

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review)
of the Capacity Charges of Ohio Power,) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company.)

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

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The Office of the Ohio Consumers' Counsel ("OCC"), representing the 1.2 million residential customers of Ohio Power Company (the "Company" or "AEP-Ohio") applies for rehearing of the October 17, 2012, Entry on Rehearing ("October 17 Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, the OCC seeks to protect customers from paying hundreds of millions of dollars in unjust and unreasonable rates for capacity charges set by the PUCO in this case.

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the October 17, 2012 Entry

was unjust, unreasonable, and unlawful because:

- A. The PUCO Erred In Finding, For The First Time In The Case, That It Had Authority Under R.C. 4905.26 To Initiate A Complaint Proceeding And Investigate Wholesale Capacity Charges.
 - 1. R.C. 4905.26 governs complaints falling within the PUCO's general authority under R.C. Chapter 4905. Since wholesale capacity charges do not fall within Chapter 4905, the Commission's reliance on R.C. 4905.26 is misplaced.
 - 2. R.C. 4905.26 contains very specific requirements that were not satisfied in this proceeding.

- B. The Commission Unreasonably And Unlawfully Determined That OCC's Arguments Opposing The Deferral Of Capacity Costs Were Prematurely Raised And Declined To Address Them In Its Entry. This Violated R.C. 4903.09 And Unreasonably Impedes OCC From Pursuing An Appeal Of This Matter.

OCC explains the basis for each of these grounds for rehearing in the attached Memorandum in Support. Consistent with R.C. 4903.10 and these claims of error, the PUCO should modify its Entry.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO’s October 17 Entry raises significant issues. Did the PUCO have authority under R.C. 4905.26 to establish wholesale capacity rates that are to be charged by the utility to competitive retail electric service providers (“CRES”)? Can the Commission allow accounting deferrals and yet deny parties the opportunity to seek rehearing on the ultimate effects of the accounting deferrals on customers’ rates?

If the PUCO’s Entry on Rehearing stands, customers will pay hundreds of millions of dollars for the capacity charges the PUCO ordered to be deferred for future collection. The capacity charge deferrals are derived from the cost of capacity that the Commission determined for AEP Ohio. Specifically, in its July 2, 2012 Opinion and Order, the Commission found that the Company should be compensated for its capacity using a cost-based formula. That cost was determined to be \$188.88/MW-day.¹ But instead of charging CRES providers that cost, the PUCO ordered the Company to charge CRES providers a much lower market-based rate of \$20.01/ MW-day.²

¹ Case No. 10-2929-EL-UNC, Opinion and Order at 33 (July 2, 2012) (“Capacity Case Opinion and Order”).

² Id. at 23.

Recognizing that a difference existed between the \$188.88/MW-day and \$20.01/MW-day, the PUCO sought a stop-gap measure. The PUCO permitted the Company to defer the difference based on its authority under R.C. 4903.13.³ The Commission did not, however, establish from whom and how the deferrals would be collected. Instead, the Commission indicated that it would establish “an appropriate recovery mechanism” for these deferrals in a separate docket--the Company’s pending electric security plan.

The electric security plan is no longer pending. The “appropriate recovery mechanism” for collecting hundreds of millions of dollars in deferrals was revealed in the Commission’s August 8, 2012 ESP Opinion and Order. Customers (shopping and non-shopping) will pay for the deferrals, plus financing charges, beginning in 2015, through an add-on to their bills (rider). CRES providers will pay no part of the deferrals.

In its October 17 Entry the Commission attempts to fortify its decision. The Commission has, after-the-fact, added authority under R.C. 4905.26 for its actions. Additionally, the Commission found it “unnecessary” to address the numerous arguments against the deferrals made by OCC and others, and denied requests for rehearing because such arguments “were prematurely raised in this case.”⁴ OCC requests rehearing on these issues.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides any party may apply for rehearing on matters decided by the Commission within thirty

³ Id. at 38.

⁴ Entry on Rehearing at ¶125.

days after an order is issued.⁵ An application for rehearing must be written and must specify how the order is unreasonable or unlawful.⁶

In considering an application for rehearing, the Commission may grant rehearing requested in an application, if “sufficient reason therefor is made to appear.”⁷ If the Commission grants a rehearing and determines that its Order is unjust or unwarranted, or should be changed, it may abrogate or modify the Order.⁸ Otherwise the Order is affirmed.

