

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	Case No. 11-346-EL-SSO
Columbus Southern Power Company and)	Case No. 11-348-EL-SSO
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.)	

In the Matter of the Application of)	Case No. 11-349-EL-AAM
Columbus Southern Power Company and)	Case No. 11-350-EL-AAM
Ohio Power Company for Approval of)	
Certain Accounting Authority.)	

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

As part of our advocacy for residential consumers of Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”) (collectively, “AEP Ohio” or “Company”) to receive adequate service at reasonable rates, the Office of the Ohio Consumers’ Counsel (“OCC”) files this application for rehearing of the Entry on Rehearing (“Rehearing Entry”) issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in the above-captioned proceedings on January 30, 2013. OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

In the Rehearing Entry the PUCO found, inter alia, that the retail stability rider (“RSR”) charge falls within the default service category of R.C. 4928.143(B)(2)(d).¹ In doing so, the Commission explained for the first time the specific statutory basis for

¹ Entry on Rehearing at ¶17.

finding that the RSR is lawful. With this new finding, the Commission has provided a statutory basis for its decision –a basis that did not exist when it approved the RSR in its Opinion and Order. Permitting the RSR to be collected from customers will cause significant rate increases and financial harm to customers over the period September 2012 through May 31, 2015.

OCC seeks rehearing on the limited new finding of the Commission in its Entry that the RSR equates to default service. In determining the retail stability rider is “default service,” the Commission decision is unlawful and unreasonable because it is not based on specific findings of fact and is not supported by the record, violating R.C. 4903.09 and 4903.13.²

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support.

² See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337 citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 241, 447 N.E. 2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 12 O.O.3d 112, 388 N.E. 2d 1237.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

Maureen R. Grady, Counsel of Record

Terry L. Etter

Joseph P. Serio

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-9567 – Grady

(614) 466-7964 – Etter

(614) 466-9565 – Serio

grady@occ.state.oh.us

etter@occ.state.oh.us

serio@occ.state.oh.us

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	Case No. 11-346-EL-SSO
Columbus Southern Power Company and)	Case No. 11-348-EL-SSO
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.)	

In the Matter of the Application of)	Case No. 11-349-EL-AAM
Columbus Southern Power Company and)	Case No. 11-350-EL-AAM
Ohio Power Company for Approval of)	
Certain Accounting Authority.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On January 27, 2011, the Company filed its second standard service offer “SSO” or “standard offer” application,³ seeking approval of the Application under R.C. 4928.143. During early August 2011, the Company, the intervenors, and PUCO Staff entered into negotiations regarding a settlement of the ESP cases. OCC and others declined to sign the Stipulation. The PUCO conducted a hearing on the Stipulation during October 2011 and on December 14, 2011, the Commission issued its Opinion and Order in these proceedings adopting, yet modifying the Stipulation. On February 23, 2012, on rehearing, and after considerable public outcry about the rate increases resulting from the modified Stipulation, the Commission rejected the ESP plan.

On March 30, 2012, the Companies filed an application containing a Modified ESP. Evidentiary hearings were held from May 17, 2012 through June 15, 2012. On July 2, 2012, the Commission issued its order in the Company’s Capacity Charge

³ Case Nos. 11-346-EL-SSO and 11-348-EL-SSO, Application (Jan. 27, 2011).

proceeding, Case No. 10-2929-EL-UNC. Oral arguments were conducted following briefing in this proceeding. On August 8, 2012, the PUCO issued its decision in the case modifying and approving the Company's electric security plan.

OCC and others initially sought rehearing on a number of issues. In particular, one of OCC's assignments of error pertained to the fact that the PUCO did not identify how the RSR qualifies as one of the six categories contained in R.C. 4928.143(B)(2)(d). On January 30, 2013, the Commission issued the Rehearing Entry. The PUCO denied OCC's application for rehearing in large part. However, the Commission granted OCC's application in part "[i]n order to clarify the record in this proceeding."⁴

In its clarification, the Commission determined for the first time that the RSR "clearly falls within the default service category, as set forth in Section 4928.143(B)(2)(d)." It further found that "[a]s a SSO is the default service plan for AEP-Ohio customers who choose not to shop, the RSR meets the second inquiry of the statute as it provides a charge related to default service."⁵ These are the new findings which OCC seeks rehearing on. Thus, OCC's arguments addressing the new PUCO finding that the RSR equates to "default service" have not been heard. OCC's Application for rehearing is appropriate here.

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

⁴ Entry on Rehearing at ¶17.

