BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan.	)))))	Case No. 13-2385-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 13-2386-EL-AAM

OHIO POWER COMPANY'S MEMORANDUM CONTRA THIRD APPLICATIONS FOR REHEARING RELATED TO THE COMMISSION'S FOURTH ENTRY ON REHEARING

On December 5, 2016, the Office of the Ohio Consumers' Counsel (OCC) and the Ohio Manufacturers Association Energy Group (OMAEG) filed their Third Applications for Rehearing in this case. These applications for rehearing seek rehearing on a number of issues already addressed in the Commission's Fourth Entry on Rehearing.

In its Third Application for Rehearing OCC again argues that the Commission had no statutory authority to approve the PPA Rider; that AEP Ohio's application for an electric security plan, filed at the commencement of this case, failed to comply with the requirements of Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i); that the Commission's decision to defer ruling on the assignments of error relating to the PPA Rider in OCC's prior application for rehearing was unjust and unreasonable; and that the Commission's finding that AEP Ohio is not required to comply with the corporate separation requirement in R.C. 4928.17 is unlawful and unreasonable.

In its Third Application for Rehearing OMAEG asserts for its sole assignment of error that the Commission erred in increasing the revenue caps associated with the distribution investment rider (DIR).

This case has been pending since December 13, 2013 and has already been the subject of two substantive Entries on Rehearing. All but one of the arguments advanced in the these applications for rehearing merely re-plow ground fully covered in the Second Entry on Rehearing or argued in the prior applications for rehearing. And, as addressed below, none of the assignments of error have merit. The Commission should promptly deny rehearing and end this fully explored, debated, and exhausted case.

A. Response to OCC AFR 1: As the Commission has previously determined, R.C. 4928.143(B)(2)(d) authorizes the PPA Rider, and OCC's contention to the contrary is meritless.

The Commission exhaustively addressed and supported its conclusion that R.C. 4928.143(B)(2)(d) authorizes the PPA Rider approved in this case. It did so in its February 25, 2015 Opinion and Order at 19-23. Prior to reaching this affirmative conclusion, the Commission fully considered OCC's claim that the PPA Rider is not authorized under any provision of R.C. 4928.143(B)(1) or (B)(2). *Id*. at 14. OCC clearly understood that the Commission had made an express determination that R.C. 4928.143(B)(2)(d) *permitted* the inclusion of the PPA Rider in AEP Ohio's ESP III because it expressly challenged that determination in its March 27, 2015 Application for Rehearing (at 19). In its second assignment of error, OCC argued: "The determination that the proposed PPA Rider may be included in an ESP and charged to all distribution customers under R.C. 4928.143(B)(2)(d) as a 'financial limitation on customer shopping' contravenes legislative intent and is unlawful." *Id*.

The Commission again addressed R.C. 4928.143(B)(2)(d) as the express authority for the approval of the PPA in its Fourth Entry on Rehearing, specifically in response to the argument

by OCC, and others, that "the Commission's conclusion that the PPA Rider meets the requirements of R.C. 4928.143(B)(2)(d) to be included in an ESP is factually incorrect, unreasonable, and unlawful." Fourth Entry on Reh'g ¶¶ 36, 44. The Commission again concluded: "Following careful consideration of the applications for rehearing, the Commission *again finds* that our authorization of a PPA rider *is permitted* by R.C. 4928.143(B)(2)(d)." *Id*. ¶ 48 (emphasis added).

In its first assignment of error, OCC argues yet again that rehearing should be granted because "[t]he PUCO, in its Order adopting the ESP in this case, was unable to find a statute that *permitted* AEP Ohio's PPA charge. Instead, the PUCO found that nothing *prohibited* the PPA charge." This statement – the sole basis for seeking rehearing as to the statutory authority issue – is simply false and is expressly contradicted by the record cites noted above.

