

FILE

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Establish a	)	
Standard Service Offer Pursuant to Section	)	
4928.143, Revised Code, in the Form of	)	Case No. 11-3549-EL-SSO
an Electric Security Plan, Accounting	)	
Modifications and Tariffs for Generation	)	
Service.	)	

In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Amend its	)	
Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 11-3550-EL-ATA

In the Matter of the Application of Duke	)	
Energy Ohio for Authority to Amend its	)	
Corporate Separation Plan.	)	Case No. 11-3551-EL-UNC

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**MEMORANDUM CONTRA MOTION TO STRIKE FILED BY DUKE ENERGY CORP  
OF COLUMBUS SOUTHERN POWER COMPANY  
AND OHIO POWER COMPANY**

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**I. Introduction**

Duke Energy Ohio (Duke) inappropriately seeks to strike a valid application for rehearing filed by Columbus Southern Power Company an Ohio Power Company ("AEP Ohio"), without any basis in statute or administrative rule. As pointed out in the application for rehearing, AEP Ohio has a legal right to seek rehearing in these proceedings and the fact that Duke disagrees with AEP Ohio is not a proper grounds for striking an application for rehearing.

Ultimately AEP Ohio is seeking rehearing on the actions of the Commission in applying the law. In this proceeding the Commission applied the same laws and rules differently than in a subsequent order, despite both cases dealing with two companies that share assets affected by

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those decisions. This is a rehearing application based on the Commission's inconsistent application of the law.

As stated in the application for rehearing the Commission should be consistent and either adjust the decision in these proceedings to mirror the treatment in the AEP Ohio proceedings<sup>1</sup> or adjust the decision in those AEP Ohio proceedings to mirror the treatment of these elements in the Duke proceeding. Duke's understanding of the disparate treatment in the decisions is evidenced by its statement that "[r]egardless of the substance of AEP Ohio application for rehearing, such filing should be stricken from the record and not considered by the Commission." (Duke Motion at 3). However, the substance of AEP Ohio's rehearing request is exactly what the Commission should review. In particular, the Commission must review, on rehearing, the substance of its irreconcilably disparate application of the law to Duke's ESP orders, which is a proper basis for a party's rehearing application.

Duke offers two arguments in its efforts to strike AEP Ohio's timely and proper application for rehearing. First, Duke argues that the AEP Ohio application for rehearing does not seek a remedy. Second, Duke argues that AEP Ohio's application for rehearing is not supported by the record. Both grounds claimed by Duke are without merit and miss the point of AEP Ohio's filing and grounds for rehearing. Duke ignores the parts of the application for rehearing explaining AEP Ohio's right to seek rehearing and the concerns over the disparate treatment of the shared assets in violation of state policy (R.C. 4928.02). Thus, Duke improperly asks the Commission to strike AEP Ohio's proper application for rehearing.

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<sup>1</sup> See the December 14, 2011 Opinion and Order concerning a September 7, 2011 Stipulation and Recommendation in AEP Ohio Case Nos. 11-346-EL-SSO et al. attached to AEP Ohio's Application for Rehearing.

## **II. AEP Ohio's Application for Rehearing Seeks a Valid Remedy**

Duke first incorrectly argues that AEP Ohio's application for rehearing does not seek a remedy in these proceedings. Duke argues that the purpose of AEP Ohio's rehearing application is to change the treatment in the AEP Ohio decisions. (See Duke Motion at 4). Duke proffers a number of AEP Ohio asserted outcomes and asserts none of them are an appropriate subject for rehearing in these proceedings. Yet its own motion highlights the exact request of AEP Ohio that could be applied in this case and is the matter subject to rehearing in this proceeding.

Duke clearly points out that AEP Ohio asked the Commission to either modify the AEP ESP order or the Duke ESP order. (Id.) AEP Ohio makes no secret that , with regard to this inconsistent application of the law and rules AEP Ohio would prefer the Commission to be consistent by applying its rationale and methods from the Duke decision in AEP Ohio's cases. However, AEP Ohio's request ultimately is that the Commission apply the law consistently, and if the correct application of the law and rules is ultimately determined on rehearing or appeal to be those applied in the AEP ESP orders then that should be applied in the Duke ESP orders.

