

**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)	

**MEMORANDUM CONTRA OF OHIO POWER COMPANY TO
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
APPLICATION FOR REHEARING**

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On behalf of Ohio Power Company

INTRODUCTION

On January 11, 2013, the Office of the Ohio Consumers' Counsel (OCC) filed an application for rehearing of the Commission's December 12, 2012 Entry on Rehearing in this case (Second Entry on Rehearing). The Second Entry on Rehearing was issued in response to a second round of rehearing requests not only from OCC but also the Industrial Energy Users-Ohio (IEU) and FirstEnergy Solutions (FES) regarding the Commission's reliance on R.C. 4905.26 in deciding this case, as explained in the October 17, 2012 Entry on Rehearing (First Entry on Rehearing). Ohio Power Company ("AEP Ohio" or the "Company") hereby files this memorandum in opposition.

ARGUMENT

I. OCC's January 11, 2013 application for rehearing should be rejected because it simply re-argues meritless claims originally made in its November 16, 2012 application for rehearing that have already been considered and rejected by the Commission.

In its prior application for rehearing, OCC specifically challenged the First Entry on Rehearing on the basis that the Commission had not adequately or properly found reasonable grounds under R.C. 4905.26 prior to conducting the hearing. (OCC November 16, 2012 AFR at 7-8.) While OCC's current application for rehearing is more narrowly focused on attacking the Commission's reasonable grounds finding and elaborates on certain points previously raised, it merely attempts to fortify the same challenge already raised and decided. The Commission should deny OCC's January 11, 2013 application for rehearing because it raises no new issue for review and continues to lack merit. Rather, the new application for rehearing merely layers on additional points in addressing the same claim that the Commission's reasonable grounds finding is inadequate. OCC's current rehearing bid simply seeks a "second bite at the apple" and should be summarily rejected.

II. The Commission properly clarified in its December 12, 2012 Entry on Rehearing that reasonable grounds existed in this case under R.C. 4905.26.

OCC's second attempt to challenge the reasonable grounds finding appears to place new emphasis on two aspects of the reasonable grounds finding's supposed inadequacy, alleging: (1) there is a timing problem under the statute because the reasonable grounds finding was not made, according to OCC, until nearly two years after the case was initiated, and (2) the Commission's finding is inadequate under the *Western Reverse* decision because it was "tentative." While AEP Ohio submits that it is not proper under the rehearing statute to try and improve on arguments supporting a claim raised previously on rehearing, AEP Ohio will briefly address OCC's misguided position with additional focus on OCC's new points of emphasis. AEP Ohio continues to generally rely, however, on its November 26, 2012 Memorandum in Opposition to Intervenor's Rehearing Requests (at 8-10) to defend the Commission's "reasonable grounds" finding.

1. There is no timing or sequencing problem with the reasonable grounds finding.

OCC asserts (at 3) that the Commission's reasonable grounds finding was improper because it was made "nearly two years" after the entry initiating this case. This is inaccurate, because the reasonable grounds finding was already an implicit part of the December 8, 2010 Entry upon its issuance. As the Commission has found:

We believe that the [December 8, 2010] Entry provided sufficient indication of the Commission's finding of reasonable grounds for complaint that AEP-Ohio's capacity charge may be unjust or unreasonable. We agree with AEP-Ohio that there is no precedent requiring the Commission to use rote words tracking the exact language of the statute in every complaint proceeding. In any event, to the extent necessary, the Commission clarifies that there were reasonable grounds for complaint that AEP-Ohio's proposed capacity charge may have been unjust or unreasonable.

(Second Entry on Rehearing at 9.) The Commission's clarification does not attempt to alter the sequence of events leading up to the decision, but instead "relates back" to and clarifies and defines the original findings in a manner consistent with R.C. 4905.26.

Moreover, OCC's position that the reasonable grounds finding cannot be clarified after the proceeding commences is also wrong because this narrow interpretation would undercut the rehearing statute and improperly turn the rehearing process on its head. The Commission is statutorily entitled to finalize both its factual and legal findings through the rehearing process, prior to being subject to judicial review on appeal. The rehearing process is a jurisdictional prerequisite to any appeal and, as a related matter, an appellant can only challenge a final order on appeal. (*See* the statutes and cases cited in footnote 7 of AEP Ohio's November 26, 2012 Memo Contra.) The Court only reviews final orders of the Commission and does not review interim or provisional findings made along the way, especially if the prior findings are modified or clarified as part of the decision being finalized through rehearing. While OCC disagrees with the Commission's finding of reasonable grounds and opposes the notion of the Commission strengthening its decision on rehearing, it is the Commission's right to do so prior to any judicial review.

Because the statements made in the Second Entry on Rehearing merely clarified the Commission's December 8, 2012 Entry, they merely give additional meaning to the original findings initiating this case. The statements in the Second Entry on Rehearing do not change the sequence of events and are not untimely. Rather, the December 8, 2010 Entry, as clarified by the Commission, satisfies R.C. 4905.26's requirement for the existence of reasonable grounds.

2. OCC's continued reliance on the *Western Reserve* case is misguided and the Commission's reasonable grounds finding in this case is not improperly tentative in nature.

