

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)	
Power Purchase Agreement Rider)	Case No. 18-1004-EL-RDR
of Ohio Power Company for 2018.)	
In the Matter of the Review of the)	
Power Purchase Agreement Rider)	Case No. 18-1759-EL-RDR
of Ohio Power Company for 2019.)	
In the Matter of the Review of the)	
Reconciliation Rider of Duke Energy)	Case No. 20-167-EL-RDR
Ohio, Inc.)	

**OHIO POWER COMPANY’S MEMORANDUM CONTRA
JOINT MOTION FOR A CONSOLIDATED HEARING**

The Joint Motion for a Consolidated Hearing (“Motion”) filed by the Office of the Ohio Consumers’ Counsel (“OCC”) and the Ohio Manufacturers’ Association Energy Group (“OMAEG”) is again an unwarranted and premature attempt¹ to morph this straightforward annual prudency review of Ohio Power Company’s (“AEP Ohio” or “Company”) Power Purchase Agreement Rider (“PPA Rider”) into a litigious and inefficient procedure. The Commission should not be persuaded.

¹ OCC issued its first and second notices of deposition and requests for production of documents to AEP Ohio on January 7 and January 14, 2021, forcing the Company to file a Motion for Protective Order on January 11, 2021. While OMAEG didn’t join in OCC’s notices, it nevertheless filed a memorandum contra to the Company’s Motion on January 26, 2021. Second, OCC and OMAG asked jointly for a notice of deposition of the Commission’s auditor and a waiver of the rule that forbids this practice (Ohio Adm.Code 4901-1-16(I)) on March 17, 2021. Third, they also filed a Motion to Compel the deposition of AEP Ohio on the same date. The Company filed a Memorandum Contra the Motion to Compel on April 1, 2021, which noted that OCC and OMAEG had admitted they sought the Company’s deposition because they wanted to file the deposition transcript and improperly use it as evidence without a hearing. (See Memorandum Contra at 4.) Now, however, OCC and OMAEG appear to concede that “a hearing is necessary to allow parties to present evidence * * * .” (Memorandum in Support at 5.)

Using one finding in the London Economics International, LLC's ("Auditor") report, and very sparse precedent, as a pretense, OCC and OMAEG make several conclusory leaps in an effort to convince the Commission that a hearing is not only warranted, but *required*.

(Memorandum in Support at pp. 2-3.) Their empty rhetoric includes:

- 1) an accusation that the Commission is giving AEP Ohio (and other electric distribution utilities ("EDUs")) a "blank check" for the Ohio Valley Electric Corporation ("OVEC") Plants' costs (Motion at 1);
- 2) complaints about original H.B. 6 that have nothing to do with this proceeding (*id.* at 1-2) ;
- 3) false allegations that the Auditor had "suggest[ed]" the Company was not "acting like [a] competitive operator" and that the Auditor found the Company acted "unreasonably by allowing the plants" to operate (*id.* at 2; Memorandum in Support at 5);
- 4) declaring that the EDUs are "charging for operating losses through above-market subsidy charges" (Memorandum in Support at 1); and
- 5) asserting that the Company and the Commission "implied" and "envisioned" that the PPA Rider audit cases would involve a hearing (*id.* at 5).²

All of these assertions are "sound bites" intended to attract attention, but they are not based in fact or in legal or administrative precedent.

Put simply, the Commission should deny OCC and OMAEG's Motion in its entirety for the reasons set forth below. At the very least, the Commission should refrain from ordering a

² As will be discussed later in this Memorandum Contra, the Commission thoroughly considered the process of the annual audit review and did not order a hearing.

hearing and discovery until after the comment period and any staff report or recommendation – a procedural schedule has not yet been implemented in these cases. Moreover, any hearing should not be consolidated, as the issues (and the “facts”) raised by OCC and OMAEG are different for AEP Ohio and Duke Energy Ohio (“Duke”), making consolidation inappropriate.

