

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio )  
Power Company for Authority to ) Case No. 13-2385-EL-SSO  
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 ) Case No. 13-2386-EL-AAM  
Power Company for Approval of )  
Certain Accounting Authority. )

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

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**I. INTRODUCTION**

The Office of the Ohio Consumers’ Counsel (“OCC”) files this Memorandum Contra the Ohio Power Company’s (“Utility”, “Ohio Power”, or “AEP”) Application for Rehearing. OCC opposes, inter alia, the Utility’s attempt to undo portions of the Public Utilities Commission of Ohio’s (“PUCO”) decision that protect consumers by placing limits on how much customers pay for distribution investment. AEP’s Application for Rehearing should be denied.

**II. ARGUMENT**

**A. The Utility’s request does not meet the standards for rehearing, but rather seeks PUCO clarification.**

AEP does not claim that the PUCO’s decision was unlawful or unreasonable in any respect. Instead, AEP Ohio claims that the Commission “mistakenly indicated that the newly established DIR annual revenue caps reflect a 3-4% growth rate” and the

PUCO “should further adjust the annual revenue caps on rehearing to match its stated intention.”<sup>1</sup> This is an inappropriate purpose for applications for rehearing under R.C. 4903.10 and does not conform to the PUCO rules.

Ohio law provides that, within thirty days after issuance of an order from the PUCO, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.”<sup>2</sup> Further, the application for rehearing “shall set forth *specifically* the ground or grounds on which the applicant considers *the order to be unreasonable or unlawful*.”<sup>3</sup> Ohio Adm. Code 4901-1-35 mirrors this requirement.

The Supreme Court of Ohio and the PUCO have determined that an application for rehearing does not comply with R.C. 4903.10 if the application does not specify the grounds on which the PUCO’s order is unlawful or unreasonable. The Court has held that “when an appellant’s grounds for rehearing fail to specifically allege in what respect the PUCO’s order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met.”<sup>4</sup> The Court has further mandated that there be “strict compliance with such specificity requirement.”<sup>5</sup> The AEP Application for Rehearing does not meet the specificity required by R.C. 4903.10 and should be dismissed.

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<sup>1</sup> AEP Application for Rehearing at 16.

<sup>2</sup> R.C. 4903.10.

<sup>3</sup> R.C. 4903.10(B).

<sup>4</sup> *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted).

<sup>5</sup> *Office of Consumers’ Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted). See also *Discount Cellular*, 112 Ohio St. 3d at 375 (stating that “[W]e have strictly construed the specificity test set forth in R.C. 4903.10.”).

In addition, the PUCO eliminated motions for clarification of PUCO orders in 2008.<sup>6</sup> AEP's Application for Rehearing is not a proper application for rehearing, and hence the PUCO should not issue the clarification sought in the Joint Application.

**B. The PUCO already adjusted the Distribution Investment Rider (“DIR”) Revenue Caps to include adequate growth.**

**1. The DIR Revenue Caps include a three percent growth rate.**

Despite the objections of OCC and other parties, in its Entry on Rehearing, the PUCO increased the DIR revenue caps and the amounts that customers have to pay for reliable service to include significant growth from year to year during the term of the ESP period.<sup>7</sup>

The PUCO initially approved DIR revenue caps of \$124 million in 2016, \$146.2 million in 2017, \$170 million in 2018 and \$103 million for the partial year of 2018.<sup>8</sup> In its Entry on Rehearing the PUCO increased the DIR revenue caps by \$21 million for 2015 from \$124 to \$145, \$18.8 million for 2016 from \$146.2 to \$165.<sup>9</sup> As a result of this change, AEP's customers who already pay the highest electric rates in the state<sup>10</sup> will have to pay even higher rates in the future. The PUCO explained this adjustment by stating that “it was not the [PUCO's] intent to provide for no growth in the annual cap from 2014 to 2015.”<sup>11</sup>

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<sup>6</sup> *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (December 6, 2008) at 55-56.

<sup>7</sup> ESP 3 Entry on Rehearing at 24 (May 28, 2015).

<sup>8</sup> ESP 3 Opinion and Order at 41 (February 25, 2015).

<sup>9</sup> ESP 3 Entry on Rehearing at 24 (May 28, 2015).

<sup>10</sup> OCC Ex. 11 (Williams Direct) at 13.

<sup>11</sup> ESP 3 Entry on Rehearing at 24 (May 28, 2015).

