

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter 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 Clauses for Ohio Power Company))	Case No. 13-572-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company))	Case No. 13-1286-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Ohio Power Company))	Case No. 13-1892-EL-FAC

**INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO
OHIO POWER COMPANY'S MEMORANDUM CONTRA TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO COMPEL**

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The Office of the Ohio Consumers’ Counsel (“OCC”) has sought discovery regarding the revenue Ohio Power Company (“AEP-Ohio”) collected through its Retail Stability Rider (“RSR”) from August 2012 through the most recent month for which AEP-Ohio has data.¹ AEP-Ohio refused to provide the information in response to OCC’s legitimate discovery request, prompting OCC to file a Motion to Compel with the Public Utilities Commission of Ohio (“Commission”) on July 16, 2015. AEP-Ohio responded to OCC’s Motion to Compel and has used its Memo Contra² as an

¹ Motion to Compel of the Office of the Ohio Consumers’ Counsel at 1 (July 16, 2015) (“OCC Motion to Compel”).

² Memorandum Contra of Ohio Power Company to the Office of the Ohio Consumers’ Counsel’s Motion to Compel (“AEP-Ohio Memo Contra”).

opportunity to advance claims that the Commission should restrict the scope of the review of AEP-Ohio's double-recovery of certain capacity costs. For the following reasons, the Commission should again deny AEP-Ohio's attempt to redefine the scope of the review of AEP-Ohio's double-recovery.

I. **BACKGROUND**

In 2010, AEP-Ohio made a filing at the Federal Energy Regulatory Commission ("FERC") requesting that FERC authorize a significant above-market price increase for capacity service such that AEP-Ohio's compensation for capacity service was \$355 per megawatt-day ("MW-day").³ Review of AEP-Ohio's requested above-market increase in its capacity compensation ultimately made its way to the Commission. In the *Capacity Case*⁴ before this Commission, AEP-Ohio offered a witness, Mr. Allen, to support its request to charge the proposed \$355/MW-day price to competitive retail electric service ("CRES") providers serving shopping customers in its territory. In the *Capacity Case*, Mr. Allen testified that AEP-Ohio's base generation rates produced compensation roughly equivalent to a \$355/MW-day charge.⁵ Mr. Allen also testified in the *ESP II Case*⁶ claiming that AEP-Ohio's base generation rates "are essentially the same" as its proposed \$355/MW-day rate.⁷

³ *American Electric Power Service Corporation*, FERC Docket No. ER11-2183, Application at 3 (Nov. 24, 2010). This filing was made by American Electric Power Service Corp. ("AEPSC") on AEP-Ohio's behalf.

⁴ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC ("*Capacity Case*").

⁵ *Capacity Case*, Tr. Vol. III at 635-637.

⁶ *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. ("*ESP II Case*," "ESP" refers to electric security plan).

⁷ *ESP II Case*, Direct Testimony of William A. Allen at 9 (Mar. 30, 2012).

In the *Capacity Case*, the Commission largely relied upon AEP-Ohio's claimed "costs" as inputs into the ratemaking methodology that the Commission utilized to conclude that AEP-Ohio's "cost" of capacity was \$188/MW-day.⁸ The main difference between the \$355/MW-day price and the \$188/MW-day price was the energy revenue offset that the Commission found was appropriate to take into account.⁹ The Commission authorized AEP-Ohio to collect a portion of the \$188/MW-day price through May 31, 2015, and authorized accounting changes for AEP-Ohio to permit AEP-Ohio to defer the remaining portion of the \$188/MW-day price.¹⁰

In the *ESP II Case*, the Commission authorized a nonbypassable charge, the RSR, at a rate of \$3.50 per megawatt-hour ("MWh") and \$4.00/MWh during the term of the ESP II.¹¹ The Commission directed AEP-Ohio to apply \$1/MWh of the RSR revenue as a credit against the accumulating capacity deferral authorized in the *Capacity Case*.¹² In the *ESP II Case*, the Commission also directed AEP-Ohio to conduct energy-only auctions in increasing percentages over the term of the ESP II.

