

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)
Approval of Ohio Power Company's)
Proposal to Enter into an Affiliate)
Power Purchase Agreement for) Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase)
Agreement Rider)

In the Matter of the Application of)
Ohio Power Company for Approval of) Case No. 14-1694-EL-AAM
Certain Accounting Authority)

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

In this proceeding, the Ohio Power Company (“AEP-Ohio”) seeks authorization to enter into a purchase power agreement with its unregulated competitive affiliate, AEP Generation Resources (“AEP Generation”). AEP-Ohio also seeks authority to begin to credit or charge customers for the difference between what it pays its affiliate and the Ohio Valley Electric Company (“OVEC”) for the energy, capacity, and ancillary services received under purchase power agreements and what it receives from sales of the power attributes in the wholesale markets established by PJM Interconnection, LLC (“PJM”).

On December 14, 2015, AEP-Ohio, the Commission Staff (“Staff”), and several parties filed a Joint Stipulation and Recommendation (“Stipulation”). Joint Ex. 1. The Stipulation includes provisions addressing the implementation of AEP-Ohio’s application. *Id.* at 4-9. Additionally, the Stipulation provides that AEP-Ohio will file a

separate application requesting that its current electric security plan (“ESP”) be extended through May 31, 2024.

In the provisions of the Stipulation outlining the terms AEP-Ohio will include in the application to extend the ESP, AEP-Ohio agrees to seek to amend the interruptible power tariff and credit program (“IRP-D”) to extend it for the full ESP term for current customers. The amendment would also provide for an increase of the load that could participate in the IRP-D of up to 250 megawatts (“MW”). The expanded load would be available to signatory and non-opposing parties. The amendment would also provide that the load limit that may be subscribed under the IRP-D could be increased by an additional 25 MW for signatory parties if an additional 100 MW of additional interruptible load subscribes during the 12 months immediately following approval of the Stipulation. Finally, the amendment would include a provision to increase the IRP-D credit from \$8.21/kilowatt (“KW”)-month to \$9/KW-month starting in June 2018. *Id.* at 10-11.

In the same section of the Stipulation addressing the amendment to the IRP-D, the Signatory Parties agree that the Stipulation does not constitute an amendment to the AEP-Ohio energy efficiency and peak demand reduction (“EE/PDR”) plan, and “that nothing in this Stipulation affects a customer’s opt-out right under R.C. 4928.6612. ... IRP tariff customers may opt out of the opportunity and ability to obtain direct benefits from AEP Ohio’s EE/PDR Plan as provided in S.B. 310.” *Id.* at 11-12.

Following a hearing concerning the Stipulation, parties were directed and filed initial briefs on February 1, 2016.¹ In their initial briefs, the Environmental Law and Policy Center, Environmental Defense Fund, and Ohio Environmental Council

¹ Industrial Energy Users-Ohio (“IEU-Ohio”) did not file an initial brief, but reserved its right to file a reply brief.

(collectively, “ELPC”) and Ohio Manufacturers’ Association Energy Group (“OMAEG”) urge the Commission to reject the Stipulation in part because they find fault with the provisions of the Stipulation addressing the IRP-D. ELPC argues that the provision concerning the right of customers taking service under the IRP-D to opt out of the EE/PDR program would violate R.C. 4928.6613. Initial Post-Hearing Brief of the Environmental Law and Policy Center, Environmental Defense Fund, and Ohio Environmental Council at 58 (Feb. 1, 2016) (“ELPC Brief”). OMAEG argues that the limitation of eligibility to signatory and non-opposing parties to the expanded IRP-D load is unfair and that the cost of expanding the program is too great. Initial Brief of the Ohio Manufacturers’ Association Energy Group at 58-61 (Feb. 1, 2016) (“OMAEG Brief”).

For the reasons discussed below, the Commission should reject the arguments concerning the IRP-D of ELPC and OMAEG.

II. THE ARGUMENTS OF ELPC AND OMAEG CONCERNING PROVISIONS THAT ARE NOT BEFORE THE COMMISSION ARE PREMATURE

Under the three-prong test the Commission has adopted to review stipulations, the Commission addresses whether the Stipulation is the product of serious bargaining among capable and knowledgeable parties, whether the Stipulation, as a package, benefits ratepayers and the public interest, and whether the Stipulation violates any important regulatory principles. *Office of the Consumers’ Counsel v. Pub. Util. Comm’n of Ohio*, 64 Ohio St. 3d 123, 126 (1992).

