

**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) Case No. 14-1693-EL-RDR
Purchase Agreement in the Power)
Purchase Agreement Rider.)

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

**MEMORANDUM CONTRA AEP OHIO’S APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND
APPALACHIAN PEACE AND JUSTICE NETWORK**

I. INTRODUCTION

In response to legal action¹ by the Ohio Consumers’ Counsel (“OCC”) and others, the Federal Energy Regulatory Commission (“FERC”) issued orders to provide Ohioans the benefits of competitive markets and lower rates. FERC’s ruling affirmed the importance of affiliate sales restrictions that protect against captive customers of monopoly public utilities (like AEP Ohio) cross subsidizing market-regulated power sales affiliates (like AEP Generation Resources). FERC’s ruling has the potential to save AEP Ohio’s 1.4 million electric consumers hundreds of dollars over the next eight years, while advancing the competitive market envisioned by the Ohio Legislature.

Yet the saga continues for AEP Ohio customers. Even though AEP Ohio appears to have shuttled its plans for an affiliate PPA, in light of FERC’s rulings, it nonetheless

¹ See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et al.*, Docket No. EL16-33-000 Order Granting Complaint (April 27, 2016).

has come up with another way to extract money from customers. AEP Ohio has once again sought an OVEC-only PPA. The Public Utilities Commission of Ohio (“PUCO”) should deny this latest request. The PUCO has already decided that an OVEC-only PPA Rider “would not provide a sufficiently beneficial financial hedge, or other commensurate benefits, to AEP Ohio’s customers to justify approval of the OVEC PPA.”² There is no reason to stray from that decision. AEP Ohio’s Application for Rehearing should be denied.

II. RECOMMENDATIONS

A. The PUCO has already rejected AEP Ohio’s OVEC-only PPA Rider.

In its ESP III case, AEP Ohio proposed a PPA Rider based solely on its OVEC contractual entitlement.³ Evaluating the proposal, the PUCO looked at the “considerable evidence of record offered by the Company, Staff, and intervenors[.]”⁴ Based on the “considerable evidence” regarding an OVEC-only PPA Rider, the PUCO found that:

- 1) it was unable to reasonably determine an OVEC-only PPA Rider’s rate impact;
- 2) there was little offsetting benefit from the OVEC-only PPA Rider’s intended purpose as a hedge against market volatility;
- 3) it was not persuaded that that an OVEC-only PPA Rider would promote rate stability or that it is in the public interest; and
- 4) it was not persuaded that an OVEC-only PPA Rider would provide customers with sufficient benefit from the rider’s

² Case No. 13-2385-EL-SSO, Second Entry on Rehearing at 4, para. 8 (May 28, 2015).

³ See, e.g., *id.* at Opinion and Order at 8 (February 25, 2015).

⁴ See *id.* at 20.

alleged financial hedging mechanism or any other benefit commensurate with the rider's potential cost.⁵

In its Second Entry on Rehearing, the PUCO reiterated its finding that an OVEC-only PPA Rider “would not provide a sufficiently beneficial financial hedge, or other commensurate benefits, to AEP Ohio’s customers to justify approval of the OVEC PPA.”⁶

Further, the PUCO in its ESP III Opinion and Order affirmed its directive that AEP Ohio continue pursuing transferring the OVEC entitlement or otherwise divest the OVEC asset.⁷ Propping up OVEC with a PPA Rider would completely gut that directive. There would be no incentive to transfer or divest OVEC, and every incentive to keep it.

Clearly, the PUCO has already been presented with an OVEC-only PPA Rider and rejected it.⁸ No further ruling is necessary. Rehearing should be denied.

B. AEP Ohio cannot “invoke” Section IV.D of the Stipulation.

Due to the decision by FERC, AEP Ohio asserts that it is invoking Section IV.D of the Stipulation and reserves the right to pursue a replacement provision of equivalent

⁵ See *id.* at 24-25.

⁶ See *id.* at Second Entry on Rehearing at 4, para. 8 (May 28, 2015).

⁷ ESP III Opinion and Order at 27.