This adjustment from the Opinion and Order (“O&O”) to the Entry on Rehearing (“EoR”) represents a significant increase as noted below:

<u>Year</u>	<u>O&amp;O Revenue Caps</u>	<u>EoR Revenue Caps</u>	<u>\$ Increase</u> <sup>12</sup>	<u>% Increase</u> <sup>13</sup>
2015	\$124 million	\$145 million	\$21 million	16.9
2016	\$146.2million	\$165 million	\$18.8 million	12.85
2017	\$170 million	\$185 million	\$15 million	8.8

Moreover, not only did the PUCO increase the total annual revenue cap amounts for the DIR for the ESP period by \$37.8 million, but the Entry on Rehearing also allowed for significant increases for DIR spending for each year of the ESP as noted below:

<u>2015 DIR Rev. Cap</u>	<u>2016 DIR Rev. Cap</u>	<u>\$ Increase</u>	<u>% Increase 2015 to 2016</u> <sup>14</sup>
\$145 million	\$165 million	\$20 million	13.79
<u>2016 DIR Rev. Cap</u>	<u>2017 DIR Rev. Cap</u>	<u>\$ Increase</u>	<u>% Increase 2016 to 2017</u> <sup>15</sup>
\$165 million	\$185 million	\$20 million	12.12

In setting the DIR revenue caps at these levels in the Entry on Rehearing, the PUCO concluded that:

We find that the adjusted caps shall reflect annual growth in the DIR, as a percentage of *customer base distribution charges*, of three to four percent, which was our objective in modifying the

<sup>12</sup> Represents the Entry on Rehearing (“EoR”) DIR revenue cap amount minus the Opinion and Order (“O&O”) DIR revenue cap amount.

<sup>13</sup> Represents the difference between the EoR DIR revenue cap amount and the O& O DIR revenue cap amount divided by the O&O DIR revenue cap amount.

<sup>14</sup> Represents the difference between 2015 and 2016 DIR revenue cap amounts divided by the 2015 DIR revenue cap amount.

<sup>15</sup> Represents the difference between 2016 and 2017 DIR revenue cap amounts s divided by the 2016 DIR revenue cap amount.

DIR annual revenue caps proposed by AEP Ohio for the ESP 3 term so that they more closely track the progression from the ESP 2 Case.<sup>16</sup>

In its Application for Rehearing, AEP Ohio once again seeks to increase the amount of money being collected from customers for the DIR. This time around AEP requests that the PUCO to approve an additional \$23 to \$86 million of customer funding over the term of the ESP for the DIR. AEP argues that the increased collection from customers that the PUCO ordered in the Entry on Rehearing (\$37.8 million) is still not enough. AEP argues that despite this increase in the amount of money that can be collected from customers the PUCO nonetheless did not provide for three to four percent annual growth, that it committed to when it approved the DIR.

AEP Ohio is factually wrong. The PUCO did include a three to four percent growth in customer funding for the DIR from 2015 to 2016 and 2017 as set forth below:

<u>Year</u>	<u>Base D</u>	<u>DIR Cap</u>	<u>DIR Cap/Base D</u>	<u>DIR Cap %</u>	<u>% increase</u>
2015	\$642 million	\$145 million	145/642	22.6%	3.1% <sup>17</sup>
2016	\$642 million	\$165 million	165/642	25.7%	3.1% <sup>18</sup>
2017	\$642 million	\$185 million	185/642	28.8%	

The PUCO measured the growth in the DIR caps from “customer base distribution revenues” -- \$642 million.

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<sup>16</sup> ESP 3 Entry on Rehearing at 24 (May 28, 2015).

<sup>17</sup> For 2016, the DIR Cap % of 25.7 minus the 2015 DIR Cap% of 22.6 results in an annual increase of 3.1%.

<sup>18</sup> For 2017, the DIR Cap % of 28.8 minus the 2016 DIR Cap% of 25.7 results in an annual increase of 3.1%.

AEP appears to suggest that the growth in DIR should be measured from the “total distribution revenue” which reflects “customer base distribution revenues” plus the added revenue from the annual DIR caps.<sup>19</sup> In other words AEP is seeking a three to four percent increase above “customer base distribution revenues.” This would allow AEP to collect even greater amounts of money from customers.

But the PUCO specifically tied the three to four percent increase to “customer base distribution charges” not “total distribution revenues.”<sup>20</sup> The PUCO should enforce its findings on rehearing, which limits the increase to customer base distribution charges. The PUCO should reject AEP Ohio’s Application for Rehearing.

