

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Ohio Power Company for Approval of	)	Case No. 12-1126-EL-UNC
Full Legal Corporate Separation and	)	
Amendment to Its Corporate Separation	)	
Plan.	)	

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

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January 3, 2014

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Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the December 3, 2013 Order was unjust, unreasonable, and unlawful in the following respects:

- <sup>1</sup> “OVEC contractual entitlement” refers to AEP’s right to purchase power from generating resources owned by Ohio Valley Electric Corporation (“OVEC”), which AEP Ohio jointly owns.

changes in the standard of review and the burden of proof contravene the applicable law.

2. The PUCO unreasonably and unlawfully failed to rule that customers should be held harmless on “retail rate issues” that are associated with AEP Ohio’s OVEC contractual entitlements.
3. The PUCO unreasonably and unlawfully allowed AEP Ohio to retain OVEC contractual entitlements (without a hold-harmless condition to protect customers) that can result in AEP Ohio being subsidized by customers for OVEC expenses that exceed revenues for OVEC power sold in the PJM market. This violates R.C. 4928.38, which requires AEP Ohio to be fully on its own in the competitive market, following the market development period.
4. The PUCO unreasonably and unlawfully ruled that the Utility’s corporate separation plan complied with R.C. 4928.17, when:
  - A. Retaining the OVEC contractual entitlement does not satisfy the public interest because it can result in AEP Ohio being afforded an unfair competitive advantage, violating R.C. 4928.17(A)(2);
  - B. Retaining the OVEC contractual entitlement does not effectuate the policy of the state because it can impede competition by facilitating an anti-competitive subsidy to AEP Ohio and can allow AEP Ohio the opportunity to collect generation-related costs through distribution rates, violating R.C. 4928.17(A)(1).
5. The PUCO unreasonably and unlawfully ruled that the corporate separation plan effectuates the policy of the state, when it enabled AEP Ohio to seek to collect OVEC generation related costs through distribution rates, in violation of R.C. 4928.02(H).

OCC further explains 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 Order and require AEP Ohio to hold customers harmless for any retail rate consequences of it retaining the OVEC entitlement.

Respectfully submitted,

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## I. INTRODUCTION

In its recently filed electric security plan (“ESP 3”) the Utility has proposed a rider as the means to charge customers for the costs that AEP Ohio will incur for the OVEC entitlement. The rider is called the “PPA” -- the Purchased Power Agreement Rider. AEP Ohio proposes to sell the OVEC power in the market, and if the expenses it incurs (the OVEC entitlement) exceed the revenues it receives, it proposes to collect the difference from all customers through the non-bypassable PPA rider.<sup>3</sup>

<sup>3</sup> Id. at 8-11.

The PUCO's ruling in this proceeding provided impetus for AEP Ohio to seek approval to charge customers for OVEC expenses in its electric security plan. In deferring the issues into the ESP 3 proceeding, the PUCO unlawfully changed the standard of review and burden of proof, making it easier for the Utility to seek to collect OVEC expenses from customers. Moreover, had the PUCO ruled that customers be held harmless on retail rate issues (as requested by OCC and the Industrial Energy Users-Ohio), AEP Ohio likely would not have proposed, in its recently filed ESP, a PPA rider to charge customers for OVEC expenses.

Additionally, the PUCO's approval allowing the Utility to retain the OVEC contractual entitlement is contrary to laws that require AEP Ohio's corporate separation plan to be in the public interest and consistent with the state objectives under R.C. 4928.02. Finally, the PUCO's actions can result in customers subsidizing AEP Ohio for OVEC expenses that exceed revenues for OVEC power sold in the PJM market, violating R.C. 4928.38. Accordingly, OCC requests rehearing, and asks that the PUCO reconsider its decision which enabled AEP Ohio's request to collect OVEC expenses from customers through the PPA rider in its the electric security plan it proposed on December 20, 2013.

## **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 days after an order is issued.<sup>4</sup> An application for rehearing must be written and must specify how the order is unreasonable or unlawful.<sup>5</sup>

In considering an application for rehearing, the Commission may grant rehearing requested in an application, if “sufficient reason therefore is made to appear.”<sup>6</sup> 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.<sup>7</sup> Otherwise the Order is affirmed.

OCC was a party to the case. Its motion to intervene was granted by the Commission.<sup>8</sup> Additionally, OCC actively participated in this case by filing comments, 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.

