

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio     )  
Power Company for Authority to             ) Case No. 13-2385-EL-SSO  
Establish a Standard Service Offer         )  
Pursuant to §4928.143, Revised Code,     )  
in the Form of an Electric Security Plan.   )

In the Matter of the Application of Ohio     ) Case No. 13-2386-EL-AAM  
Power Company for Approval of             )  
Certain Accounting Authority.             )

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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June 29, 2015

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The Office of the Ohio Consumers' Counsel ("OCC") files this application to preserve its right to appeal a decision by the Public Utilities Commission of Ohio ("Commission" or "PUCO") that could require customers to subsidize uneconomic power plants that are no longer regulated by the PUCO.<sup>1</sup> In its Second Entry on Rehearing the PUCO deferred ruling on all assignments of error related to the power purchase agreement ("PPA"), including OCC's assignments of error. The PUCO's Second Entry on rehearing was unreasonable and unlawful in the following respects:

**ASSIGNMENT OF ERROR 1: The PUCO has no authority to defer ruling on applications for rehearing once rehearing has been granted; under R.C. 4903.10 it must either modify or affirm its Order.**

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<sup>1</sup> OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

**ASSIGNMENT OF ERROR 2: The PUCO acted unreasonably when it tried to create a non-final Order and apply that Order to other pending, related proceedings. The PUCO by its actions created a de facto final order that is appealable.**

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Ohio Power's 1.4 million customers pay the highest electric rates in the state. And customers will potentially be facing hundreds of millions of dollars more in future rate increases because of the PUCO's decision. While the PUCO conceptually approved the power purchase agreement as a tool to stabilize customers' rates, the price tag for the alleged (not proven) stability--hundreds of millions of dollars—is just too high for consumers. It's a bad deal for customers, which unnecessarily enriches the Utility's shareholders.

OCC applied for rehearing and asked the PUCO to reverse its ruling that approved the power purchase agreement so that customers could get some relief from the exorbitant electric rates they are paying—rates higher than the rates paid by customers in thirty two other states.<sup>2</sup> But the PUCO managed to sidestep the issues that OCC (and

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<sup>2</sup> EIA Table 5.6b.

others) raised on rehearing regarding the PPA. The PUCO did so by deferring ruling on all PPA related assignments of error contained in OCC's application for rehearing.

But the PUCO does not have the right under the law to defer ruling on an application for rehearing after it grants and holds rehearing. And the PUCO cannot create a non-final order in one proceeding, and treat it as final in another pending, related proceeding. Its Second Entry on Rehearing was unreasonable and unlawful in this regard. The PUCO should abrogate its order, and rule on the applications for rehearing related to the PPA.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on December 24, 2013, which was granted by Entry dated April 24, 2014. OCC also filed testimony regarding the Application and participated in the evidentiary hearing on the Application.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such

application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “[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; otherwise such order shall be affirmed.”

The statutory standard for abrogating portions of the PUCO’s Second Entry on Rehearing is met here. The Commission should grant and hold rehearing on the matters specified in this Application for Rehearing. The PUCO should then abrogate or modify its Opinion and Order of February 25, 2015.

### **III. ARGUMENT**

**ASSIGNMENT OF ERROR 1: The PUCO has no authority to defer ruling on applications for rehearing once rehearing has been granted; under R.C. 4903.10 it must either modify or affirm its Order.**

The Commission is a creature of statute. It may only exercise the authority conferred upon it by the General Assembly. *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 Ohio Op.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op.3d 478, 414 N.E.2d 1051.

Under R.C. 4903.10, once an application for rehearing is filed the PUCO must either grant and hold rehearing or deny rehearing. If the PUCO grants rehearing to allow additional time to consider the rehearing requests, upon subsequent rehearing it may

abrogate or modify its Order upon finding that the original order, or any part is “unjust unwarranted or should be changed.” “[O]therwise such order shall be affirmed.”

But the PUCO did not follow the statute. It initially granted rehearing on the PPA rider issues through its April 22, 2015 Entry on Rehearing. When it granted rehearing it did so in order to provide itself more time to consider the arguments on rehearing.<sup>3</sup> After granting rehearing, the PUCO on rehearing was restricted to abrogating or modifying its original Order or affirming its order. It did neither.

