

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's	)	Case No. 14-1693-EL-RDR
Proposal to Enter into an Affiliate Power	)	
Purchase Agreement for Inclusion in the	)	
Power Purchase Agreement Rider.	)	

In the Matter of the Application of Ohio	)	
Power Company for Approval of Certain	)	Case No. 14-1694-EL-AAM
Accounting Authority.	)	

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

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**APPLICATION FOR REHEARING**

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The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing<sup>1</sup> to protect the 1.2 million residential consumers of the Ohio Power Company ("AEP Ohio") from being charged approximately \$191million dollars<sup>2</sup> to subsidize the Ohio Valley Electric Corporation ("OVEC") through an OVEC-only Power Purchase Agreement Rider ("OVEC PPA Rider"). This Public Utilities Commission of Ohio ("PUCO")-approved captive customer-funded agreement will subsidize, via government regulation, old, inefficient, coal-fired power plants that cannot compete in a market deregulated by the Ohio General Assembly over 16 years ago. The agreement is unreasonable and unlawful..

On March 31, 2016, the PUCO issued an Opinion and Order ("PPA Order") modifying and approving a Joint Stipulation and Recommendation filed by AEP Ohio

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

<sup>2</sup> See Compliance Tariff of AEP Ohio, Case No. 14-1693-EL-SSO, et al. (December 22, 2016) (0.0016624/kWh \* 1,000kWh = \$1.66 per month or \$19.92 per year per residential customer using 1,000 kWh per month. \$19.92 \* 1,200,000 residential AEP Ohio customers = \$23,904,000 per year. \$23,904,000 \* 8 years=\$191,232,000.).

and other signatory parties in this proceeding on December 14, 2015.<sup>3</sup> The PPA Order approved a request for a Power Purchase Agreement Rider (“PPA Rider”). The PPA Rider was designed to flow through to customers the net cost (or benefit) from AEP Ohio’s sale of generation into the PJM market from its OVEC contractual entitlement and several power plants owned by AEP Ohio’s unregulated affiliate, AEP Generation Resources.

In April 2016, the Federal Energy Regulatory Commission (“FERC”) rescinded the waiver under which AEP Ohio claimed it could proceed with its PPA Rider without FERC review. In response to the PPA Order and FERC’s April 2016 Order, AEP Ohio proposed its OVEC-only PPA Rider in its May 2016 Application for Rehearing. The OVEC PPA was approved by the PUCO in its Second Entry on Rehearing, issued November 3, 2016. On December 22, 2016, AEP Ohio filed tariff sheets in compliance with the PUCO orders and entries.<sup>4</sup> The tariff sheet will allow AEP Ohio to charge each residential consumer approximately \$20 per month.<sup>5</sup> Under the PUCO-modified electric security plan AEP Ohio will collect tens of millions of dollars per year from all customers, shopping and non-shopping alike, for eight years through the OVEC PPA Rider starting January 1, 2017.

The OCC filed an application for rehearing from the PUCO’s Second Entry on Rehearing on December 5, 2016. On January 4, 2017, the PUCO issued a Third Entry on Rehearing. In that Third Entry on Rehearing, the PUCO granted rehearing “for further

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<sup>3</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, et al., Case No. 14-1693-EL-RDR, et al., Opinion and Order (March 31, 2016) (“PPA Order”).

<sup>4</sup> See Compliance Tariff of AEP Ohio, Case No. 14-1693-EL-SSO, et al. (December 22, 2016).

<sup>5</sup> See Compliance Tariff of AEP Ohio, Case No. 14-1693-EL-SSO, et al. (December 22, 2016) (0.0016624/kWh \* 1,000kWh = \$1.66 per month or \$19.92 per year per residential customer using 1,000 kWh per month).

consideration of the matters specified in the applications for rehearing."<sup>6</sup> The PUCO's Third Entry on Rehearing of January 4, 2017 was unreasonable or unlawful in the following respects:

Assignment of Error 1: The PUCO erred by not granting and holding rehearing, and abrogating its Entry on the matters specified in OCC's December 5, 2016 application for rehearing.

Assignment of Error 2: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Order permits it to evade a timely judicial review of its order and precludes parties from exercising their rights to appeal a PUCO order to the Ohio Supreme Court -- a right that is established under R.C. 4903.10, 4903.11 and 4903.13.

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 Second Entry on Rehearing as requested by OCC.

