

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2018 Long-Term Forecast Report on behalf of Ohio Power Company and Related Matters.	:	Case No. 18-0501-EL-FOR
	:	
In the Matter of the Application of Ohio Power Company for Approval to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Energy Rider.	:	Case No. 18-1392-EL-RDR
	:	
In the Matter of the Application of Ohio Power Company for Approval to Amend Its Tariffs.	:	Case No. 18-1393-EL-ATA
	:	

**INITIAL BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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INTRODUCTION

The ultimate purpose of forecasting proceedings is to assure that there will be electricity service when it is needed. If, based on the various forecasts presented, it appears that there will not be electricity service available when it is demanded in the future, there is “need” for some action, perhaps the construction of a generating facility, to address that shortfall. A review of the record in this case shows that there is a sufficient supply of energy, capacity, and renewable energy credits (RECs) to meet anticipated demands across the planning period without the addition of the 900 MW of

renewable generating facilities. There is, therefore, no “need”, in a traditional forecasting sense, for the addition of the generating facilities that Ohio Power Company (AEP or the Company) proposes.

DISCUSSION

This proceeding is of interest because AEP has committed to creating at least 900 MW of renewable energy resources. As AEP would like to obtain ratepayer support for this initiative, it plans to utilize R.C. 4928.143(B)(2)(c), which give the Public Utilities Commission of Ohio (Commission) the authority to authorize a nonbypassable surcharge for such a project. The first step of the process to obtain this sort of treatment for the renewable initiative is that the “...commission first determines in the proceeding that there is a need for the facility based on resource planning projections submitted by the electric distribution utility.” R.C. 4928.143(B)(2)(c). Resource planning is considered by this Commission in FOR cases under R.C. 4935.04. The findings the Commission makes in these forecasting cases “...shall serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.” R.C. 4935.04(H). Thus the primary issue in this case is whether there is a “need”, under R.C. 4928.143(B)(2)(c), for the 900 MW of renewable energy that AEP proposes. Unless a “need” is found, the Commission must deny AEP’s proposal.

The Commission, as a creature of statute, has no authority to act beyond that conferred by statute. *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302, 307, 414 N.E.2d 1051 (1980). When construing a statute, one should first look to its

plain language. *State v. Thomas*, 148 Ohio St.3d 248, 2016-Ohio-5567, 70 N.E.3d 496, ¶ 7. If the meaning of a statute is unambiguous, one must apply it as written without further interpretation. *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17, 734 N.E.2d 775 (2000). Most importantly for this case, “[i]n the absence of a definition of a word or phrase used in a statute, words are to be given their common, ordinary, and accepted meaning.” *State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 39, citing *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus; see also *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 17.

The term “need” is not explicitly defined in either R.C. 4935.04 or R.C. 4928.143. It is clear, however, that the determination of “need” in R.C. 4928.143 (B)(2)(c) is to be based on resource planning projections submitted by the utility, and resource planning projections are submitted to this Commission under R.C. 4935.04. This is logical in that the information needed to make resource planning decisions is found in FOR cases. As noted previously, the findings made in FOR¹ proceedings are then to be used in other cases where resource planning is being considered and R.C. 4928.143(B)(2)(c) is one such example. Had the General Assembly wished the Commission to examine the “need” question under the much more broad scope of R.C. Chapter 4928 there would

¹ “FOR” is the purpose code designation used by the Commission’s docketing information system for forecasting cases brought before the Commission.

have been no need to refer to resource planning projections. Those words have meaning² and therefore “need” must be construed in the context of R.C. 4935.04.

As noted previously, R.C. 4935.04 does not explicitly define “need” however the context of the statute makes it rather clear. The basic review in an FOR case is:

The hearing shall include, but not be limited to, a review of:
(a) the projected loads and energy requirements for each year of the period; (b) the estimated installed capacity and supplies to meet the projected load requirements.

R.C. 4935.04(E)(2). Thus a forecasting case is really about assuring that there is sufficient resource available to meet anticipated demand. This is to be expected as forecasting requirements were first enacted in 1977, a period when there was a great concern that there would simply not be enough energy available. Thus it is clear that “need” in this construct means a mismatch in the supply of resources and the demand for them. And, in order for the Commission to approve a surcharge under R.C. 4928.143(B)(2)(c), the utility’s resource planning projections must show that such a mismatch. Only then would there be a “need” for a new energy facility to help alleviate this energy shortfall.

The meaning of the term “need” is consistent with the Commission Staff’s (Staff) analysis in this case and indeed in all forecasting cases. As explained by Staff witness

² Indeed R.C. 1.47(B) requires that the entirety of statutes must be read so as to be effective.

