

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Commission Review of)
the Capacity Charges of Ohio Power) Supreme Court Case Nos. 2012-2098
Company and Columbus Southern Power) 2013-0228
Company.)
) Appeal from the Public Utilities
) Commission of Ohio
) Case No. 10-2929-EL-UNC

**RESPONSE OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
TO THE JOINT MOTION TO DISMISS OF OHIO POWER COMPANY AND THE
PUBLIC UTILITIES COMMISSION OF OHIO**

Bruce J. Weston
(Reg. No. 0016973)
Ohio Consumers' Counsel

Mike DeWine
(Reg. No. 0009181)
Attorney General of Ohio

Kyle L. Kern, Counsel of Record
Assistant Consumers' Counsel
(Reg. No. 0084199)
Melissa R. Yost
Deputy Consumers' Counsel
(Reg. No. 0070914)

Thomas G. Lindgren
(Reg. No. 0039210)
Werner L. Margard, III
(Reg. No. 0024858)
John H. Jones
(Reg. No. 0051913)
Assistant Attorneys General

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-9585 – (Kern) Telephone
(614) 466-1291 – (Yost) Telephone
(614) 466-9475 – Facsimile
kern@occ.state.oh.us
yost@occ.state.oh.us

Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
(614) 644-8698 - Telephone
(614) 644-8764 - Facsimile
thomas.lindgren@puc.state.oh.us
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us

*Attorneys for Appellant/Cross-Appellee
Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee
Public Utilities Commission of Ohio*

FILED
AUG 26 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)
Frank P. Darr (Reg. No. 0025469)
Joseph E. Olikier (Reg. No. 0086088)
Matthew R. Pritchard (Reg. 0088070)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
(614) 469-8000 - Telephone
(614) 469-4653 - Facsimile
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

*Counsel For Appellant,
Industrial Energy Users-Ohio*

Steven T. Nourse (0046705)
(Counsel of Record)
Matthew J. Satterwhite (0071972)
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
(614) 716-1608 - Telephone
(614) 716-2950 - Facsimile
stnourse@aep.com
mjstatterwhite@aep.com

Daniel R. Conway (0023058)
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
(614) 227-2270 - Telephone
(614) 227-1000 - Facsimile
dconway@porterwright.com

*Counsel for Appellee/Cross-Appellant
Ohio Power Company*

Jeffrey A. Lamken (4120-2013)
Martin V. Totaro (4122-2013)
MoloLamken LLP
The Watergate, Suite 660
600 New Hampshire Ave. NW
Washington D.C. 20037
(202) 556-2010 – (Lamken) Telephone
(202) 536-2010 - Facsimile
(202) 556-2013 – (Totaro) Telephone
(202) 536 2013 - Facsimile
jlamken@mololamken.com
mtotaro@mololamken.com

*Counsel for Appellee/Cross-Appellant
Ohio Power Company*

Mark Hayden (81077)
(Counsel of Record)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
(330) 761-7735 - Telephone
(330) 384-3875 - Facsimile
haydenm@firstenergycorp.com

James F. Lang (0059668)
Laura C. McBride (0080059)
N. Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200 - Telephone
(216) 241-0816 - Facsimile
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik (0006418)
Allison E. Haedt (0082243)
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939 - Telephone
(216) 579-0212 - Facsimile
dakutik@jonesday.com
aehaedt@jonesday.com

*Counsel for Appellee/Cross-Appellant,
FirstEnergy Solutions Corp.*

I. INTRODUCTION

In this proceeding, the Court should decide whether Ohio law (R.C. 4928.141 and R.C. 4928.02(A)) is violated when a utility is permitted to defer the difference between its costs of capacity and the wholesale discounted rate it charges Marketers¹ that causes customers (both showing and non-shopping) to pay twice for capacity. Accordingly, the Joint Motion to Dismiss of the Ohio Power Company (“Ohio Power” or “Utility”) and the Public Utilities Commission of Ohio (“PUCO” or “Commission”) should be denied.

