

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review of Capacity Charges of Ohio Power Company and Columbus Southern Power Company)	Case No. 10-2929-EL-UNC
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 No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority)	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
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
In the Matter of the Fuel Adjustment Clauses For Ohio Power Company)	Case No. 13-1892-EL-FAC

**JOINT MEMORANDUM CONTRA
OHIO POWER COMPANY'S
MOTION FOR A CONSOLIDATED RESOLUTION OF MULTIPLE PROCEEDINGS
OF THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
AND
THE KROGER COMPANY**

I. INTRODUCTION

On June 7, 2016, the Ohio Power Company (AEP Ohio) requested that the Public Utilities Commission of Ohio (Commission) establish a consolidated procedural schedule and

issue a unified decision to resolve outstanding issues in four “interrelated” proceedings.¹ Specifically, the four proceedings contained in AEP Ohio’s request include the following:

- PUCO Case No. 10-2929-EL-UNC (Capacity Charge Case)
- PUCO Case Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, and 11-350-EL-AAM (ESP II Case)
- PUCO Case No. 14-11-86-EL-RDR (Retail Stability Rider (RSR) Implementation Plan)
- PUCO Case No. 13-1892-EL-FAC (Fuel Adjustment Clause (FAC) Audit Case)

These cases involve not only two remands from the Ohio Supreme Court in the Capacity Charge Case and the ESP II Case,² but also \$601 million in AEP Ohio estimated deferred capacity costs that AEP Ohio seeks to collect from customers.³ AEP Ohio argues the merits of the cases in its motion and offers recommendations for resolution of the issues. Additionally, AEP Ohio has proposed an aggressive procedural schedule that requires intervening parties to prepare for the potential of a complex evidentiary hearing involving four significant cases in only 53 days.⁴ This request is not only unreasonable and prejudicial, but is also void of any substantive arguments for such an expedited proceeding.

The Commission should reject AEP Ohio’s attempts to argue the substance of the merits of the cases in its motion that misrepresent the Court’s decisions and further reject AEP Ohio’s suggestions for how to resolve these proceedings. The Commission should also reject AEP Ohio’s proposed procedural schedule. AEP Ohio’s motion comes after intervenors filed a Joint

¹ Ohio Power Company’s Motion for a Consolidated Resolution of Multiple Proceedings at 1 (Motion).

² See *In re Comm. Rev. of the Capacity Charges of Ohio Power Co. and Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1607 (April 21, 2016) (*Capacity Charge Case Remand Order*); *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 (April 21, 2016) (*ESP II Case Remand Order*).

³ Testimony of William A. Allen at 21 (June 7, 2016).

⁴ Memorandum in Support of Motion at 8.

Motion for AEP Ohio to Cease and Desist Collecting Rider RSR from Customers,⁵ which was granted in part by issuing an entry making the collection of Rider RSR subject to refund.⁶ Pursuant to Ohio Adm. Code 4901-1-12(B)(1), the Ohio Manufacturers' Association Energy Group (OMAEG) and the Kroger Company (Kroger) (collectively, Intervenors) hereby file their Memo Contra to AEP Ohio's motion.

II. ARGUMENT

A. AEP Ohio's substantive arguments and mischaracterizations of the decisions of the Ohio Supreme Court, as well as its suggested resolution of these proceedings, should be rejected.

AEP Ohio's substantive arguments and misrepresentations of the Ohio Supreme Court's findings and directives are prejudicial to intervening parties and should be rejected. Additionally, AEP Ohio's suggested resolution of these proceedings should be rejected. Within AEP Ohio's lengthy procedural history summary is an inaccurate portrayal of the Court's decisions in both the Capacity Charge Case and ESP II Case.

For example, AEP Ohio's summary of the Court's decision in the Capacity Charge case implies that the Commission erred in relying on the methodology and calculation of the energy credit used by the Commission Staff (Staff).⁷ AEP Ohio then seeks to propose a new energy credit and capacity charge calculation, which is more beneficial to them.⁸ However, the Court's decision does not state that the methodology or calculation approved by the Commission was inaccurate, as argued by AEP Ohio. Rather, the Court noted that the Commission's order

⁵ Joint Motion for AEP to Cease and Desist Collecting Rider RRS from Customers, Case No. 14-1186-EL-RDR, et al. (May 6, 2016).

⁶ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, et al.*, Case No. 10-2929-EL-UNC, et al., Entry directing Rider RSR be collected subject to refund at ¶ 9 (May 18, 2016) (Subject to Refund Entry).

⁷ Memorandum in Support of Motion at 4.