⁸ AEP Ohio’s present request is made out of whole cloth. It presented no evidence in this proceeding that an OVEC-only PPA Rider would provide any benefits. See R.C. 4903.09; *In re: Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, para. 55 (2016); *Tongren v. PUCO*, 85 Ohio St. 3d 87 (1999). In light of the fact that the PUCO has already rejected an OVEC-only PPA Rider, it could not have. See, e.g., *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, Opinion and Order at 35-37 (February 13, 2014); *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Finding and Order at 14 (April 2, 2015); R.C. 4903.15. And if it did, its proposal that the PUCO could make the rider bypassable would make it even worse than the PUCO already found it to be. If some consumers chose to shop (something AEP Ohio assumes will happen – see Memorandum in Support at 13) then those who do not would see increased charges. This is because the same costs would be divided among fewer customers. AEP Ohio’s request to eliminate the five percent rate cap recognizes this very fact.

value.⁹ But this provision of the Stipulation does not allow it to do so. Section IV.D of the Stipulation, the “Severability” provision, applies where a “court of competent jurisdiction invalidates the application of the PPA Rider proposal”¹⁰ By its terms, it does not apply to FERC decisions.¹¹ Further, FERC did not invalidate the PPA Rider proposal – as AEP Ohio acknowledges.¹²

Section IV.D is no refuge for AEP Ohio.¹³ It may be able to withdraw its ESP under Section IV.G of the Stipulation. Or it may be able to withdraw its ESP under R.C. 4928.143(C)(2)(a).¹⁴ But the statute permits acceptance of the PUCO’s modifications or withdrawal and termination. Here, AEP Ohio has done neither. The PUCO should not enable AEP Ohio’s efforts to go beyond the statute and present an entirely new plan (especially one not supported by any record evidence).¹⁵

⁹ Memorandum in Support at 3, n.2.

¹⁰ Stipulation at 35.

¹¹ See, e.g., *EFA Assocs. v. Dep’t of Admin. Servs.*, 2002 Ohio 2421, p. 31 (Franklin 2002) (citations omitted) (courts should give effect to plain meaning of contract’s words).

¹² See Memorandum in Support at 5, n. 4. As AEP Ohio well knows, FERC rescinded the waiver on affiliate transaction restrictions. Accordingly, no charges can be made under the Affiliate PPA unless and until it is filed with and approved by FERC. See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et. al*, Docket No. EL16-33-000 Order Granting Complaint at 19, n. 85 (April 27, 2016). Since AEP Ohio has decided not to file the Affiliate PPA with FERC, it cannot pass any charges through the PPA Rider.

¹³ In point of fact, the PUCO should dismiss the Amended Application. Due to FERC’s ruling in Docket No. EL16-33-000 (the effect of which is that there is no lawful Affiliate PPA) and the PUCO’s previous decision that there can be no OVEC-only PPA Rider, AEP Ohio cannot have a PPA Rider right now as a matter of law.

¹⁴ See Memorandum in Support at 14; Direct Testimony of OCC Witness Hixon (OCC Ex. 9) filed September 11, 2015 and Direct Testimony of OCC Witness Haugh (OCC Ex. 33) filed December 28, 2015 (each describing how the PUCO’s ESP III’s analysis was not, and could not have been, complete because the PPA Rider had not yet been populated); see generally OCC’s Initial Post-Hearing Brief at 160-61.

¹⁵ See R.C. 4903.09; *In re: Comm. Rev. of Capacity Charges of Ohio Power Co.*, Slip Opinion No. 2016-Ohio-1607, para. 55 (2016); *Tongren v. PUCO*, 85 Ohio St. 3d 87 (1999).

C. AEP Ohio’s renewables proposals would be costly to consumers and should be rejected in their entirety.

AEP Ohio raises various concerns with the PUCO’s Opinion and Order regarding the Stipulation’s renewable energy provisions.¹⁶ OCC/APJN have already pointed out why such provisions should be rejected in their entirety, with reasons including what consumers would be charged for the cost of the renewable power plants.¹⁷

Further, AEP Ohio’s concern – with the PUCO’s directive that it must demonstrate that bilateral opportunities were explored and that a competitive process was used to source and determine ownership of any solar or wind-related projects – lacks merit. AEP Ohio asserts: “[t]he affiliate ownership [of solar or wind-related projects] would not undermine a bilateral transaction structure, since there would still be a PPA between AEP Ohio and each renewable project (some of which would be partially owned by another AEP affiliate).”¹⁸ It therefore seeks “clarification” that the PUCO’s directive does not affect the right of AEP Ohio affiliates to own up to 50% of the renewable projects.¹⁹

As the recent FERC decision in Docket No. EL16-33-000 confirms, a regulated utility cannot enter into a transaction with its unregulated affiliate unless the transaction

¹⁶ See Memorandum in Support at 9-12.