I. THE COMMISSION IS NOT “REQUIRED” TO HOLD A HEARING IN THIS DOCKET.

As an initial matter, absent a statutory requirement (which as discussed below does not exist here) the Commission enjoys “wide discretion” over its order of business. *Office of Consumers’ Counsel v. Pub. Util. Comm.*, 56 Ohio St.2d 220, 227, 383 N.E.2d 593 (1978); *State ex rel. Columbus Gas & Fuel Co. v. Pub. Util. Comm.*, 122 Ohio St. 473, 475, 172 N.E. 284 (1930). Although OCC and OMAEG claim that the Commission is “required” to hold a hearing (Memorandum in Support at 3), Ohio law does not provide for full discovery or a hearing simply because the Commission opened a docket. *See In re Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, Pub. Util. Comm. No. 06-685-AU-ORD*, Finding and Order at ¶ 9 (Dec. 6, 2006) (finding that if OCC’s proposal to add a broad definition of “proceeding” to Ohio Adm.Code 4901-1-01 were adopted, “any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC’s proposed definition would eliminate the Commission’s discretion to conduct its proceedings in a manner that it deems appropriate and would unduly delay the outcome of many cases.”) *See also In re Triennial Review Regarding Local Circuit Switching*, Case No. No. 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (Oct. 28, 2003) (“The Commission’s procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an

evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required.”) That decision is left to the broad discretion of the Commission. *See, e.g., In the Matter of the Joint Application of Sprint Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry on Rehearing ¶ 9 (Jan. 25, 2006) (holding that, where the applicable statutes do not mandate a hearing, the Commission has “discretion [to determine] whether to allow discovery, depositions and testimony”).

OCC and OMAEG attempt to rely on the Fuel Adjustment Clause cases, taking the Commission through an interesting dissertation of how the law evolved. Conspicuously absent is any legal authority that supports a required hearing process in this docket. Indeed, they admit that “Ohio enacted a law that provided for a hearing process that the PUCO could use for FAC cases.” (Memorandum in Support at 5). There is no such statutory requirement related to the PPA Rider.³ Without any statutory, legal, or administrative requirement to hold a hearing, the Commission has discretion to decide what is appropriate.

Finally, OCC and OMAEG’s distortions of the testimony and Commission rulings in the Company’s ESP Cases are equally unpersuasive. Indeed, in neither of those cases, in initial opinion and order and on rehearing, did the Commission indicate that a hearing was required. In its Opinion and Order in Case No. 14-1693-EL-SSO, the Commission rejected arguments that the process for “ongoing Staff review” and annual audits of the PPA Rider would be “inadequate or illusory[,]” and ordered that “AEP Ohio’s quarterly PPA rider filings ... should include appropriate work papers. Staff should review should review each such filing for completeness, computational accuracy, and consistency with any prior Commission determinations regarding

³ A hearing requirement is also absent from R.C. 4928.148 (which does not apply here).

the adjustments.” *In the Matter of the Application Seeking Approval of Ohio Power Co. ’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order at 88, 89 (March 31, 2016). The Commission ordered, as well, that the PPA Rider remains “subject to adjustment during the annual audit and reconciliation, through which Staff, or another auditor selected by the Commission, will review the accuracy and appropriateness of the rider's accounting and the prudence of AEP Ohio's decisions and actions as set forth in the stipulation.” *Id.* at 90. The Commission noted that “interested stakeholders may seek to intervene and participate in the annual audit process, consistent with any established procedural schedule.” *Id.* The Commission did not establish a particular procedure, nor did it categorically require a hearing. There is not currently a procedural schedule in this case.

Further, the Commission stated that “the Commission has always provided for the periodic review and reconciliation of riders created under an ESP. It is well-established that state commissions can review whether a utility prudently entered into a particular transaction in light of the alternatives.” *Id.* at 88. Likewise, the Commission affirmed its rejection of certain intervenors’ challenges to the annual prudence review process on rehearing. *Id.* at Second Entry on Rehearing at ¶178 (Nov. 3, 2016). Finally, in Case No. 16-1852-EL-SSO, *et al.*, the Commission modified and approved a stipulation and recommendation, which authorized AEP Ohio to implement an ESP for the period of June 1, 2018, through May 31, 2024, and provided for the continuation of the PPA Rider, maintaining the annual audit process. *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, *et al.*, Opinion and Order at ¶ 53 (Apr. 25, 2018). The Commission has not ordered a hearing in any of those cases. For all of those reasons, the Commission should deny the Motion.