OCC was a party to the case. Its motion to intervene was granted by the Commission.⁹ Additionally, OCC actively participated in this case, and thus, may apply for rehearing under R.C. 4903.10. OCC respectfully requests that the Commission determine that OCC has shown “sufficient reason” to grant rehearing on the matters specified below.

III. ARGUMENT

A. The PUCO Erred In Finding, For The First Time In The Case, That It Had Authority Under R.C. 4905.26 To Initiate A Complaint Proceeding And Investigate Wholesale Capacity Charges.

The PUCO granted rehearing for the “limited purpose of clarifying that the investigation initiated by the Commission in this proceeding was consistent with Section 4905.26, Revised Code, as well as with [its] authority under Sections 4905.04, 4905.05,

⁵ R.C. 4903.10.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Entry at ¶10 (Aug. 11, 2011).

and 4905.06,¹⁰ Revised Code.”¹¹ In this regard, the Commission relies on R.C. 4905.26 for the following purposes:

- To investigate AEP-Ohio’s capacity charge;¹²
- To evaluate the impact of the proposed change to AEP-Ohio’s existing capacity charge;¹³
- To examine AEP-Ohio’s existing capacity charge with respect to its FRR obligations;¹⁴
- To establish an appropriate state compensation mechanism;¹⁵ and
- To alter AEP-Ohio’s capacity charge without compelling the Company to apply for a rate increase pursuant to R.C. 4909.18.¹⁶

But the Commission is wrong. Revised Code Chapter 4905 provides the context within which R.C. 4905.26 operates.¹⁷ And Chapter 4905 does not permit the Commission to set wholesale capacity prices, let alone permit the shifting of wholesale costs from CRES providers to retail electric service customers through the electric security plan (“ESP”) retail rates. Thus, R.C. 4905.26 is not a source of authority that enables the Commission to investigate and fix wholesale capacity rates. The Commission’s reliance on R.C. 4905.26 is improper.

Wholesale transactions are rarely subject to the PUCO’s jurisdiction—a point the Commission has acknowledged: “pursuant to the FPA [Federal Power Act], electric sales

¹⁰ OCC challenged the PUCO’s assertion that it has authority in this proceeding pursuant to R.C. Chapters 4905 and 4909 in its August 1, 2012 Application for Rehearing filed in this proceeding.

¹¹ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power, Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry on Rehearing at 9-10 (Oct.17, 2012).

¹² Id. at 9.

¹³ Id.

¹⁴ Id. at 29.

¹⁵ Id.

¹⁶ Id at 54.

¹⁷ See *Office of Consumers’ Counsel v. Pub. Util. Com.*, 61 Ohio St.3d 396 at 402, where the Supreme Court of Ohio found that R.C. 4905.26 is linked to the PUCO’s general authority under Chapter 4905.

for resale and other wholesale transactions are generally subject to the exclusive jurisdiction of FERC [Federal Energy Regulatory Commission].”¹⁸ However, the PUCO claimed that it has jurisdiction in this proceeding for **the sole purpose** of “establish[ing] a state compensation mechanism.”¹⁹ But, the PUCO does not have authority under Chapter 4905 to establish a state compensation mechanism, and thus, R.C. 4905.26 is not authoritative in this case.

In addition, even if it was within the Commission’s authority to initiate a complaint proceeding under R.C. 4905.26 to evaluate a wholesale capacity charge for retail customers, the Commission nonetheless failed to satisfy the requirements set forth in the statute.

- 1. R.C. 4905.26 governs complaints falling within the PUCO’s general authority under R.C. Chapter 4905. Since wholesale capacity charges do not fall within Chapter 4905, the Commission’s reliance on R.C. 4905.26 is misplaced.**

The Commission stated in its July 2 Opinion and Order, “[s]ections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission authority to supervise and regulate all public utilities within its jurisdiction.”²⁰ But in its October 17 Entry, the Commission expanded its authority to include R.C. 4905.26—the complaint statute. This reliance is misplaced. Although the Commission may initiate a complaint proceeding per R.C. 4905.26 for purposes of investigating a matter over which it has jurisdiction, it cannot do so where it has no jurisdiction over the matter (i.e., wholesale capacity rates for retail customers).

¹⁸ Capacity Case Opinion and Order at 13.