⁸ Id.

contained “no record citations” and did not “directly address[] or refute[] AEP’s challenges to the inputs.”⁹ Further, the Court found that the Commission erroneously focused on competing methodologies, rather than the accuracy of the calculation due to the inputs into the methodology.¹⁰ As explained by the Commission:

Upon review of the *ESP [III] Case*, the Court found, regarding the RSR, that AEP Ohio ‘is entitled to recover only its actual capacity costs’ and, therefore, the *ESP [III] Case* was remanded to the Commission ‘to adjust the balance of [the Company’s] deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP.’ *In re Application of Columbus S. Power Co.*, Slip Opinion 10-2929-EL-UNC, et al. No. 2016-Ohio-1608, at ¶ 40. The Court also determined that the Commission failed to explain its decision to establish a significantly excessive earnings test threshold of 12 percent to be applied during the term of the ESP for purposes of the annual earnings review required by R.C. 4928.143(F). *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608, at ¶ 66.¹¹

The Commission then concluded:

Consistent with the Court's decision regarding the RSR approved in the *ESP [III] Case*, the Commission directs AEP Ohio to file revised tariffs that provide that the RSR is being collected subject to refund, effective with bills rendered for the first billing cycle of June 2016, and until otherwise ordered by the Commission.¹²

Therefore, the Court remanded the case to the Commission to substantively address AEP Ohio’s arguments related to the accuracy of the inputs used.¹³

The Court’s remand does not necessarily assume that the Commission erred in accepting Staff’s methodology or calculation as AEP Ohio implies in its motion; only that the Commission needs to “substantively address AEP’s input arguments.”¹⁴ A re-hearing of issues in the

⁹ *Capacity Charge Case Remand Order* at ¶ 55.

¹⁰ *Id.* at ¶ 56.

¹¹ *Subject to Refund Entry* at ¶ 6.

¹² *Id.* at ¶ 9.

¹³ *Capacity Charge Case Remand Order* at ¶ 57.

¹⁴ *Id.*

Capacity Charge case is not necessary, as AEP Ohio indicates in its motion, given that the Commission only needs to address AEP Ohio's arguments and justify its decision. The Court did not require the Commission to re-open the entire proceeding and review Staff's methodology and calculation in order to allow for additional and new arguments regarding that calculation. AEP Ohio's request that the Commission apply a significantly different energy credit and capacity charge is merely an attempt to re-litigate the Capacity Charge Case in the hopes of receiving a more favorable outcome that will result in increased revenues to AEP Ohio.¹⁵ An attempt to recalculate the energy credit established in 2012 and collect increased revenues for capacity charges implemented from August 2012 through May 2015 amounts to retroactive ratemaking in violation of the Court's precedent.¹⁶ As explained herein, AEP Ohio's request is unlawful, unreasonable, and unnecessary in light of the Court's decision on remand and must be rejected.

AEP Ohio also mischaracterizes the Court's decision in the ESP II proceeding when it states that "the Supreme Court rejected various challenges to the RSR."¹⁷ This statement is inaccurate. In its decision, the Court found that the Commission erred in approving the additional capacity revenue recovery associated with Rider RSR.¹⁸ Specifically, the Court noted that the Commission had previously determined in the Capacity Charge Case that a cost-based capacity charge and deferral of incurred capacity costs would fairly compensate AEP Ohio

¹⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985). See also *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984) (the law of the case "doctrine functions to compel trial courts to follow the mandates of reviewing courts. * * * Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.").

¹⁶ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9-11 ("the commission set AEP's rates at a level 'intended to permit the companies to recover 12 months of revenue over a 9-month period.' * * * This was retroactive ratemaking."), citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

¹⁷ Memorandum in Support of Motion at 6.

¹⁸ *ESP II Case Remand Order* at ¶ 37.

without undermining its return on investment.¹⁹ This determination was made by the Commission just weeks before it unreasonably authorized additional capacity revenue recovery in the ESP II Case.²⁰ Therefore, the Court held that the evidence relied upon by the Commission in its ESP II Case Order was irrelevant with respect to AEP Ohio's recovery of additional revenue through Rider RSR, which resulted in AEP Ohio unlawfully recovering the equivalent of transition revenues.²¹ The Court remanded the case to the Commission to determine the appropriate amount to offset the balance of deferred capacity costs in order to avoid collecting unlawful transition revenues.²² Therefore, the Court found that Rider RSR *was* unlawful, specifically as it relates to the collection of impermissible transition revenues.

AEP Ohio's attempt to re-litigate the ESP II Case in order to reach a more beneficial outcome is also unnecessary based on the Court's decision. AEP Ohio's proposed \$327 million deduction from the deferred capacity balance does not "implement[] the Court's remand,"²³ as the Court made no statement regarding how to calculate such costs. AEP Ohio is attempting to use the Court's decision as an avenue to place new arguments and calculations in front of the Commission, in the hopes of receiving a more favorable outcome and collecting \$601 million in estimated deferred capacity costs from customers in violation of Court precedent.²⁴

AEP Ohio clearly mischaracterizes the Court's decisions in both the Capacity Charge Case and the ESP II Case. AEP Ohio then attempts to use the misrepresented decisions to

¹⁹ Id. at ¶ 35.

