

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
OHIO POWER COMPANY TO UPDATE ITS  
GRIDSMART PHASE 2 RIDER.

CASE NO. 17-1156-EL-RDR

### ENTRY ON REHEARING

Entered in the Journal on April 25, 2018

#### I. SUMMARY

{¶ 1} The Commission denies the application for rehearing of the February 28, 2018 Finding and Order filed by the Ohio Consumers' Counsel.

#### II. DISCUSSION

##### A. *Procedural History*

{¶ 2} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is an electric distribution utility as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} In Case No. 13-2385-EL-SSO, et al., the Commission modified and approved an ESP for AEP Ohio for the period of June 1, 2015, through May 31, 2018. Among other matters, the Commission approved AEP Ohio's proposal to extend its gridSMART program, which focuses on smart grid technologies, including advanced metering infrastructure and distribution automation. The Commission stated that, as with gridSMART Phase 1, the gridSMART Phase 2 program will be reviewed on an annual basis, including consideration

of the prudence of expenditures and the reconciliation of investments placed in service with revenues collected. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (*ESP 3 Case*), Opinion and Order (Feb. 25, 2015) at 51-52.

{¶ 5} In Case No. 13-1939-EL-RDR, the Commission modified and approved a stipulation and recommendation (Stipulation) regarding the implementation of Phase 2 of AEP Ohio's gridSMART program. The Commission noted that, in accordance with the Stipulation, costs incurred for the gridSMART Phase 2 program will be recovered through the gridSMART Phase 2 Rider. AEP Ohio's gridSMART Phase 2 Rider rates are adjusted on a quarterly basis, with automatic approval 30 days after the filing, unless otherwise ordered by the Commission. Additionally, the gridSMART Phase 2 Rider is subject to an annual audit for prudence. *In re Ohio Power Co.*, Case No. 13-1939-EL-RDR (*gridSMART Phase 2 Case*), Opinion and Order (Feb. 1, 2017) at ¶¶ 33, 37.

{¶ 6} On January 29, 2018, in the above-captioned case, AEP Ohio filed an application to update the gridSMART Phase 2 Rider, effective with the first billing cycle of March 2018. With its application, AEP Ohio filed proposed gridSMART Phase 2 Rider tariffs.

{¶ 7} On February 5, 2018, the Ohio Consumers' Counsel (OCC) filed comments, in addition to a motion to intervene in this proceeding that was previously filed on May 12, 2017. AEP Ohio filed reply comments on February 20, 2018.

{¶ 8} On February 23, 2018, AEP Ohio filed revisions to its proposed gridSMART Phase 2 Rider tariffs. Following consultation with Staff, AEP Ohio proposed to modify the gridSMART Phase 2 Rider tariffs to provide that the rider "is subject to reconciliation, including, but not limited to, refunds to customers, based upon the impact to the carrying charge rate recovered through this Rider of changes in Federal corporate income taxes due to the Tax Cuts and Jobs Act of 2017 or based upon the results of audits ordered by the Commission in accordance with the February 1, 2017 Opinion and Order in Case No. 13-1939-EL-RDR."

{¶ 9} On February 26, 2018, Staff filed its review and recommendations. Staff recommended that the proposed tariff language be approved, effective with the first billing cycle of March 2018.

{¶ 10} By Finding and Order dated February 28, 2018, the Commission approved AEP Ohio's amended gridSMART Phase 2 Rider tariffs, effective with the first billing cycle of March 2018. The Commission also granted OCC's motion to intervene in this proceeding.

{¶ 11} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 12} On March 30, 2018, OCC filed an application for rehearing of the February 28, 2018 Finding and Order. AEP Ohio filed a memorandum contra on April 9, 2018.