**C. The PUCO should strike AEP Ohio’s reference to information that is not part of the record.**

In trying to convince the PUCO that it needs to collect more money from customers for its distribution investment, AEP Ohio complains again that the DIR revenue caps are not sufficient enough to avoid system reliability being negatively impacted.<sup>21</sup> AEP Ohio specifically identifies the Underground Network Risk Mitigation Project (“UNRMP”) as a part of the DIR spending that has already been undertaken.<sup>22</sup> The Utility notes that the capital budget for the UNRMP was approved in May of 2014.<sup>23</sup> AEP Ohio claims that the UNRMP is being fully implemented going forward.<sup>24</sup> AEP Ohio implies that system reliability would be threatened without the additional \$86

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<sup>19</sup> AEP Application for Rehearing at 15.

<sup>20</sup>ESP 3 Entry on Rehearing at 24 (May 28, 2015).

<sup>21</sup> AEP Application for Rehearing at 16.

<sup>22</sup> AEP Application for Rehearing at 16.

<sup>23</sup> AEP Application for Rehearing at 16.

<sup>24</sup> AEP Application for Rehearing at 16.

million in DIR spending it is seeking on rehearing because programs like the UNRMP would not be funded.<sup>25</sup>

There are two problems with AEP's claims. First, there is nothing in the record of this case that identifies any specific distribution projects that might not be pursued if AEP does not get its requested additional funds. The PUCO should not accept as evidence any such claim made in a pleading filed at this stage in the game, when the record has been closed for quite some time. Second, the PUCO should reject AEP's inappropriate attempt to supplement the record through an application for rehearing.. .

AEP's mention of the UNRMP is beyond the record in this case as the UNRMP was not part of the Utility's Application and should not be considered as part of the PUCO's deliberation. The PUCO should strike the portion of the Utility's Application for Rehearing on page 16, line 12 beginning with the words "An example" and ending on page 17, line 7 ending with the words "DIR caps." The discussion about the UNRMP is not evidence nor is it properly part of the record. It cannot be relied upon by the PUCO as a basis to make a decision on DIR spending caps. This information was not offered as part of the Utility's direct or rebuttal case. The material was not made available for any party to cross-examine at the evidentiary hearing. To consider the material submitted now would be highly prejudicial to OCC and other intervenors in this case.

The PUCO is required under R.C. 4903.09 to make its "findings of fact and written opinions" with regard to the record of the case. The evidentiary hearing provided the Utility with an ample opportunity to adduce such evidence, through the "testimony and ... exhibits..." referenced in R.C. 4903.09. The Utility's Application for Rehearing is not an appropriate opportunity to present new material to the PUCO as though it were

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<sup>25</sup> AEP Application for Rehearing at 16.

evidence. AEP provided no explanation of why this material was not presented in the course of the evidentiary hearing. No explanation could possibly justify the Utility's unique and inappropriate tactic. The material could have been introduced at the hearing and was not.

The PUCO has recognized that "it is improper to rely on claims in the brief which are unsupported by evidence within the record."<sup>26</sup> The PUCO has also ruled that "[d]ocuments that are not part of the record, and that were not designated a late-filed exhibit at hearing, cannot be attached to a brief, or filed after a hearing, and thereby be made a part of the record."<sup>27</sup> The PUCO has determined that such documents are "hearsay, not excused by any exception to the rules of evidence governing hearsay, and [are] inadmissible as evidence."<sup>28</sup>

And, use of the anecdotal information is misleading. The Utility's 2015 DIR Work Plan as filed in Case No. 14-2275-EL-UNC does not include any spending for the UNRMP.<sup>29</sup> This means that the Utility's claim is not supported by its own DIR Work Plan.

For all of these reasons, the PUCO should strike the aforementioned portions of the Utility's Application for Rehearing and deny AEP's Application for Rehearing.

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<sup>26</sup> See Case No. 11-346-EL-SSO, Opinion and Order (December 14, 2011) at 16-17.

<sup>27</sup> *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order (November 21, 2006) ("*FAF Order*") at 3.

<sup>28</sup> *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order (November 21, 2006) ("*FAF Order*") at 3.

<sup>29</sup> The PUCO should take administrative notice of the AEP Ohio 2015 DIR Work Plan filed by the Utility on December 15, 2014 in Case No. 14-2275-EL-UNC.