In their briefs, ELPC and OMAEG ask the Commission to address the merits of provisions (including the IRP-D-related provision) that the Stipulation requires AEP-Ohio to include in an application seeking the authorization to modify the current ESP. The issue presented to the Commission in this case, however, is not whether modifications

to the current ESP are lawful and reasonable. At this point, the only issue before the Commission is whether the Stipulation's provision providing that AEP-Ohio will seek to modify its current ESP violates the three-prong test. Thus, the merit claims are not ripe for review.²

III. EVEN IF THE ARGUMENT OF ELPC WAS NOT PREMATURE, THE COMMISSION SHOULD REJECT IT BECAUSE THE ARGUMENT IS INCORRECT AND ITS APPLICATION WOULD REDUCE CUSTOMER INCENTIVES TO MAKE DEMAND RESPONSE AVAILABLE TO AEP-OHIO FOR THE BENEFIT OF SYSTEM RELIABILITY

ELPC's argument that the provision of the Stipulation concerning the IRP-D is unlawful rests on its claim that R.C. 4928.6613 prohibits a customer to take service under the IRP-D and at the same time to opt out of the costs and benefits of AEP-Ohio's EE/PDR program under R.C. 4928.6611. ELPC Brief at 57. ELPC, however, incorrectly assumes that the IRP-D is a part of the EE/PDR plan. Moreover, its argument, if accepted, would reduce the incentive for customers with demand response capabilities to make those capabilities available to AEP-Ohio. Such a result would injure other customers and system reliability.

Initially, it is incorrect to assume, as ELPC does, that the IRP-D is part of the AEP-Ohio EE/PDR plan such that a customer taking service under the IRP-D cannot elect to opt out under R.C. 4928.6611. The IRP is a provision of the AEP-Ohio tariff that is approved as part of the ESP, not as part of its portfolio plan. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer*

² Moreover, a proposal to offer an amendment in a future proceeding does not violate a regulatory principle. Current law provides that the Commission can amend its ESP order under proper circumstances. *In re Application of Ohio Power Co.*, Slip Op. 2015-Ohio-2056 ¶ 16 (June 2, 2015). Because the Commission can lawfully change its orders in an ESP case if the proper circumstances are demonstrated, the lawfulness of the provision of the Stipulation that requires AEP-Ohio to file an amendment does not in itself present a violation of Ohio law or regulatory policy.

Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Case Nos. 13-2385-EL-SSO, et al., Opinion and Order at 40 (Feb. 25, 2015) (“ESP III”). If there were no portfolio plan, there would still be an IRP-D. Additionally, the IRP-D benefits extend beyond AEP-Ohio’s compliance with EE/PDR requirements. As the Commission has previously found, the IRP-D advances “numerous benefits, including the promotion of economic development and the retention of manufacturing jobs.” *Id.* Because the IRP-D is separately approved and provides benefits that extend beyond compliance with EE/PDR requirements, a customer electing to take service under the IRP-D should not be deemed to be taking a benefit of the EE/PDR plan.³ Accordingly, the provision of the Stipulation making explicit that a customer taking service under the IRP-D may elect to opt out of the portfolio plan under R.C. 4928.6611 does not violate the limitation contained in R.C. 4928.6613.

Taking ELPC’s argument concerning the availability of the opt-out provided under R.C. 4928.6611 to R.C. 4928.6613 to its logical conclusion, moreover, would encourage customers to not offer their demand response capabilities to AEP-Ohio. The streamlined opt-out would be available to a customer eligible to participate in the IRP-D if the customer successfully bids its demand response into the PJM market. An opt-out customer could also use its demand response to reduce its capacity obligation without loss of the statutory opt-out right. These customers could benefit from reducing their

³ The question whether a customer taking service under the IRP-D is taking a benefit of the portfolio plan is distinct from the issue whether changes in the recovery mechanism constitute an amendment to the existing plan. Had the Commission revised the recovery mechanism as requested by AEP-Ohio in its first application for rehearing in the ESP III case, that change would have amended the EE/PDR plan. See *ESP III*, Memorandum of Industrial Energy Users-Ohio in Opposition to the Applications for Rehearing of the Ohio Power Company, Ohio Manufacturers’ Association Energy Group, and Environmental Advocates at 13 (Apr. 6, 2015). Whether the modification of the ESP is an amendment becomes irrelevant beginning January 1, 2017 because all current plans terminate and any eligible customer may elect to opt out of the costs and benefits of a portfolio plan. See Substitute Senate Bill 310, Section 6 and R.C. 4928.6611-4928.6613.

capacity charges and have no obligation to offer those capabilities to AEP-Ohio. If the customer participates in the IRP-D, however, that customer is subject to unlimited emergency interruptions. *ESP III*, Opinion and Order at 40. The customer gives up its right to use emergency-related demand response as it may see fit, and AEP-Ohio is then able to use this demand response capability to address emergency circumstances that might otherwise cause involuntary interruptions of service to other non-IRP customers.

