

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the                    )  
Review of the Alternative Energy Rider                    )  
Contained in the Tariffs of Ohio Edison                    )  
Company, The Cleveland Electric                            )  
Illuminating Company, and the Toledo                    )  
Edison Company.

Case No. 11-5201-EL-RDR

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**APPLICATION FOR REHEARING OR IN THE ALTERNATIVE A MOTION  
FOR LEAVE TO FILE AN APPLICATION FOR REHEARING AND  
MEMORANDUM IN SUPPORT OF OHIO POWER COMPANY**

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Pursuant to Section 4903.10, Ohio Revised Code, and Rule 4901-1-35, Ohio Administrative Code (“O.A.C.”), Ohio Power Company (“Ohio Power” or the “Company”) respectfully files this Application for Rehearing of the Commission’s August 7, 2013 Opinion and Order. In the alternative or to the extent necessary, Ohio Power seeks leave to file this Application for Rehearing and memorandum in support as an affected person, firm or corporation under R.C. 4903.10.

The Commission’s August 7, 2013 Opinion and Order is unreasonable and unlawful in the following respects:

- A. The Commission’s Opinion and Order denying Ohio Power’s intervention is unreasonable and unlawful.**
- B. The Commission’s Opinion and Order is unreasonable and unlawful to the extent it failed to reopen the proceedings to consider additional evidence that could have been provided by Ohio Power.**

**C. The Commission Opinion and Order is unreasonable and unlawful to the extent the Commission concluded that the prohibition against retroactive ratemaking only applies in traditional base rate proceedings.**

A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,

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## **Memorandum in Support**

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### **I. Introduction**

The Commission declined an opportunity to round out this record and delve deeper into issues presented by the FE Companies to test the veracity of their claims made and potential affiliate concerns, when the Commission denied Ohio Power the right to intervene in this case and the motion to reopen the proceedings to consider further evidence. Had the Commission granted Ohio Power intervention in the case and reopened the proceeding to consider further information the record would contain an account of how Ohio Power, operating in the same market, did not find itself in the same constrained situation as the FE Companies, a situation that apparently drove them to purchase in-state renewable energy certificates from an affiliated company at a price well over the market. The Commission's legal discussion on retroactive ratemaking also appears to contradict well-established case law prohibiting retroactive ratemaking. These errors can and should be fixed on rehearing.

### **II. Standard for Applications for Rehearing**

Ohio Power seeks rehearing of the actions of the Commission directly impacting the intervention and request to reopen the proceeding in the August 7, 2013 Opinion and Order. Ohio Power's requests were explicitly denied even though it filed an appearance and request in the case justifying the filing of this application.

The applicable law and administrative code also allows Ohio Power to file this Application for Rehearing. Applications for Rehearing are authorized by R.C. 4903.10 and filed under O.A.C. 4901-1-35. Specifically under the rule:

Any party or any affected person, firm, or corporation may file an application for rehearing, within thirty days after the issuance of a commission order, in the form and manner and under the circumstances set forth in section 4903.10 of the Revised Code.

This language includes the allowance of an application for rehearing by parties and affected persons, firms, or corporations.

An entity seeking leave to file an application for rehearing that did not appear in the case prior to the final order must also show additional grounds beyond an entity previously involved in the case. Under R.C. 4903.10:

Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Ohio Power did file an appearance prior to the final order and therefore should be eligible to file an application for rehearing. Ohio Power seeks leave to file for rehearing under this provision to the extent the Commission denies its right to file an application for rehearing due to its denial of intervention or limits the arguments Ohio Power can raise. Separately, Ohio Power also seeks rehearing on a matter that did not arise until the language included in the Opinion and Order related to the scope of the Commission's ability to retroactively adjust rates. As indicated below, Ohio Power has a significant interest in how the Commission's language may unlawfully limit the broad bar against

retroactive ratemaking in Ohio. The Commission considered the interests of the FE Companies in this docket but that did not adequately represent Ohio Power's interests. The FE Companies were found to have made unreasonable management decisions and any discussion in this docket will be focused on that factor and not the impact on other EDUs in the state of Ohio. The potential market influence and subsidy issues and change in the scope of the bar against retroactive ratemaking justify leave to file rehearing on the issues raised by Ohio Power.