**D. It was reasonable for the PUCO to delegate certain Purchase of Receivables issues to the working group.**

AEP filed for Rehearing of the PUCO's decision to delegate aspects of the Purchase of Receivables ("POR") discussion to a subset of the Market Development Working Group ("MDWG"), which was initially established by the PUCO as part of its investigation of the competitive retail electric market.<sup>30</sup> The PUCO addressed this matter in its Entry on Rehearing where the PUCO rejected the Utility's argument:

We find that our deferral of the implementation details to a future proceeding is a proper next step and well within the bounds of our discretion. As the Ohio Supreme Court has recognized, the Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 433 N.E.2d 212 (1982). We, therefore, find no error in our decision to address the implementation details in a future case and AEP Ohio's request for rehearing should be denied.

AEP has presented no new arguments to demonstrate that the PUCO's decision to delegate certain issues to the MDWG was unreasonable or unlawful.

Nonetheless, despite this definitive declaration, AEP filed another Application for Rehearing arguing that "there may be reason to visit some of the findings the Commission relied on in its orders."<sup>31</sup> The Utility further argued that the PUCO should grant rehearing to permit the subgroup to "raise whatever issues necessary"<sup>32</sup> The Utility's request is nothing more than an additional attack of the aspects of the POR that the PUCO has already decided. Among those are significant customer protections such

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<sup>30</sup> *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EI-COI, Finding and Order at 6 (March 26, 2014).

<sup>31</sup> AEP Application for Rehearing at 18.

<sup>32</sup> AEP Application for Rehearing at 18.

as: only permit commodity-related charges to be included in the POR;<sup>33</sup> not allowing the Utility to disconnect customers for nonpayment of CRES charges;<sup>34</sup> and not implementing a late payment fee.<sup>35</sup>

The PUCO has clearly stated its position on the limitation of only commodity-related charges being included in AEP Ohio's POR.

The Commission expressly stated, in the ESP 3 Order, that only commodity related charges may be included in AEP Ohio's POR program. ESP 3 Order at 80. To the extent that it is necessary to do so, the Commission clarifies that commodity related charges means charges that are directly tied to the actual cost of generation and does not include early termination fees, which are not a necessary component of generation service.<sup>36</sup>

Similarly, the PUCO has concluded that R.C. 4928.10(D)(3) prohibits disconnection for non-payment of CRES-related charges. Regarding any waiver of the prohibition, the PUCO stated, "the consumer protections afforded by the statute would be defeated if CRES receivables are simply reclassified as a non-competitive retail service under the POR program.

Finally, the PUCO has determined that the merits of a late payment charge for residential customers should be addressed in a distribution base rate case,<sup>37</sup> and thus not as part of the MDWG.

The PUCO has ruled that these protections are important and they should not be reconsidered as part of the MDWG. Instead, the PUCO should reiterate that the MDWG should focus on POR program rules, calculation of the discount rate, implementation and

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<sup>33</sup> ESP 3 Entry on Rehearing at 37 (May 28, 2015).

<sup>34</sup> ESP 3 Entry on Rehearing at 43 (May 28, 2015).

<sup>35</sup> ESP 3 Entry on Rehearing at 43 (May 28, 2015).

<sup>36</sup> ESP 3 Entry on Rehearing at 37 (May 28, 2015).

<sup>37</sup> ESP 3 Entry on Rehearing at 43 (May 28, 2015).

maintenance costs, collection rates and procedures, and the timing and other mechanics of the process by which the Utility will purchase receivables from CRES providers as set forth in the Opinion and Order<sup>38</sup> and Entry on Rehearing.<sup>39</sup> The PUCO's finding was well within its broad discretionary authority to manage its dockets. There was nothing unreasonable about the PUCO's approach. Rehearing should be denied.

### III. CONCLUSION

AEP's Application for rehearing should be rejected in large part, as explained above. Otherwise customers will be charged even higher rates for service, when AEP already has the highest rates in the state and among the highest in the country.<sup>40</sup>

Respectfully submitted,

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<sup>38</sup> ESP 3 Opinion and Order at 80-81 (February 5, 2015).

<sup>39</sup> ESP 3 Entry on Rehearing at 36 (May 28, 2015).

<sup>40</sup> OCC Ex. 11 (Williams Direct) at 15.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo Contra AEP Ohio's Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 9th day of July, 2015.

/s/ Maureen R. Grady

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Summary: Memorandum Memorandum Contra Ohio Power Company's 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.