¹⁷ See, e.g., OCC’s Initial Post-Hearing Brief at 52-53; OCC’s Application for Rehearing at 49-50.

¹⁸ See Memorandum in Support at 11.

¹⁹ See *id.* at 12.

is reviewed by FERC (or is subject to a waiver).²⁰ This is true regardless of the PUCO's directive that AEP Ohio is concerned with. Nonetheless, the PUCO's directive gives some measure of additional protection to consumers. It should be kept. Rehearing should be denied.

D. AEP Ohio, not consumers, should bear the costs of capacity performance penalties.

The PUCO was correct in requiring AEP Ohio to bear any capacity performance penalties.²¹ AEP Ohio is best situated to avoid capacity performance penalties by investing its revenues to maintain and upgrade its affiliated generation and operate it reliably.²²

The PUCO concluded that if AEP Ohio bears the burden of penalties, it should get the reward of bonuses.²³ That AEP Ohio wants to give up the potential to earn capacity performance *bonuses*, as well as asking for the ability to flow through the PPA Rider capacity performance *penalties*, certainly confirms that AEP Ohio is very concerned with the PPA Units' ability to perform.²⁴ The PUCO should not allow AEP Ohio to shift the risk of non-performance – and thus capacity performance penalties –

²⁰ See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et. al.*, Docket No. EL16-33-000 Order Granting Complaint (April 27, 2016). There is no record evidence that AEP Ohio intends to file the renewable PPAs with FERC. If it believes that such PPAs fall under a waiver, FERC's recent decision, at the very least, calls into question that belief. AEP Ohio is fully aware of the issue. It asserts that "the renewable PPAs are compatible with the FERC's wholesale contract review standards[.]" Memorandum in Support at 4, n. 3. But that misses the point. The renewable PPAs have to be filed at FERC (unless a waiver applies) and FERC must review the contracts. For the PUCO to approve AEP Ohio's renewable PPA proposals before the FERC process concludes runs the substantial risk of recreating what happened regarding the PPA Rider and Affiliate PPAs: years of litigation, massive expenditure of resources and time, all for naught.

²¹ 14-1693 Opinion and Order at 87-88.

²² See generally OCC's Application for Rehearing at 38-40.

²³ A conclusion with which OCC respectfully disagrees. See *id.*

²⁴ See Memorandum in Support at 12.

away from AEP Ohio to consumers *when it is AEP Ohio affiliates that are running the plants and there is absolutely no risk from making investments in them.*²⁵

The PUCO should also consider that when AEP Ohio negotiated the OVEC contract, it agreed to an allocation of risk regarding capacity performance penalties and bonuses.²⁶ The PUCO should not undo the deal that AEP Ohio itself struck by bailing it out from the agreed-to risk allocation and imposing the risk on consumers.²⁷

E. The five percent customer bill cap should be retained as a limitation on the harm the PPR Rider could impose on Ohioans.

To limit the rate impact of the PPA Rider, the PUCO directed AEP Ohio to limit customer rate increases related to the rider at five percent of the June 1, 2015 standard service offer rate plan bill schedules.²⁸ AEP Ohio does not dispute that the five percent cap is necessary if an OVEC-only PPA Rider remains non-bypassable.²⁹ But AEP Ohio asserts that there is no need for the five percent cap if the PPA Rider is made bypassable.³⁰ If it is bypassable, AEP Ohio says, customers could simply shop and avoid

²⁵ The concept applies were the PUCO to consider OVEC alone.

²⁶ See Memorandum in Support at 12 (explaining that under the OVEC contract, AEP Ohio bears the risk of capacity performance penalties and bonuses).

²⁷ Nothing herein should be construed as approving an OVEC-only PPA Rider.

²⁸ 14-1693 Opinion and Order at 81.

²⁹ See Memorandum in Support at 13.

