-EL-UNC, Entry at 3 (Oct. 15, 1998). The Supreme Court of Ohio has held that this standard "is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶83; *see also*

R.C. 4903.082 ("[T]he Rules of Civil Procedure should be used wherever practicable."). Civil Rule 26(B)(1) explains that a discovery request is "relevant to the subject matter involved in the pending action" if "it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" Civ.R. 26(B)(1).

But a party's entitlement to discovery is not unfettered, and it must be curtailed if it is unduly burdensome or oppressive, or if the information sought is not relevant. Courts may limit discovery to prevent "fishing expeditions" where the requested discovery is broad and the party requesting the discovery fails to demonstrate a likelihood that relevant evidence will be obtained. *Drawl v. Cleveland Orthopedic Ctr.*, 107 Ohio App.3d 272, 277-78 (1995), citing *Bland v. Graves*, 85 Ohio App.3d 644,620 N.E.2d 920 (1993). This Commission similarly has denied motions to compel discovery when the discovery requests related to issues beyond the scope of a proceeding. *See, e.g., In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company*, Case No. 99-1729-EL-ETP, *et al.*, Entry, 2000 Ohio PUC LEXIS 412, 3 (Apr. 24, 2000) (denying a motion to compel discovery related to service reliability and workforce levels because the "scope of the transition plan proceedings [was] not to evaluate the reliability, safety, or quality of the utilities' services at the present or throughout the market development period"); *In the Matter of the Application of Time Warner Communications of Ohio, L.P., et al.*, Case No. 94-1695-TP-ACE, Entry, 1995 Ohio PUC LEXIS 454, 17-18 (May 30, 1995).

And the Commission has routinely denied motions to compel that seek discovery of materials not relevant, not imperative to a decision in the case, and/or beyond the scope of a proceeding. *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA,

2003 Ohio PUC LEXIS 392 at *34-35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials "relevant to the subject matter of the proceeding" and denying motion to compel because "the information sought would not be relevant to the determination of [the present] matter"); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at *2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, "not imperative to a final in a final determination of [the] matter," overly broad, and because the respondent had already responded to several of the discovery requests at issue) *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 325 at *7-9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

III. ARGUMENT

OCC's motion to compel seeks information that is beyond the scope of this proceeding, is not calculated lead to the discovery of admissible evidence and is otherwise simply inappropriate for discovery in this case. Specifically, OCC seeks historical data concerning collected RSR revenues. OCC maintains (at 5, 8) that, in addition to collecting the Lawrenceburg/OVEC demand charges through the FAC and the SCM as examined by the Auditor, AEP Ohio also over-collected the demand charges through the RSR. This misguided theory is the sole basis for OCC's Interrogatory 10 in Set 4 of its discovery requests in this case, the question OCC seeks through its motion to compel to force AEP Ohio to answer. For the reasons set forth below, the Company's refusal to provide the information was proper and the Commission should deny the motion to compel.

The only connection between collected RSR revenues and the $188.88/MW-day SCM rate is the capacity deferral balance. But the Commission has already stated that there will be a

separate proceeding for reviewing the capacity deferrals which, among other things, will be reviewed to verify that the $1/MWH portion of RSR revenues allocated by the Commission to reduce the deferral balance has been properly applied by the Company during the ESP II term.[1] There is no need to duplicate those efforts in this docket. Further, since only a minor portion of the RSR revenues collected during the *ESP II* term relate to the capacity deferrals and the balance of RSR revenues constitute the approved financial stability charge, there is no useful purpose that discovery regarding the RSR revenues would serve in this case. Moreover, while it is premature to discuss a remedy in this case, the Commission has already determined earlier in this proceeding that it would make any adjustments for double recovery through the FAC reconciliation process – not through adjustment of the SCM or ESP generation rates. (February 13, 2014 Entry on Rehearing at 4-5.)

Regardless, if the Commission does decide to adjust the capacity deferrals based on a finding of double recovery, the result would be – over the Company's objections – a reduction of future RSR collections by that remedial amount. So again, historical RSR collections are irrelevant. Similarly, an adjustment through the FAC reconciliation process would make ratepayers whole without regard to the level of RSR revenues collected historically.[2] Indeed, OCC's attempt to count both the SCM and the RSR capacity deferrals would amount to double credit against the costs recovered once through the FAC – because the capacity deferrals recovered (and to be recovered) through the RSR are the same dollars that were authorized for recovery through the SCM ($188.88/MW-day) but which were unrecovered through the lower

[1] The *ESP II* Opinion and Order (at 36) provided that $1/MWH of the RSR will be allocated to capacity deferral recovery. On page 13 of its April 2, 2015 Finding and Order in Case No. 14-1186-EL-RDR (Retail Stability Rider Case), the Commission adopted AEP Ohio's proposal to conduct a financial audit of the capacity deferral balance and indicated that a subsequent entry would establish the process for review of the auditor's findings and recommendations.

