

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Columbus Southern)
Power Company for Approval of a)
Mechanism to Recover Deferred Fuel)
Costs Ordered Under Section 4928.144,)
Ohio Revised Code.)

Case No. 11-4920-EL-RDR

In the Matter of the Application of Ohio)
Power Company for Approval of a)
Mechanism to Recover Deferred Fuel)
Costs Ordered Under Section 4928.144,)
Ohio Revised Code.)

Case No. 11-4921-EL-RDR

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) June 29, 2016 Entry issued in the above-captioned matters. OMAEG contends that the Order is unlawful and unreasonable in the following respects:

1. The Commission erred by violating the prohibition against retroactive ratemaking when it authorized AEP Ohio to collect carrying charges at its Weighted Average Cost of Capital through the Phase-In Recovery Rider for a past period beginning in September 2012.

For these reasons, and as further explained in the Memorandum in Support attached hereto, OMAEG respectfully requests that the Commission grant its Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

This case presents a textbook example of unlawful retroactive ratemaking, which has caused commercial and industrial customers to experience an increase in rates. On June 29, 2016, the Commission issued its Entry approving the Ohio Power Company's (AEP Ohio) Phase-In Recovery Rider (PIRR) tariffs.¹ The Entry permits AEP Ohio to collect carrying costs through the PIRR by applying its weighted average cost of capital (WACC) rate all the way back to September 2012.² Although Commission Staff projected that commercial and industrial customers would experience an approximate 1.9 to 4.8 percent increase based on the typical bills provided in AEP Ohio's filing, OMAEG's members are seeing much higher increases.³

¹ Entry at ¶ 1 (June 29, 2016).

² Id. at ¶ 14; Staff Review and Recommendations at 2 (June 22, 2016).

³ Entry at ¶ 13. For example, one member has calculated an approximate 20 percent increase, while another member has calculated an approximate 10.2 percent increase.

By allowing AEP Ohio to recalculate rates back to September 2012, the Commission sharply departed from the longstanding prohibition against retroactive ratemaking articulated in *Keco Indus., Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). This precedent forbids the Commission from granting a rate increase that makes up for revenues lost due to regulatory delay.⁴ Because ratemaking is prospective only, the Commission cannot authorize a utility to charge increased rates to make up for losses associated with rates that are ultimately found to be too low. By allowing AEP Ohio to reach back to September 2012 to collect carrying charges through the PIRR at its higher WACC rate rather than its lower long-term debt rate, the Commission plainly violated this precedent. On rehearing, the Commission should revise its Entry to avoid any conflict with *Keco's* prohibition against retroactive ratemaking. Doing so will ensure that customers are paying lawful rates that are just and reasonable as required by R.C. 4905.22.

II. Background.

In AEP Ohio's first electric security plan proceeding (ESP 1), the Commission authorized AEP Ohio to establish a regulatory asset to record and defer its fuel costs with carrying costs at its WACC rate.⁵ This deferral was to be phased in from 2012 to 2018 for the purpose of mitigating bill impacts to customers.⁶

On September 2, 2011, AEP Ohio filed an application in these proceedings for approval of a mechanism to recover those deferred fuel costs in the form of a nonbypassable rider termed

⁴ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 515, 947 N.E.2d 655 (2011) (citing *Keco*).

⁵ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, et al.*, Case No. 08-917-EL-SSO, et al., Opinion and Order at 20-24 (March 18, 2009).

⁶ *Id.* at 22.

the PIRR.⁷ On August 1, 2012, the Commission modified and approved the application. The Commission ruled that AEP Ohio could collect carrying charges on the deferral at its WACC rate, but upon commencement of the recovery period, AEP Ohio could only collect carrying charges on the deferral at its long-term debt rate.⁸

On appeal, the Supreme Court of Ohio reversed the Commission's decision which directed AEP to collect carrying charges on the deferral at its long-term debt rate.⁹ The Court reasoned that the Commission violated AEP Ohio's right to withdraw its ESP application under R.C. 4928.143(C)(2)(a) when it modified the carrying charge rate from the WACC rate to the long-term debt rate.¹⁰ The Court remanded the matter to the Commission for reinstatement of the WACC rate.¹¹

On May 23, 2016, AEP Ohio filed proposed PIRR tariffs to implement the Court's decision.¹² The Ohio Energy Group (OEG) and the Office of the Ohio Consumers' Counsel (OCC) objected to the proposed PIRR tariffs on the theory that AEP Ohio was attempting to retroactively increase the carrying charge rate collected through the PIRR from prior years.¹³ OEG and OCC also requested an investigation into the lawfulness of the proposed tariffs.¹⁴

⁷ Finding and Order at 2 (August 1, 2012).