Subsequently, in the *CBP Case*¹³ AEP-Ohio requested authority to bifurcate the Fuel Adjustment Clause ("FAC") into two components, the Auction Phase-in Rider and the Fixed Cost Rider ("FCR"); the latter of which is relevant here. Under the FCR, AEP-Ohio proposed to continue collecting from customers its fixed demand costs (also referred to herein as capacity costs) associated with its purchase power arrangements

⁸ *Capacity Case*, Opinion and Order at 33-34 (July 2, 2012).

⁹ *Id.* at 34-35.

¹⁰ *Id.* at 23.

¹¹ *ESP II Case*, Opinion and Order at 36 (Aug. 8, 2012).

¹² *Id.*

¹³ *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 (the "*CBP Case*").

with the Lawrenceburg Generating Station (“Lawrenceburg”) and the Ohio Valley Electric Corporation (“OVEC”). AEP-Ohio also proposed to adjust base generation rates for the final five months of the ESP II to \$188/MW-day.¹⁴

During the hearing in the *CBP Case*, various parties including the Industrial Energy Users-Ohio (“IEU-Ohio”) urged the Commission to reject the FCR on grounds that authorizing the FCR and extending it through the end of the ESP II would allow AEP-Ohio to double-recover its capacity costs.¹⁵ As the evidence in the *CBP Case* demonstrated, AEP-Ohio was recovering the Lawrenceburg and OVEC capacity costs through the \$188/MW-day price.¹⁶ Base generation rates during the ESP II were also set at rates equal to or greater than \$188/MW-day.¹⁷ Accordingly, IEU-Ohio and others argued that the combination of base generation rates and the \$188/MW-day price applicable to shopping load allowed AEP-Ohio to fully recover the Lawrenceburg and OVEC capacity costs.¹⁸ Based on this conclusion, IEU-Ohio and others argued that the extension of the FCR would allow AEP-Ohio to double-recover the Lawrenceburg and OVEC capacity costs.¹⁹

The Commission authorized AEP-Ohio’s requested bifurcation, but directed AEP-Ohio to begin blending the \$188/MW-day price into AEP-Ohio’s base generation rates (which were approximately \$355/MW-day) with the commencement of AEP-Ohio’s

¹⁴ *CBP Case*, Direct Testimony of David M. Roush at 6 (June 14, 2013).

¹⁵ *CBP Case*, Initial Brief of IEU-Ohio at 10-11, 11 at n.39 (Aug.16, 2013); *CBP Case*, Tr. Vol. I at 242; FirstEnergy Solutions (“FES”) Initial Brief at 11-14 (Aug 16, 2013).

¹⁶ *Id.*

¹⁷ *Id.*; *CBP Case*, Opinion and Order at 14 (Nov. 13, 2013) (ordering that the \$355/MW-day base generation rate be blended with the \$188/MW-day rate over the term of the ESP II).

¹⁸ *CBP Case*, Initial Brief of IEU-Ohio at 10-11, 11 at n.39 (Aug.16, 2013); *CBP Case*, Tr. Vol. I at 242; FES Initial Brief at 11-14 (Aug 16, 2013).

¹⁹ *Id.*

energy-only auctions.²⁰ The Commission further held that the *CBP Case* was not the appropriate proceeding to review whether AEP-Ohio's FAC/FCR were recovering costs that AEP-Ohio was already recovering elsewhere.²¹

In its Entry selecting an auditor for AEP-Ohio's FAC in this proceeding, the Commission found that it was appropriate to review the double-recovery allegations in this proceeding.²²

II. **ARGUMENT**

A. **The Commission's rules are designed to allow a broad scope of discovery**

Rule 4901-1-16(B), Ohio Administrative Code ("O.A.C."), provides "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding." The Rule continues "[i]t is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Thus, discovery is proper if it seeks evidence that is either relevant or if the discovery is reasonably calculated to lead to the discovery of admissible evidence. As noted by the Commission, its "rules are designed to allow broad discovery of material that is relevant to the proceeding in question and to allow the parties to prepare thoroughly and adequately for hearing."²³ OCC's discovery request at issue in its Motion to Compel falls within the Commission's broad scope of permissible discovery.