Instead in its Second Entry on Rehearing it deferred consideration of the PPA-related assignments of error. By doing so it did not abrogate or modify its original Order. Nor did it affirm its Order. Rather its Order will apparently be subject to a later determination where the assignments of error raised by parties may be addressed. However, the actuality and timing of any such subsequent review is unknown at this time.

The PUCO’s attempt to avoid timely and meaningful review of its Order by deferring the PPA rider issues is unlawful under R.C. 4903.10. The PUCO did not follow the law. Rehearing should be granted. The PUCO should address the assignments of error pertaining to the PPA rider.

**ASSIGNMENT OF ERROR 2: The PUCO acted unreasonably when it tried to create a non-final Order and apply that Order to other pending, related proceedings. The PUCO by its actions created a de facto final order that is appealable.**

The PUCO’s failure to follow the statute, as discussed supra, was an attempt by the PUCO to evade review by creating a “non-final” Order. Through its “non-final” Order the PUCO unreasonably attempts to evade challenges to its authority to implement a PPA rider, and a review of its holdings.

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<sup>3</sup> Entry on Rehearing (April 22, 2015).



Yet, at the very same time, it treated its “non-final” Order on the PPA rider as a final order for purposes of other proceedings, including the FirstEnergy electric security plan proceeding.<sup>4</sup> The PUCO’s actions in this regard confirm that the PUCO’s AEP Order pertaining to the PPA is a final, appealable order.

In the FirstEnergy electric security plan case, the PUCO ordered the parties to address “how and whether the Commission’s findings in the AEP Ohio Order should be considered in evaluating FirstEnergy’s application.”<sup>5</sup> The Entry was issued to provide parties with “sufficient time [to] conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order.”<sup>6</sup> FirstEnergy, in response to the PUCO Order<sup>7</sup>, has supplemented its PPA filing in its ESP, to respond to factors the PUCO identified in the AEP Order.

Additionally, relying upon the PUCO’s ruling here that approved a zero placeholder rider, AEP has requested the PUCO to approve an amended application for a PPA.<sup>8</sup> AEP bases its application on the PUCO’s holdings in the ESP proceeding,

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<sup>4</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry at 2 (March 23, 2015) The Entry stated: “In order for the parties to address whether and how the Commission’s findings in the AEP Ohio Order should be considered in evaluating FirstEnergy’s application in this proceeding, the attorney examiner finds that amending the procedural schedule at this time is reasonable. In order to provide the parties in this proceeding sufficient time conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case, the attorney examiner establishes the following procedural schedule: ...”

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, See FirstEnergy’s Supplemental Testimony of the following witnesses: Sarah Murley, Donald Moul, Raymond Evans, Dr. Lawrence Makovich, Rodney Phillips, and Eileen Mikkelsen (June 4, 2015).

<sup>8</sup> *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Amended Application (May 15, 2015).

including the holdings that are the subject of OCC's application for rehearing.<sup>9</sup> Although the PUCO has not yet ruled on AEP's amended application, AEP's filing is setting up the very process the PUCO embraced in the FirstEnergy ESP. That process assumes the AEP ESP Order on the PPA rider is lawful and reasonable. Yet the assignments of errors relating to the PPA were not ruled upon under the PUCO's "non-final" Order.

The PUCO by its actions showed that its "non-final" Order was in fact final despite its words otherwise. The "non-final" Order has been the basis for going forward with a PPA in two separate proceedings. The "non-final" Order must be treated as a final order which can be appealed and subsequently reviewed by the Ohio Supreme Court.

The PUCO's "non-final" order on rehearing was unreasonable because in other pending, related proceedings it was treated as a final Order. Rehearing should be granted and the PUCO should decide upon the issues raised on rehearing. Otherwise, the PUCO should not go forward with its "non-final" Order to other pending, related cases.

#### **IV. CONCLUSION**

The PUCO should grant rehearing on OCC's assignments of error. Granting rehearing as requested by OCC is necessary to ensure that AEP Ohio customers are not subject to unreasonable and unjust charges. Otherwise Ohio consumers could end up paying more than is just and reasonable under the law.

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<sup>9</sup> Id. at 2-3.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 29th day of June, 2015.

/s/ Maureen R. Grady

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.