⁸ Id. at 18-19.

⁹ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 25-26.

¹⁰ Id.

¹¹ Id. at ¶ 43.

¹² AEP Ohio PIRR Tariff Filing at 1 (May 23, 2016). AEP Ohio does not explain why it waited roughly a year after the Court's decision to file the proposed tariffs.

¹³ OEG Motion to Suspend Rates (May 24, 2016); OEG Reply to AEP Ohio Memo Contra (June 3, 2016); OCC Reply to AEP Ohio Memo Contra (June 3, 2016).

¹⁴ Id.

On June 22, 2016, the Staff issued its review and recommendations on the proposed PIRR tariffs, but chose not to recommend an implementation date for the revised WACC rate.¹⁵ Staff observed that AEP Ohio utilized its WACC rate of 11.15% in its proposed PIRR tariffs and that the attachments to the tariffs included calculations showing that AEP Ohio recalculated its revenue requirement to incorporate the WACC rate back to September 2012.¹⁶ Staff expressed its belief that the proposed tariffs showing the inclusion of an “11.15% rate back to September 2012 are accurate and designed to collect a revenue requirement of \$462 [million] from July 1, 2016 through December 31, 2018.”¹⁷

On June 29, 2016, the Commission issued its Entry approving AEP Ohio’s proposed PIRR tariffs.¹⁸ The Commission rejected the contention made by OEG and OCC that approving the tariffs would constitute retroactive ratemaking. The Commission also rejected the contention that an investigation was warranted. In the Commission’s view, Staff’s analysis showed that the rates were accurately calculated.¹⁹

¹⁵ Staff Review and Recommendations (June 22, 2016).

¹⁶ Id. Staff did not express an opinion on the appropriate date to begin applying the WACC rate. See Staff Review and Recommendations at footnote 1.

¹⁷ Id.

¹⁸ Entry at ¶ 1.

¹⁹ Id. at ¶ 15.

III. Discussion.

- 1. The Commission erred by violating the prohibition against retroactive ratemaking when it authorized AEP Ohio to collect carrying charges at its Weighted Average Cost of Capital through the Phase-In Recovery Rider for a past period beginning in September 2012.**

The Commission violated the longstanding prohibition against retroactive ratemaking by allowing AEP Ohio to reach back to September 2012 to collect carrying charges on the deferrals at its WACC rate. The prohibition against retroactive ratemaking, as articulated by *Keco*, provides that “a utility may not charge increased rates during proceedings before the [C]ommission seeking same and losses sustained thereby may not be recouped.”²⁰ Over the course of several decades the Court has repeatedly reaffirmed *Keco*’s prohibition against retroactive ratemaking. For example, in *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997), the Court cited to *Keco* in support of its statement that “utility ratemaking by the [Commission] is prospective only. The General Assembly has attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of [C]ommission proceedings and appeals, while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal. * * * In short retroactive ratemaking is not permitted under Ohio’s comprehensive statutory scheme.” Similarly, in *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 515, 947 N.E.2d 655 (2011), the Court explained that “[a] rate increase making up for revenues lost due to regulatory delay is” forbidden under *Keco*.

Following these principles, the Commission has likewise declared that:

The Supreme Court of Ohio has ruled that the difference between rates established pursuant to a remand upon reversal of a

²⁰ *Keco*, 166 Ohio St. at 259 (quotations omitted).