[2] Of course, AEP Ohio strongly disagrees with the notion that double recovery has occurred but will leave that debate of the merits until later.

RPM capacity rate collected from CRES providers. A determination of whether the $188.88/MW-day rate has recovered any of the Lawrenceburg/OVEC demand charges is all that is needed and it would be double counting if the Commission were to treat both a portion of the $188.88/MW-day capacity rate and a portion of the RSR deferral recovery as double recovered demand charges – effectively punishing the Company twice. Thus, compelling discovery to produce collected RSR revenues in this case is both unnecessary and burdensome.

OCC's confusion and misapprehension about the relationship between the SCM and the RSR is evident from its motion to compel:

> OCC agrees with the auditor's report, inasmuch as it determined that AEP Ohio has over-collected the Lawrenceburg and OVEC capacity costs through the FAC and SCM since August 8, 2012 when ESP II became effective. However, OCC disagrees with the report to the extent that it failed to address AEP Ohio's *additional over-collection* of the capacity costs. Specifically, the FAC (and subsequent Fixed Cost Rider ("FCR") also should be adjusted to reconcile the portion of the Lawrenceburg and OVEC capacity costs that AEP Ohio over-collected *through two other mechanisms*: the Retail Stability Rider ("RSR") approved in ESP II and the Generation Cost Recovery Rider ("GCR") approved in the CBP Case.

OCC Motion to Compel at 8 (emphasis added). Setting its position on the GCR aside as extraneous to the current discovery dispute,[3] the fundamental point supporting OCC's motion to compel is based on a false premise that the capacity deferrals being recovered through the RSR are somehow different and in addition to the capacity costs reflected in the SCM capacity charge. In reality, the capacity deferrals are the same costs that were reflected in the approved $188.88/MW-day cost cap but which were *not recovered* through the RPM price charged to CRES providers as part of the SCM. So, it would be patently unreasonable to doubly count both the capacity deferrals established by the SCM and the RSR revenues that recover those deferrals

[3] As noted (at 5) by OCC, the Company provided the information requested by OCC in discovery concerning the GCR. Unlike the RSR revenue, there is no other proceeding that will audit or review the GCR collections. Regardless, the GCR data is not at issue here because there is no pending discovery dispute about it.

against the Company when they are the same dollars only being recovered once *either* through the RPM price element of the SCM or the RSR. Rather, the issue in this case is whether the SCM rate reflects any of the same Lawrenceburg/OVEC demand charges that were recovered through the FAC – and any determinations about the RSR are irrelevant and beyond the scope of this case.

Stated differently, because the historical RSR collections will be separately audited in another docket in conjunction with the prospective implementation of the RSR, probing for the collected RSR revenues in this case adds nothing to litigating the issues presented and would improperly inject issues here that are already slated for decision in a different docket. The RSR is merely the vehicle for receiving the unrecovered portion of the $188.88/MW-day rate for shopping capacity during the ESP II term – $1/MWh of the RSR during the ESP II term and the full $4/MWh during the post-ESP recovery period go toward recovery of the capacity deferrals.[4] In any case, the deferral balance will be audited separately and any appropriate adjustments resulting from RSR revenues received will be made as a result of that audit process and do not need to be addressed in this case. If there is any double recovery between the FAC and the SCM as to the Lawrenceburg/OVEC demand charges, it does not matter whether the costs were already recovered through past RSR revenue or deferred for future recovery through the RSR; rather, the extent, if any, of such an overlap will be determined by the Commission and an FAC adjustment will be made if appropriate. Thus, while the portion of RSR revenues received to date to partially reimburse the Company for the incurred capacity costs affects the current

[4] Per the *ESP II* Opinion and Order (at 31-38), the balance of the RSR (beyond the $1/MWh) was a financial stability charge to enable the Company to earn a reasonable return during the transition period of ESP II that was not based on the discounted capacity charges. The fact that RSR revenues collected during the ESP II term do not relate directly or exclusively to the recovery of capacity deferrals is yet another reason the collected RSR revenues do not inform the double recovery issues. As further explained below, any adjustment or refund of the financial stability component of the RSR would amount to unlawful retroactive ratemaking.

deferral balance (*i.e.*, the subject of the separate audit), it does not relate to the issue of whether the $188.88/MW-day rate cap recovers any of the Lawrenceburg/OVEC demand charges that were recovered through the FAC (*i.e.*, the issue in this case).