¹⁹ Id.

²⁰ Case No. 10-2929-EL-UNC, Entry on Rehearing at 12 (Oct. 17, 2012).

Under R.C. 4905.26 the Commission may find a rate or tariff provision “unlawful, unjust, unreasonable or discriminatory.”²¹ R.C. 4905.26 states in pertinent part:

Upon complaint in writing against any public utility by any person * * *, or upon the initiative or complaint of the public utilities commission, that *any rate* * * * is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, * * * if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof, and shall publish notice thereof in a newspaper of general circulation in each county in which complaint has arisen. * * *

But Chapter 4905 sets forth the PUCO’s general powers.²² It provides the PUCO with authority to supervise and regulate all public utilities within its jurisdiction, including “any rate” of public utilities that it has the power to set. But it is not within the general powers of the PUCO to set wholesale capacity prices. Nor is it in the PUCO’s power to shift wholesale costs from CRES providers to retail electric service customers through a utility’s retail electric rates.

The Commission is a creature of statute and can only exercise the authority granted it under Ohio law.²³ The PUCO acknowledges that it “may exercise only the authority conferred upon it by the Generally Assembly.”²⁴ R.C. 4905.26 works within the confines of Chapter 4905. Since the PUCO does not have authority to establish a wholesale capacity rate under Chapter 4905, it cannot initiate a complaint proceeding

²¹ See R.C. 4905.26, and *Office of the Consumers’ Counsel v. Public. Util.. Com.*, 61 Ohio St. 3d 396 at *402.

²² See R.C. 4905, generally.

²³ *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; *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

²⁴ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power, Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 12 (July 2, 2012).

under R.C. 4905.26 to investigate a charge that is not permitted under its general authority.

2. R.C. 4905.26 contains very specific requirements that were not satisfied in this proceeding.

R.C. 4905.26 has very specific requirements, which were not satisfied in this case.

These criteria can be summarized as follows:

1. There must be a written complaint, or the Commission may initiate a complaint case.
2. The Commission must find that there were reasonable grounds for the complaint before conducting a hearing and ultimately fixing new rates.
3. The Commission must find that the rate in question is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.

R.C. 4905.26 allows for a proceeding to be initiated in two ways. The statute plainly requires that there be a written complaint against a public utility to initiate a proceeding under the statute. A complaint can be brought by a person, firm or corporation.²⁵ Alternatively, a complaint proceeding under R.C. 4905.26 may be initiated by the PUCO.²⁶ Neither scenario is applicable here, so the proceeding is not properly before the PUCO under R.C. 4905.26. But assuming, *arguendo*, that the Commission properly initiated this proceeding—it failed to satisfy the other requirements of the statute, as follows.

R.C. 4905.26 requires that “if it appears that **reasonable grounds** for complaint are stated, the commission shall fix a time for hearing and shall notify

²⁵ R.C. 4905.26.

²⁶ Id.

complainants***thereof.”²⁷ The Commission never established that reasonable grounds existed for a complaint in this proceeding. In fact, when the Attorney Examiner established a procedural schedule for this proceeding the stated purpose was to “establish an evidentiary record on a state compensation mechanism.”²⁸

The PUCO has previously found that R.C. 4905.26 “requires that the Commission shall set such a complaint for hearing **only when** reasonable grounds for a complaint are stated.”²⁹ And the Supreme Court of Ohio has held that reasonable grounds for the complaint must be found. “R.C. 4905.26 requires that reasonable grounds for complaint be stated This prerequisite should apply whether the Commission begins such a proceeding on its own initiative or on the complaint of another party.”³⁰

In *Western Reserve Transit Authority v. Public Utilities Com.*, the Supreme Court of Ohio found that although the procedural requirements contained in R.C. 4905.26 were clear, they were not observed by the Commission in that case.³¹ The Court held that a “tentative” finding for “reasonable grounds” was without legal authority.³² In other words, reasonable grounds for a complaint must actually exist before the PUCO can order

²⁷ The Commission has held “Section 4905.26, Revised Code, permits customers to file complaints or objections to any rate or classification of a utility and, **if reasonable grounds are shown**, the Commission will set the matter for hearing and the burden of proof shall be upon the complainant” (emphasis added). 1990 Ohio PUC LEXIS 947 at 11.

²⁸ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power, Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at 2 (Aug. 11, 2012).