OCC does not cite to either the Commission's Order or its extended discussion of the statutory authority for the PPA Rider in paragraphs 36-48 of the Entry on Rehearing. Rather, OCC cites only to paragraph 50 of the Entry on Rehearing, in which the Commission responded to the erroneous assertion that "the General Assembly precluded the Commission's authorization of a non-bypassable generation-related rider under R.C. 49218.143(B)(2)(d)." *Id*. ¶ 38. OCC seizes on the Commission's observation that there is no prohibition against making a rider, properly authorized by R.C. 4928.142(B)(2)(d), non-bypassable, to make its argument that the Commission found no affirmative authority at all for the PPA Rider in the statute. OCC's assignment of error is based on a selective and distorted misreading of the Commission's Entry on Rehearing.

Moreover, the Commission did address the non-bypassability component of the PPA Rider in its February 25, 2015 Order and concluded that the "proposed PPA rider, if approved,

should be non-bypassable, as authorized by the second criterion of R.C. 4928.143(B)(2)(d)." *Id*. at 22. The Commission found that R.C. 4928.143(B)(2)(d) authorizes electric utilities to include, in an ESP, terms related to 'bypassability' of charges to the extent that such charges have the effect of stabilizing or providing certainty regarding retail electric service." *Id*. By definition, "retail electric service" includes generation service. R.C. 4928.01(A)(27); *see also Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 32. As a result, R.C. 4928.143(B)(2)(d) affirmatively authorizes non-bypassable generation-related charges that otherwise satisfy the (B)(2)(d) requirements. Any further debate on this point is foreclosed by the Ohio Supreme Court's approval of AEP Ohio's Retail Stability Rider – a non-bypassable generation-related charge – in *In re Application of Columbus Southern Power Co.*, __ Ohio St.3d __, 2016-Ohio-1608, ¶ 43.

B. Response to OCC AOE 2: Ohio Adm. Code 4901:1-35-03(C)(9)(c) is inapplicable, and the Commission previously rejected OCC's argument to the contrary when the same argument was advanced by a different intervenor.

OCC's second assignment of error merely repeats the same argument advanced by OMAEG in its March 27, 2015 Application for Rehearing at 8-9. The Commission thoroughly considered, and rejected, the argument that AEP Ohio's failure to comply with the filing requirement of Ohio Adm. Code 4901:1-35-03(C)(9)(c) rendered its approval of the PPA Rider unlawful or unreasonable in its Entry on Rehearing ¶¶ 37-38, 49. Because OCC raises nothing new in its application for rehearing, and the Commission has considered and rejected the argument, the Commission should not grant rehearing for this reason alone.

The Commission properly concluded that Ohio Adm. Code 4901:1-35-03(C)(9)(c) was not applicable to AEP Ohio's ESP application because "AEP Ohio did not propose the PPA rider, at the time of filing of its ESP application as a limitation on shopping for retail electric

generation service." Entry on Rehearing ¶ 49. Its conclusion is consistent with the factual record and entirely appropriate and reasonable. The filing requirements set forth in the rule apply – or not – based upon the facts that exist at the time the application is filed and cannot be retroactively resurrected and applied to new facts or circumstances that develop only after the application has been filed.

Moreover, as AEP Ohio previously explained when this argument was first raised by OMAEG, the rule is inapplicable for the alternative reason that it contemplates only components of an ESP that are designed to affect the level of customer shopping. This distinction flows directly from the language used in the rule. The rule requires a "listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric service." Ohio Adm. Code 4901:1-35-03(C)(9)(c). The standard principle of construction, *noscitur a sociis*, requires the meaning of the term "limitation" to be ascertained from the accompanying words "preventing . . . inhibiting, or promoting." *Ashland Chem. Co. v. Jones*, 92 Ohio St. 3d 234, 236-237 (2001) (citing 2A Singer Sutherland, Statutory Construction (6th Ed. 2000), Section 47:16). Each of the surrounding words describes an action that would have the effect of either decreasing (preventing or inhibiting) or increasing (promoting) the level of customer shopping. Thus, the word "limiting" as used in the rule must also have a similar effect in order for the rule to be applicable. The PPA rider has no such effect, and there was no evidence presented to suggest that the rider was designed with that purpose in mind. To the contrary, the record evidence was that the PPA rider constitutes "a financial limitation on shopping that would help to stabilize rates," despite imposing "no physical restraints on shopping." Order at 22 (citing Tr. XI at 2539, 2559). The PPA rider is properly