Commission order and the higher rates collected during the consideration of the appeal from that order is not recoverable in an action by a consumer. * * * The Commission is of the opinion that this principle would also apply to an action by a utility to recover the difference between rates collected during the pendency of an appeal of rate reduction, and higher rates which may be established on remand.²¹

Given the Commission's familiarity with the principles articulated in *Keco* and the long line of cases that have emerged from it, the Commission should have concluded that AEP Ohio's proposed PIRR tariffs were contrary to well-established law.²² Indeed, the situation here is remarkably similar to what the Court found unlawful in *In re Application of Columbus S. Power Co.* In that case, AEP Ohio sought a rate increase to be effective by January 2009; however, the Commission did not issue an order until March of 2009.²³ Because of this delay, AEP Ohio collected less revenue than it would have if the application had been approved under its requested timeline.²⁴ To make up for these lost revenues, the Commission granted a rate increase that effectively permitted AEP Ohio to recover twelve months of revenue over a nine-month period.²⁵ In the words of the Court: "This was retroactive ratemaking. Although the Commission did not authorize AEP to rebill customers for usage from January through March, it

²¹ *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base and Rate of Return of the Ohio Utilities Co.*, Case No. 77-1073-WS-COI, 1978 WL 443457, at *1 (Aug. 23, 1978). See also *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry on Rehearing at 6 (June 22, 2000) (finding *Keco* "controlling").

²² OMAEG did not involve itself in the initial challenge to the proposed PIRR tariff filings because it was OMAEG's expectation that the Commission would apply longstanding precedent to deny AEP Ohio's request for a retroactive rate increase. The Commission's departure from this precedent warrants OMAEG's involvement now.

²³ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d at 514.

²⁴ *Id.*

²⁵ *Id.*

reached the same financial result by setting rates from April through December 2009 at a level sufficient to recover lost revenues from January through March.”²⁶

In re Application of Columbus S. Power Co. renders AEP Ohio’s tariff filings unlawful and the Commission should have so held. AEP Ohio sustained lost revenues starting in 2012 from its inability to recover carrying charges on the deferrals at its WACC rate. Even though the Commission’s Entry did not permit AEP Ohio to retroactively rebill customers for usage dating back to September 2012, the Commission “reached the same financial result” by permitting AEP Ohio to recalculate its revenue requirement to incorporate the WACC rate back to September 2012. This plainly violates the prohibition against retroactive ratemaking, especially in light of the decision in *In re Application of Columbus S. Power Co.*

The Commission’s rationale for refusing to apply the prohibition against retroactive ratemaking is unconvincing. First, the Commission reasons in its Entry that because the Court did not specify an effective date for reinstatement of the WACC rate, AEP Ohio should be permitted to recover its entire PIRR deferral balance at the WACC rate over the entire recovery period.²⁷ But the Court did not need to take the extra step of providing the effective date for reinstatement of the WACC rate—its precedent supplies the answer to that question. The Court has instructed that “a remand order of this [C]ourt does not automatically render the existing rates unlawful, as ‘the rate schedule filed with the [C]ommission remains in effect until the [C]ommission executes this [C]ourt’s mandate by an appropriate order.’”²⁸ The “[C]ourt’s reversal and remand of an order of the [C]ommission does not change or replace the schedule as

²⁶ Id.

²⁷ Entry at ¶ 14.

²⁸ *In re Application of Columbus S. Power*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 51 (quoting *Cleveland Electric Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976)).

a matter of law, but is a mandate to the [C]ommission to issue a new order which replaces the reversed order * * * .”²⁹ Coupling these precepts with the tenet that ratemaking is prospective only, the answer to the question of when the WACC rate can be reinstated becomes clear: no earlier than the June 29, 2016 Entry which implements the Court’s remand directive.

The Commission’s second justification for failing to apply the prohibition against retroactive ratemaking is equally unpersuasive. The Commission opines that “the Court did not find that *Keco* precluded the collection of this \$130 million.”³⁰ This is a technically true, but nevertheless incomplete statement. It is more accurate to say that the Court never expressly addressed *Keco*’s impact at all. In fact, the Court did not even cite to *Keco*. Moreover, AEP Ohio’s brief to the Court never featured the issue of retroactive ratemaking as an assignment of error.³¹ The central issue before the Court involved competing arguments over whether the Commission could modify earlier orders, and if so, whether such a modification infringed the right of a utility to withdraw its ESP under R.C. 4928.143(C)(2)(a). It is erroneous for the Commission to infer that the omission of any discussion about *Keco* therefore licenses it to grant AEP Ohio a retroactive rate increase in direct contradiction to *Keco*. The Commission cannot ignore binding precedent simply because the Court did not provide a remand directive instructing the Commission on how to administer *Keco*’s prohibition against retroactive ratemaking. Given that the Commission’s proceedings are subject to the Court’s revisory jurisdiction,³² the

²⁹ *Cleveland Electric Illum. Co.*, 46 Ohio St.2d at 117.