If the Commission accepted EPLC's argument, however, customers with demand response capabilities would be deterred from taking service under the IRP-D since they would not be permitted to opt out of the EE/PDR costs and benefits under R.C. 4928.6611 to 4928.6613. As a result, AEP-Ohio and its other customers would not receive the full collective benefit of larger customers' demand response.

Establishing barriers to securing demand response resources should not be an outcome of the Commission's review of the Stipulation. Accordingly, the Commission should reject ELPC's argument that the provision of the Stipulation recognizing that IRP-D customers have the right to opt out under R.C. 4928.6612 violates R.C. 4928.6613.

IV. EVEN IF THE ARGUMENT OF OMAEG WAS NOT PREMATURE, THE COMMISSION SHOULD REJECT IT BECAUSE IT IS WITHOUT MERIT

On the merits of the proposed amendment to expand the IRP-D, OMAEG argues that the Commission should expand the eligible customers and that the expansion would be too costly. *Compare* OMAEG Brief at 58-59 (limiting eligibility under an expanded IRP-D is anticompetitive) *with id.* at 59 (costs associated with expanding the

IRP-D greatly outweigh the benefits for program participants). The Commission should reject OMAEG's argument because it is internally contradictory and unsupported.

Initially, the Commission should reject OMAEG's argument because its internal contradiction renders the argument nonsensical. On the one hand, OMAEG claims that other non-parties to the Stipulation should have access to an expanded IRP-D; on the other hand, it asserts that the expansion of the IRP-D is too expensive. In other words, OMAEG is asking the Commission to approve the OMAEG proposal to more aggressively expand the IRP-D and, at the same time, to block the proposed expansion of the IRP-D. Because OMAEG's argument is internally contradictory, the Commission should reject it for that reason alone.

Moreover, OMAEG's claim that the expansion is too expensive lacks any apparent support in the record. In the absence of analysis, it is not appropriate for the Commission to accept OMAEG's claims. See *ESP III*, Opinion and Order at 68 (Commission refused to alter allocation methodology because no bill impact analysis was provided).

Further, OMAEG's concern that the expansion of the program will be unreasonably costly ignores that the Commission has already required customers taking service under the IRP-D to agree to allow AEP-Ohio to bid their demand response capability into PJM's auctions (after a transition to accommodate existing contract arrangements), with the resulting revenue applied as a credit to the EE/PDR rider. *ESP III*, Second Entry on Rehearing at 15 (May 28, 2015).⁴ Under the current

⁴ Since the Commission issued its Second Entry on Rehearing, the United States Supreme Court has affirmed the lawfulness of the compensation scheme established by the Federal Energy Regulatory Commission ("FERC") to compensate customers for reductions in wholesale energy markets. *FERC v. Electric Power Supply Association*, U.S. Sup. Ct. Case No. 14-840, Slip Op. (Jan. 25, 2016).

regime, therefore, the Commission has already addressed and provided a means of reducing the cost of the emergency response capability that is established under the current IRP-D and the expanded version for which the Stipulation requires AEP-Ohio to seek Commission approval.⁵ Thus, OMAEG has not provided any support for its argument that the Commission should reject the Stipulation because expansion will be too expensive.

V. CONCLUSION

For the reasons discussed above, the Commission should reject the arguments advanced by ELPC and OMAEG concerning the IRP-D. The issues raised by these parties can be addressed when AEP-Ohio makes its application to amend the ESP.

Respectfully submitted,

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ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

⁵ FERC Commissioner Clark recently stated FERC should review Order 745's requirement that regional transmission organizations ("RTO") pay demand response providers prices for demand response equal to generation.

See <http://ferc.gov/media/statements-speeches/clark/2016/01-27-16-clark.asp#.VrTjI2bSmUkRich> and Heidorn, Jr., *Clark Calls for New Look at Order 745*, RTO Insider (Feb. 2, 2016), viewed at <http://www.rtoinsider.com/clark-demand-response-21775/>. If compensation from RTOs is reduced, the compensation provided under the IRP-D becomes even more important in assuring that customers with demand response capabilities are provided incentives to make those capabilities available for the benefit of system reliability.

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 *Reply Brief of Industrial Energy Users-Ohio*, was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 8th day of February 2016, via electronic transmission.

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