²⁰ Id.

²¹ Id. at ¶ 37-38.

²² Id. at ¶ 40.

²³ Memorandum in Support of Motion at 6.

²⁴ Testimony of William A. Allen at 21; *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9-11 ("the commission set AEP's rates at a level 'intended to permit the companies to recover 12 months of revenue over a 9-month period.' * * * This was retroactive ratemaking."), citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

advance their own arguments regarding how best to resolve the outstanding issues remanded by the Court. These arguments are meritless as they are based on inaccurate statements about the Court's decision and, therefore, should be rejected. Moreover, AEP Ohio should not be provided a second attempt to litigate issues in order to receive a more favorable outcome. The Court's decisions do not grant AEP Ohio this latitude and intervening parties should be protected from spending significant time on unnecessary discovery, witness testimony, witness preparation, and hearings.

AEP Ohio's attempt to re-litigate issues in front of the Commission that were conclusively decided by the Court cannot stand under the doctrines of res judicata and collateral estoppel. "These doctrines operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."²⁵ Applying these doctrines, AEP Ohio cannot request that the Commission implement the remands in the Capacity Charge Case and the ESP II Case in ways that depart from the Court's directives. AEP Ohio must accept the Court's directives whether or not it agrees with the outcomes.

Moreover, AEP Ohio's request for a retroactive rate increase of \$470 million to recover costs associated with load served by CRES providers over the period of August 2012 through May 2015 should be denied.²⁶ According to AEP Ohio, these costs arise from a so-called "overstated" energy credit proposed by the Staff in the Capacity Charge Case that resulted in

²⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985). See also *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984) (the law of the case "doctrine functions to compel trial courts to follow the mandates of reviewing courts. * * * Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.").

²⁶ Testimony of William A. Allen at 12.

“understated” costs for AEP Ohio.²⁷ But under the prohibition against retroactive ratemaking, the Commission cannot grant a “rate increase making up for revenues lost due to regulatory delay * * * .”²⁸ Ratemaking is prospective only.²⁹ Thus, the rates set by the Commission in 2012 are the only lawful rates that can be charged.³⁰ Further, a remand order “does not automatically render the existing rates unlawful, as the rate schedule filed with the commission remains in effect until the commission executes th[e] [C]ourt’s mandate by an appropriate order.”³¹ Under these precedents, AEP Ohio cannot receive the retroactive rate increase it requests to recover what it claims were “understated” costs of \$470 million over the period of August 2012 through May 2015. Any ratemaking order issued by the Commission must apply on a prospective basis and cannot make up for lost revenues allegedly owed to AEP.

B. AEP Ohio’s proposed procedural schedule should be denied as it is unjust, unreasonable, and unduly prejudicial to intervening parties.

Although Intervenors believe that a hearing of the nature proposed by AEP Ohio is unnecessary, if the Commission is going to schedule a hearing to address the issues remanded by the Court, the Commission should reject AEP Ohio’s proposed procedural schedule as it is unjust, unreasonable, and unduly prejudicial. Ohio Adm. Code 4901-1-16 states that the purpose of the discovery rules is “to facilitate thorough and adequate preparation for participation in commission proceedings.” Similarly, R.C. 4903.082 requires that “[a]ll parties and intervenors shall be granted ample rights of discovery.” Thus, the Ohio Administrative Code and the Ohio

²⁷ Id.

²⁸ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9-11 (“the commission set AEP’s rates at a level ‘intended to permit the companies to recover 12 months of revenue over a 9-month period.’ * * * This was retroactive ratemaking.”), citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

²⁹ *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

³⁰ *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51.

³¹ Id. (internal quotations omitted).

Revised Code together provide parties to a Commission proceeding basic due process rights as it relates to the discovery process and its purpose within the overall proceeding.