II. ANY HEARING AT THIS TIME WOULD BE PREMATURE

Even if a hearing would be warranted, which it is not, the request is also premature. The original procedural schedule in this docket contained a comment period, which was continued. (See Entry (Dec. 7, 2020); Entry (Jan. 19, 2021).) A new comment period has not been established. Submitting comments is more than sufficient to provide all parties an opportunity to present their positions to the Commission. Only after a comment period, Staff review and recommendation, and adoption of the audit report would it be appropriate to consider scheduling a hearing. See, e.g., *In the Matter of the Fuel Adjustment Clauses of Columbus S. Power Co. and Ohio Power Co.*, Case Nos. 09-872-EL-FAC, *et al.*, Finding and Order at ¶15 (Jan. 7, 2010) (finding that no hearing was necessary because the tariff filings did not appear to be unjust, unreasonable, or inconsistent with Commission orders based on the Commission’s review of the applications, the parties’ arguments and Staff’s review and recommendation); *In the Matter of the Review of the Non-Market Based Services Rider in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 18-1818-EL-RDR, Second Finding and Order at ¶35 (Oct. 9, 2019) () The Commission should find that a hearing is not warranted at this time.

III. THE COMMISSION SHOULD NOT CONSOLIDATE AEP OHIO’S DOCKETS WITH DUKE AS THE PROCEDURAL HISTORY AND FINDINGS ARE SEPARATE AND DISTINCT

OCC and OMAEG make bare arguments that the Commission should consolidate AEP Ohio’s dockets with Duke’s dockets because it would be “orderly” and because issues in the two proceedings “overlap.” (Memorandum in Support at 8.) Notably, while OCC and OMAEG cite to AEP Ohio’s prior proceedings, they make no mention of Duke’s prior proceedings. Each utility has its own right to a separate and distinct docket – they are two distinct parties. The

tariffs at issue in these dockets arose out of completely separate proceeding with distinct stipulations. And, each docket has matured at its own pace with different procedural orders. Indeed, in Duke's docket (Case No. 20-167-EL-SSO), OCC and other parties have already filed comments.

In addition, as OCC and OMAEG pointed out, the Auditor issued separate audit reports for AEP Ohio and Duke.⁴ Most importantly, the Auditor's findings were different for each entity. For example, the audit of AEP Ohio's PPA Rider was January 1, 2018, to December 31, 2019. Duke's audit period was January 1, 2019, to December 31, 2019. The Auditor examined different months when reviewing the PJM prices versus OVEC energy charges. (*See* Audit Report for AEP at 52; Audit Report for Duke at 52.)⁵ In conducting its audit, LEI made it clear that it was reviewing "AEP's actions," not AEP Ohio *and* Duke's actions. With all of these difference between each entity's audit, consolidation is not appropriate. *See, e.g., In the Matter of the Complaint of Warner Amex Cable Communications, Inc. v. Columbus S. Power Co.*, Case No. 86-2121-EL-CSS, Entry at ¶5 (Oct. 9, 1987) (rejecting motion to consolidate because the parties, among other things, had different tariffs). The Commission should reject the request to consolidate.

⁴ AEP Ohio recognizes that the Commission recently issued an Entry in a consolidated docket for the 2020 OVEC Generation Purchase Rider audits. (*See generally* Case No. 21-477-EL-RDR.) That docket was opened pursuant to R.C. 4928.148. That case is distinguishable here because it merely consolidated the preliminary audit contract portion of the proceeding at the outset. Here, OCC is requesting consolidation after the fact, where different riders, different procedural schedules and different audits have all occurred independently.

⁵ The Auditor examined all twelve months in 2019 in the Duke audit, but seven months in 2018 and 2019 for AEP Ohio.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny the Joint Motion for a Consolidated Hearing.

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 Joint Motion for a Consolidated Hearing to Determine Whether AEP and Duke's OVEC Charges Were Prudent by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 23rd day of July, 2021, via electronic transmission.

/s/ Steven T. Nourse

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Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR, 20-0167-EL-RDR

Summary: Memorandum - Ohio Power Company's Memorandum Contra Joint Motion for a Consolidated Hearing electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company