OCC again relies (at 5-6) on *Western Reserve Transit Authority v. Pub. Util. Comm.*, 39 Ohio St.2d 16 (1974), for the proposition that a “tentative” finding that reasonable grounds “may exist” is not sufficient. In the *Western Reserve* case, however, the Court reversed and remanded the case with instructions to conduct an evidentiary hearing, because the Commission first found there may be reasonable grounds, then later dismissed the complaint because it found that there were no reasonable grounds (based on the record from a separate proceeding, which was also criticized by the Court). *Western Reserve*, 39 Ohio St.2d at 17-19. This scenario is inapplicable and irrelevant here, where the Commission on its own initiative determined reasonable grounds existed to investigate whether RPM pricing was unjust and unreasonable and conducted an extensive adjudicative hearing process to decide the case. There can be no question that the Commission has provided extensive opportunities for OCC and the other parties to engage in discovery and conduct an evidentiary hearing that included the opportunity to present testimony and participate in cross examination. The concerns articulated by the *Western Reserve* Court concerned the Commission's decision to not conduct an evidentiary hearing (the basis for the reversal) and its reliance on the record from another proceeding; these concerns have no application here.

Moreover, there is a substantive difference between the finding made in the *Western Reserve* case (where the Commission found that there “may be” reasonable grounds) and the finding made in the case at bar (where the Commission found that “there were” reasonable grounds). Thus, the Commission's finding here is not comparable to the finding made in the

Western Reserve case and is not tentative. In any case, OCC's over-reliance on the single word "tentative," as mentioned in passing in the dicta of the opinion, is misplaced.

The *Western Reserve* Court concluded that "such a tentative finding" as was made by the Commission in that case was not proper in that case – it did not say that any finding of reasonable grounds that can be characterized as "tentative" is unlawful. In reality, a finding of reasonable grounds in proceedings under R.C. 4905.26 is always a tentative finding, in the sense that it is a finding that is subject to the outcome of a final ruling on the merits (which is separate and distinct and controls the final disposition of the case). Absent a reasonable grounds finding being tentative in that manner, the Commission would be forced to *finally determine the merits of claims being raised prior to adjudicating those issues*, which would be unreasonable and absurd. Contrary to OCC's misapprehension of *Western Reserve* as requiring that there must be a non-tentative finding of reasonable grounds, the statute itself requires a hearing to proceed "if it appears that reasonable grounds are stated." (Emphasis added.) R.C. 4905.26. The Commission's threshold finding of reasonable grounds under the statute is properly tentative in that sense and is always reached without prejudice to the final disposition on the merits of the claims being considered.

Stated differently, the Commission is not locked into finding merit to a claim raised in a complaint just because it initially made a finding that there "appears" to be reasonable grounds; rather, the Commission can (and often does) find that there appears to be reasonable grounds only to ultimately reject the claim in the final decision on the merits. That is perfectly reasonable and permissible under the statute, since the requirement for finding reasonable grounds is a screening mechanism to guard against litigation of claims that fail to state a claim or otherwise patently lack merit. As confirmed in the Second Entry on Rehearing, the Commission obviously

believed that reasonable grounds existed to proceed with an adjudicative hearing process at the time it decided to move forward with its investigation of AEP Ohio's capacity charges in December 2010.

In a similar vein, OCC is also misguided in attacking (at 7) the wording used in the Commission's merit decision where it concluded that RPM pricing "could risk" an unjust and unreasonable result for AEP Ohio (quoting the First Entry on Rehearing at 18). First, as referenced above, the Commission's merit findings are not tied to, or bound by, the separate reasonable grounds determination. Second, even accepting OCC's notion that threshold findings of reasonable grounds under R.C. 4905.26 must be definitive, recite the "magic words" precisely, and not be tentative in any fashion (AEP Ohio does not accept this notion), it has no application or relevance to the wording used in ruling on the merits of a claim. Third, OCC's parsing of words from the First Entry on Rehearing is improperly elevating form over substance, since the Commission's findings were sufficiently clear and direct, particularly when viewed in context.

In the proper context, it must be observed that the Opinion and Order (at 22) had just finished concluding under Ohio law that charges for capacity services "shall be just and reasonable," as opposed to being unjust and unreasonable. Thus, when the Opinion and Order went on to conclude on the very next page that RPM pricing could risk an unjust and unreasonable result, it was evident that the Commission was deciding that if RPM pricing were the sole form of compensation to AEP Ohio for capacity service, it would risk an unjust and unreasonable result. Of course, this is the same section of the Opinion and Order where the Commission decided to establish a cost-based mechanism for capacity and modified the Company's accounting procedures to accommodate the associated capacity cost deferral.

In sum, the issue of whether RPM pricing should be continued as the means of capacity compensation was the *raison d'être* of this entire proceeding, as was manifestly evident from the December 8, 2010 Entry initiating the case, and the merit decision on that issue is separate from the reasonable grounds determination as clarified in the First Entry on Rehearing and the Second Entry on Rehearing.

CONCLUSION

For the reasons set forth above, the Commission should deny OCC's January 11, 2013 application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra of Ohio Power Company* was served by electronic mail upon counsel for all other parties of record in this case on this 22nd day of January, 2013.

//s/ Steven T. Nourse

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