³⁰ Entry at ¶ 14.

³¹ Notice of Appeal of Ohio Power Co. at 2, Ohio Supreme Court Case No. 2012-2008 (November 30, 2012), http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=718108.pdf.

³² Ohio Constitution, Article IV, Section 2(B)(2)(d); R.C. 4903.13.

Commission must faithfully follow the Court’s precedents on retroactive ratemaking whether specifically referenced or not.³³

AEP Ohio’s earlier efforts at defending its request for a retroactive rate increase are similarly unavailing. First, it is irrelevant that the “remaining period of PIRR collection can be adjusted to fully implement the Court’s decision and correct the lower carrying charges created by the Commission’s earlier.”³⁴ The Court squarely rejected a similar argument in *In re Application of Columbus S. Power Co.*³⁵ In that case, the appellants sought a prospective rate adjustment to fully remedy the over collection of \$368 million in unjustified POLR charges.³⁶ The appellants claimed the Court could account for this over collection and avoid *Keco* by pointing to the existence of a mechanism that the Court could apply the prospective rate adjustment against.³⁷ But the Court explained that the “existence of a mechanism to adjust rates prospectively does not alter the nature of the appellants’ requested remedy. The appellants are seeking to recover—through an adjustment to current rates—POLR charges that already have been collected from customers and later were found to be unjustified.”³⁸ The Court rejected the appellants’ argument because it was an attempt to account for regulatory delay through present rates.³⁹ In reliance on *Keco*, the Court explained that “AEP is permitted to keep [the \$368 million], resulting in a windfall to AEP.”⁴⁰ Given this precedent, AEP Ohio’s argument must

³³ Cf. *Consolidated Rail Corp. v Forest Cartage Co.*, 68 Ohio App.3d 333, 341, 588 N.E.2d 263 (8th Dist. 1990) (“All [tribunals] are charged with accepting and enforcing the law as promulgated by the Supreme Court not changing, modifying or ignoring that law.”).

³⁴ AEP Ohio Memo Contra at 6 (May 27, 2016).

³⁵ *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462.

³⁶ *Id.* at ¶ 53-54.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at ¶ 56.

similarly fail. Regardless of whether the PIRR is still in effect, the Commission cannot authorize a prospective rate adjustment to the PIRR that makes up for regulatory delay. A principled application of *Keco* demands that just as AEP Ohio was not required to pass back its \$368 million windfall to customers, customers should not be required to pay higher costs to AEP Ohio simply to make up for regulatory delay.

Moreover, AEP Ohio derives no support from *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982). To begin with, that decision did not involve ratemaking.⁴¹ Here, the Commission has unquestionably engaged in ratemaking as it has approved AEP Ohio's request to implement a new, and dramatically higher, PIRR rate—a rate that has its roots in the ratemaking process from AEP Ohio's ESP 1 proceeding. Moreover, the mechanism at issue in *River Gas* permitted the utility to pass along certain of its costs without prior Commission approval.⁴² No such mechanism is present here. As this case well illustrates, AEP Ohio was required to seek Commission approval before implementing its proposed PIRR rate. In short, *River Gas* does not foreclose the application of *Keco* to these circumstances.

⁴¹ Id. at 512 (“We are not convinced that the [C]ommission’s actions at issue herein constitute ratemaking as that term is customarily defined.”).

⁴² Id. at 513.

IV. Conclusion

OMAEG respectfully requests that its application for rehearing be granted by the Commission. The Commission's Entry violates the prohibition against retroactive ratemaking by permitting AEP Ohio to reach back to September 2012 and charge increased rates that make up for regulatory delay. As set forth above, the Commission should modify its Entry to permit AEP Ohio to prospectively collect carrying charges at its WACC rate through the PIRR and further clarify that no adjustments to the PIRR can be made for the purpose of recouping lost revenues associated with regulatory delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via email on July 29, 2016 upon the following parties of record:

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Summary: Application For Rehearing And Memorandum In Support Of The Ohio Manufacturers' Association Energy Group electronically filed by Debra A Gaunder on behalf of Ohio Manufacturers' Association Energy Group