²⁹ 1989 Ohio PUC LEXIS 104 (Ohio PUC 1989) at *15.

³⁰ *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 154 (1979).

³¹ *Western Reserve Transit Authority v. Public Utilities Com.*, 39 Ohio St. 2d 16 at *19 (1974).

³² *Id.*

a hearing pursuant to R.C. 4905.26.³³ But the PUCO never found reasonable grounds and thus the statute it relies upon was not complied with.

It must also be shown that the rate in question is “unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.”³⁴ The Ohio Supreme Court has found that “the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by the utility are unjust and unreasonable.”³⁵ Thus, only after an investigation and hearing pursuant to R.C. 4905.26 can the Commission determine that existing rates are unjust or unreasonable. Then the Commission can remedy the situation by ordering new rates be put in effect.³⁶ So to order new rates (as the PUCO did) the PUCO must find that the existing rates are unjust and unreasonable. But the PUCO did not. There was no such finding.

Instead, the Commission found that a state compensation mechanism “based on RPM pricing **could risk** an unjust and unreasonable result for AEP-Ohio.”³⁷ Further, the concurring opinion of Commissioners Porter and Slaby states: “[o]ur opinion of this result, in this case, should not be misunderstood as it relates to RPM; *by joining the majority opinion we do not, in any way, agree to any description of RPM-based capacity rates as being unjust or unreasonable.*”³⁸ So the third requirement under R.C. 4905.26 was not met.

³³ *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 154 (1979).

³⁴ R.C. 4905.26.

³⁵ *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350

³⁶ *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 154 (1979).

³⁷ Case No. 10-2929-EL-UNC, October 17, 2012 Entry at 18 (emphasis added).

³⁸ Case No. 10-2929-EL-UNC, Opinion and Order at 1, concurring opinion.

Finally, R.C. 4905.26 dictates a clear order of events that are to occur in a complaint case. Yet the PUCO failed to cite to R.C. 4905.26 as authority until the end of the case—in the rehearing stage. Rather than treat this proceeding as a complaint case from the beginning, the PUCO has instead justified its actions after the fact. In the October 17 Entry, the Commission states: “the Commission’s initiation of this proceeding was consistent with Section 4905.26, Revised Code, which requires only that the Commission hold a hearing and provide notice to the applicable parties.”³⁹ But the plain language of the statute must control.⁴⁰ That language clearly requires more than a hearing and notice, and those requirements were simply not met here.

B. The Commission Unreasonably And Unlawfully Determined That OCC's Arguments Opposing The Deferral Of Capacity Costs Were Prematurely Raised And Declined To Address Them In Its Entry. This Violated R.C. 4903.09 And Unreasonably Impedes OCC From Pursuing An Appeal Of This Matter.

In its August 1, 2012 application for rehearing OCC requested that the PUCO reconsider its ruling that permitted the Company to defer capacity costs that are not collected from CRES provider billings. OCC claimed that by allowing the deferrals, the Commission was taking action that could result in unfair competition, potentially unlawful subsidies, double payments, and discriminatory pricing.⁴¹ At that time, the Commission had not yet established “an appropriate recovery mechanism” for the deferrals, but had indicated that it would create one in the ESP proceeding.

³⁹ Case No. 10-2929-EL-UNC, October 17, 2012 Entry at 54.

⁴⁰ R.C. 1.42 and 1.47.

⁴¹ OCC Application for Rehearing at 16-22 (Aug. 1, 2012).

The “appropriate recovery mechanism” was announced, a week later, on August 8, 2012, in the Opinion and Order issued in the Company’s ESP proceeding. The deferrals will be collected from all customers, not CRES providers, on a non-bypassable basis through a rider beginning in 2015, and the Company may accrue carrying costs on the deferrals.⁴² OCC and others have applied for rehearing of the ESP Order.⁴³ To date, however, the PUCO has not substantively ruled upon the issues OCC raised on rehearing in the ESP case—unfair competition, potentially unlawful subsidies, double payments, and discriminatory pricing. It has merely issued an Entry on Rehearing giving itself more time to consider the applications for rehearing that were filed. In the meantime, the deferral accounting has begun, and new ESP rates are being collected under newly approved tariffs.⁴⁴

In its Entry on Rehearing in this case, the PUCO claims that OCC’s arguments were “prematurely raised” and were “merely an attempt to anticipate the Commission’s decision in the ESP 2 Case.”⁴⁵ That is mistaken.