Benedict, the Staff uses a three step process. First it determines if the supply and demand forecasts submitted are reasonable. Staff Ex. 2 at 3. In this case they are within the range of the forecasts created independently by the Staff. Staff Ex. 2 at 4-5. Second, and significantly for this case, the Staff would examine these forecasts to determine if there was a shortfall in supply for some period. Staff Ex. 2 at 3. As will be discussed at greater length below, Staff found no such shortfall and its analysis ended at that point, there being no problem to address. Staff Ex. 2 at 7. If the circumstances had been otherwise and Staff had identified such a shortfall, the analysis would have continued to the third step, attempting to find the most cost-effective means to eliminate the potential future shortfall. Staff Ex. 2 at 3,8-9. This would have been done through a review of any potential options suggested by the company or others in the case. In that hypothetical situation, where the forecasts indicated that there would not be energy or capacity to meet future demand, there would have been a problem to address. In the actual case before the Commission, there is no problem to be addressed. Having failed to show “need” for 900 MW of renewable energy facilities, AEP’s request should be denied.

TURNING POINT

It may be instructive to consider the only other time in which the Commission was faced with making a “need” determination in the R.C. 4935.04 and R.C. 4928.143 context, Turning Point. *In the Matter of the Long Term Forecasting Report of the Ohio Power Company*, 10-501-EL-FOR and *In the Matter of the Long Term Forecast Report of the Columbus Southern Power Company* 10-502-EL-FOR, Opinion and Order January

9, 2013 (Turning Point). In Turning Point, the Commission was asked to consider the “need” for a significant solar plant to be built by the then two operating companies³ owned by AEP. AEP argued that the plant was needed to provide in state solar RECs, which were in relatively short supply because the requirement was relatively new at that point in time, and that it would provide significant economic benefits to the state particularly in the locale where construction would occur. Just as in the current case, AEP did not argue that Turning Point was needed for either energy or capacity.

The Commission examined the evidence in the case and found that there was no *general* need for additional in-state solar RECs until 2015⁴ and that AEP itself did not ever need any in-state solar RECs during the planning period. Turning Point at 26. A general, future shortfall in RECs was not sufficient. AEP itself would have had to have shown that it would have insufficient RECs and it did not. Even if the potential shortfall in the REC supply for others would be considered, the Commission was not convinced. It indicated a willingness to rely on future development of solar facilities by others to meet the obligation. Turning Point at 26-27. Even more tellingly, the Commission did not consider benefits to the public or ratepayers at all. It felt that it could not do so absent a finding of “need”. Turning Point at 27.

³ Subsequently these two companies have merged.

⁴ 2015 was only two years out from the time that Turning Point was decided.

Thus it appears that the Commission's view of "need" within the statute is exactly the same as Staff's. "Need" means a lack of energy, capacity, or RECs. In the absence of a deficiency in these aspects, there is no "need". AEP does not even argue that there is a shortfall in energy, capacity, or RECs. Staff Ex. 2 at 7. AEP's request should be denied.

MISCELLANEOUS MATTERS

While the Staff's analysis stopped once it was clear that there was no need within the meaning of the statute presented in this case, several other observations should be made.

There will, no doubt, be much discussion in other briefs of the proposed economic benefits associated with, particularly, the construction phase of the renewable project. Whether the benefits are large or small, or whether they are incremental or merely represent wealth transfer from one place in Ohio to another, misses the real point. Whatever the benefits are, they are not unique to this proposal. They would exist in just the same way whoever constructed 900 MW of renewable resources. Privately funded construction would do exactly as much or as little as this utility initiative. Tr. Vol. IV at 1087-8. Therefore these economic effects, regardless of how they are characterized, are not a reason to endorse this proposal.

This case is not a referendum on the wisdom of constructing renewable generating resources. Rather it is the first step of a process to determine if all ratepayers should bear the cost burden of new resources. The General Assembly has determined that the

Commission can only consider forcing ratepayers to bear this burden if the facilities are needed to maintain electric service. No matter how wonderful the idea of adding 900 MW of renewable generation may be, forcing all ratepayers to pay the bill can only be *considered* if those facilities are needed and the record here shows they are not.

The Company will claim that its Navigant study provides a reason to support the project. Staff is not in a position to critique the technical validity or lack thereof for this survey.⁵ However Staff would suggest that the Commission would be better served to examine what happens in the market rather than what some people may have suggested in a survey. Certainly there is an interest on the part of some portion of the public in purchasing renewable energy. The record reveals that there are numerous renewable offerings on the Apples to Apples service. Staff Ex. 2 at 10. Indeed AEP itself makes one. Tr. Vol. II at 313. There are even straight REC offerings without any power. Tr. Vol. VII at 2007. It seems clear that CRES providers have recognized that there is a sufficient interest in renewable energy that renewable offerings are sustainable in a business sense. The relative absence of Ohio-only renewable options⁶ would seem to indicate that CRES providers do not see an actual desire on the part of a significant number of customers to warrant such an offering⁷. This seems intuitive. If consumers

⁵ Others do extensively, see OCC Ex. 18, OCC Ex. 24.

