

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

**In the Matter of the Alternative Energy)
Rider and Auction Cost Recovery Rider)
for Ohio Power Company)**

Case No. 15-1052-EL-RDR

**OHIO POWER COMPANY’S MEMORANDUM CONTRA THE OFFICE OF THE
OHIO CONSUMERS’ COUNSEL’S MOTION TO COMPEL**

I. INTRODUCTION

On February 25, 2015, the Commission issued an Opinion and Order approving and adopting portions of Ohio Power Company’s (“AEP Ohio” or the “Company”) electric security plan in Case Nos. 13-2385-EL-SSO, *et al.* (“*ESP III*”). Among other things, the Commission approved the continuation of the Alternative Energy Rider (AER). *ESP III*, Opinion and Order at 35 (Feb. 25, 2015). The Commission approved the AER for recovery of prudently incurred alternative energy costs, including the renewable energy credit expense associated with acquiring or creating renewable energy, in the Company’s *ESP II* case, Case Nos. 11-346-EL-SSO, *et al.* *See ESP II*, Opinion and Order at 17-18 (Aug. 8, 2012). Staff audits the AER annually. *ESP III*, Opinion and Order at 35. No party objected to the creation or continuation of the AER. *ESP II*, Opinion and Order at 18 (stating that “[n]o party took exception to the implementation of the AER mechanism”); *ESP III*, Opinion and Order at 35 (noting that AEP Ohio’s “proposal to continue the AER is unopposed”).

Consistent with the Commission’s Opinion and Order in *ESP III*, the Company filed its Application to initiate this proceeding for purposes of filing quarterly updates to the AER and the Auction Cost Recovery Rider (ACRR) on June 1, 2015. AEP Ohio has filed quarterly updates in this docket seven more times since then, all of which were administrative and ministerial in

nature. AEP Ohio has calculated its AER rates using the same methodology in each quarterly filing, and each time it has provided identical schedules demonstrating the calculation of the rate and its components. And in each filing, AEP Ohio has been transparent about its renewable energy costs.

OCC has requested to intervene in this rider update proceeding for the improper purpose of challenging the reasonableness of AEP Ohio's AER rates approved in *ESP III*. (*See* AEP Ohio Mem. Contra OCC Mot. to Intervene (June 8, 2017).) To that end, OCC has now served AEP Ohio with interrogatories and requests for production asking that AEP Ohio "provide calculations showing whether the cost of AEP Ohio's compliance with the renewable benchmarks under R.C. 4928.64(B)(2) exceeds the 3% cap provided by R.C. 4928.64(C)(3)," identify the date such calculations were performed, and provide documents supporting such calculations ("OCC's Requests"). (*See* OCC Mot. at Ex. 1.) AEP Ohio objected to OCC's Requests on the basis that they sought irrelevant information that is outside the scope of this case. (*Id.*) Subject to those objections, however, the Company substantively responded to the Requests, indicating that it has not prepared the calculation OCC requested and, therefore, could not provide it. (*Id.*)

OCC has now moved to compel calculations that are not relevant to this proceeding, that the Company is not required to perform, and that the Company in fact has not performed. OCC's Requests and its motion to compel are predicated on OCC's flawed misunderstanding of the compliance excusal provision set forth in R.C. 4928.64(C)(3). Moreover, AEP Ohio should not be required to provide a calculation that it otherwise has no affirmative obligation to perform. The Commission should deny OCC's motion in its entirety.

II. LAW AND ARGUMENT

OCC's position that AEP Ohio has not fully responded to OCC's Requests, or that AEP Ohio's responses are somehow deficient, is misplaced. AEP Ohio properly objected to OCC's Requests as seeking irrelevant information that is outside the scope of this case and not reasonably calculated to lead to the discovery of admissible evidence. (*See* OCC Mot. at Ex. 1.) As AEP Ohio explained in its memorandum contra OCC's motion to intervene, this is an administrative rider update proceeding. (*See* AEP Ohio Mem. Contra OCC Mot. to Intervene (June 8, 2017).) It is inappropriate for OCC to challenge the prudence or reasonableness of the costs that will flow through the AER here; those costs were approved in the Company's prior ESP proceedings. The information OCC's Requests seek, therefore, is outside the scope of this ministerial proceeding.

