

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company to Adjust the Economic) Case No. 14-193-EL-RDR
Development Cost Recovery Rider Rate.)

**MOTION TO STRIKE OHIO POWER’S REPLY COMMENTS OR, IN THE
ALTERNATIVE, MOTION TO ACCEPT OCC’S RESPONSE INSTANTER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”), on behalf of approximately 1.2 million residential electric customers of Ohio Power Company (“Ohio Power” or “AEP Ohio” or “Utility”), respectfully moves to strike Ohio Power’s Reply Comments filed in response to OCC’s Comments of February 24, 2014. There is no provision in the rules of the Public Utilities Commission of Ohio (“PUCO” or “Commission”) that allows Ohio Power to file Reply Comments on these issues involving Ohio Power’s request to charge millions of dollars to its customers. If the PUCO denies OCC’s motion, then the PUCO should grant OCC’s motion to accept OCC’s response (herein) to Ohio Power’s Reply Comments.

The reasons for granting OCC’s alternative Motions are more fully explained in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 3, 2014, Ohio Power filed an application to update its Economic Development Rider (“EDR”) rate. The update seeks to charge customers for uncollected revenues under PUCO-approved unique arrangements with a number of AEP Ohio’s mercantile customers. Under Ohio Admin. Code 4901:1-38-08, “affected parties” may file comments and objections to any application within twenty days of the date the application is filed.

On February 24, 2014, OCC filed Comments and Objections to Ohio Power’s Application. OCC objected to the portion of the application seeking to charge customers for \$49.336 million in delta revenues associated with the Ormet unique arrangement. On March 7, 2014, Ohio Power filed “Reply Comments” addressing OCC’s comments. It is these “Reply Comments” that OCC moves to strike.

II. ARGUMENT

A. Ohio Power’s Reply Comments Should Be Stricken.

The PUCO’s rules of procedure establish a level playing field of fairness. Ohio Power’s Reply Comments are not a pleading authorized under Ohio Admin. Code 4901-

1-12.¹ Reply comments are also not permitted under the rules specific to this proceeding. See Ohio Admin. Code 4901:1-38-08(C). Those rules only permit comments and objections such as those filed by OCC on February 24, 2014. Ohio Power filed its application to charge millions of dollars to its customers. That is the opportunity allowed to it by the PUCO's rules. Neither the Attorney Examiner nor the Commission has, upon its own motion or by motion of a party, waived any requirement, standard, or rule, or prescribed different practices or procedures to be followed in this proceeding.²

While the Commission can allow a responsive pleading for good cause shown,³ Ohio Power failed to argue that "good cause" exists to permit it to file reply comments. Moreover, Ohio Power failed to file a motion seeking leave to file reply comments. The PUCO's rules allow a party to file a motion and supporting memo for relief.⁴ It is the general practice for a party to file such a motion for leave to file a pleading that is not otherwise authorized by the PUCO's rules or PUCO Entry. Other parties may then file a memorandum contra opposing the motion for leave to file the additional pleading.⁵ But AEP Ohio seeks to circumvent these due process protections. This should not be permitted by the PUCO and the reply comments should be stricken.

¹ See *In the Matter of the Complaint of The Cleveland Electric Illuminating Company, Complainant, v. Medical Center Company, American Electric Power Company, Inc., American Electric Power Service Corp., and Ohio Power Company, Respondents, Relative to an Alleged Violation of the Certified Territory Act*, Case No. 95-458-EL-UNC, Entry at n.1 (July 9, 1999) (where CEI filed a surreply to a reply to CEI's memo contra, the Attorney Examiner specifically stated that "[t]he Commission's procedural rules do not provide the opportunity for a party to file a surreply to a memorandum contra" and disregarded CEI's surreply).

² See Ohio Admin. Code 4901-1-38(B).

³ Id.

⁴ See *In the Matter of the Complaint of James E. Pietrangelo, II, Complainant, v. Columbia Gas of Ohio, Inc., Respondent*, Case No. 99-694-GA-CSS, Entry at n.1 (September 22, 1999) (Attorney Examiner noting that Rule 4901-1-12 only recognizes a memorandum contra and a reply to motions filed in Commission proceedings).

⁵ Id.

B. Response to Ohio Power's Substantive Claims

OCC's alternative motion is to allow this response to Ohio Power's Reply Comments if the PUCO does not strike those comments. Through this motion, OCC seeks leave from the PUCO to file a response to Ohio Power's Reply Comments. OCC's response will point out the misstatements of AEP Ohio. This will assist the PUCO in determining the matters in this proceeding.

Ohio Power claims that the original Opinion and Order in 2009 authorized it to collect from customers *all delta revenues* accrued during the duration of the unique arrangement through its EDR.⁶ That is wrong. AEP Ohio also argues that under its contract with Ormet, all unpaid bills fall within the definition of delta revenues. That is mistaken. AEP Ohio then claims that delta revenues are "foregone revenue under Section 4905.31, Revised Code and shall be recovered by AEP Ohio through its EDR."⁷ Again, Ohio Power has missed the mark. Ohio Power's arguments are not well-founded and should be rejected.

First, to be clear, the PUCO's 2009 Ormet Order addressed the delta revenues that were known then and created under the order. Those delta revenues included maximum yearly discounts from tariff rates over the ten-year period of the arrangement and "deferrals." The deferrals that the PUCO permitted were discrete. AEP Ohio was specifically permitted to defer up to \$6 million per year for 2010 and 2011 (\$12 million in total):

The Commission will adopt Staff's recommendation of \$54 million as the maximum amount of delta revenue which ratepayers should be expected to pay in a given year.

⁶ Reply Comments at 3, citing to page 10 of the Opinion and Order, which is the excerpt provided above.