²⁰ *CBP Case*, Opinion and Order at 14 (Nov. 13, 2013).

²¹ *Id.*

²² Entry at 3-4 (Dec. 4, 2013).

²³ *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO, *et al.*, Entry at 3 (Oct. 1, 2008).

B. OCC's Motion to Compel should be granted because even under AEP-Ohio's preferred audit scope, AEP-Ohio's own admissions support a finding that OCC's discovery is reasonably calculated to lead to the discovery of admissible evidence

In its Memo Contra, AEP-Ohio admits that there is a “connection between collected RSR revenues,” OCC’s discovery request, “and the \$188.88/MW-day SCM rate;” the latter AEP-Ohio acknowledges is a relevant matter within what it views as a proper audit scope.²⁴ In the same vein, AEP-Ohio also acknowledges that a portion of the RSR revenue relates to the capacity deferral.²⁵ Having admitted that OCC’s discovery request is connected to (and relates to) what AEP-Ohio also admits is a relevant matter, AEP-Ohio fails to provide any convincing argument regarding how the discovery is not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, even under AEP-Ohio’s already-rejected preferred narrow audit scope (see Section C below), OCC’s discovery request would still fall within the proper scope of discovery as it is reasonably calculated to lead to the discovery of admissible evidence.

C. The Commission should again reject AEP-Ohio's attempt to narrow the scope of the double-recovery audit in this proceeding

As noted above, in its Entry selecting an auditor for AEP-Ohio’s FAC/FCR in this proceeding, the Commission directed that the auditor review the alleged double-recovery of AEP-Ohio’s capacity costs.²⁶ AEP-Ohio filed an Application for Rehearing raising three arguments in support of its effort to prevent an audit of the alleged double-recovery in this proceeding.²⁷ The Commission denied rehearing, but AEP-Ohio now recycles those same arguments that the Commission rejected as grounds to deny

²⁴ AEP-Ohio Memo Contra at 4.

²⁵ *Id.* at 5.

²⁶ Entry at 3-4 (Dec. 4, 2013).

²⁷ Application for Rehearing of AEP-Ohio (Jan. 3, 2014).

OCC's Motion to Compel. The Commission should once again refuse to approve AEP-Ohio's attempt to limit the scope of the Commission's review of the double-recovery.

Initially, in its January 3, 2014 Application for Rehearing, AEP-Ohio argued that it was inappropriate to review the double-recovery in this proceeding. The Commission rejected AEP-Ohio's argument:

The Commission finds that AEP Ohio's first ground for rehearing lacks merit. In the *CBP Case*, we acknowledged the double-recovery allegations raised by the intervenors, but determined that the *CBP Case* was not the proper forum for resolution of the alleged double recovery. *CBP Case*, Opinion and Order (Nov. 13, 2013) at 16. Subsequently, in the FAC Audit Entry, the Commission reasonably directed that the double-recovery allegations raised in the *CBP Case* be reviewed and investigated in these FAC proceedings. The alleged double recovery partially stems from capacity costs that are currently recovered through AEP Ohio's FAC and are soon to be recovered, upon unbundling of the FAC, through the FCR. Therefore, the Commission does not agree that the alleged double recovery is not a FAC-related issue or is in any way not a proper subject for review in these FAC proceedings.²⁸

As reflected in its Entry on Rehearing, the Commission held that the proper scope of the double-recovery audit would include a review of the "allegations" raised by parties in the *CBP Case*. These "allegations" included claims that AEP-Ohio was recovering all of the Lawrenceburg and OVEC costs through the FAC/FCR, and then double-recovering those same costs through the \$188/MW-day capacity price applicable to shopping load, and through base generation rates (which were blended with the \$188/MW-day Generation Cost Rider ("GCR") rates).²⁹

²⁸ Entry on Rehearing at 4 (Feb. 13, 2014).