Moreover, OCC's Requests are based on the false premise that there is some requirement for AEP Ohio to have performed the calculations OCC has requested. To be clear, there is not. There is no statutory requirement that an electric utility perform the compliance excusal calculation discussed in R.C. 4928.64(C)(3). Nor has any rule or order of the Commission required AEP Ohio to perform that calculation. Nor is OCC's position that the compliance excusal provision constitutes a legislative limit on renewable energy costs. (*See* OCC Mot. at 1.) Rather, and contrary to OCC's characterization of the statute, the Commission has consistently recognized that R.C. 4928.64(C)(3) *permits* an electric utility to avoid compliance with renewable energy benchmarks to the extent that its reasonably expected cost of complying with the benchmarks exceeds its actual total cost of SSO generation by three percent or more. *See, e.g., In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison*

Company, Case No. 11-5201-EL-RDR, Opinion and Order at 33 (Aug. 7, 2013). Nothing in the statute, however, affirmatively *requires* an electric utility to affirmatively calculate its status relative to the three percent provision outside of that narrow context – and, in fact, the Commission has declined the invitation to interpret the statute in that manner. *Id.* at 30-34.

That the compliance excusal calculation is permissive and not some mandatory requirement automatically imposed upon the Company is evident from the plain language of both the statute and O.A.C. 4901:1-40-07, which provides that an electric utility “*may file* an application requesting a determination from the commission that its reasonably expected cost of compliance with a renewable energy resource benchmark * * * would exceed its reasonably expected cost of generation to customers by three per cent or more.” O.A.C. 4901:1-40-07(B) (emphasis added). Although the burden of proof for substantiating a claim under Rule 4901:1-40-07(B) remains with the electric utility, *see* O.A.C. 4901:1-40-07(B)(1), the rule is clear that the decision to request a compliance excusal determination is within an electric utility’s discretion.

Moreover, contrary to OCC’s position, the compliance excusal calculation is not “readily available” to AEP Ohio (*see* OCC Mot. at 6, citing O.A.C. 4901-1-19(B)) because the Company has not performed it. It would be an abuse of the discovery rules for OCC to be able to compel AEP Ohio to create and provide a calculation that it has not performed (and is not required to perform at OCC’s request). Courts interpreting discovery rules comparable to those the Commission applies have consistently held that a party does not have a duty to create a document in response to a discovery request. *See, e.g., Harris v. Advance Am. Cash Advance Ctrs.*, 288 F.R.D. 170, 174 (S.D. Ohio 2012) (citing supporting cases). The Commission should hold similarly here.

Finally, R.C. 4928.641 was enacted in 2014 as part of S.B. 310 and provides that AEP Ohio's renewable energy purchase agreements (entered into before April 1, 2014) being recovered in rates at that time shall continue until the prudently incurred costs associated with those contracts are fully recovered. Both the Fowler Ridge and Timber Road REPAs have been recovered in rates since their inception. The statutory grandfathering of continuing cost recovery under R.C. 4928.641 is a mandatory statute that has specific application to the Company's two REPAs and prevails over the optional 3% cost excusal provision. Hence, that statute provides an additional basis to conclude that OCC's attempt to force a 3% cost excusal calculation is unnecessary and irrelevant to the current situation.

III. CONCLUSION

For the reasons set forth above, Ohio Power Company respectfully requests that the Commission deny in its entirety OCC's motion to compel three percent compliance excusal calculations that the Company has no obligation to provide and has not performed.

Respectfully submitted,

/s/ Steven T. Nourse

Steven T. Nourse

American Electric Power Service Corporation

1 Riverside Plaza, 29th Floor

Columbus, Ohio 43215-2373

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

Counsel for Ohio Power Company

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 the Office of the Ohio Consumers' Counsel's Motion to Compel* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 26th day of July, 2017, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

EMAIL SERVICE LIST

christopher.healey@occ.ohio.gov

william.wright@ohioattorneygeneral.gov

sarah.parrot@puc.state.oh.us

greta.see@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/26/2017 2:30:15 PM

in

Case No(s). 15-1052-EL-RDR

Summary: Memorandum -Ohio Power Company's Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Compel electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company