

**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)

**COMMENTS OF AEP OHIO OPPOSING TARIFF LANGUAGE PROPOSED BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

On February 28, 2018, Ohio Power Company (“AEP Ohio” or the “Company”) filed an update to the PPA Rider to be effective with the first billing cycle of April 2018. The Company included with that filing the following additional tariff language for the PPA Rider:

This Rider is subject to reconciliation, including, but not limited to, refunds to customers, based upon the results of audits ordered by the Commission in accordance with the February 25, 2015 Opinion and Order in Case Nos. 13-2385-EL-SSO *et al.* and the March 31, 2016 Opinion and Order in Case No. 14-1693-EL-RDR.

The additional tariff language proposed by the Company in this case is consistent with the language proposed in several other AEP Ohio rider cases – all of which has been coordinated with Staff *See* Case Nos. 18-96-EL-RDR (Basic Transmission Cost Recovery Rider), 17-1156-EL-RDR (gridSMART Phase 2), 14-1696-EL-RDR (Distribution Investment Rider (“DIR”)), 15-1052-EL-RDR (Advanced Energy Rider), 18-440-EL-ATA (Energy Efficiency/Peak Demand Reduction Rider), 18-441-EL-ATA

(Enhanced Service Reliability Rider), 18-375-EL-RDR (Pilot Throughput Balancing Adjustment Rider), 15-1052-EL-RDR (Auction Cost Recovery Rider), and 18-191-EL-RDR(Economic Development Rider). OCC objects to the proposed tariff language and seeks adoption of alternative tariff language that seeks to bypass prior Commission rulings in this proceeding and unlawfully circumvent mandatory requirements under R.C. 4903.16.

The Company's proposed language was developed cooperatively between AEP Ohio and the Staff. And the Staff filed its report in the docket on March 12 recommending that the language be adopted because it "appropriately clarifies the Commission's authority with respect to reconciliations and adjustments to the Riders * * *." While OCC claims (at 3) that the Company's proposed tariff language is "woefully inadequate," the Commission itself has already approved the same language for the DIR and gridSMART Phase 2 Rider, adopting the same tariff language over OCC's objections. *See AEP Ohio gridSMART Phase 2 Rider Update*, Case No. 17-1156-EL-RDR, Finding and Order at 4-5 (Feb. 28, 2018); *AEP Ohio Distribution Investment Rider Update*, Case No. 14-1696-EL-RDR, Finding and Order at 4-5 (Feb. 21, 2018). The proposed tariff language already addresses the issue presented by the Supreme Court's decision in *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 ("*Ohio Edison*"). In explicit terms, the tariff renders the PPA Rider subject to reconciliation, including for audits ordered in the *ESP III* and *PPA Rider* decisions. Hence, the Company's proposed tariff language fully resolves the issue presented by the *Ohio Edison* decision, as the Commission has previously found.

But OCC's quarry here is different. OCC is trying to achieve something well beyond addressing the implications of the Supreme Court's *Ohio Edison* decision. In reality, OCC's proposed tariff language is an untimely and unlawful attempt to circumvent the controlling process for OCC's appeal of the PPA Rider pending before the Supreme Court in Case No. 2017-752. OCC described its primary objection (at 3) as being that the Company's proposed tariff language "does not address the situation where the PUCO approved a charge and the charge is later found unlawful or unreasonable by the Court." Thus, OCC's transparent purpose is to try and expand reconciliation to preserve the outcome of its pending appeal to challenge the PPA Rider and its proposed tariff language is designed to circumvent the Commission's existing rulings on this point and "end run" the controlling process governing Supreme Court appeals.

OCC has urged the Commission throughout this proceeding to render the PPA Rider to being collected subject to refund – and the Commission has rejected those requests based in part on R.C. 4903.15 (Commission orders are effective immediately). In its Opinion and Order (at 87), the Commission found that the matter of whether any refunds would be issued in the event of reversal would be a future issue for the Commission or a reviewing court. And the Commission reinforced on rehearing that the PPA Rider would not be collected subject to refund, finding that doing so would be inappropriate. Second Entry on Rehearing (November 3, 2016) at 78; Fifth Entry on Rehearing (April 5, 2017) at 32-33. Similarly, the Commission rejected OCC's request to stay the PPA Rider proceeding based on an allegation that OCC would prevail in a challenge before the Supreme Court of Ohio. Opinion and Order at 20. It would be even more inappropriate to presently entertain OCC's request to modify the Commission's

final decision on the merits (which is a final order with a challenge pending before the Supreme Court) at this stage of the proceedings where the rider mechanism is simply being implemented.

Finally, OCC's proposed tariff language is inappropriate because it would circumvent the established requirements under R.C. 4903.16 for staying a Commission order to preserve the outcome of an appeal before the Supreme Court. R.C. 4903.16 as the part of the comprehensive statutory scheme governing requests to suspend a Commission decision results in OCC's request being unlawful.

The statute requires an undertaking conditioned for the prompt payment of all damages caused by the delay in enforcement of the order complained of by the appellant on appeal. The statutory prerequisite of an undertaking is not an option or suggestion. An appellant such as OCC must file an undertaking in order for the Court to stay execution of or "suspend" an order. The Court has repeatedly reiterated the requirement to post a bond to secure a stay under R.C. 4903.16. *Office of Consumers' Counsel v. Public Util. Comm.* (1991), 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162; *City of Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 112, 163 N.E.2d 167, 172; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 258, 141 N.E.2d 465, 468. In the *Office of Consumer's Counsel* decision the Court applied this requirement directly to a stay request filed by OCC. Specifically, the Court stated that "R.C. 4903.16 provides for the procedure that must be followed when seeking a stay of a final order of the Commission." *Id.* at 403, 162.

OCC did not request a stay from the Supreme Court in its pending challenge of the PPA Rider in Case No. 2017-752. And it cannot obtain such relief from the

Commission now that the underlying decision is final and an appeal has been lodged. OCC's transparent attempt to bypass the mandatory requirement under R.C. 4903.16 should not be entertained.

CONCLUSION

For the foregoing reasons, the Commission should adopt the Company's proposed tariff language and reject OCC's alternative tariff language.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ohio Power Company's *Comments* has been served upon the below-named counsel for all parties on this 23rd day of March, 2018.

/s/ Steven T. Nourse

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Summary: Comments of AEP Ohio Opposing Tariff Language Proposed by the Office of The Ohio Consumers' Counsel electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company