In the Capacity Case² below, the PUCO determined that Ohio Power could collect from third parties the Utility’s fully embedded cost of capacity, even though the Utility would charge Marketers³ a much lower discounted wholesale rate for capacity. (R. 417 at 23, Appx. 31).⁴ The PUCO authorized the Utility, for accounting purposes, to defer the wholesale discount – the difference between the market-based rate it would charge the Marketers and the Utility’s fully embedded cost. (R. 417 at 23, Appx. 31). This accounting authorization was the prelude to significant retail rate increases to third parties, other than the Marketers. It was not until approximately one month later that the PUCO identified the third parties who were to pay increased retail rates for the discounted wholesale capacity provided to the Marketers. (Appx.

¹ In Ohio, Marketers are entities that may vie to sell retail energy and capacity to customers of an electric distribution utility. Under R.C. Chapter 4928, these Marketers are referred to as Competitive Retail Electric Service (“CRES”) providers. But for purposes of clarity, OCC will refer to CRES providers as “Marketers.”

² PUCO Case No. 10-2929-EL-UNC.

³ In Ohio, Marketers are entities that may vie to sell retail energy and capacity to customers of an electric distribution utility. Under R.C. Chapter 4928, these Marketers are referred to as Competitive Retail Electric Service (“CRES”) providers. But for purposes of clarity, OCC will refer to CRES providers as “Marketers.”

⁴ “R”, as used herein, refers to the Record.

271, August 8, 2012 Ohio Power ESP Order at 36). The payers were to be all retail customers receiving electric service in the Utility's service territory.

And now, Ohio Power and the PUCO (collectively "Joint Movants") do not want this Court to decide (in this proceeding) whether it is lawful for the Utility to be permitted (by the PUCO) to defer, for later collection from its retail customers, certain capacity costs not collected from Marketers. Specifically, the Joint Movants request that the Court dismiss the Office of the Ohio Consumers' Counsel ("OCC") Proposition of Law No. 2. With that proposition of law, this Court would decide whether Ohio law (R.C. 4928.141 and R.C. 4928.02(A)) is violated when a utility is permitted to defer the difference between its costs of capacity and the wholesale discounted rate it charges marketers. (OCC First Merit Brief Case No. 2013-288 at 19).

The PUCO and Ohio Power contend that the Ohio Power Capacity Order did not address the deferral recovery mechanism, and thus, OCC's Proposition of Law No. 2 is not appropriate for this appeal. Joint Movants argue that the "proper vehicle" for OCC Proposition of Law No. 2 is the appeal of the Ohio Power Electric Security Plan II Proceeding (Ohio Supreme Court Docket No. 2013-521).

But the accounting authorization by the PUCO in the Ohio Power Capacity Case was the prelude to the significant retail rate increases to customers, which will result in both shopping and non-shopping customers paying twice for the same service. Thus, OCC's Proposition of Law No. 2 is appropriately before the Court in this appeal.

II. STATEMENT OF FACTS

In the Ohio Power Capacity Case, the PUCO authorized the Utility, for accounting purposes, to defer the wholesale discount –the difference between the market-based rate it would charge the Marketers and Ohio Power's fully embedded costs (\$188.88/MW-D). (R. 417 at 23,

Appx. 31). In the Ohio Power Electric Security Plan II Proceeding the PUCO confirmed that the payers of the capacity deferrals were to be all retail customers receiving electric service in the Utility's service territory. (Appx. 271, August 8, 2012 Ohio Power ESP Order at 36).

From September 2012, to May 31, 2015, the discount for the wholesale capacity provided to Marketers is being set aside for later collection, or in accounting jargon, "deferred." During the period when the cost of the wholesale discount is being deferred, financing charges are accumulating, which will also be collected later from Ohio Power's retail customers. (R. 417 at 24, Appx. 32). Specifically, the wholesale discount and financing charges will be collected, over a period of time, from all retail customers, beginning in June 2015, when the Utility's Electric Security Plan ends. (Appx. 271, August 8, 2012 Ohio Power ESP Order at 36). And all retail customers include customers who receive retail standard offer electric generation service from the Utility (non-shopping customers), as well as retail customers who have chosen to receive generation service from Marketers (the shoppers or choice customers). Standard service offer customers' are already paying Ohio Power for its capacity through standard service offer generation rates, and thus, will pay twice for capacity.⁵ And unless the Marketers pass the entire discount for capacity along to shopping customers, they will also pay twice. (R. 417, Concurring and Dissenting Opinion of Roberto at 3-4, Appx. 52-53).