⁵ Id.

to any matters determined in the proceeding.” OCC filed a motion to intervene in this proceeding on February 4, 2011, which was granted in an Entry dated March 23, 2011. OCC also filed testimony regarding the Application containing the Modified ESP and participated in the hearing on the Modified ESP.

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: “If, 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.” As shown herein, the statutory standard for abrogating some portions of the Order and modifying other portions is met here. The Commission should grant rehearing on a number of the assignments of error and otherwise should abrogate its Rehearing Entry of January 30, 2013.

III. ARGUMENT

ASSIGNMENT OF ERROR:

In Determining The Retail Stability Rider Is “Default Service” The Commission’s Decision Is Unlawful And Unreasonable Because It Is Not

Based On Specific Findings Of Fact And Is Not Supported By The Record, Violating R.C. 4903.09 And 4903.13.⁶

In its Rehearing Entry, the Commission found that a SSO is the default service plan for AEP Ohio customers who choose not to shop and thus the RSR is a charge related to “default service.” But this conclusion by the Commission is insufficient to meet the mandates of the Ohio Revised Code.⁷

A legion of cases establishes that the Commission abuses its discretion if it renders an opinion on an issue without record support.⁸ The need for record support is mandated under R.C. 4903.09. Under R.C. 4903.09 in all contested cases heard the Commission “shall file, with the records of such cases, finding of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” As recognized by the Ohio Supreme Court the primary purpose of this statute is to provide the Court “with sufficient details to enable [it] to determine, upon appeal, how the commission reached its decision.”⁹ Some factual support for

⁶ See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337 citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 241, 447 N.E. 2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 12 O.O.3d 112, 388 N.E. 2d 1237.

⁷ See e.g. *Erie-Lackawanna Rd. Co. v. Pub. Util. Comm.* (1969), 18 Ohio St. 2d 112 (PUCO reversed where facts cited were insufficient to support PUCO order); *General Tel. Co. v. Public Utilities Comm.* (1972), 30 Ohio St. 2d 271 (PUCO reversed where Court found the record was incomplete and no decision as to the reasonableness of the determined rate of return could be made); *New York C. & S. L. R. Co. v. Pub. Util. Comm.* (1964), 176 Ohio St. 81, 83 (PUCO reversed where it made no findings of fact with respect to the factors considered by it in making the allocation required by Section 4907.47, Revised Code, and gave no reasons for the allocation which it made, making it “impossible for this court to determine whether the allocation made by the commission is either reasonable or lawful.”).

⁸ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 163, 166.

⁹ *Cleveland Elec. Co. v. Pub. Util. Comm.* (1983), 447 N.E.2d 746, 748; *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 513 N.E.2d 337, 343.

commission determinations must exist in the record, an obligation which the Commission itself has recognized in its orders.¹⁰

Without adequate facts and reasons to support the PUCO's decision, the Court would not be able to determine if the Rehearing Entry is reasonable and lawful under R.C. 4903.13. Additionally, lack of a record stymies a complaining party's effort in demonstrating prejudice,¹¹ a necessary element to obtain reversal of a Commission order by the Ohio Supreme Court.¹²

Here, the Commission merely concludes, for the first time, that the RSR relates to default service. Yet, while concluding that the RSR relates to default service, the PUCO does not provide the facts or the basis that support its decision. There is not sufficient detail from the bare statements presented in the Commission's Rehearing Entry to permit the Court to determine the basis of the Commission's reasoning. The Commission, thus, has violated R.C. 4903.09. Rehearing should be granted and the Commission should allow an appropriate record to be developed before deciding on this issue.

Not only has the PUCO violated R.C. 4903.09, it has also violated R.C. 4903.13. Under the "unlawful or unreasonable" standard set forth in R.C. 4903.13, the Supreme Court of Ohio will reverse a decision of the Commission if such decision is so clearly unsupported by the record and against the manifest weight of the evidence as to constitute mistake.¹³ The PUCO's determination that the RSR relates to default service was just

¹⁰ See, e.g., *In re Petition of Studer & Numerous Other Subscribers of Neapolis Exchange of ALLTEL Ohio*, Case No. 88-481-TP-PEX, Entry on Rehearing (Sept. 6, 1990).

¹¹ See *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 92-93.

¹² *Id.*, citing *Holliday Corp. v. Pub. Util. Comm.*, (1980), 61 Ohio St.2d 335, syllabus.

¹³ *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337 citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 241, 447 N.E. 2d 733; *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 12 O.O.3d 112, 388 N.E. 2d 1237.

that -- against the manifest weight of the evidence and clearly unsupported by the record in the case.