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<sup>4</sup> R.C. 4903.10.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Case No. 12-1126-EL-UNC, Entry at ¶10 (Oct. 17, 2012).



### III. ARGUMENT

#### Assignment of Error 1:

**The PUCO erred by unlawfully deferring the “retail rate issues” (that affect customers) from what should be a resolution in this case under R.C. 4928.17 to a later resolution under a different statute (R.C. 4928.143(C)) that is less protective of customers in AEP Ohio’s recently filed electric security plan case. These changes in the standard of review and the burden of proof contravene the applicable law.**

The PUCO deferred issues affecting Ohio retail customers from this case to a separate case (being AEP Ohio’s new request for an electric security plan). That is unlawful. The standard of review and burden of proof in AEP Ohio’s newly proposed ESP cannot be substituted for the different standard of review and burden of proof (that are more protective of customers) applicable to the OVEC issues in this case.

OCC (and the Industrial Energy Users-Ohio) asked the PUCO to protect customers from harm if AEP Ohio retains its OVEC contractual entitlements.<sup>9</sup> Both OCC and IEU-Ohio identified the possibility that customers could be harmed if they are required to pay AEP Ohio for losses that occur on the sale of the OVEC power. The PUCO nevertheless allowed AEP Ohio to retain its OVEC entitlements on the basis that it would ensure that the Utility’s corporate separation will be completed by December 31, 2013.<sup>10</sup> The PUCO ruled that it agreed with AEP Ohio that the retail rate issues related to OVEC should be deferred and addressed in the next ESP proceeding.<sup>11</sup>

Under the statute (R.C. 4928.17) applicable to this corporate separation case, the PUCO had to determine if the corporate separation plan is consistent with and effectuates

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<sup>9</sup> See OCC comments at 7 (Oct. 29, 2013), IEU-Ohio comments at 3-4 (Oct. 29, 2013).

<sup>10</sup> Opinion and Order at ¶20.

<sup>11</sup> Id.

the policy specified in R.C. 4928.02. That means the PUCO has to determine if AEP Ohio's plan "satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power,"<sup>12</sup> and ensures that the utility will not extend any undue preference or advantage to its affiliates.<sup>13</sup> The utility bears the burden of proving that it has met the standard and that its plan complies with the statutes and the extensive PUCO rules on corporate separation.<sup>14</sup> Thus, the Commission was obligated to determine if AEP's retention of the OVEC commitment, without holding consumers harmless, met, inter alia, the public interest standard.

In contrast, under the electric security plan case to which the PUCO deferred the issue (Case No. 13-2385-EL-SSO), the standard of proof is less protective of customers and provides the utility with more latitude. There, the utility bears the burden of merely proving that the plan, in its entirety or aggregate, is more favorable than a market rate alternative.<sup>15</sup> This statutory test in the ESP, as interpreted by the PUCO, favors the utility's aggregate proposals. Additionally, the law applicable to ESP proposals grants the utility the power to reject the PUCO's decision in an ESP case, under R.C. 4928.143(C)(2), if the PUCO modifies its plan. These standards taken together (especially with the utility's opportunity to veto the PUCO's decision in an ESP case) are less protective of customers than the standard in the instant case.

Here the PUCO by its ruling changed the standard of review and burden of proof, making it easier for the utility to seek to collect OVEC costs from customers. But the

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<sup>12</sup> R.C. 4928.17(A)(2).

<sup>13</sup> R.C. 4928.17(A) (1)-(3).

<sup>14</sup> See Ohio Admin. Code 4901:1-20-16.

<sup>15</sup> R.C. 4928.143(C).

PUCO cannot change the law or its standard of review. It is but a creature of statute, and holds only the power conferred upon it by the General Assembly.<sup>16</sup> The PUCO's action here was unreasonable and unlawful. Rehearing should be granted, and the PUCO should address the OVEC entitlement issue in this corporate separation proceeding using the public interest standard of review required under R.C. 4928.17.

**Assignment of Error 2:**

**The PUCO unreasonably and unlawfully failed to rule that customers should be held harmless on “retail rate issues” that are associated with AEP Ohio’s OVEC contractual entitlement.**

It was unreasonable and unlawful for the PUCO to defer the OVEC issues into the next ESP proceeding because it was incumbent upon the PUCO to act in the corporate separation proceeding to protect customers. Under the corporate separation proceeding, the PUCO had to determine that the corporate separation plan, inter alia, “satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.”<sup>17</sup> It failed to do so here. The PUCO failed to address how allowing AEP Ohio to retain the OVEC contractual entitlement and deferring the issue into the ESP meets the public interest standard.

