**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support its Standard Service Offer. | )  )  )  )  ) | Case No. 12-3254-EL-UNC |

**MEMORANDUM CONTRA**

**OHIO POWER COMPANY’S**

**APPLICATION FOR REHEARING**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

On November 13, 2013, the Public Utilities Commission of Ohio (“PUCO”) issued an Opinion and Order that should reduce base generation rates for standard service offer (“SSO”) customers of Ohio Power Company. The PUCO required Ohio Power Company (“AEP Ohio” or the “Utility”) to proportionately blend a $188.88/MW-day capacity rate with the base generation rates for each of the energy-only auctions scheduled to occur over the term of the electric security plan.[[1]](#footnote-1) The PUCO also found that issues of double recovering capacity costs would be best handled in another forum.[[2]](#footnote-2) The PUCO’s Order affords SSO customers some relief in rates and offers the opportunity for parties to address double recovery issues, with the assistance of an independent audit.

Applications for rehearing were filed by Ohio Energy Group (“OEG”), AEP Ohio, and FirstEnergy Solutions. This memorandum responds to the application filed by AEP Ohio.

AEP Ohio seeks to overturn the SSO rate reductions and thwart the PUCO’s review of the double recovery issues in its 2012 fuel adjustment clause case. AEP Ohio, in part, relies on information that is outside the record.

Sixty years ago the Ohio General Assembly determined, in enacting R.C. 4903.09, that the PUCO will decide cases based upon the record before it:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

There is no shortage of precedent on this subject.[[3]](#footnote-3) There is no novelty to the concept of the record.

But over half a century later AEP Ohio has demonstrated a disregard for the Legislature’s directive.Specifically, AEP Ohiouses its application for rehearing to argue the merits of the double recovery issue—using facts and data that it did not produce in the course of the evidentiary proceeding, even though it had ample opportunity to do so. That information has not been subject to cross-examination in this or any other proceeding.

The PUCO should reject AEP Ohio’s request for rehearing, The PUCO’s November 13, 2013 Opinion and Order (“Order”) is neither unjust nor unreasonable. It is based on record evidence submitted in the proceeding—evidence that was subject to review and cross examination.

## A. AEP Ohio Has Failed To Prove That There Is No Double Recovery Of The Fixed Cost Portion Of Its Fuel Adjustment Clause.

The Commission has held that “[d]ocuments that are not part of the record, and that were not designated a late-filed exhibit at hearing, cannot be attached to a brief or filed after a hearing, and thereby be made part of the record.”[[4]](#footnote-4) In assessing the arguments of applications for rehearing, the PUCO requires parties to rely on evidence within the record, in accordance with R.C. 4903.09.

AEP Ohio attempts to address and settle the double recovery arguments once and for all by relying on information that was never part of the record of this proceeding. It claims there will be no double recovery from customers of fixed costs through the fixed cost recovery rider (“FCR”) that have already been recovered through the fuel adjustment clause.[[5]](#footnote-5) In support of its allegations, AEP Ohio provides a “threshold analysis” that relies upon Witness Pierce’s testimony in the Capacity Case.[[6]](#footnote-6) It bolsters that analysis using actual 2012 data (Exhibit A) – data that was not introduced in the record and not subject to cross examination in this or any other proceeding. It then tries to re-litigate the Capacity Case by arguing that the energy credit produced under the Capacity Case was “riddled with errors.”[[7]](#footnote-7) According to AEP Ohio, when the Capacity Case energy credit is compared to actual gross margins achieved in 2012 (Exhibit B), this comparison shows that the energy credit was unrealistic.[[8]](#footnote-8) Like Exhibit A, this data was not introduced in the record and was not subject to cross examination in this or any other proceeding. AEP Ohio uses this data to argue that the energy credit determined by the PUCO in the Capacity Case is “overstated” when compared to 2013 experience.[[9]](#footnote-9) According to the Utility, the “overstatement” of the energy credit is proof that there is no double recovery.