³⁰ See *id.*

the PPA Rider.³¹ Accordingly, “there is no need to impose the bill cap.”³²

Contrary to AEP Ohio’s own testimony, this assumes that customers can and will move in response to any price increase. As AEP Ohio Witness Allen pointed out during hearing, customers are not always so quick to move:

the incentive for a customer to – especially a customer that has been served by a utility for many, many years to take the, I am going to say “risk” in the most positive way, but to take the risk of going out to a CRES provider and really change how they do business, something they have been comfortable with, and they are going to go and reach out to find a new way to procure electricity, if there is not a significant discount, customers aren’t going to do that.³³

Given what AEP Ohio itself describes as some consumers’ “comfort level” with taking service from a utility, and the “risk” associated with leaving the utility, switching may not occur with the speed or regularity that AEP Ohio assumes in its Application for Rehearing.

³¹ See *id.* AEP Ohio’s assertion that making the OVEC-only PPA Rider bypassable will enhance the rider’s stability value for non-shopping customers is wrong. See Memorandum in Support at 4. AEP Ohio itself said that making the rider bypassable would encourage customers to take service under the standard service offer when the rider results in a credit and to take service from a competitive retail energy supplier when it is a charge. See Direct Testimony of William A. Allen in Support of Amended Application (AEP Ohio Ex. 10) at 8 (May 15, 2015). It reasoned that this could increase migration to and from the standard service offer, which would increase the risk premium that auction participants would include in their offers. See *id.* Thus, as AEP Ohio pointed out, the PUCO agreed in AEP Ohio’s ESP III Opinion and Order that any PPA Rider should be non-bypassable. See ESP III Opinion and Order at 22. To the degree risk premiums increase, as AEP Ohio asserts, the rider would *increase instability* as auction participants gauge the amount of migration to and from the standard service offer and adjust the risk premium accordingly. Further, making the OVEC-only PPA Rider bypassable would not solve the problem with the rider under the recent FERC order. See *Electric Power Supply Association, et al. v. AEP Generation Resources, Inc., et al.*, Docket No. EL16-33-000 Order Granting Complaint (April 27, 2016). There, FERC stated that retail choice protects customers from affiliate abuse only to the extent that customers have a choice to undertake generation costs. See *id.* FERC found that the customers in AEP Ohio’s service territory would be “captive” under the PPA Rider because they could not avoid the charge. See *id.* Low-income customers on the PIPP program are not lawfully allowed to shop in Ohio. Thus, low-income customers would have no choice but to pay the costs of an OVEC-only PPA Rider. That would render low-income customers in AEP Ohio’s service territory “captive” under an OVEC-only PPA Rider. Making the OVEC-only PPA Rider bypassable would not solve AEP Ohio’s FERC problem.

³² See Memorandum in Support at 13.

³³ Hearing Transcript at Vol. XVIII, p. 4639:15-25.

Further, if AEP Ohio Witness Allen is wrong and customers do shop, as AEP Ohio suggests in its Application for Rehearing,³⁴ then that is precisely why the five percent cap is necessary. As described above, if some customers do bypass the OVEC-only PPA Rider by shopping, then non-shopping customers will face increased rates. The burden of increased rates will fall most harshly on those most in need of the PUCO's protection – PIPP customers, who cannot shop. Without the five percent cap there is no ceiling to how high non-shopping customers' rates can climb. The PUCO must protect such non-shopping customers and ensure that they have reasonably priced electric service consistent with state policy.³⁵ The cap should remain.³⁶

III. CONCLUSION

The PUCO has already decided that an OVEC-only PPA Rider is not in the public interest. The Stipulation provision AEP Ohio “invokes” is inapplicable. Consumer interest necessitates rejecting the renewables proposal and retaining the protections of AEP Ohio bearing capacity performance penalties and the five percent cap. AEP Ohio's Application for Rehearing should be denied.

³⁴ See Memorandum in Support at 13.

³⁵ R.C. 4928.012(A).

³⁶ Brazenly, AEP Ohio asserts that if the PUCO later determines that rate mitigation is necessary it can simply authorize additional deferral at that time. See Memorandum in Support at 13. Customers will still pay, just later. That does not mitigate rates. That is not consumer protection. Nothing herein should be construed as approving an OVEC-only PPA Rider.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served on the persons stated below via electronic transmission, this 12th day of May 2016.

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in

Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM

Summary: Memorandum Memorandum Contra AEP Ohio's Application for Rehearing by the Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.