Duke also mistakenly asserts that AEP Ohio does not explain what right it would have to appeal the Duke order. It is not clear if Duke is asserting that a party cannot appeal an order by the Commission that approves a settlement or an entry on rehearing that approves the initial opinion and order. Either way Duke's suggestion that rehearing or an appeal would be barred is without merit. As Duke points out, a rehearing application can be filed in respect to any matters determined in the proceeding. (Id.) As discussed in the application for rehearing, the Commission applied the corporate separation and asset transfer issues in this proceeding and then applied them in an inconsistent manner in another proceeding within the rehearing

timeframe of the instant proceedings. As a party to the instant proceedings, AEP Ohio has a right to seek rehearing and ultimately take an appeal to the Supreme Court of Ohio if the issues are not remedied on rehearing. The basis of these rights are found in R.C. 4903.10. AEP Ohio seeks consistency by the Commission in its orders applying the law, especially with respect to decisions that involve the transfer and corporate separation of generation assets owned jointly by those two companies. Under R.C. 4903.10, AEP Ohio has the right to seek rehearing and appeal on matters it determines are decided in an unreasonable or unlawful manner by the Commission in cases in which AEP Ohio is a party.

Duke lists other potential outcomes in its argument that all focus on changes to the AEP Ohio's ESP orders rather than the order in these proceedings. (Id. at 4-5). The fact that AEP Ohio indicates in its filing that it would prefer the Commission cure its inconsistent rulings by applying its approach in the Duke proceeding on these issues to the AEP Ohio ESP orders should not be viewed by the Commission as presenting something beyond or other than a proper rehearing application in these proceedings. AEP Ohio's discussion simply serves to inform the Commission of changes that could occur that would in essence make the grounds for its rehearing request in these proceedings moot. AEP Ohio will seek rehearing of the AEP Ohio order in those proceedings enabling the Commission to make any necessary decisions in those proceedings.<sup>2</sup> If the law and rules are then applied consistently allowing for the corporate separation and transfer of those assets in both cases then the grounds for consistent application of the law will be satisfied and there will be no reason for further rehearing or appeal to the Supreme Court of Ohio.

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<sup>2</sup> The Commission can also act in AEP Ohio's corporate separation docket (11-5333-EL-UNC) on many of these matters to make the inconsistent application of the law moot.

If the Commission does take the inappropriate action of issuing an order that purports to strike the application for rehearing, it will merely compound the present error and doing so will not change the fact that AEP Ohio has a statutory right to pursue rehearing and appeal. Thus, contrary to Duke Ohio's argument, "striking" the application would not remove any uncertainty over Duke Ohio's ESP or prevent AEP Ohio from filing appeals before the Supreme Court of Ohio to the address the conflicting orders. The reality is that Duke Ohio's motion to strike merely amounts to (incorrect) arguments in opposition to the application for rehearing. The Commission should rule on the application for rehearing and address the merits.

### **III. AEP Ohio Seeks Rehearing on the Commission's Legal Determinations**

Duke incorrectly asserts that the AEP Ohio's application for rehearing is procedurally inappropriate because it is not supported by the closed factual record in these proceedings. Duke bases its argument on the position that the Duke evidentiary record was closed before the AEP Ohio ESP order was issued and therefore it could not possibly be in the record in these proceedings. Therefore, according to Duke, the order in the AEP Ohio ESP proceedings is not factual evidence in these proceedings and AEP Ohio cannot make it evidence by attaching it to its application for rehearing.

Duke again misses the point of AEP Ohio's grounds for rehearing. AEP Ohio seeks rehearing based on the unlawful and unreasonable application of the law, not based on a matter of fact at issue in other proceedings.<sup>3</sup> Duke would not likely argue that a party to a Commission proceeding could not cite to another decision involving the same laws and rules as a means for

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<sup>3</sup> However to the extent administrative notice would be desired by the Commission of the AEP Ohio ESP order, Duke makes a compelling argument on page 5 of its motion that the matter was not available at the time of the evidentiary hearing, and therefore it would be appropriate to grant rehearing for the purpose of taking administrative notice of the order, adding this to the record in these proceedings.

determining the lawfulness of the Commission's actions. Likewise, Duke would not argue that a Supreme Court of Ohio decision would be ineligible for citation on brief before the Court just because it was from a different case. A timely rehearing application related to issues raised in a subsequent order, in this case applying the law in an inconsistent manner, is appropriate.