As indicated in the Opinion and Order, Ohio Power did enter an appearance and had its arguments denied by the Commission. Ohio Power respectfully files this application for rehearing as a result of its arguments denied in the Opinion and Order and the language of the Commission's decision that appears to go beyond the parameters of the case and impacts Ohio Power's interests. To the extent necessary, Ohio Power is also eligible to file an application for rehearing as an affected person, firm, or corporation.

### **III. Law and Argument**

#### **A. The Commission's Opinion and Order denying Ohio Power's intervention is unreasonable and unlawful.**

Ohio Power sought intervention late in the proceeding before the Commission but that delay was influenced by the extensive redactions for confidentiality and delayed filing of documents in the docket. Upon review of the briefs in the docket it became obvious the record could be enhanced by further development of facts related to Electric Distribution Utility compliance with state renewable standards. The record alluded to a potential issue involving affiliate transactions and market influence that also was unclear due to extensive redactions and delayed filings. As noted by the Commission, the Office of the Consumers' Counsel (OCC) and the Environmental Advocates both recognized

this point and supported the intervention request of Ohio Power. (O&O at 7.) The Environmental Advocates supported the intervention and reopening of the record on the basis that AEP Ohio's utility perspective could assist the Commission in deciding the issue in this case, and that AEP Ohio is affected by the issues in the case. (Id.)

Despite the support of the intervenors in the docket, the Commission denied Ohio Power's motions to intervene and reopen the proceedings in light of its conclusion that the circumstances are not extraordinary. A review of the public docket and the Order shows that the Commission and parties struggled with testing the arguments made by the FE Companies on their efforts to comply with renewable standards and with questions of undue preference the Commission found needed further evidence (O&O at 29.).

Ohio Power is prepared to share with the Commission its own experience in the same situation that the FE Companies found themselves seeking to comply with state mandates. Ohio Power's experience could help the Commission determine the reasonableness of the positions taken on both sides of the debate. Ohio Power offered to share its experience in the market to assist the Commission in determining market conditions at the time for the sake of the record. Ohio Power's involvement is reasonable and supported by the intervenors in the docket.

The ability of Ohio Power to supply comparative experiences that the record did not include provides the extraordinary circumstances justifying the late intervention in this unique situation.

**B. The Commission's Opinion and Order is unreasonable and unlawful to the extent it failed to reopen the proceedings to consider additional evidence that could have been provided by Ohio Power.**

Ohio Power stands ready to provide the Commission with a fresh perspective on issues in contention in the docket. The information was not provided earlier as there was no indication that there were industry issues in question where the very prudence of the expenditures would be an issue for the Commission to consider. The extensive redactions of the now apparent affiliate relationship between the FE Companies and its affiliated REC supplier left those monitoring the docket unaware of the potential concern and those intervening unable to share that information due to confidentiality agreements. Ohio Power understands that it is highly unusual for an EDU to be involved in another EDU's rider proceeding, but such action is appropriate in this case at this late stage due to the gaps in the record on issues important to consumers in Ohio. The Commission has a responsibility under the varying policy considerations in R.C. 4928.02 and R.C. 4928.06 to ensure adequate and nondiscriminatory pricing and ensure effective competition to guard against unauthorized subsidies. When the serious concerns in the docket arose, the reopening of the docket became a reasonable action for the Commission to pursue.

If allowed to provide additional evidence in the record Ohio Power will share its experience in the market during the same time period that is being examined in this docket. Ohio Power will be able to show its experience with requests for proposal (RFP) for renewable energy certificates at the time and its use of broker and bilateral agreements after the unacceptable RFP results. The Company did not accept all of the bids received in the RFPs due to its assessment of the reasonableness of offers received in the response. Ohio Power will discuss how it worked cooperatively with the Commission



Staff, keeping them informed of the issues the Company faced as it moved to comply with the requirements, including when receiving bid responses determined to be unreasonable. Ohio Power will be able to provide evidence on how it moved to secure long-term contracts when the market prices were high and the in-state renewable energy certificates were in relatively few hands to avoid increased prices due to market power. Ultimately, Ohio Power successfully met its 2009, 2010 and 2011 standards without having to pay more than the annual compliance penalty for any renewable energy certificate or solar renewable energy certificate.