⁶ Although IGS may have created one recently. Tr. Vol. IX at 2009.

⁷ Indeed one might wonder if there would be a net increase in the purchase of renewables if such offerings were available. For there to be a net increase there would need to be a significant group of customers who would purchase Ohio-only renewables but refuse to purchase non-Ohio renewables. If customers merely switched from non-Ohio to Ohio sources, there would be no

are drawn to renewable energy out of a concern for global warming which is, by definition, global, the location of the generation should be irrelevant. It is difficult to imagine that there is a sufficiently large group of consumers for whom only Ohio RECs will do. But imagine we must as there is no record evidence that shows this. Indeed AEP cannot identify a single customer who does not have access to renewable energy if they desire it. Tr. Vol. IV at 1051-4. The record does not even reveal how many customers buy renewable power currently. Tr. Vol. II at 295, 300. Not knowing the current demand level makes it appear impossible to know the unmet demand level.

Buying RECs is not the only course of action. Other consumers may meet their desire for renewable energy quite directly by installing solar panels on their own property. While this is certainly not an option for everyone, some very small portion of those who physically could install such facilities have done so. Large customers have even more ability to self-provision and the record shows that some have. Tr. Vol. I at 147-152. Aside from the Navigant study there does not appear to be any indication in the record that there is some unmet desire for Ohio-only renewable service. This also is intuitive. Ohio is a competitive state. It relies on market forces. It is the nature of markets to seek out unmet desires and fulfill them. The relative absence of Ohio-only offerings certainly makes it appear that there really is not a desire on the part of a significant portion of the public for such service.

net change. The existence of a significant number of customers with such refined preferences seems very speculative.

Even if the situation were different and there was significant evidence of a desire on the part of the public for Ohio-only renewable generation, a utility initiative to meet that need should not be the first option. The Turning Point decision is instructive here as well. In Turning Point the Commission recognized that there was a future need for solar RECs that couldn't be met by the then-existing resources. But rather than meeting this potential future need with a utility initiative, the Commission chose to let market forces rise to address the shortfall.⁸ This situation should be treated similarly. Rather than forcing renewable generation costs on the vast body of consumers who have not chosen to purchase more renewable energy than the law mandates, it is better to let the market provide for actual desires that people express through their own voluntary spending choices.

There will be a discussion of supply diversity. Whether concerns about changes in the diversity of the generation supply rise to the level of determining “need” within the meaning of the statute is a matter for the Commission to determine in its discretion. Staff has no recommendation.

The subject of energy independence for Ohio is distinct from supply diversity. The record shows that Ohio is a net importer of electricity and has been for at least sixteen years. Tr. Vol. I at 98-99. Energy independence means literally nothing. On an

⁸ And of course the Commission was correct and no shortage occurred.

unconstrained system like AEP,⁹ it simply does not matter where electricity is supplied. The central dispatching provided by PJM Interconnection, LLC (PJM) provides access to the cheapest source at all times. In this context dependence or independence have no meaning. Some sort of attempt to move toward Ohio supplying all of the power that it uses is not meaningful or useful. The state already has reliable access to the cheapest available power at any point in time.

STAFF SUPPORTS RENEWABLES

Although the Staff concluded that there has been no showing of “need” under Ohio law, this should not be taken to mean that the Staff is opposed to the construction of renewable generation in Ohio. Far from it. Staff’s position is merely that there is a specific statutory showing that must be made before a utility initiative like this, essentially ratepayer funding for generation construction and operation, can be considered and no such showing has been made. Staff would applaud an initiative by a competitive affiliate of AEP (or any other non-EDU) to build these units.

In Staff’s view, the provisions of R.C. 4928.143 (C) are intended only as an ultimate back stop. “Need” in this context would only arise in the context of an abject failure of the PJM structure which currently offers assurance of sufficient capacity,

⁹ See Tr. Vol. I at 207.

energy, and wholesale reliability.¹⁰ While it is, thankfully, difficult to imagine a supply deficit scenario, with today's relatively mature PJM structures in place, when R.C. 4928.143(C) would be needed, it would have been much easier to have such concerns when the section was enacted. The provision is a last resort, to be used *in extremis*. Thankfully we are not there today and hopefully never will be.

CONCLUSION

For the Commission to find that the facilities AEP has proposed in this case are needed within the meaning of R.C. 4928.143(C), there must be a resource planning need under R.C. 4935.04. This means there needs to be a projected shortage of energy, capacity, or RECs. The record shows the opposite. AEP has sufficient resources to meet anticipated demand. The Commission should so find.

Respectfully submitted,

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¹⁰ There is a current dispute about the fairness of the *pricing* in the PJM structure, but this is irrelevant to the point here, which simply deals with the quantity of power available and not its cost.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail upon the following Parties of Record, this 6th day of March, 2019.

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