approved under R.C. 4928.143(B)(2)(d) because the statute, unlike the rule, uses the term "limitation" without qualifying it directly or by association with other words.

Finally, while OCC's request to revisit the Rule 4901:1-35-03(C)(9)(c) argument for a second time should be denied both for procedural reasons and for lack of merit, if the Commission were to revisit the issue, it should also address whether the PPA Rider is nevertheless authorized as a charge related to "default service." The Commission found it unnecessary to address this alternative basis for approval of the PPA Rider under R.C. 4928.143(b)(2)(d) once it concluded that the PPA Rider is a financial limitation on shopping. Order at 22. Should the Commission grant rehearing and find that statutory basis unavailable due to OCC's technical filing re-argument, it should address "default service" as alternative statutory authority for approving the PPA rider. AEP Ohio advanced "default service" as an alternative source of statutory authority in its Initial Post-Hearing Brief (at 27-28) and urged the Commission to address the "default service" issue in its April 6, 2015 Memorandum Contra Intervenor Applications for Rehearing (at 13). The Commission expressly relied on the "default service" component of R.C. 4928.143(B)(2)(d) in approving the retail stability rider in AEP Ohio's second ESP. *In re Columbus Southern Power and Ohio Power*, Case No. 11-346-EL-SSO, Entry on Rehearing at 15-16 (Jan. 30, 2013). The PPA Rider, like the RSR approved in the ESP 2 Case, is related to default service for all customers regardless of whether they are shopping for generation service.

C. Response to OCC AFR 3: Any error associated with the Commission's decision to delay ruling on the PPA assignments is moot now that the Commission has fully addressed the PPA in the Fourth Entry on Rehearing.

In their initial applications for rehearing following the Commission's February 25, 2015 Opinion and Order, numerous parties asserted assignments of error related to the Commission's

approval of a placeholder PPA Rider. In its Second Entry on Rehearing, the Commission deferred ruling on the assignment of errors related to the PPA Rider, although it addressed all other assignments of error. *See* Second Entry on Rehearing ¶ 10. In its June 29, 2015 Application for Rehearing, OCC argued that the Commission's decision to defer ruling on those assignments of error was both unlawful and unreasonable. OCC contended the Commission has no statutory authority to essentially bifurcate its ruling on rehearing by deferring some issues for a later resolution. *Id*. at 3. It also contended deferring the PPA Rider assignments of error was unreasonable because it made the Second Application for Rehearing a *de facto* final order as to the issues decided therein. *Id*. at 4.

The Commission addressed the OCC's assignments of error, as well as other assignments of error related to the deferral decision raised by other parties (including AEP Ohio), in its Fourth Entry on Rehearing. The Commission properly found at paragraph 94 that the assignments of error related to its decision to defer ruling on the PPA Rider assignments of error are now moot because it has now addressed those assignments of error on the merits.

In its current Application for Rehearing, OCC again argues that the Commission's "[deferral] ruling is unlawful and unreasonable because it is not authorized by statute to consider the parties' applications for rehearing in a bifurcated fashion." Because OCC raises no new argument, its application for rehearing as to this issue should be denied summarily.