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<sup>6</sup> Third Entry on Rehearing at ¶ 4 (January 4, 2017).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio ("PUCO") still has the ability in this proceeding to protect 1.2 million Ohioans from paying massive unwarranted charges to Ohio Power Company ("AEP Ohio") to subsidize its OVEC generation. The OVEC PPA will require all residential consumers to pay approximately \$191 million over the next eight years.<sup>7</sup>

In 1999, the Ohio General Assembly approved Senate Bill 3 ("S.B. 3") that replaced cost-based regulation for generation with competitive markets. The fundamental premise behind S.B. 3 is that retail customers should not now be asked to protect Ohio electric utilities from competitive generation market risks or losses. Since 2005, AEP Ohio has been wholly responsible for whether it is in a competitive position in the generation market. There can be no customer-funded generation subsidies. Such subsidies undermine competitive markets. Instead, consumers should receive the benefits

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<sup>7</sup> See Compliance Tariff of AEP Ohio, Case No. 14-1693-EL-SSO, et al. (December 22, 2016).



of historically low competitive market pricing as the Ohio General Assembly intended when it required the separation of generation and distribution facilities from Ohio utilities in 1999.

The OCC, on behalf of Ohio's residential energy consumers, submits this application for rehearing on the PUCO's Third Entry on Rehearing. Because the PUCO's decision violated Ohio law and the policy underlying the law, OCC seeks rehearing.

## **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 October 29, 2014, which was granted. 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 some portions of the Order and modifying other portions is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Third Entry on Rehearing of January 4, 2017. The PUCO’s ruling was unreasonable or unlawful in the following respects.

### **III. ERRORS**

#### **Assignment of Error 1: The PUCO erred in not granting and holding rehearing, and abrogating its Entry on the matters specified in OCC's application for rehearing.**

The PUCO ruled that rehearing should be granted for further consideration of the matters specified in the applications for rehearing.<sup>8</sup> The PUCO was wrong in doing so. It should have granted OCC’s rehearing on the matters specified in its Application for Rehearing, and accordingly should have held a rehearing and abrogated its Entry to address OCC's claimed errors.

OCC requested rehearing contending that, among other things, the PUCO violated the law under R.C. 4928.38 and 4928.39 when it permitted AEP Ohio to enter into a power purchase agreement with OVEC to subsidize old, inefficient coal-fired power plants. The OVEC PPA Rider allows AEP Ohio to collect transition charges from Ohio consumers, something that AEP Ohio can no longer do under Ohio law. As OCC stated in its Second Application for Rehearing, the coal-fired power plants included in the OVEC PPA are at a risk of premature retirement because they can no longer compete in

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<sup>8</sup> Third Entry on Rehearing at ¶4 (January 4, 2017).

Ohio's competitive electric market.<sup>9</sup> That is, the OVEC PPA is designed to guarantee AEP Ohio the revenues that these uneconomic non-competitive plants cannot recover on their own in the competitive market. As the Ohio Supreme Court has recently explained, this is a textbook example of an unlawful transition revenue.<sup>10</sup>

The PUCO attempted to distance its findings in this case from the recent Ohio Supreme Court precedent. It states that the OVEC PPA is not a transition charge because the July 10, 1953 Inter-Company Power Agreement ("ICPA"), between OVEC and the Sponsoring Companies (including AEP Ohio), was not used to provide generation service to electric consumers in Ohio prior to the unbundling of rates in S.B. 3. Therefore, the OVEC PPA Rider is not a transition charge because AEP Ohio was not entitled to recover costs associated with generation assets prior to the implementation of S.B. 3. As OCC stated in its Second Application for Rehearing, the ICPA provided for sales of power from OVEC to any of the Sponsoring Companies, including AEP Ohio, which was not used by the Department of Energy or its predecessors.<sup>11</sup> Therefore, contrary to the PUCO decision in its Second Entry on Rehearing, the ICPA can be the basis for transition charges or their equivalent. Moreover, AEP Ohio's interpretation ignores the breadth of

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<sup>9</sup> See OCC Application for Rehearing at 44 (May 2, 2016) citing (Direct Testimony of Pablo Vegas at 13-14 (May 15, 2015); Direct Testimony of Toby Thomas at 11 (May 15, 2015)).

<sup>10</sup> *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Under R.C. 4928.143 in the Form of an Electric Security Plan*, Oh. S. Ct. 2016-Ohio-1608, Slip Opinion at ¶ 25 (April 21, 2016) (italics in original).