It does not meet the public interest standard. For if the assets are retained and AEP Ohio is permitted to charge customers for “retail rate issues” related to OVEC, it will provide AEP Ohio with an unfair competitive advantage. No other competitive retail

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<sup>16</sup> *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; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

<sup>17</sup> R.C. 4928.17(A)(2).

electric supplier is protected from such a loss of revenues on the sale of electricity in the market.

The PUCO's ruling enabled AEP Ohio's request to collect monies from customers for OVEC expenses through the PPA rider proposed in the pending ESP. The PUCO's December 3 Order was unjust and unreasonable and should be reconsidered.

The PUCO should hold AEP Ohio customers harmless from the retail rate issues associated with OVEC.

**Assignment of Error 3:**

**The PUCO unreasonably and unlawfully allowed AEP Ohio to retain the OVEC contractual entitlement (without a hold-harmless condition to protect customers) that can result in AEP Ohio being subsidized by customers for OVEC expenses that exceed revenues for OVEC power sold in the PJM market. This violates R.C. 4928.38, which requires AEP Ohio to be fully on its own in the competitive market, following the market development period.**

The PUCO permitted AEP Ohio to retain the OVEC contractual entitlement. But the PUCO failed to require AEP Ohio to hold customers harmless in retaining the OVEC entitlement. By its ruling here, the PUCO has enabled the request that AEP Ohio made in its ESP 3 proceeding. There, AEP Ohio has requested to charge customers (through the PPA rider) for expenses of the OVEC contractual entitlement if the revenues AEP Ohio received from the capacity and energy sold into PJM do not cover the expenses.<sup>18</sup>

But the law in the state of Ohio precludes the PUCO from authorizing additional compensation for AEP Ohio's legacy generation expenses associated with OVEC. R.C.

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<sup>18</sup> See *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Revised Code, in the Form of an Electric Security Plan; In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority*, Case No. 13-2385-EL-SSO, Testimony of William A. Allen at 8-11.

4928.38 mandates that after the transition period<sup>19</sup> revenues have terminated, “the utility shall be fully on its own in the competitive market.” The collection of transition revenues ceased for AEP Ohio on December 31, 2010.<sup>20</sup> If AEP Ohio is fully on its own in the competitive market, then its customers should not bear the risk of losses on sales of OVEC generation into the PJM market. But that is just what the PUCO ruling permitted. By deferring the OVEC issue to the ESP proceeding, the PUCO enabled AEP Ohio to seek transition revenues through the PPA rider in the proposed ESP 3. The PUCO erred. The PUCO should have rejected AEP Ohio’s OVEC-related request in this docket. The PUCO’s failure to reject AEP Ohio’s OVEC-related request was unjust and unreasonable.

**Assignment of Error 4:**

**The PUCO unreasonably and unlawfully ruled that the Utility’s corporate separation plan complied with R.C. 4928.17, when:**

- A. Retaining the OVEC contractual entitlement does not satisfy the public interest because it can result in AEP Ohio being afforded an unfair competitive advantage, violating R.C. 4928.17(A)(2);**
- B. Retaining the OVEC contractual entitlement does not effectuate the policy of the state because it can impede competition by facilitating an anti-competitive subsidy to AEP Ohio and can allow AEP Ohio the opportunity to collect generation-related costs through distribution rates, violating R.C. 4928.17(A)(1).**

Under R.C. 4928.17, a utility is required to operate under a corporate separation plan that is approved by the PUCO, is consistent with the policies of R.C. 4928.02, and

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<sup>19</sup> Transition period is defined under R.C. 4928.37 as spanning from the starting date of competitive retail electric service and ending on the expiration date of its market development period. The market development period under R.C. 4928.40 was to end on December 31, 2005, unless otherwise authorized. AEP Ohio’s market development period was authorized to end on December 31, 2010.

<sup>20</sup> See R.C. 4928.40 (the commission may set the recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010).

achieves a number of objectives.<sup>21</sup> Included in the objectives that the corporate separation plan must achieve is that the plan satisfies the public interest in preventing unfair competitive advantage and effectuates the policy of R.C. 4928.02. But here, AEP Ohio's amended plan (allowing it to retain OVEC contractual entitlement) does neither.