The PUCO should not accept AEP Ohio’s assertions that there is no double recovery of the fixed cost portion of its fuel adjustment clause, without further investigation and inquiry. There are several reasons why. First, AEP Ohio mistakenly focuses on the base generation rates. No party argued that there would be double recovery through the base generation rates. Instead the arguments have focused upon the double recovery between the $188.88 capacity costs and the FCR. The parties alleged double recovery because both the $188 value and the FCR reflect the capacity cost for the purchases from OVEC and Lawrenceburg. The Utility never refutes this fact. Rather it clings to obfuscatory arguments that are not determinative of the issues.

Second, the PUCO should not consider information AEP Ohio submitted in its application for rehearing to refute assertions of double-recovery. Under R.C. 4903.09, the PUCO must decide the case based on the record evidence, not on statements (and calculations) submitted for the first time in a pleading that pertains to an application for

rehearing.[[10]](#footnote-10) AEP Ohio had the burden of proof in this proceeding to provide sufficient probative and detailed evidence to sustain its point by a preponderance of the evidence.[[11]](#footnote-11) It failed to do so when it had ample opportunity to address this issue at hearing. Moreover, the “new” non-record information (Exhibits A, B) attached to AEP Ohio’s Application for Rehearing, could have been produced as part of the record in this proceeding. If produced, parties would have been afforded an opportunity to cross examine on that information. But it was not. Parties to this proceeding did not have a chance to address such information. It would be unreasonable and unlawful now for the PUCO to consider the non-record information on rehearing and reverse or modify its Opinion and Order based on such information.[[12]](#footnote-12)

If double recovery of capacity costs is occurring, the Commission should remedy it by ordering further reductions to the fuel cost recovery rider. Otherwise, the rates will be unjust and unreasonable. The double recovery issue is an issue that some Commissioners found troubling[[13]](#footnote-13) and worthy of further investigation in the Utility’s 2012 fuel adjustment clause proceeding.[[14]](#footnote-14) OCC fully agrees and supports addressing this issue in AEP Ohio’s 2012 fuel cost proceeding. Fully vetting these issues in that proceeding will enable parties to appropriately address evidence in lieu of responding to information AEP Ohio submitted for the first time in its application for rehearing.

## B. The PUCO’s Order Reducing Standard Service Offer Rates Is Just And Reasonable And Supported By The Record.

AEP Ohio claims that the PUCO’s decision reducing base generation rates for standard service offers is unjust and unreasonable.[[15]](#footnote-15) It asserts that the PUCO has reversed course in this proceeding on an issue that was decided in the ESP II proceeding.[[16]](#footnote-16) AEP Ohio believes that the Order in the ESP II proceeding established frozen base generation rates through December 31, 2014, and that the PUCO’s Entry on Rehearing only rejected frozen rates for the last five months of the ESP.[[17]](#footnote-17) Hence, AEP Ohio asserts that the Order in this proceeding—which proportionately reduces SSO rates for all of the energy auctions--goes beyond both the ESP II Order and the Entry on Rehearing.

AEP Ohio also claims that the PUCO’s decision “lacks any basis in the record in this case.”[[18]](#footnote-18) AEP Ohio claims that retail base generation service is not equivalent to wholesale capacity service and thus, it is unreasonable to reduce retail generation rates to the $188.88/MW-day price of wholesale capacity.[[19]](#footnote-19) AEP Ohio claims that it will lose “substantial” revenues under the PUCO’s decision, undermining the retail stability rider (“RSR”).[[20]](#footnote-20)

AEP Ohio’s claims should be rejected. AEP Ohio focuses on miscellaneous bits and pieces of the ESP II Entry on Rehearing to fabricate its arguments, but misses the direct discussion of the issue in that Entry. Specifically, the PUCO addressed the issue at length when rejecting AEP Ohio’s request to confirm that the state compensation mechanism does not apply to the SSO energy auctions or non-shopping customers:

The Commission finds that AEP-Ohio’s application for rehearing should be denied. In its modified ESP application, AEP-Ohio originally offered to provide capacity for the January 1, 2013 auction at $255 per MW-day. In light of the Commission’s decision in the Capacity Case, which determined $188.88 per MW-day would allow AEP Ohio to recover its capacity cost without overcharging customers, it would be unreasonable for us to permit AEP-Ohio to recover an amount higher than its cost of service.[[21]](#footnote-21)

This passage directly refutes the Utility’s claim that the PUCO is reversing itself in this Order. Rather the PUCO is merely affirming what it decided on rehearing in the ESP II proceeding when it addressed AEP Ohio’s arguments. The PUCO made clear in the ESP II Entry on Rehearing that it would be unreasonable if AEP Ohio were to collect more money from its SSO customers for capacity than its cost of service. Its decision here is entirely consistent with its ESP II Entry on Rehearing. It is not unjust or unreasonable.

Additionally, AEP Ohio draws distinctions between capacity supplied to competitive retail electric service providers (“CRES”) and capacity supplied to SSO customers. But such distinctions do not make a difference for purposes of establishing the cost of capacity. While the PUCO did distinguish between retail and wholesale service in the Capacity Order,[[22]](#footnote-22) in the ESP II Order[[23]](#footnote-23) it ordered the wholesale deferred capacity costs to be collected through retail rates. Thus, even if there is a distinction, the PUCO ESP II Order makes it irrelevant for the purposes of setting retail rates. And importantly, capacity is capacity - whether it is supplied (on a wholesale basis) to marketers or supplied (on a retail basis) to non-shopping SSO customers. The PUCO’s Order is not unjust or unreasonable because it recognizes that retail capacity payments, like wholesale capacity payments, should not be higher than the Utility’s cost to provide that capacity. AEP Ohio’s application for rehearing should be denied in this respect.

## C. It Is Both Just And Reasonable For The PUCO To Decide The Issue Of Double Recovery Of Purchase Power Costs In The Fuel Adjustment Clause Proceeding.

AEP Ohio also claims it was unreasonable and unlawful for the PUCO to defer ruling on double recovery of purchased power costs.[[24]](#footnote-24) AEP Ohio alleges that the PUCO should hold rehearing in this docket if necessary to resolve the issue of double recovery.[[25]](#footnote-25) And if no rehearing is held, the Utility opines there should be a new separate docket to address these issues.[[26]](#footnote-26) The Utility argues that the fuel adjustment clause (“FAC”) proceeding is not an appropriate docket to consider these issues because there is no connection between the FAC and the wholesale cost of capacity supplied to CRES.[[27]](#footnote-27) Moreover, AEP Ohio claims that because the PUCO’s auditor in the Capacity Case is the same auditor selected by the PUCO for the fuel case, there would be no independent review of the issue in the existing 2012 FAC proceeding.[[28]](#footnote-28)

AEP Ohio’s application for rehearing should be denied. It is both just and reasonable for the PUCO to order a review of this issue in the existing FAC docket under which an annual audit is performed. Such a review will allow the issue of whether there is double recovery of purchase power costs to be completely vetted. An independent audit process serves as an important tool to assist in vetting this issue. AEP Ohio’s allegations of the lack of independence of the auditor appear to be based on the fact that it was not satisfied with the auditor’s recommended energy credit in the Capacity Case – an energy credit ultimately adopted by the PUCO. Using the same auditor who testified in the Capacity Case makes sense as she is completely familiar with these complex underlying issues involving AEP Ohio’s capacity costs. The auditor’s familiarity with the issues is a plus. AEP Ohio’s allegations that the FAC auditor lacks independence are unfounded.

The PUCO was acting appropriately and wisely in deferring review and consideration of the double recovery issue. AEP Ohio’s application for rehearing should be denied.

## 

**D. Conclusion**

For all of the above reasons, the PUCO should deny AEP Ohio’s request for rehearing. Instead the PUCO should find that its Opinion and Order, that allows standard service offer customers to receive reductions in rates and provides for further investigation into issues of double recovery, is lawful and reasonable.