**B. Consideration of the Application for Rehearing**

{¶ 13} In its sole ground for rehearing, OCC argues that the February 28, 2018 Finding and Order is unreasonable and unlawful, because the tariff language approved by the Commission is too limited in scope and does not provide that customers may be eligible for refunds of unlawful charges in situations other than the two cases identified in the tariff. Specifically, OCC asserts that events other than prudence audits of the gridSMART Phase 2 Rider and the recent federal tax cuts may trigger a need to adjust amounts that have already been collected from customers through the rider. Citing the Ohio Supreme Court's recent decision in *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (*Ohio Edison Case*), OCC contends that, in order to protect consumers, the tariff language for the gridSMART Phase 2 Rider should be broadened to encompass other events that would render the tariff subject to refund, including unforeseen legislative actions, Commission rulings, and decisions of the Ohio Supreme Court. OCC adds that tariff language providing that the rider is subject to "reconciliation" is ambiguous.

For these reasons, OCC proposes that the Commission adopt the following tariff language: "This tariff is collected subject to refund or similar adjustment to customers, based upon (1) the impact to the carrying charge rate recovered through this Rider of changes in Federal corporate income taxes due to the Tax Cuts and Jobs Act of 2017, (2) the results of audits ordered by the Commission in accordance with the February 1, 2017 Opinion and Order in Case No. 13-1939-EL-RDR, or (3) any other legislation, Commission decision, or court decision that makes collection of amounts from customers under this Rider unlawful, imprudent, or unreasonable."

{¶ 14} In its memorandum contra, AEP Ohio responds that the Company's tariff language was developed in coordination with Staff, in order to fully address the issue in the *Ohio Edison Case*, and has been approved by the Commission in other cases, despite OCC's objections. *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, Finding and Order (Apr. 4, 2018) at ¶¶ 11-12; *In re Ohio Power Co.*, Case No. 14-1696-EL-RDR, Finding and Order (Feb. 21, 2018) at ¶ 11. AEP Ohio also contends that its tariff language properly addresses the Tax Cuts and Jobs Act of 2017 (TCJA), as the Commission found. AEP Ohio notes that OCC did not oppose the Stipulation in the *gridSMART Phase 2 Case* and that, in any event, it is too late for OCC to pursue a challenge of the *gridSMART Phase 2 Rider*. According to AEP Ohio, OCC's proposed tariff language constitutes an untimely and unlawful attempt to circumvent the controlling appellate process for challenging the legality of rates. AEP Ohio adds that OCC seeks to bypass the established requirements under R.C. 4903.16 for staying a final order of the Commission.

{¶ 15} In the Finding and Order, the Commission found that the language in the *gridSMART Phase 2 Rider tariffs*, as proposed by AEP Ohio following consultation with Staff, is reasonable and consistent with the Commission's orders in the *ESP 3 Case* and the *gridSMART Phase 2 Case*, which require that the rider be audited on an annual basis. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 52; *gridSMART Phase 2 Case*, Opinion and Order (Feb. 1, 2017) at ¶¶ 33, 37. Addressing OCC's comments, we noted that AEP Ohio's tariff language expressly clarifies that the *gridSMART Phase 2 Rider* is subject to reconciliation

and adjustment, including, but not limited to, refunds to customers, based upon the annual prudence reviews of the rider. The Commission also concluded that other recommendations offered by OCC in its comments were beyond the scope of this case. Finding and Order at ¶¶ 11-12.

{¶ 16} Upon consideration of OCC's application for rehearing, the Commission finds that it should be denied. Following the decision in the *Ohio Edison Case*, it was necessary to include appropriate additional language in AEP Ohio's tariffs, in order to clarify that the annual review and reconciliation of the gridSMART Phase 2 Rider should occur as the Commission and the signatory parties to the Stipulation in the *gridSMART Phase 2 Case* intended. However, as OCC is well aware, our authority to provide for refunds of previously collected charges is circumscribed by Ohio law. As OCC acknowledged in its comments, the Supreme Court of Ohio found in the *Ohio Edison Case* that the Commission's orders providing for a \$43 million refund of rider charges to customers, following a Commission-ordered audit, constituted unlawful retroactive ratemaking, in violation of R.C. 4905.32. The Court specifically noted that R.C. 4905.32 barred any refund because the rider in question, as filed with the Commission, did not specify a refund process. *Ohio Edison Case* at ¶¶ 19, 69.