<sup>11</sup> See AEP Ohio Ex. 10 (Direct Testimony of William A. Allen, filed May 15, 2015) at 4-5; see also AEP Ohio response to Sierra Club Set 2 INT 9, Composite Copy of Inter-Company Power Agreement dated July 10, 1953. OCC requested in its Second Application for Rehearing, that the PUCO should take administrative notice of the ICPA. See Ohio Evid. R. 201.

the law that precludes the PUCO from authorizing "any equivalent revenues" as well.<sup>12</sup>

And it ignores the words of the law that the utility "shall be fully on its own in the competitive market."<sup>13</sup>

It was not reasonable or lawful for the PUCO to approve AEP Ohio's electric security plan that included an OVEC PPA Rider charged to Ohio consumers. The PUCO's approval of the OVEC PPA Rider constituted an unlawful subsidy and transition charge. The error is clear. The PUCO should have granted rehearing and abrogated its Entry to cure the errors OCC complained of.

**Assignment of Error 2: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Order permits it to evade a timely review and reconsideration of its order by the Ohio Supreme Court and precludes parties from exercising their rights to appeal a PUCO order to the Ohio Supreme Court -- a right that is established under R.C. 4903.10 and 4903.11 and 4903.13.**

The Ohio Supreme Court ("Court") has held that "[i]t is the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before that tribunal."<sup>14</sup> This duty is described, with defined parameters, under R.C. 4903.10.

Under R.C. 4903.10, the General Assembly established a 30-day process for the PUCO to either grant or deny rehearing. Under the statute, if the PUCO does not grant or deny the applications within 30 days, the applications are denied by operation of law. This provision is to ensure that the PUCO resolved applications in timely manner--30

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<sup>12</sup> See R.C. 4928.38.

<sup>13</sup> Id.

<sup>14</sup> *State ex rel. Columbus Gas & Fuel Col. v. Pub. Util. Comm.* (1930), 122 Ohio St. 473, 475.

days under the statute. The statute is designed to enforce the axiom that "justice delayed is justice denied."<sup>15</sup>

The timely resolution of applications for rehearing (within 30 days) is important because an order of the PUCO cannot be appealed as a "final order" until the PUCO has substantively ruled on all rehearing applications or the rehearing has been denied by operation of law.<sup>16</sup> Yet while the Third Entry on Rehearing is not a final appealable order, customers are being charged rates that are being challenged on rehearing.<sup>17</sup> That means AEP Ohio can charge customers rates that include an annual \$58 million PPA Rider charge, regardless of the fact that OCC is challenging that charge before the PUCO. This happens because under Ohio law the PUCO has authority to implement its Order, regardless of challenges made through the rehearing process. The law (R.C. 4903.10) makes clear that the filing of an application for rehearing does not excuse compliance with the order or operate to stay or postpone enforcement of the order.

The PUCO, however, has recently been side-stepping the 30-day review by instead employing a process under which rehearing has been extended by months, and in

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<sup>15</sup> See, e.g., *Moeller v. Moeller* (C.A. 9th Dist.), 1993 Ohio App. LEXIS 50 (finding that a similar statute, R.C. 2701.02, setting forth the time limit in which courts must render decisions on certain matters, was designed to enforce the axiom that "justice delayed is justice denied."

<sup>16</sup> See R.C. 4903.11.

<sup>17</sup> There are few exceptions to this. The exceptions provide that through a special order of the PUCO, the filing of an application may stay the order. Also if parties file an application prior to the effective date of the order the order is stayed, "unless otherwise ordered by the commission."

some cases, even years.<sup>18</sup> And while the Court has ruled that the PUCO may grant applications for rehearing for the limited purpose of allowing additional time to consider them,<sup>19</sup> the Court's ruling is being unreasonably applied in a manner that disrupts timely judicial review of PUCO rulings, prejudicing would-be appellants. The PUCO can thwart (and evade) judicial review by granting itself more time to consider the applications and issuing a final order months or years down the road, while at the same time uneconomic and unwarranted subsidies are being collected from Ohioans.<sup>20</sup>

Delaying judicial review matters to Ohioans because of Court precedent<sup>21</sup> that generally precludes refunds to customers for rates already collected. Each day that the PUCO delays issuing a final order, is a day that PPA rates are charged to customers without an opportunity to stop these unnecessary collections and without a likely recourse to a refund for customers.