Respectfully submitted,

BRUCE J. WESTON

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Memo Contra by the Office of the Ohio Consumers’ Counsel was served on the persons stated below via electronic service this 23rd day of December 2013.

*/s/ Maureen R. Grady*

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1. The energy only auctions will be: 10% February 2014; 25% May 2014; 25% September 2014; 40% November 2014. [↑](#footnote-ref-1)
2. *In The Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support its Standard Service Offer*, Case No. 12-3254-EL-UNC, Opinion and Order at 12 (Nov. 13, 2013). [↑](#footnote-ref-2)
3. See, e.g., *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 89-07-EL-EFC, Entry upon Application for Rehearing at \*5-6 (Oct. 17, 1989) (“[T]o meet the requirements of R.C. 4903.09, the Commission's order must show, in sufficient detail, the facts in the record on which the order is based and the reasoning followed by the Commission in reaching its conclusion.”) (citing *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 320, 322; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm*. (1983), 4 Ohio St.3d 107; *Harold D. Miller, Inc. v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 162). (Emphasis added). [↑](#footnote-ref-3)
4. *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order at 2 (Nov. 21, 2006) at 2. [↑](#footnote-ref-4)
5. AEP Ohio Application for Rehearing at 19. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. Id. [↑](#footnote-ref-7)
8. Id. [↑](#footnote-ref-8)
9. Id. [↑](#footnote-ref-9)
10. See, for example, *In the Matter of the Review of Ameritech Ohio’s Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic; In the Matter of the Application of Ameritech Ohio for Approval of Carrier to Carrier Tariff*, Case No. 96-922-TP-UNC et al., Entry on Rehearing at ¶34 (Jan. 31, 2002) (where the Commission expressly noted it could not consider an affidavit submitted with a rehearing application as evidence in a proceeding) . [↑](#footnote-ref-10)
11. *Central Movers Corp. v. Pub. Util. Comm.* (1976), 47 Ohio St.2d 58; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 107. [↑](#footnote-ref-11)
12. See, e.g., *In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, Entry on Rehearing at ¶8-10 (July 15, 2010) (granting a motion to strike a footnote and accompanying exhibit contained in an application for rehearing when the information was available prior to the hearing and could have been presented); *In the Matter of the Application of the City of Clyde Requesting Removal of Certain Electric Facilities of the Toledo Edison Company From Within Clyde’s Corporate Limits*, Case No. 95-02-EL-ABN, Entry on Rehearing at ¶11-12 (June 12, 1996) (claims of new evidence occurring after the close of evidence are not appropriately raised on rehearing). [↑](#footnote-ref-12)
13. Opinion and Order, Concurring Opinion of Commissioners Lesser and Trombold. [↑](#footnote-ref-13)
14. *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters,* Case No. 11-5906-EL-FAC, Entry at ¶10 (Dec. 4, 2013). [↑](#footnote-ref-14)
15. AEP Ohio Application for Rehearing at 6. [↑](#footnote-ref-15)
16. Id. at 7. [↑](#footnote-ref-16)
17. Id. at 7. [↑](#footnote-ref-17)
18. Id. [↑](#footnote-ref-18)
19. Id. at 8. [↑](#footnote-ref-19)
20. Id. at 9. [↑](#footnote-ref-20)
21. *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 Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Entry on Rehearing at ¶39 (Jan. 30, 2013). [↑](#footnote-ref-21)
22. *In re: AEP*, Case No. 10-2929-EL-UNC, Opinion and Order (July 2, 2012). [↑](#footnote-ref-22)
23. *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 Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO et al., Opinion and Order (Aug. 8, 2012). [↑](#footnote-ref-23)
24. AEP Ohio Application for Rehearing at 9-10. [↑](#footnote-ref-24)
25. Id. [↑](#footnote-ref-25)
26. AEP Ohio Application for Rehearing at 20. AEP Ohio never explains what the separate docket would be or what opportunities parties would have in the docket. [↑](#footnote-ref-26)
27. Id. at 10, 20-22. [↑](#footnote-ref-27)
28. Id. at 21. [↑](#footnote-ref-28)