The Commission previously considered subsequent orders on rehearing to modify decisions in cases before the Commission. In *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 12, 460 N.E.2d 1108, the Commission, on rehearing, considered an order issued by the Nuclear Regulatory Commission issued subsequent to the Commission's initial opinion and order, ultimately changing its initial order on rehearing. The Commission recognized the fact that events "taking place after a utilities hearing have varying degrees of relevance to the respective matters to be determined." (Id. at 14, 1110). In upholding the consideration of the subsequent order in the rehearing analysis the Commission also made clear the standard for changing matters upon rehearing. Particularly the Commission pointed out that the standard to make a change on rehearing is:

[i]f after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same \* \* \*.

Following a rehearing, the commission *need only be of the opinion that the original order should be changed for it to modify the same.*

Emphasis added. (Id. at 15, 1111).

There is clear precedent for the Commission's consideration of subsequent action on rehearing. The Commission's consideration in the Columbus & Southern decision involved a factual matter related to the collection of construction work in progress in a rate proceeding. The

matters sought for rehearing in the instant proceedings are even less controversial than a new factual consideration. The basis of AEP Ohio's application for rehearing is rooted in the inconsistent application of the law. The Commission actions in the relevant orders could not be known at the time of hearing and therefore any argument that they are now barred from rehearing and, by extension, from appeal can only be seen as an attempt to frustrate the statutory process for rehearing and appeals. Ultimately any inconvenience perceived or asserted by Duke does not provide an adequate basis to ask the Commission to deny AEP Ohio due process and ignore the rights provided by statute to seek rehearing and appeal if necessary.

In these proceedings, AEP Ohio cites to Commission action that applies the same rules and laws differently in two different cases that involve some of the same generation assets. AEP Ohio was granted intervention in part on the basis of its joint ownership of these assets with Duke. The fact that the outcome of these proceedings puts the consistent treatment of those assets at risk while violating the state policy to encourage competition makes the present rehearing based in the application of the law appropriate.

#### **IV. Duke's Claimed Importance of an Expedited Ruling does not Match its Efforts**

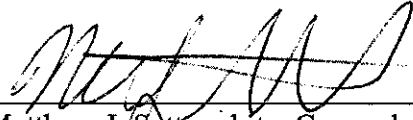
Duke seeks expedited treatment under O.A.C. 4901-1-12(C), but also seeks an even shorter time for responses despite any efforts to inform AEP Ohio of its filing of the motion to strike or efforts for expedited treatment. The administrative code rules allow a party to request expedited Commission action. The rule encourages the moving party to contact all the parties. Duke points out that it was not practical with the pending holiday and recognized the 7-day response time allowed by the rule as a remedy for not contacting all the parties. But Duke then seeks to shorten that timeframe even more, even though its motion was filed in the afternoon on December 23, 2011.

Duke did not take any action to notify AEP Ohio in advance of its filing to work out an expedited schedule or provide any type of notice. It bears pointing out that AEP Ohio notified Duke in advance of its filing of the application for rehearing as a courtesy. AEP Ohio received no call from Duke's counsel indicating its intent to file the motion to strike, nor a request for expedited treatment over the holiday period. Duke's inaction coordinating its expedited request impeaches the credibility of the need for an immediate decision, as claimed by Duke. Surely something so important would be accompanied by a higher level of cooperation or notice among the parties. In either case the actions of Duke under O.A.C. 4901-1-12(C) do not allow for a reply to this memorandum contra. Accordingly, the Commission can deny the motion to strike immediately.

## **V. Conclusion**

There is no basis for Duke's motion to strike AEP Ohio's application for rehearing allowed by the administrative code and the Ohio revised code. AEP Ohio bases its rehearing request on the actions of the Commission in applying rules and statutes. To the extent the Commission's application of statutes is inconsistent with other rulings those matters should be remedied. Nowhere is this principle more appropriate then in a case like this where generation assets jointly owned by two utilities are treated differently in two different cases. AEP Ohio respectfully requests that the Commission deny the motion to strike and grant rehearing on the issues requested as outlined in the application for rehearing.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Columbus Southern Power Company and Ohio Power Company's Memorandum Contra Motion to Strike was served electronically and/or by U.S. Mail upon counsel identified below this 27<sup>th</sup> day of December, 2011.



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