OCC’s arguments are ripe for the Commission to consider because the ruling already is harming customers. It is unreasonable for OCC to wait until another subsequent order is issued that more directly affects customers. By not ruling on OCC’s application, where a material issue has been raised, the Commission is violating R.C.

⁴² *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 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 36 (Aug. 8, 2012).

⁴³ *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 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, OCC Application for Rehearing (Sept. 7, 2012). The Commission recently issued an Entry on Rehearing allowing itself more time to consider the applications for rehearing but it has not issued any substantive ruling on the rehearing applications. See *Id.*, Entry on Rehearing (Oct. 3, 2012).

⁴⁵ Entry on Rehearing at ¶125.

4903.09⁴⁶ and is unreasonably impeding an appeal that rightfully could be taken from this case.

The immediate and direct result of the PUCO's Order is to allow the Company to recognize for financial reporting purposes revenues that are not yet but will be collected from customers in the future, as confirmed by the ESP Order.⁴⁷ Statement of Financial Accounting Standard ("SFAS") No. 71⁴⁸ provides guidance to utilities in preparing financial statements.⁴⁹ SFAS 71 allows regulated utilities to adopt accounting treatment of assets and liabilities that would otherwise be improper according to the Generally Accepted Accounting Principles (GAAP)⁵⁰--where "regulation provides assurances that incurred costs will be recovered in the future."⁵¹ Under accounting standards, a utility can defer these revenues if it has regulatory assurance that the amounts will be collected from customers.

The "regulation" that provides assurance of later recovery must come through a PUCO Order so that the utility may defer the revenues in its financial statements.⁵²

⁴⁶ See, e.g., *In re: Application of Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶71 (holding that R.C. 4903.09 requires the Commission to explain material matters).

⁴⁷ See *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 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order (Aug. 8, 2012).

⁴⁸ See, e.g., *In re: Application of Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶71 (holding that R.C. 4903.09 requires the Commission to explain material matters).

⁴⁹ Statement of Financial Accounting Standards 71, Financial Accounting Standards Board of the Financial Accounting Foundation (1982) is now known as Financial Accounting Standards Board's Accounting Standards Codification 980 ("FASB ASC 980").

⁵⁰ SFAS 71, "This statement may require that a cost be accounted for in a different manner from that required by another authoritative pronouncement." at 2.

⁵¹ *Id.* at 1.

⁵² In cases where the independent auditors disagree with the company on whether there is assurance by the regulatory body that costs will be recovered in the future, and the level of costs is material, this disagreement is disclosed by the independent auditors in the company's financial reports. Rule 203, 204 of the Rules of Conduct of the Code of Professional Ethics of the American Institute of Certified Public Accountants.

The Order in this case, permitting deferral of the price differential, creates a regulatory asset for AEP Ohio amounting to hundreds of millions of dollars. The asset can then be recognized as revenues for financial reporting purposes.

The Ohio Supreme Court has recognized that accounting orders of the PUCO can cause harm in and of themselves.⁵³ For instance, in 2006 an appeal from a PUCO order was taken, of, inter alia, an accounting order that authorized the utility to defer certain expenses (regional transmission organization expenses). The Court rejected the very same premise the PUCO offers here –that appeal of an accounting order is premature because the rate changes associated with the accounting have not been made. Instead, the Court found the PUCO’s order “final and appealable.” It did so because it found that customers were already harmed by the PUCO’s actions: “The fact that subsequent orders may result in more direct effects does not mean that the orders allowing accounting procedure changes are not final. Thus the Consumers’ Counsel may argue in these appeals that customers have already been harmed by PUCO actions that she [OCC] claims were unreasonable or unlawful.”⁵⁴

The Court’s holding recognizes the interrelatedness of accounting and ratemaking: “To be sure, as Consumers’ Counsel contends, FirstEnergy and Dayton Power and Light, having secured the accounting changes, will likely ask the PUCO for permission to raise their customers’ rates after the market development period to cover the costs that the PUCO has allowed the companies to defer during that period.”⁵⁵

⁵³ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940 (“FirstEnergy”).

⁵⁴ Id. at ¶25.

⁵⁵ Id. at ¶35.