⁵ Ohio Power acknowledged that standard service offer generation rates produce revenues that cover their fully embedded cost of capacity. (R. Trans Vol. III at 716, Supp. 33). The record reflects that these customers pay nearly double the fully embedded cost rate for capacity. (R. Trans Vol. III at 716, Supp. 33).

III. ARGUMENT

A. **This Court Has Held That A Party May Argue That Harm Resulted From a PUCO An Accounting Order That the Party Claims Was Unlawful and Unreasonable.**

This Court is not precluded from deciding (in this proceeding) whether Ohio law (R.C. 4928.141 and R.C. 4928.02(A)) is violated when a utility is permitted to defer the difference between its costs of capacity and the wholesale discounted rate it charges Marketers because the PUCO approved the actual recovery mechanism in another case. The Joint Movants contend that the Capacity Order did not address the deferral recovery mechanism, and thus, OCC's Proposition of Law No. 2 is not appropriate for this appeal. (Joint Motion to Dismiss at 8-10). Ohio Power and the PUCO state that the Ohio Power Electric Security Plan II appeal is the appropriate place for OCC to raise this argument. (Joint Motion to Dismiss at 9). While the Joint Movants' assertions are correct in that the actual deferral "mechanism" was implemented in the Ohio Power Electric Security Plan II Case, the accounting that was the prelude to the significant rate increases for customers was authorized in the Ohio Power Capacity Case. Thus, OCC's Proposition of Law No. 2 is properly raised in this appeal.

R.C. 4905.13 grants the PUCO authority to establish a system of accounts for public utilities and to prescribe the manner in which the accounts must be kept. The Court has recognized the PUCO's discretion under R.C. 4905.13, and it has held that the Court "generally will not interfere with the accounting practices set by the commission." *Consumers' Counsel v. Pub. Util. Comm.*, 32 Ohio St.3d 263, 271, 513 N.E.2d 243, (1987). However, as OCC explained in its First Appellant Brief, the Ohio Supreme Court addressed a similar challenge to a PUCO accounting Order in *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, N.E.2d 1176. Specifically, in *Elyria Foundry*, the Court found that the PUCO

violated R.C. 4928.02(G)⁶ when it gave FirstEnergy accounting authority to collect deferred increased fuel costs through future distribution cases. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871, N.E.2d 1176, 170. Thus, the Court has previously found accounting orders (deferrals) to be unlawful when they resulted in harm.

The Ohio Supreme Court has also found that “the fact that subsequent orders may result in more direct effects does not mean that the orders allowing accounting-procedure changes are not final.” *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*, 111 Ohio St. 3d 384, 2006 Ohio 5853, 2006 LEXIS 3280 at ¶25. The Court concluded that OCC was permitted to argue on appeal that “customers have already been harmed by PUCO actions that [OCC claimed] were unreasonable or unlawful.” (Id.) In this appeal, the PUCO’s approval of the capacity deferrals (that will harm customers and will result in customers paying twice for capacity) is being challenged. The harm to shopping customers (paying twice for capacity) as a result of the PUCO’s decision in the Ohio Power Capacity Case was acknowledged by one Commissioner:

If the retail providers do not pass along the entirety of the discount, **then consumers will certainly and inevitably pay twice for the discount today granted to the retail suppliers.** To be clear, unless every retail provider disgorges 100 percent of the discount to consumers in the form of lower prices, shopping consumers will pay more for Fixed Resource Requirements service than the retail provider did. This represents the first payment by the consumer for the service. Then the deferral, with carrying costs, will come due and the consumer will pay for it all over again -- plus interest. (R. 417 July 2, 2012 Opinion and Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4, Appx. 53). (Emphasis added).

This opinion supports OCC’s Proposition of Law No. 2, which concludes that under the PUCO’s Order in the Ohio Power Capacity Case, customers will pay twice for the same service. The

⁶ Note that former R.C. 4928.02(G) is now R.C. 4928.02(H).