First, allowing AEP Ohio to retain the OVEC contractual entitlement, without a customer hold-harmless condition, is the gateway to collecting more revenues from customers and can create an unfair competitive advantage for AEP Ohio. This occurs because AEP Ohio has proposed a charge (PPA rider) that requires customers to pay any losses it incurs associated with OVEC. Approving the PPA rider in the ESP would be unreasonable and unlawful because it is likely to give AEP Ohio an unfair competitive advantage as compared to other suppliers of generation. Under AEP Ohio's proposal if it sells the OVEC generation in the market at a loss, customers will hold it harmless. No other competitor in the marketplace has such protection from generation market losses. When AEP Ohio sells the OVEC generation into the market, under the proposed PPA rider customers would pick up the loss. No other generation service provider or marketer has the same advantage.

Second, allowing AEP Ohio to retain the OVEC contractual entitlement, without a hold-harmless condition, fails to effectuate the policy of R.C. 4928.02. Specifically, subsection (H) of that statute establishes ensuring effective competition by precluding subsidies. It prohibits, inter alia, the recovery of any generation-related costs through distribution or transmission rates. But here the PUCO has allowed the OVEC contractual entitlement to be retained, with no hold-harmless condition. This decision has enabled

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<sup>21</sup> R.C. 4928.17(A).

the Utility's request to collect OVEC losses through distribution rates paid by all customers. The collection of these generation-related expenses through distribution rates is prohibited by R.C. 4928.02(H). The PUCO's Order enabling the potential collection of OVEC expenses from customers is unreasonable and unlawful.

**Assignment of Error 5:**

**The PUCO unreasonably and unlawfully ruled that the corporate separation plan effectuates the policy of the state, when it enabled AEP Ohio to seek to collect OVEC generation related costs through distribution rates, in violation of R.C. 4928.02(H).**

The PUCO ruled that AEP Ohio's corporate separation plan, as amended, effectuates the policy of the state.<sup>22</sup> The PUCO appears to believe that the conditions it imposed on the sale of energy from the OVEC entitlements ensure that the policy of the state is effectuated. The PUCO's conditions were that: 1) the energy from OVEC contractual entitlement is to be sold into the PJM market at the then-current market wholesale-equivalent price; and 2) the PUCO Staff or an independent auditor shall semi-annually audit AEP Ohio's record to ensure compliance with the preceding condition.<sup>23</sup>

These conditions, however, do not address the fact that the PUCO granted AEP Ohio the opportunity in its ESP to have customers subsidize its OVEC entitlement. Such a subsidy is inconsistent with the state policy under R.C. 4928.02(H). Subsection (H) requires the PUCO to ensure effective competition by avoiding anti-competitive subsidies. In particular, this subsection prohibits the recovery of any generation-related costs through distribution or transmission rates. Yet, AEP Ohio is seeking such a subsidy in its ESP to be paid by customers through the PPA rider. That rider is proposed as a

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<sup>22</sup> Opinion and Order at ¶22.

<sup>23</sup> Opinion and Order at ¶20.

non-bypassable rider for all distribution customers. It will, if approved, subsidize generation service with distribution revenues. That would violate R.C. 4928.02(H), and is inconsistent with Ohio Supreme Court precedent.<sup>24</sup>

The Commission erred in enabling AEP Ohio's request to subsidize generation with distribution revenues, in violation of R.C. 4928.02(H). Rehearing should be granted.

#### **IV. CONCLUSION**

The PUCO's December 3 Order was unlawful and unreasonable. The December 3 Order failed to protect AEP Ohio customers from the "retail rate issues" that could harm them. The PUCO unlawfully changed the scope of review and the burden of proof away from the public interest standard to a more favorable in the aggregate test, allowing the Utility to meet its burden of proof more easily. The PUCO's failure to hold customers harmless from the OVEC entitlement enabled AEP Ohio's request to collect OVEC losses in its recently filed ESP. The PUCO's December 3 Order should be reconsidered.

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<sup>24</sup> See, e.g. *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-41264 (holding that the deferral of fuel-cost increases when the rate certainty plan was in effect violated R.C. 4928.02(G) as it allowed cross-subsidization between two of the three major electric-service components.) R.C. 4928.02(G) was redesignated (H) after revisions to the law under S.B.221. Accord *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, ¶4 (post S.B. 3, each service component must stand on its own.)



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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission this 3<sup>rd</sup> day of January, 2014.

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