FirstEnergy confirms that when the PUCO creates a regulatory asset in an accounting case there is an inextricable “influence”⁵⁶ on future rates.

Indeed there is much more than an “influence” on future rates in the case at hand. The Commission in its ESP Order authorizes AEP Ohio to collect from customers the revenues AEP Ohio will book based on the order in this case. These booked revenues are real, not theoretical, and amount to hundreds of millions of dollars the utility intends to collect from customers. This accounting harms customers. It will enable the utility to collect hundreds of millions of dollars from customers.

Thus, as the Ohio Supreme Court has previously recognized, residential customers can be harmed when the Commission authorizes the deferral of costs. It follows then that a party is not pursuing issues prematurely when it seeks rehearing on issues that are intertwined with the ultimate collection of deferrals from customers. Such requests for rehearing should be addressed and the Commission’s failure to address a material issue raised by a party on rehearing is an error under R.C. 4903.09.⁵⁷ It is also unjust and unreasonable because it will impair OCC’s ability to seek appellate review of these very important issues.

R.C. 4903.09 requires that, in all contested cases, “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.” The Ohio Supreme

⁵⁶ *Ohio Consumers Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St.3d 377, 380, 6 OBR 428, 453 M.E.2d 673 at 380, (Locher, R.S., dissenting)(where Justice Locher recognized that the purpose of an accounting change is to “influence rates.”).

⁵⁷ See, e.g., *In re: Application of Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶71.

Court has recognized that the Commission must comply with this statute for the Court to fulfill its responsibility to review the order being appealed.⁵⁸

By characterizing OCC's rehearing request as premature, and not addressing the merits, the Commission fails to rule on OCC's application. This violates R.C. 4903.09.⁵⁹ Thus the Commission's decision is unlawful.

The Commission should also grant rehearing because its Entry is unreasonable. This is because it impedes an appeal of these issues. Under R.C. 4903.09, the Commission must make findings of fact and set for the reasons prompting the decision. The Ohio Supreme Court has recognized that the Commission must comply with this statute for the Court to fulfill its responsibility to review the order being appealed.⁶⁰ A party may apply for rehearing of the Commission Order, within thirty days of a final order being issued.⁶¹ Under 4903.13, a party may prosecute an appeal of a final order of the Commission, provided it files a timely notice of appeal, consistent with R.C. 4903.11.

But here the Commission did not substantively consider the arguments OCC presents, and instead deferred the arguments to the ESP proceeding. The Commission though has a duty to address material issues raised by parties in a proceeding.⁶² It failed to do so here. That was unreasonable and its actions will impede any review by the Supreme Court—a review that OCC is entitled to. Thus, the purpose of R.C. 4903.09 will be thwarted. For it can be expected that others will argue that OCC has to wait for an entry on rehearing in the ESP case before prosecuting an appeal.

⁵⁸ See, e.g., *Allnet Communications v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 209.

⁵⁹ See, e.g., *In re: Application of Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶71.

⁶⁰ *Id.*

⁶¹ R.C. 4903.10.

⁶² See, e.g., *In re: Application of Columbus Southern Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶71.

The timing for an entry on rehearing is strictly not determined by the provision in R.C. 4903.10 that the PUCO has 30 days to issue an entry on rehearing. As provided in *State ex rel. Consumers' Counsel v. Public Utilities Comm. of Ohio*,⁶³ R.C. 4903.10 does not prevent "grant[ing] the applications *** for the limited purpose of allowing additional time to consider them."⁶⁴ This additional time has been lengthy in many instances.

In an October 3, 2012 Entry on Rehearing it granted itself additional time to consider the arguments raised on rehearing.⁶⁵ The additional time means that, absent seeking extraordinary relief from the Court, an appeal will be delayed, with deferrals all the while continuing to build. As these deferrals build, so does the impetus for collecting those deferrals from customers. The Commission should therefore abrogate the Order and address OCC's assignments of error forthwith.

IV. CONCLUSION

To protect customers, the Commission should grant OCC's application for rehearing and modify the July 2 Order as recommended by OCC.

⁶³ 102 Ohio St.3d 301, 2004-Ohio-2894.

⁶⁴ *Office of Consumers' Counsel v. Pub. Util. Comm.*, 2004-Ohio-2894.

⁶⁵ *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 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Entry on Rehearing (Oct. 3, 2012).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing of the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 16th day of November, 2012.

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