PUCO cannot permit a utility to defer the difference between its costs of capacity and the wholesale discounted rate it charges marketers when it will cause customers (both shopping and non-shopping) to pay twice for capacity. This result violates R.C. 4928.141 and R.C. 4928.02(A). R.C. 4928.02(A) requires that “non-discriminatory” and “reasonably priced retail electric service” be available to consumers and R.C. 4928.141 mandates that a utility is to provide retail electric service on a “comparable and non-discriminatory basis.” But as a consequence of the PUCO’s decision in the Ohio Power Capacity Case, there will be a wholesale discount to Marketers. And that Marketer-discount will be deferred and later collected from retail customers. That results in hundreds of millions of dollars being added to customers’ bills. This is the result of the PUCO’s decision in the Ohio Power Capacity Case.

B. The Court Could Consolidate The Double-Payment Issue In This Appeal and the Electric Security Plan Appeal For Purposes of Rendering A Decision.

OCC also raised the issue of double payments for capacity by customers in its appeal of the Ohio Power Electric Security Plan II Proceeding. (OCC First Merit Brief Case No. 2013-521 at 7). It was proper for OCC to raise that issue in the appeal of the Ohio Power Electric Security Plan II Proceeding because the PUCO implemented the mechanism by which Ohio Power will collect the deferrals from customers in that case. The PUCO’s decision to address the capacity deferral accounting in the Ohio Power Capacity Case, but the deferral recovery mechanism in the Ohio Power Electric Security Plan II Proceeding effectively linked these cases together. As a result, there is some commonality of issues in this appeal and the Ohio Power Electric Security Plan II appeal. As some of the issues in the Ohio Power Capacity Case and Electric Security

Plan cases are intricately connected, this Court could consolidate the double payment issue⁷ for purposes of rendering its opinion.⁸

IV. CONCLUSION

This Court has previously held that harm can result from accounting orders. Customers will be harmed as a result of the PUCO's decision to authorize deferral of the difference between Ohio Power's cost for capacity (\$188.88/MW-day) and the much lower market based price for Marketers. Recovery of the deferrals from customers, both shopping and non-shopping, will cause them to pay twice for capacity. This issue is prevalent and properly raised by OCC in both the Ohio Power Capacity Appeal and the Ohio Power Electric Security Plan II Appeal. It would also be appropriate for the Court to consolidate this issue for purposes of rendering its decision on this issue.

⁷ OCC Proposition of Law No. 2 in Case No. 13-288 and OCC Proposition of Law No. 1 in Case No. 2013-521.

⁸ OCC notes that in *State v. Barnes*, 118 Ohio St. 3d 1404, 2008 Ohio 2388, 886 N.E.2d 868, the Court consolidated an issue for oral argument, but permitted the appellant to brief all of the propositions of law separately in each of the respective appeals.

Respectfully submitted,

Bruce J. Weston
Ohio Consumers' Counsel
(Reg. No. 0016973)

By: Kyle L. Kern
Kyle L. Kern, Counsel of Record
Assistant Consumers' Counsel
(Reg. No. 0084199)
Melissa R. Yost
Deputy Consumers' Counsel
(Reg. No. 0070914)

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-9585 – (Kern) Telephone
(614) 466-1291 – (Yost) Telephone
(614) 466-9475 – Facsimile
kern@occ.state.oh.us
yost@occ.state.oh.us

*Attorneys for Appellant/Cross-Appellee
Office of the Ohio Consumers' Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was served upon the below parties via electronic transmission this 26th day of August 2013.



Kyle L. Kern
Assistant Consumers' Counsel

PARTIES OF RECORD

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
mjsatterwhite@aep.com
stnourse@aep.com

Thomas G. Lindgren
Werner L. Margard, III
John H. Jones
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
thomas.lindgren@puc.state.oh.us
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us

Samuel C. Randazzo
Joseph E. Olikier
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1405 East Sixth Street
Cleveland, Ohio 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

Daniel R. Conway
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
dconway@porterwright.com

David A. Kutik
Allison E. Haedt
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114
dakutik@jonesday.com
aehaedt@jonesday.com

Jeffrey A. Lamken
Martin V. Totaro
MoloLamken LLP
The Watergate, Suite 660
600 New Hampshire Ave. NW
Washington D.C. 20037
jlamken@mololamken.com
mtotaro@mololamken.com