The evidence offered by Ohio Power would provide the Commission with a proper perspective of the market at the time and allow the Commission to weigh claims of undue preference and potentially other issues still unknown to Ohio Power as a non-party to the case who has not viewed the still confidential portions of the record.

**C. The Commission Opinion and Order is unreasonable and unlawful to the extent the Commission concluded that the prohibition against retroactive ratemaking only applies in traditional base rate proceedings.**

The Commission appears to overstate its authority to retroactively adjust rates in the Opinion and Order to any case that does not involve a base rate proceeding. (O&O at 28.) To the extent the Commission concluded that the doctrine against retroactive ratemaking does not apply to matters outside of traditional R.C. 4909 base rate matters, the Opinion and Order is unreasonable and unlawful. Ohio Power takes no position on how the bar against retroactive ratemaking applies to the facts in the current case. Ohio Power limits this request for rehearing to the unlawfulness and unreasonableness of the legal conclusions relied on by the Commission in the Opinion and Order that contradict established precedent.

The Commission appropriately cited to the *River Gas* 69 Ohio St.2d at 512, 433 N.E.2d 568, Supreme Court of Ohio decision to discuss its ability to adjust rates in a rider based on the prudence review established at the creation of the rider. It is only logical that a mechanism that trues up costs by tracking those costs and subjecting them to a prudence review would be able to adjust those rates based on those pre-defined standards for that pre-defined period. The parameters of the mechanism when it is created defines the scope of the retroactive review, not the presence of the mechanism in a base rate as opposed to a standard service offer or general settlement proceeding. It would be inappropriate for the Commission to change the application of prior orders by revisiting prior decisions well after they are adjudicated or retroactively reviewing issues after the time period established for such review through a rider mechanism expires. The *Keco* Doctrine<sup>1</sup> was built on the Court's understanding that certainty in rates is vital in the area of public utilities. The creation of a rider is a specific action and a general ability to retroactively change any defined component under some general power or just because it was not created in a base case proceeding violates the *Keco* Doctrine and is not reasonable or lawful.

The *River Gas* decision involved a gas cost recovery clause or approved plan that tracked the cost of natural gas for the year and the expected costs for the future. Based on those factors the Commission developed a rate to charge customers for the gas portion of the bill. That rate was then trued up the following year based on the cost and prudence review the following year. The structure or plan for the later review was established as

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<sup>1</sup> The *Keco* Doctrine encourages rate certainty by barring retroactive ratemaking in Ohio absent specific statutory authority. *Keco Industries, Inc. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St.2d 254, 257, 141 N.E.2d 465; *Cleveland Elec. Ill. Co. v. Pub. Util. Comm.* (1976), 46 Ohio St.2d 105, 115, 346 N.E.2d 778.

part of the mechanism to determine if the cost of the natural gas secured was reasonable and if so it was reflected in rates. This is a limited application of a defined mechanism and not a broad right to change any and all matters related to Commission ordered rates or mechanisms solely because they are not part of a base rate proceeding.

The Supreme Court of Ohio has already held that the bar against retroactive ratemaking applies in matters beyond a base rate proceeding. Recently, in AEP Ohio's initial ESP I appeal reviewing provider of last resort charges, the Court found a rate established in a standard service offer proceeding (not a base rate case) and overturned on appeal was prohibited from any retroactive rate adjustment under the traditional *Keco* Doctrine. *In re Application of Columbus Southern Power Co.* (2011) 128 Ohio St.3d 512, 515-516. The case included a number of rider mechanisms and appropriately none were used to refund rates from that order related to the items reversed on appeal. Thus, if left unchanged, the language in the Opinion and Order will contradict bedrock ratemaking precedent.

Ohio Power respectfully requests that the Commission modify its Opinion and Order to make it clear that the bar against retroactive ratemaking can apply outside of traditional base rate proceedings and can specifically apply to riders established through an ESP.

### **III. Conclusion**

Ohio Power respectfully requests that the Commission consider the above arguments on rehearing and change its Opinion and Order accordingly.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing and Memorandum in Support* has been served, via first class mail and/or electronic service, to the counsel identified below this 6th day of September 2013.

//s/ Matthew J. Satterwhite

Matthew J. Satterwhite

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Summary: Application for Rehearing electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company