

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Ohio Power Company for a Limited) Case No. 15-386-EL-WVR
Waiver of Rule 4901:1-35-10.)

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

One of the limited benefits for customers to come out of Senate Bill 221 was the possibility that customers could receive a refund should the Utility earn significantly excessive earnings. In this case, where a refund may be coming to customers, the Utility wants to delay its filing, and thus, delay possible refunds to customers. The PUCO should not permit such tactics.

On February 24, 2015, Ohio Power Company (“Ohio Power” or “Utility”) filed an Application for a waiver of Rule 4901:1-35-10 of the Ohio Adm. Code. Under its request, the Utility would not have to file its earnings reports until 60 days after the later of two events: (1) the final adjudication on the merits by the Ohio Supreme Court in Case No. 2013-521, which is the appeal of Ohio Power’s 2012-2015 Electric Security Plan (“ESP”), PUCO Case No. 11-346-EL-SSO, or (2) the PUCO’s final order in Ohio Power’s fuel Case Nos. 11-5906-EL-FAC et al. Otherwise, if no waiver is granted, the Utility’s filing is due May 15, 2015. The filing by the Utility of the earnings reports begins the process in which the PUCO examines the earnings to determine if they are significantly excessive so as to warrant a refund to customers under the ESP.

The PUCO ruled on Ohio Power's 2012-2015 ESP on August 8, 2013. Because PUCO orders are effective immediately,¹ Ohio Power's 1.2 million residential customers have been paying rates in accordance with the ESP that is now on appeal at the Ohio Supreme Court. Those rates include issues that OCC and others appealed, such as the \$508 million retail stability rider.²

Ohio Power also appealed issues to the Court including the PUCO's holding regarding a 12 percent SEET threshold. However, just as the rates that were established by the PUCO have been and are still effective (and being charged to customers), the 12 percent SEET threshold is also effective. To allow Ohio Power to wait for the Court to rule on the SEET issue, and potentially delay customers a refund, is unreasonable and contrary to Ohio law. The PUCO should enforce the Order that it issued in 2013 and deny Ohio Power's waiver request.

Ohio Power also requests that its SEET case be put on hold until the PUCO resolves the Utility's pending FAC audit case. Ohio Power cites fuel Case Nos. 11-5906-EL-FAC et al., as allegedly affecting its 2014 earnings. The fuel rates that are the subject of these cases involve the years 2012, 2013, and 2014.³ The SEET cases for 2012 and 2013 have been resolved, though the fuel rates of Ohio Power in 2012 and 2013 are still subject to the currently pending FAC audit cases. The 2014 SEET case should proceed,

¹ R.C. 4903.13.

² *The Kroger Co. v. the Pub. Util. Comm. of Ohio*, Supreme Court Case No. 2013-0521, OCC Brief at 2 (Aug. 12, 2013).

³ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company an Ohio Power Company and Related Matters*, Case No.11-5906-EL-FAC, Report at 3 (Oct. 6, 2014).

as did the 2012 and 2013 SEET cases.⁴ There is no reason that these pending cases should delay potential refunds to customers.

II. ARGUMENT

In this case, Ohio Power states that “[g]ood cause exists for granting AEP Ohio’s current application for limited waiver. First, the Supreme Court’s decision in the ESP II appeal (S. Ct. Case No. 2013-521) has not yet been rendered and may affect AEP Ohio’s SEET filing for 2014.”⁵ However, Ohio law governing the effective timing of PUCO orders is very clear:

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission.⁶

The PUCO, on August 8, 2013, issued an Opinion and Order approving, modifying, and rejecting parts Ohio Power’s ESP.⁷ Many parties, including Ohio Power, filed Applications for Rehearing⁸ of the ESP and appealed the decision to the Ohio Supreme Court.⁹ Among other issues, Ohio Power Company specifically appealed the PUCO’s

⁴ *In the Matter of the Application of Ohio Power Company for Administration of Significantly Excessive Earnings Test Under R.C. 4928.143(F) and Ohio Adm. Code 4901:1-13-10.*, Case Nos. 13-2251-EL-UNC, Order (May 28, 2014) and 14-875-EL-UNC, Order (Dec. 3, 2014).

⁵ Ohio Power’s App. at 3.

⁶ R.C. 4903.13.

⁷ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346, Opinion and Order (Aug. 8, 2012).

⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346, Ohio Power App. for Rehearing (Sept. 7, 2012).