⁷ Id.

However, this will result in a potential differential of up to \$6 million per year between the \$60 million maximum discount from tariff rates for Ormet and the \$54 million maximum in delta revenues which ratepayers can be expected to pay. AEP-Ohio will be authorized to defer this differential, with carrying costs equal to AEP-Ohio's long term cost of debt, during the term of the unique arrangement. During this time, all delta revenue credits attributable to above-tariff payments by Ormet, to be calculated as discussed below, will be first applied to AEP-Ohio's economic development rider. At the end of the term of the unique arrangement, AEP-Ohio will be permitted to recover any remaining deferred amounts, including carrying charges, through its economic development rider.

When the PUCO noted that "AEP-Ohio will be permitted to recover any remaining deferred amounts, including carrying charges" it was referring to the \$12 million in deferrals related to 2010 and 2011—the deferrals discussed in the very same paragraph of the PUCO's order. Nothing more, nothing less.⁸

AEP Ohio would have the PUCO stretch these words beyond recognition—to encompass deferrals that were not even envisioned, created, or permitted by the PUCO at the time. And AEP Ohio would stretch these words to encompass *all delta revenues* created under the entire term of the unique arrangement, regardless of how and under what circumstances the delta revenue arose.

But the revenues that AEP Ohio claims are delta revenues, and to which OCC objects, relate to September 2013 and October 2013 unpaid bills. The 2009 PUCO Order did not rule that AEP Ohio was entitled to recover these unpaid bills.

And while AEP Ohio also argues that these unpaid bills are delta revenues under its contract, it fails to identify the words or provisions of the contract that support its

⁸ OCC is not challenging the recovery of the 2010 and 2011 deferrals (plus carrying charges), amounting to \$13.853 million of the \$49.336 million in delta revenues sought through the EDR. See Schedule No. 3.1, lines 1 and 2.

argument. To the contrary, there are provisions in the executed contract which convey just the opposite. For instance, under Article 3.01, the “Early Termination” provisions allow parties to terminate the contract if the PUCO “limits AEP Ohio’s recovery of Delta Revenues associated with this Power Agreement in a manner more adverse than the July 15, 2009 Opinion and Order...”⁹ These words recognize that the PUCO could limit AEP Ohio’s recovery of delta revenues in a way that is “more adverse” than the July 2009 Order.

Consistent with this particular provision of the AEP Ohio contract is provision 9.01 which explicitly recognizes that the agreement is subject to the “ongoing jurisdiction of the Commission” and is “subject to modification to reflect any Commission order in Case No. 09-119-EL-AEC.”¹⁰ This provision reflects the fact that the PUCO, by statute, has jurisdiction over reasonable arrangements and may change, alter, or modify such arrangements.¹¹ Thus, AEP Ohio’s claims of its entitlement for being made whole by all other customers, in essence its guaranteed recovery of certain unpaid bills, are inconsistent with the words of the executed contract, contrary to its claims otherwise.

And finally, even though AEP Ohio contends that Ormet’s unpaid bills are “foregone revenue under Section 4905.31, Revised Code and *shall* be recovered by AEP Ohio through its EDR,”¹² its contention that the PUCO must provide for such recovery is incorrect. R.C. 4905.31 gives the PUCO the authority to *allow* recovery of delta revenue resulting from a

⁹ *In re: Ormet*, Case No. 09-119-EL-AEC, Power Agreement at 9-10 (Sept. 15, 2009).

¹⁰ *Id.* at 20.

¹¹ See R.C. 4905.31(E).

¹² *Id.* (emphasis added)

unique arrangement.¹³ But the General Assembly's words in the statute are permissive, stating that the PUCO "may" authorize a utility to recover delta revenues from customers. Indeed the PUCO, in its Supreme Court Brief, argued that "it would have been statutorily valid for the Commission to have approved a unique arrangement for ORMET without having made any provision allowing Appellant [AEP Ohio] to collect *any* amount from other customers to pay Appellant for lowering the rates for ORMET."¹⁴ This reading of the law was upheld by the Ohio Supreme Court.¹⁵

The Ohio General Assembly gave the PUCO the discretion to determine if a utility will be allowed to charge customers for delta revenues. Here, the PUCO should use that discretion to prohibit AEP Ohio from charging other customers for the unpaid bills of one customer.

III. CONCLUSION

The Reply Comments of Ohio Power should be stricken. There is no provision in the Commission rules that allow for reply comments to be filed in this proceeding. Nor has there been a ruling requesting any additional pleadings or prescribing different practices or procedures to be followed in this proceeding.

If the PUCO does not strike Ohio Power's reply comments, then the PUCO should grant OCC's alternative motion to accept its response to Ohio Power's unauthorized comments. That ruling will further the interest of fairness.

¹³ *In re: Ormet*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶12 (Sept. 15, 2009) (affirming its earlier ruling that the Provider Of Last Resort charge paid for by Ormet could be credited to the economic development rider); affirmed by the Ohio Supreme Court in *In re: Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011-Ohio-2477, 949 N.E.2d 991.

¹⁴ *In re: Ormet Primary Aluminum Corp.*, Case No. 09-2060, Appellee Brief of PUCO at 12 (Mar. 3, 2010)(emphasis added).

¹⁵ *In re: Ormet Primary Aluminum Corp.*, 129 Ohio St.3d at 129.

For all these reasons, the PUCO should strike Ohio Power's comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served by electronic transmission to the persons listed below, on this 14th day of March 2014.

/s/ Maureen R. Grady

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Summary: Motion Motion to Strike Ohio Power's Reply Comments or, in the Alternative, Motion to Accept OCC's Response Instantly by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.