²⁹ *CBP Case*, Initial Brief of IEU-Ohio at 10-11, 11 at n.39 (Aug.16, 2013); *CBP Case*, Tr. Vol. I at 242; FES Initial Brief at 11-14 (Aug 16. 2013).

AEP-Ohio also previously argued that “multiple limitations” should have been imposed on the scope of the audit.³⁰ Among these, AEP-Ohio claimed that it was unlawful and unreasonable for the Commission to leave the scope of the double-recovery audit “open-ended.” The Commission rejected AEP-Ohio’s argument that the “open-ended” scope of the double-recovery audit was unlawful or unreasonable.³¹

Finally, AEP-Ohio attempted to limit the scope of the hearing by presenting arguments on the merits claiming that there could be no double-recovery. The Commission noted that because these arguments “appear to concern the merits of the double recovery allegations” it was not appropriate to rule on them at that stage of the proceeding.³² The Commission further provided that “[i]f the investigation reveals that double-recovery has occurred and adjustments are recommended, the Commission will, at that point, establish a process for AEP Ohio and intervenors to address the findings and recommendations in the audit report.”³³ At this point, there has been an audit report issued by Baker Tilly concluding that a double-recovery occurred.³⁴ Presumably, after Energy Ventures Analysis, Inc. (“EVA”) concludes the audits for 2014 and the first five months of 2015, the Commission will establish the aforementioned process by setting this matter for a hearing to allow AEP-Ohio, IEU-Ohio, and others to present the merit arguments the Commission deferred ruling on.

In a renewed attempt to limit the scope of this proceeding through its opposition to providing discovery responses, AEP-Ohio restates the same arguments that the Commission previously rejected. Specifically, in its Memo Contra to OCC’s Motion to

³⁰ AEP-Ohio Application for Rehearing at 4 (Jan. 3, 2014).

³¹ Entry on Rehearing at 5 (Feb. 13, 2014).

³² *Id.* (emphasis added).

³³ *Id.*

³⁴ Cite

Compel, AEP-Ohio requests that this proceeding be limited to a review of “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”³⁵ Again, AEP-Ohio seeks to present its merit arguments regarding what should and should not be considered in calculating the extent of the alleged double-recovery in an attempt to limit the scope of the Commission’s review. For the same reasons relied upon by the Commission in its February 13, 2014 Entry on Rehearing, the Commission should again reject AEP-Ohio’s arguments that go to the merits of the magnitude of AEP-Ohio’s double-recovery, and should instead allow parties to fully present their positions at an evidentiary hearing.

In sum, in its Memo Contra, AEP-Ohio recycles arguments that the Commission has already rejected in an attempt to secure a favorable ruling on the merits of AEP-Ohio’s claims prior to an evidentiary hearing. The Commission should again reject AEP-Ohio’s arguments to narrow the scope of the hearing in a manner that could prevent parties from otherwise presenting relevant evidence during the hearing on the issue of the magnitude of AEP-Ohio’s double-recovery of OVEC and Lawrenceburg capacity costs.³⁶

³⁵ AEP-Ohio Memo Contra at 1.

³⁶ Additionally, the Attorney Examiners are well versed in ruling on parties’ relevance objections, and AEP-Ohio has not presented any new or legitimate reason for the Commission to deprive the Attorney Examiners of the ability to rule on relevance objections during the hearing in this matter.

III. CONCLUSION

Because AEP-Ohio admits that OCC's discovery request is related to the recovery of the same capacity costs at issue in the double-recovery audit in this proceeding, it is evident that OCC's request is reasonably calculated to lead to the discovery of admissible evidence. The Commission should also uphold its prior Entry on Rehearing in this matter and should again reject AEP-Ohio's arguments seeking to narrow the scope of this hearing. Accordingly, the Commission should grant OCC's Motion to Compel.

Respectfully submitted,

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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 to Ohio Power Company's Memorandum Contra to the Office of the Ohio Consumers' Counsel's Motion to Compel*, was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 7th day of August, 2015, via electronic transmission.

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