Rehearing also is properly denied for the reason cited by the Commission. Although AEP Ohio objected to the Commission's decision to defer ruling on the PPA Rider issues, it agrees that objection is now moot. AEP Ohio remains concerned that delays in the rehearing process may impair the Company's right to withdraw from an ESP under R.C. 4928.143(C)(2). *See In re Application of Ohio Power Company*, Slip Opinion No. 2015-Ohio-2056. And the

Company hopes the Commission will not find it necessary to bifurcate and extend the rehearing process in future case. As to this case, however, the issue is moot and any substantive response by the Commission would be an advisory opinion only.

Alternatively, the Commission should deny OCC's assignment of error on the merits. Here again OCC takes an overly narrow view of the Commission's authority. OCC's mindset is that the Commission may never act unless the exact action is affirmatively authorized by statute in minute detail. That mindset is at odds with the established principle that where the statute does not prescribe in detail how the Commission is to carry out its duty, "the commission [has] discretion to find its way." *In re Columbus S. Power Co.*, 129 Ohio St. 3d 46, 51, 2011-Ohio-2383, ¶ 27. This discretion includes the "inherent power to manage the orderly flow of its business." *Senior Citizens Coalition v. Public Utilities Com.*, 69 Ohio St. 2d 625, 627 (1982). While the Commission's discretion may be limited where its chosen course denies a party its rights, such as an EDU's right to withdraw from an ESP, or otherwise prejudices a party or the process, OCC goes too far in arguing that the Commission has no discretion at all as to how it carries out its statutory duties.

D. Response to OCC AFR 4: The Commission already addressed, and rejected, the argument that the PPA Rider conflicts with R.C. 4928.17's corporate separation requirements.

OCC acknowledges (at 10) that other intervenors previously argued in their respective applications for rehearing that the PPA Rider allows AEP Ohio to evade the corporate separation requirements generally imposed in R.C. 4928.17. OCC also acknowledges that the Commission addressed – and denied – OCC's assignments of error in the Fourth Entry on Rehearing ¶¶ 51-54. OCC is not raising any new issue; it simply disagrees with the Commission's dispositive

conclusion on rehearing that the corporate separation statute does not apply to components of an approved ESP.

The Commission's conclusion, moreover, is based on a proper reading of the statutes. R.C. 4928.17 has an express exception that renders it inapplicable when action is taken under R.C. 4928.142 or .143. That is the significance of the prefatory language: "Except as otherwise provided in sections 4928.142 or 4928.143." OCC, however, argues that this language applies only if there is independent language in the latter statutes that demonstrate the corporate separation provisions do not apply. In other words, OCC reads the statute to require an affirmative statement in R.C. 4928.142 and R.C. 4918.143 that a term or condition authorized therein is exempt from the corporate separation requirements in R.C. 4928.17. OCC's suggested reading, however, is plainly wrong because it would render the explicit exemption in R.C. 4928.17 a nullity. Under R.C. 1.51 any such special provision in R.C. 4928.142 or .143 would automatically negate the application of R.C. 4928.17. In other words, the exception in R.C. 4928.17 is superfluous, if there has to be specific language in R.C. 4928.142 or .143 "that demonstrates that the corporate separation provisions do not apply." The result would be inconsistent with the presumption R.C. 1.47(B) that all language in a statute is intended to be meaningful.

OCC's argument also ignores the fact that R.C. 4928.143 contains language that specifically trumps R.C. 4928.17, among other statutes. R.C. 4928.143(B) states that it applies "[n]otwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code." This is a clear, unambiguous expression of legislative intent that actions or programs authorized by R.C. 4928.143(B), including terms,

conditions and charges authorized in (B)(2)(d), are not subject to the corporate separation requirements in R.C. 4928.17.

OCC's argument that the Commission's reading of the two statutes "would nullify R.C. 4928.17 regarding the majority of [ESP] proposed programs," misses the big picture. R.C. 4928.17 was enacted in S.B. 3 in 1999. Nine years later, the statute was amended as part of S.B. 221 to add the explicit language exempting ESP provisions from the corporate separation requirements. The Commission's reading of the amended statute is entirely consistent with the fact that the General Assembly substantially overhauled the electric utility regulatory scheme in 2008 and, in doing so, negated significant portions of the prior scheme by the introductory language in R.C. 4928.143(B)(2).