{¶ 17} From a review of the rider adjustment proceedings that have occurred since the *Ohio Edison Case*, it is apparent that the Commission, Staff, and AEP Ohio, as well as the other electric distribution utilities, have acted promptly to respond to the Court's decision. AEP Ohio has proposed, and the Commission has approved, appropriate language to clarify that the riders are subject to reconciliation and adjustment, including, but not limited to, refunds to customers, based upon the results of Commission-ordered audits. *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Finding and Order (Apr. 4, 2018); *In re Ohio Power Co.*, Case No. 15-1052-EL-RDR, Finding and Order (Mar. 28, 2018); *In re Ohio Power Co.*, Case No. 18-96-EL-RDR, Finding and Order (Mar. 28, 2018); *In re Ohio Power Co.*, Case No. 18-191-EL-RDR, Finding and Order (Mar. 28, 2018); *In re Ohio Power Co.*, Case No. 18-440-EL-ATA, et al., Finding and Order (Mar. 28, 2018); *In re Ohio Power Co.*, Case No. 14-

1696-EL-RDR, Finding and Order (Feb. 21, 2018). We have also approved comparable tariff language for the riders of other electric distribution utilities. *See, e.g., In re Duke Energy Ohio, Inc.*, Case No. 17-2088-EL-RDR, et al., Finding and Order (Mar. 28, 2018); *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 17-2275-EL-RDR, et al., Finding and Order (Mar. 28, 2018). As we found in the Finding and Order, AEP Ohio's proposed tariff language is sufficient to address the concerns raised by OCC in light of the *Ohio Edison Case*. Finding and Order at ¶¶ 11-12. We disagree with OCC's contention that "reconciliation" is ambiguous, and the approved tariff language makes clear that the term includes refunds to customers.

{¶ 18} OCC acknowledges that the gridSMART Phase 2 Rider tariff language adopted by the Commission, which accounts for both the *Ohio Edison Case* and the recent enactment of the TCJA, is "an improvement." OCC believes, however, that the tariff language should be further modified to encompass any other legislation, Commission decision, or court decision that renders amounts collected through the rider unlawful, imprudent, or unreasonable. We find that OCC's proposed tariff language exceeds the scope of this proceeding and the bounds of Ohio law.

{¶ 19} In the *Ohio Edison Case*, the Court reaffirmed its longstanding decision in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957). In *Keco*, the Court addressed the tenets of the filed rate doctrine, determining that a public utility may charge only the rates fixed by its current, Commission-approved tariff and that the Commission is prohibited from engaging in retroactive ratemaking. OCC's proposed tariff language would render *Keco* meaningless and goes well beyond the deficiency in the tariffs identified by the Court in the *Ohio Edison Case*. The Court has consistently held that *Keco* is based upon R.C. 4905.32 and that any limitation on *Keco* must come from the General Assembly; thus, the Commission lacks the authority to adopt the language proposed by OCC, which would require refunds under much broader circumstances than the language proposed by AEP Ohio in this case.

{¶ 20} As a final matter, we encourage Staff, OCC, and other interested stakeholders to continue to work cooperatively with the electric distribution utilities and other Commission-regulated public utilities to propose refund language for inclusion in their tariffs. *See, e.g., In re The East Ohio Gas Co. d/b/a Dominion Energy Ohio*, Case No. 17-820-GA-ATA, Third Entry on Rehearing (Apr. 4, 2018) at ¶¶ 16-17.

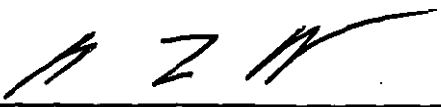

### III. ORDER

{¶ 21} It is, therefore,

{¶ 22} ORDERED, That OCC's application for rehearing be denied. It is, further,

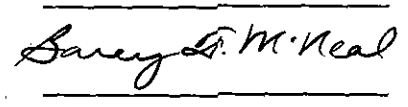
{¶ 23} ORDERED, That a copy of this Entry on Rehearing be served upon all interested persons and parties of record.

#### THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Asim Z. Haque, Chairman  
M. Beth Trombold  
Thomas W. Johnson  
Lawrence K. Friedeman  
Daniel R. Conway

SJP/sc

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Barcy F. McNeal  
Secretary