⁹ *The Kroger Co. v. the Pub. Util. Comm. of Ohio*, Supreme Court Case No. 2013-0521, Ohio Power Cross Appeal (May 24, 2013).

decision on the SEET threshold of 12 percent.¹⁰ Ohio Power, in its pending appeal at the Supreme Court of Ohio, argues that “[t]he Commission’s imposition of a significantly excessive earning test (SEET) threshold of 12 percent for AEP Ohio, to be applied annually during the term of the ESP, was unreasonable and unlawful.”¹¹ But here Ohio Power is picking and choosing as to what provisions in its rates should not be implemented. It lacks the power to do so. Indeed, Ohio Power’s 1.2 million residential customers are paying rates that pertain to issues under appeal, including a \$508 million retail stability charge.

What Ohio Power is attempting to accomplish through its waiver request is a stay of one discrete provision of its ESP. Yet it failed to seek such a stay at the PUCO or at the Court. Notably, Ohio Power itself recognized that a stay on a single portion of its ESP is not permitted under the law. In its filings at the Ohio Supreme Court in its appeal of this ESP, it stated an “effort to stay one piece of an integrated Commission Order cannot be reconciled with basic fairness. Nor can it be reconciled with the plain text of the statute, which allows this Court to stay a ‘final order,’ R.C. 4903.16, but does not permit for stays of a single provision of an order.”¹² But here it asks for a stay of the single provision of the PUCO’s order. To allow a stay of the PUCO’s 12 percent SEET holding is contrary to law. The PUCO should deny Ohio Power’s request to indefinitely suspend its requirement to file a 2014 SEET application.

¹⁰ *The Kroger Co. v. the Pub. Util. Comm. of Ohio*, Supreme Court Case No. 2013-0521, Ohio Power Brief at 1 – 6 (Dec. 30, 2013).

¹¹ *The Kroger Co. v. the Pub. Util. Comm. of Ohio*, Supreme Court Case No. 2013-0521, Ohio Power Brief at 1 (Dec. 30, 2013).

¹² *The Kroger Co. v. the Pub. Util. Comm. of Ohio*, Supreme Court Case No. 2013-0521, Ohio Power’s Memo in Opposition to Joint Motion for Stay at 1- 2 (Aug. 15, 2014). The Court rejected the Motion for Stay on Oct. 22, 2014.

Ohio Power also states that good cause exists for its limited waiver because litigation is pending in fuel cases that could affect the Utility's 2014 financial results for SEET purposes.¹³ The fuel cases cited by Ohio Power involve the investigation into possible double recovery of certain capacity costs by Ohio Power for the years 2012, 2013, and 2014 as well as many other aspects of the fuel and power procurement and management during that time period. But the Utility went forward with the 2012 and 2013 SEET cases in spite of the fact that the PUCO has not issued an order on the 2012 and 2013 FAC audit. Specifically, on May 28, 2014, the PUCO approved an Order resolving the Utility's SEET case for the 2012 year and on December 3, 2014 the PUCO issued an order for Ohio Power's 2013 SEET case. The OCC recommends that the PUCO proceed with its 2014 SEET case as it did in 2012 and 2013 even with the 2014 FAC audit not yet completed. The pending resolution of the issues related to the double recovery of certain capacity costs by Ohio Power is no justification for delaying the 2014 SEET filing. A delay in the filing means a delay in potentially refunding excessive earnings to customers. The PUCO should protect customers from such a delay by rejecting the Utility's request for a waiver.

III. CONCLUSION

Ohio Power has failed to state good cause to extend its 2014 SEET filing until an unknown date. The Utility's request that the PUCO wait until the Ohio Supreme Court reaches a decision in the ESP appeal is unreasonable and will potentially delay any refund of excessive earnings to customers.

¹³ Ohio Power App. at 4.

It is also contrary to law. PUCO orders are effective immediately and the 12 percent threshold is in effect must be upheld. In addition, Ohio Power's argument to put the 2014 SEET case on hold pending the outcome of its fuel cases should be rejected because, as a matter of law, fuel cases are always subject to future decisions. The PUCO was able to reach a decision for Ohio Power's 2012 and 2013 SEET cases, though those fuel rates are also the subject of Case No. 11-5906-EL-FAC, the case cited by Ohio Power. OCC recommends that the PUCO reject Ohio Power's waiver of Ohio Adm. Code 4901:1-35-10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Comments were served on the persons stated below via electronic transmission this 3rd day of March 2015.

/s/ Jodi Bair

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Summary: Comments Comments by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Bair, Jodi Ms.