The Court has previously held that it will not normally substitute its judgment for that of the Commission, “unless the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence.”¹⁴ Here, however, the PUCO’s conclusion that the RSR relates to default service, with no supporting evidence, calls for the Court to “substitute” its judgment for that of the PUCO.

IV. CONCLUSION

To protect consumers, the Commission should grant OCC Application for Rehearing on the assignment of error raised here.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS’ COUNSEL

/s/ Maureen R. Grady

Maureen R. Grady, Counsel of Record
Terry L. Etter
Joseph P. Serio
Assistant Consumers’ Counsel

Office of the Ohio Consumers’ Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

(614) 466-9567 – Grady

(614) 466-7964 – Etter

(614) 466-9565 – Serio

grady@occ.state.oh.us

etter@occ.state.oh.us

serio@occ.state.oh.us

¹⁴ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*(1975), 42 Ohio St. 2d 403, 415, 71 O.O.2d 393, 330 N.E.2d 393 citing *Akron v. Pub. Util. Comm.*, 5 Ohio St.2d 237, 242; *Kenton v. Pub. Util. Comm.* (1965), 3 Ohio St. 2d 71, 73, 32 O.O.2d 52, 209 N.E.2d 430.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 1st day of March, 2013.

/s/ Maureen R. Grady

Maureen R. Grady

Assistant Consumers' Counsel

SERVICE LIST

Werner.margard@puc.state.oh.us
John.jones@puc.state.oh.us
lmcalister@bricker.com
tsiwo@bricker.com
MWarnock@bricker.com
stnourse@aep.com
mjsatterwhite@aep.com
tobrien@bricker.com
fdarr@mwncmh.com
joliker@mwncmh.com
ghummel@mwncmh.com
ricks@ohanet.org
msmalz@ohiopoverlylaw.org
jmaskovyak@ohiopoverlylaw.org
Philip.sineneng@thompsonhine.com
Dorothy.corbett@duke-energy.com
Elizabeth.watts@duke-energy.com
myurick@taftlaw.com
dconway@porterwright.com
cmoore@porterwright.com
haydenm@firstenergycorp.com
mkurtz@BKLawfirm.com
dboehm@BKLawfirm.com
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
dan.barnowski@snrdenton.com
JLang@Calfee.com
lmcbride@calfee.com
talexander@calfee.com
ssolberg@eimerstahl.com
aaragona@eimerstahl.com

jejadwin@aep.com
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
wmassey@cov.com
henryeckhart@aol.com
jesse.rodriguez@exeloncorp.com
sandy.grace@exeloncorp.com
kpkreider@kmklaw.com
dmeyer@kmklaw.com
BarthRoyer@aol.com
Gary.A.Jeffries@dom.com
gthomas@gtpowergroup.com
laurac@chappelleconsulting.net
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Asim.Haque@icemiller.com
sjsmith@szd.com
tsantarelli@elpc.org
nolan@theoec.org
trent@theoec.org
cathy@theoec.org
ned.ford@fuse.net
gpoulos@enernoc.com
sfisk@nrdc.org
zkraivitz@taftlaw.com
aehaedt@jonesday.com
dakutik@jonesday.com
callwein@wamenergylaw.com
Terrance.Mebane@ThompsonHine.com
bparger@bcslawyers.com

dstahl@eimerstahl.com
whitt@whitt-sturtevant.com
mwhite@igsenergy.com
kaelber@buckleyking.com
walter@buckleyking.com
judi.sobecki@dplinc.com
randall.griffin@dplinc.com
Stephanie.Chmiel@ThompsonHine.com
rjhart@hahnlaw.com
rremington@hahnlaw.com
djmichalski@hahnlaw.com
jhummer@uaoh.net
tlindsey@uaoh.net
ssalamido@cloppertlaw.com
arthur.beeman@snrdenton.com
yalami@aep.com

cendsley@ofbf.org
dane.stinson@baileycavalieri.com
joseph.clark@directenergy.com
sbruce@oada.com
rsugarman@keglerbrown.com
matt@matthewcoxlaw.com
mchristensen@columbuslaw.org
toddm@wamenergylaw.com
rburke@cpv.com
bkelly@cpv.com
eisenstatl@dicksteinshapiro.com
lehfeldtr@dicksteinshapiro.com
kinderr@dicksteinshapiro.com
kwatson@cloppertlaw.com
Thomas.millar@snrdenton.com
James.rubin@snrdenton.com

AEs: greta.see@puc.state.oh.us
Jonathan.tauber@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/1/2013 8:46:28 AM

in

Case No(s). 11-0346-EL-SSO, 11-0348-EL-SSO, 11-0349-EL-AAM, 11-0350-EL-AAM

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 Grady, Maureen R. Ms.