E. Response to OMAEG AFR 1: The Commission's determination to increase the Distribution Investment Rider (DIR) revenue cap was reasonable and lawful and adequately supported as required by R.C. 4903.09.

In its third application for rehearing, OMAEG reiterates the same arguments that it made in its Initial Post-Hearing Brief at 6-11, repeated in its First Application for Rehearing at 16-20, and repeated again in its Second Application for Rehearing at 8-10. The Commission has been consistent in its response. It rejected OMAEG's attack on the Commission's determination of the DIR revenue cap in its Order at 44-46, again in the Second Entry on Rehearing ¶¶ 34-52, and yet again in its Fourth Entry on Rehearing ¶¶ 105-115. OMAEG has not raised any new argument, come forward with any new information, or added any meaningful nuance to what has been said before. No rehearing is required or appropriate under the circumstances.

In its Order, the Commission rejected AEP Ohio's request to significantly increase the DIR caps for a total of $667 million over the period of ESP 3. It found, however, that a more modest increase in the DIR caps was necessary and appropriate to "facilitate AEP Ohio's

continued proactive investment in its aging distribution infrastructure." Order at 47. This finding was amply supported by the record. *See* AEP Ohio Initial Post-Hearing Brief at 77-80; AEP Ohio Post-Hearing Reply Brief at 68-76. The Commission approved continuation of the DIR for a total of $543 million, which the Commission determined was a "reasonable level to allow AEP Ohio to continue to replace aging distribution infrastructure in order to maintain and improve service reliability over the term of this ESP." *Id.* This amounted to a level of growth of three to four percent, the same as permitted in ESP 2. *Id.*

OMAEG objects to the Commission's approval of an increase in the annual DIR caps in its subsequent Entries on Rehearing and suggests that the Commission needed to revisit the record support separately for these subsequent modifications. The subsequent increases, however, merely correct the DIR cap levels to be consistent with the Commission's prior analysis and determination that a 3% to 4% increase is reasonable. There was no need for the Commission to revisit or repeat the substantive reasons for this determination when all it did was adjust the calculation of the caps to be consistent with its prior determination, as pointed out by AEP Ohio in its applications for rehearing. *See* Second Entry on Rehearing ¶ 51; Fourth Entry on Rehearing ¶ 115.

OMAEG's secondary arguments also are without merit. To the extent OMAEG is arguing (at 8) that the record support for the DIR caps is deficient because the Commission does not cite to any actual projects, the Commission already has addressed this issue by noting that it approved the DIR caps in order to enable AEP Ohio to continue its proactive investment in its aging infrastructure and that it was not the intent to approve specific projects. Fourth Entry on Rehearing ¶ 112. And the Company filed an annual DIR Plan in coordination with Staff to ensure a reasonable and prudent set of projects is implemented. OMAEG's suggestion that it is

unjust and unreasonable for the Commission to increase the revenue caps without requiring AEP Ohio to file a distribution rate case ignores the fact that R.C. 4928.143(B)(2)(h) expressly authorizes the inclusion of provisions in an ESP "regarding distribution infrastructure and modernization incentives." That is the intended purpose of the DIR and that purpose would be grossly subverted if infrastructure improvement and modernization projects were subject to the rigors and delay of the traditional rate case model.

CONCLUSION

For all the foregoing reasons AEP Ohio urges the Commission to promptly deny the applications for rehearing.

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 *Ohio Power Company's Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 15th day of December 2016, via electronic transmission.

/s/ Steven T. Nourse
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Summary: Memorandum - Memorandum Contra Third Applications for Rehearing Related to the Commission's Fourth Entry on Rehearing on Behalf of Ohio Power Company electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company