In reality, the auditor and parties already have the information needed to fully litigate the double recovery issues in this case. Indeed, the Company has been forthcoming and cooperative in facilitating a review of the double recovery issues, already responding to approximately 100 discovery requests from the auditor and the parties in this case – providing reams of cost data, accounting records and other financial records relating to the Lawrenceburg/OVEC demand charges and the SCM. And the auditor did not seek discovery of the collected RSR revenues because it is simply not germane to the inquiry of whether the $188.88/MW-day rate has recovered any of the Lawrenceburg/OVEC demand charges.[5] Moreover, once the Company is permitted to file testimony to address the auditor's recommendations, there will be additional opportunities for discovery of the issue presented in this case. But since the OCC's request for collected RSR revenue is out of bounds, the motion to compel should be rejected – especially since the OCC already is being provided access to all the information it needs to fully litigate the issues properly presented in this case.

The scope of the audit – and thus the scope of this proceeding – was limited to the overlap, if any, between the FAC/FCR and the SCM. The RFP issued by the Commission to define the investigation properly stated that the purpose of the investigation is as follows:

> To the extent purchased power is properly included in the FAC, both capacity and energy associated with those purchases are recoverable through the FAC. In addition, capacity costs are recovered through Ohio Power's state compensation mechanism. The extent to which both mechanisms recover the same costs is unknown.

[5] The scope of the audit – and thus the scope of this proceeding – was limited to the overlap, if any, between the FAC/FCR and the SCM. The RFP issued by the Commission to define the investigation properly stated that the purpose of the investigation is as follows:

April 16, 2014 Entry, Attachment at 2. Thus, OCC's attempted foray into collected RSR revenue is beyond the scope of this investigation.

Likewise, to the extent OCC seeks access to previously collected RSR revenues in order to facilitate its ongoing campaign that the RSR allowed the Company to collect revenues OCC considers unlawful, such matters are already being litigated before the Supreme Court of Ohio[6] and are beyond the scope of this proceeding and otherwise inappropriate and unlawful. As noted above, the major portion of the RSR (aside from the $1/MWh assigned to recover the capacity deferrals) was a financial stability charge to enable the Company to earn a reasonable return during the transition period of ESP II that was not based on the discounted capacity charges. (*ESP II* Opinion and Order at 31-38.) The financial stability charge aspect of the RSR is not within the scope of this double recovery investigation and it would be unlawful retroactive ratemaking to reverse any of the prior RSR collections.[7] *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462 at ¶¶ 47-55. In sum, neither the financial stability component nor the capacity deferral component of the RSR is properly at issue in this case.

Finally, as its default catch-all position, OCC cites language out of context from the Commission's December 4, 2013 rehearing decision in this case to support the notion that OCC has license to force discovery on "any concerns" regarding over-recovery of the

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[6] To the extent that OCC's objective is to attack the RSR, it has had ample opportunity to do so, both in Case Nos. 11-346 and 11-348-EL-SSO, where the RSR was first established (and in its appeal of the Commission's decision in that proceeding, *see* Supreme Court of Ohio Case No. 2013-521) and in Case No. 14-1186-EL-RDR, where the current RSR was established to enable the recovery of the remaining capacity cost deferrals. However, it is not appropriate to permit OCC to pursue that objective in this proceeding.

[7] OCC's attempt to address retroactive ratemaking issues on pages 12-13 of its memorandum in support is misguided. The Company's prior argument about the SCM and Base G rates was being addressed by the Commission in its February 13, 2014 Entry on Rehearing in this case and the Commission determined that it would make any adjustments using the FAC mechanism and not Base G rates or the SCM. The Commission's conclusion supports and does not undermine AEP Ohio's current position that prior RSR revenues cannot be revisited. Regardless, the Court's rulings on this subject are controlling.

Lawrenceburg/OVEC demand charges. Contrary to OCC's desire, it does not define or control the scope of this proceeding. The argument that the Commission delegated to OCC the ability to pursue discovery for "any concerns" OCC has is patently unreasonable and would violate the Company's due process rights, let alone the Commission's own discovery rules. In reality, the Commission must control the scope of this proceeding – in conformance with the law and while respecting its prior adjudicated decisions on the subject.

The scope of this proceeding is focused on the overlap, if any, between the FAC/FCR recovery of the Lawrenceburg/OVEC demand charges and the SCM cost cap. To the extent the Commission needs to further clarify and reinforce that point in ruling on OCC's motion to compel, it should do so. In any case, application of the proper standard for discovery clearly yields a conclusion that collected RSR revenues are out of bounds in this proceeding.

IV. CONCLUSION

For the foregoing reasons, OCC's motion to compel should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the Memorandum Contra of Ohio Power Company was served by electronic mail upon the individuals listed below this 31st day of July, 2015.

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Summary: Memorandum Contra to the Office of the OCC's Motion to Compel electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company