However, AEP Ohio's requested procedural schedule fails to provide both "ample rights of discovery" and "adequate preparation for participation in commission proceedings" as the law requires.³² Based on the procedural schedule proposed in AEP Ohio's motion, intervening parties will have less than two months to prepare for an evidentiary hearing that includes four significant and complex proceedings dating back to 2010, two of which were appealed to the Court and remanded to determine the appropriate amount to offset the balance of deferred capacity costs in order to avoid collecting unlawful transition revenues and to substantively address AEP Ohio's input arguments. The ESP II proceeding alone included more than 70 witnesses and almost one month of an evidentiary hearing.³³ While OMAEG believes it is unnecessary to convene an evidentiary hearing to resolve the issues presented in AEP Ohio's motion, an evidentiary hearing will likely require significant attention, diligence, and thorough preparation and review of a large amount of material by all parties involved. This is especially true given AEP Ohio's attempts to introduce new arguments, evidence, and calculations in these proceedings, which are beyond the scope of the Court's remand decisions. Parties will be required to prepare and file testimony of their own witnesses; prepare and serve discovery; respond to discovery; and complete a full review and analysis of all four proceedings in preparation for an evidentiary hearing in less than two months. Additionally, it will be difficult to obtain and secure expert witnesses on such short notice due to prior work commitments and previously scheduled vacations and time out of the office. It is inevitable that a hearing

³² Ohio Adm. Code 4901-1-16; R.C. 4903.082.

³³ *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, et.al*, Case No. 11-346-EL-SSO, et al., Opinion and Order at 8 (August 8, 2012).

envisioned by AEP Ohio involving four complex and important cases will raise a number of concerns and issues, which will require significant review and analysis by the parties and their witnesses.

The procedural schedule proposed by AEP Ohio is also unreasonable in light of the number of pending hearings already currently scheduled before the Commission within the next two months, which include many of the same intervening parties.³⁴ It is prejudicial to the intervening parties to add yet another hearing to these already scheduled hearings as parties will not only be unable to devote their full attention to all hearings, but also may be unable to even attend all of the hearings given the potential that hearings may overlap, depositions will likely occur concurrently, and witnesses may be called to testify in multiple proceedings. This hardly provides parties the basic due process rights contemplated by the law.

Moreover, AEP Ohio fails to provide any justification for requesting such an expedited procedural schedule. While AEP Ohio's motion contains pages of background procedural information regarding the four proceedings it seeks to consolidate, the motion is void of any substantive arguments to support such an expeditious schedule. There is no statutory deadline to meet; no pending SSO auction; and Rider RSR has already been implemented to be subject to refund pursuant to the Commission's directive.³⁵ AEP Ohio merely states that the Commission

³⁴ An evidentiary hearing is scheduled to begin July 11, 2016 in PUCO Case No. 14-1297-EL-SSO (See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Office Pursuant to R.C. 4928.143 in the form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Attorney Examiner Entry at 5 (June 3, 2016)). An evidentiary hearing is scheduled to begin July 25, 2016 in PUCO Case No. 16-743-EL-POR (See *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-743-EL-POR, Attorney Examiner Entry at 3 (May 23, 2016)). An evidentiary hearing is scheduled to begin August 1, 2016 in PUCO Case No. 13-1939-EL-RDR (See *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of its GridSMART Project and to Establish the GridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR, Attorney Examiner Entry at ¶ 3 (June 20, 2016)).

³⁵ AEP Ohio's Tariff Filing, Retail Stability Rider (P.U.C.O. No. 20, 2nd Revised Sheet No. 487-1) (May 20, 2016).

should adopt its proposed schedule in order to “efficiently resolve the interrelated issues presented in these dockets.” While the Intervenor agrees that these cases should be efficiently resolved, resolution should not come at the expense of the basic due process rights afforded to parties by Ohio Adm. Code 4901-1-16 and R.C. 4903.082, especially in light of AEP Ohio’s request to expand the scope of the remand proceedings. Approving AEP Ohio’s procedural schedule will result in undue prejudice to intervening parties who will be unable to adequately prepare for the Commission proceedings in such a short amount of time given the complexity of the issues involved in the proposed consolidated proceeding. Therefore, the requested procedural schedule is unjust, unreasonable and should be denied.

III. CONCLUSION

For the aforementioned reasons, the Commission should reject AEP Ohio’s new substantive arguments embedded in their mischaracterization of the Ohio Supreme Court decisions and deny AEP Ohio’s request for an expedited procedural schedule. The Commission should further reject AEP Ohio’s suggested resolution of these cases.

If the Commission grants AEP Ohio’s motion to consolidate these four significant cases, which have already included lengthy proceedings and extensive evidentiary hearings, it is only fair that parties be provided reasonable and adequate opportunity to prepare for the evidentiary hearing. The procedural schedule advanced by AEP Ohio does not afford parties this opportunity and as demonstrated, would result in significant prejudice to the intervening parties.

Therefore, the Commission should reject AEP Ohio's proposed procedural schedule as unjust, unreasonable, and prejudicial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on June 22, 2016.

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Summary: Motion OMAEG & Kroger Memo Contra AEP's Motion to Consolidate electronically filed by Ms. Cheryl A Smith on behalf of The Kroger Co. and The Ohio Manufacturers' Association