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<sup>18</sup> See, e.g., *In the Matter of the Application of Ohio Power Company*, Case No. 13-2385, Third Entry on Rehearing (July 27, 2015)(granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). A substantive Entry on Rehearing was finally issued on November 3, 2016, more than a year later. *In re: Duke Energy Ohio*, Case No. 14-841-EL-SSO, Entry on Rehearing (May 28, 2015) (granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). No substantive Entry on Rehearing has been issued. *In the Matter of the Application of The Dayton Power and Light Company for Authority to Issue and Sell and Amount Not to Exceed \$490 Million of First Mortgage Bonds, Debentures, Notes, or Other Evidences of Indebtedness or Unsecured Note*, Case No. 13-0893-EL-AIS, Entry on rehearing (Sept. 4, 2013) (Granting application for rehearing filed by OCC for the limited purpose of further consideration) No final entry. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013-2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, and 12-2192-EL-POR, Entry on rehearing (Jan. 14, 2015)(Granting the application for rehearing by FirstEnergy, OCC, OMAEG, and Environmental Groups be granted for further consideration) No final entry. *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Entry on Rehearing (May 28, 2015)(Granting application for rehearing by The Kroger Company and Joint Applicants, including OCC, for further consideration) No Final Entry.

<sup>19</sup> See, *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, (2004), 102 Ohio St.3d 301, 304.

<sup>20</sup> A factor that contributes to harm to customers is that the PUCO as a matter of course denies requests to stay rates or collect rates subject to refund. A ruling granting a stay of rates, or collecting rates subject to refund would potentially limit the harm to customers that is occurring when the PUCO delays issuing a final order. Typically the PUCO has not ordered such relief.

<sup>21</sup> *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 3d 254, 257, 141 N.E.2d 445 (1957).

The delay in ruling upon OCC's application for rehearing harms customers because customers must pay increased rates that are not paid subject to refund or not stayed. OCC requested that any funds charged under the PPA Rider be done subject to refund in the event that the rider is later struck down.<sup>22</sup> The PUCO found that it is “unnecessary and inappropriate to direct that the PPA Rider be made subject to refund.”<sup>23</sup> This is prejudicial, and manifestly unjust.<sup>24</sup> The delay in a substantive ruling on OCC's application for rehearing forecloses OCC from seeking relief from the Ohio Supreme Court, including relief (non-payment of disputed rates) by staying the collection of rates. While OCC may pursue extraordinary relief<sup>25</sup> from the Court, even without a ruling on rehearing, that relief is generally beyond OCC's grasp. This is because it is likely that, based on past experience,<sup>26</sup> the Court will deny such relief on the theory that OCC has a so-called “adequate remedy at law”: an appeal from the eventual PUCO final order.

Rehearing should be granted (or denied), substantively addressing OCC's application for rehearing. A final appealable order should be issued. Granting more time to consider issues raised on rehearing unreasonably delays the issuance of a final order all the while customers are paying higher unnecessary charges. Under the PUCO's practice, there is no denial of the application for rehearing, either by law or by entry. Thus, there is no final order. This makes it impossible for parties to exercise their rights under R.C.

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<sup>22</sup> OCC Application for Rehearing at 33-35 (May 2, 2016).

<sup>23</sup> PUCO Second Entry on Rehearing at 78 (November 3, 2016).

<sup>24</sup> See, e.g., *Knox v. Knox*, (C.A. 5th Dist), 26 Ohio App. 3d 236, where the appellate court held that the trial court's delay in rendering a judgment was an abuse of discretion considering that the delay foreclosed the relief that appellant otherwise would have been afforded .

<sup>25</sup> Through a writ of procedendo or prohibition.

<sup>26</sup> See, e.g., *State of Ohio ex rel. OCC et al. v. Alan R. Schriber et al.*, Case No. 2009-0710, Entry (June 17, 2009) (denying the writ of prohibition because the issues raised in the complaint could be resolved on appeal).

4903.11 and 4903.13 to appeal PUCO decisions to the Court. And because the PUCO has not ordered a stay of the rates, and denied OCC's request that rates be collected subject to refund, its dilatory rulings unduly delay any relief customers can seek, providing immediate and material harm to customers.<sup>27</sup>

The PUCO should not be able to evade judicial review of its decisions by failing to issue a timely final appealable order. Rehearing should be granted, with the PUCO issuing substantive findings on OCC's claimed errors, so that a final appealable order is issued. This will allow parties to exercise their statutory rights to appeal the PUCO's decisions.

#### **IV. CONCLUSION**

To protect customers from unnecessary charges, the PUCO should grant rehearing and abrogate or modify its Third Entry on Rehearing. This would ensure that parties, including OCC, can exercise their statutory right to appeal the PUCO decisions in a timely manner and helps protect the interests of the residential customers that OCC represents.

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<sup>27</sup> PUCO Second Entry on Rehearing at 78 (November 3, 2016).



Respectfully submitted,

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I hereby certify that a copy of this Application for Rehearing was electronically served via electric transmission on the persons stated below this 20th day of January 2017.

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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 Moore, Kevin F. Mr.