

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the)	Case No. 11-5906-EL-FAC
Fuel Adjustment Clauses for Columbus)	
Southern Power Company and Ohio)	
Power Company and Related Matters.)	

In the Matter of the Fuel Adjustment)	Case No. 12-3133-EL-FAC
Clauses for Columbus Southern Power)	
Company and Ohio Power Company.)	

In the Matter of the Fuel Adjustment)	Case No. 13-572-EL-FAC
Clauses for Ohio Power Company.)	

In the Matter of the Fuel Adjustment)	Case No. 13-1286-EL-FAC
Clauses for Ohio Power Company.)	

In the Matter of the Fuel Adjustment)	Case No. 13-1892-EL-FAC
Clauses for Ohio Power Company.)	

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

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**APPLICATION FOR REHEARING
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The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing¹ to oppose a ruling that permits the Utility (and no other party) to have access to and comment upon the draft Audit report prepared by an independent auditor.

In its Entry of July 22, 2015, the Public Utilities Commission of Ohio ("Commission" or "PUCO") ruled that EVA, the Commission-appointed independent auditor, should "present its draft audit report to the Staff and AEP Ohio by November 9, 2015, with its final audit report filed with the Commission by November 30, 2015." This Entry was unreasonable and unlawful in the following respects:

¹ OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

- A. Fundamental fairness means all parties to a proceeding have equal opportunities to obtain true and full disclosure of relevant facts and to develop a full and fair record.**
- B. An independent auditor should be independent. It is as simple as that.**

By providing one party (and no other party) to a proceeding access to and opportunity to comment upon a draft audit report prepared by a Commission-ordered independent auditor, the Commission violated principles of fundamental fairness, and created an uneven playing field for participants in a Commission proceeding. Additionally, in allowing one party (and no others) to preview the audit report, and provide substantive comments to the Auditor, the PUCO unreasonably impugns the integrity of the independent audit process.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its Opinion and Order as requested by OCC.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this case, the Commission will determine if customers were charged twice (or more than twice) for capacity costs related to the Lawrenceburg and Ohio Valley Electric Company (“OVEC”) generating facilities. The Commission will also evaluate AEP Ohio’s fuel and alternative energy costs for 2012, 2013, 2014, and six months of 2015. Additionally, the Commission will review the final reconciliation and true up of AEP Ohio’s fuel adjustment clause.²

² The fuel adjustment clause will no longer apply because generation for standard service offer customers will be procured entirely through a competitively bid auction process.

To assist the PUCO in its evaluation of these issues, the PUCO retained (through requests for proposals) auditors to perform audits of these costs. While certain of the audit reports have already been filed,³ the EVA audit report of AEP Ohio's fixed cost rider and auction phase in rider for January 2015 through May 31, 2015, has not been filed. The Commission in its Entry of July 22, 2015 ordered EVA "to present its draft audit report to Staff and AEP Ohio by November 9, 2015, with the final audit report filed with the Commission by November 30, 2015."

The OCC seeks rehearing of this finding in the Entry because it establishes an unreasonable and unjust review process that benefits AEP Ohio, to the detriment of other parties. Additionally, the Entry establishes a process that impugns the integrity of the independent audit process.

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 to any matters determined in the proceeding." OCC filed a motion to intervene in this proceeding on March 7, 2012, which was granted by Entry dated March 28, 2012.

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:

³ The 2012 and 2013 management /performance and financial audits of AEP Ohio's FAC and AER were filed. The audit of the double recovery of capacity-related costs was filed as well. Entry at 3 (July 22, 2015).

“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: “[i]f, 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.”

The statutory standard for abrogating portions of the PUCO’s Entry is met here. The Commission should grant and hold rehearing on the matters specified in this Application for Rehearing. The PUCO should then abrogate or modify its Entry of July 22, 2015.

III. ARGUMENT

By providing one party (and no other party) access to and opportunity to comment upon a draft audit report prepared by a Commission-ordered independent auditor, the Commission violated principles of fundamental fairness, and created an uneven playing field for participants in a Commission proceeding. Additionally, in allowing one party (and no others) to preview the audit report, and provide substantive comments to the Auditor, the PUCO impugns the integrity of the independent audit process.

A. Fundamental fairness means all parties to a proceeding have equal opportunities to obtain true and full disclosure of relevant facts and to develop a full and fair record.

The PUCO has an obligation as a quasi-judicial body, to conduct its hearings in a manner that comports with the elements of fundamental fairness and due process.⁴ The right to be heard must be provided for through a meaningful process. How the Commission reaches its decision can, in many cases, be as important as the ultimate decision reached. *Id.* at ¶ 6. The process must be fair and open. Parties to a proceeding should be treated similarly, allowing each to obtain true and full disclosure of facts and to develop a full and fair record.

The rules and laws that govern the PUCO are designed to assure that all parties have equal opportunities to obtain relevant information. All parties are granted ample rights of discovery under R.C. 4903.082. All parties have the same opportunity as others to serve discovery, conduct depositions, and subpoena witnesses to testify.⁵ No party can seek discovery from members of the PUCO Staff.⁶ All facts and information in the PUCO's possession are open to inspection by interested parties.⁷ All parties are bound by the rules setting boundaries on ex parte communications with the PUCO.⁸

But, despite the equal treatment of parties aspired to under the PUCO's rules, the PUCO issued an Entry that does not treat participants equally. In the PUCO Entry it

⁴ *In the Matter of the Complaint of the City of Cincinnati v. the Cincinnati Gas & Electric Company, et al*, Case No. 91-377-EL-CSS, Finding and Order at ¶5 (June 27, 1991), citing *Mausoleum Corp. v. Cincinnati* (1981), 1 Ohio App.3d 107 at 110. ("Where an administrative agency grants to an individual a right to be heard, it must provide a meaningful process for asserting that right. To do otherwise is to perpetrate a sham upon the affected party and the public generally.").

⁵ See Ohio Adm. Code 4901-1-16 to 4901-1-24 (affording discovery rights to "any party").

⁶ Ohio Adm. Code 4901-1-16(I) (discovery rules 4901-1-16 to 4901-1-24 do not apply to PUCO staff).

⁷ Ohio Rev. Code 4905.07.

⁸ Ohio Adm. Code 4901-1-09.

ordered the Auditor to turn over its draft report to the Utility (and no other party) and the Staff.⁹ Only the final Audit report, which may differ from the draft report (in response to utility comments), is to be filed as a public document.

In permitting the release of the draft audit report to one party alone, with that party being permitted to respond/recommend changes to the findings in the draft report, the PUCO created an uneven playing field. This uneven playing field permits the Utility to preview the Auditor's findings and comment upon those findings, when no other party is granted that opportunity.¹⁰ Coupled with parties' inability to seek discovery from members of the PUCO staff, it is possible that OCC may never learn of what the auditor's findings were in the draft report, before that report was changed in response to comments from the Utility.¹¹ Yet the draft audit findings would contain highly relevant facts that may be needed to develop a full and fair record in this proceeding.

Not only is the PUCO's Entry unfair, it is also inconsistent with the PUCO's earlier entry setting forth the terms of the audit. There the PUCO ordered that "[a]ny conclusions, results, or recommendations formulated by the auditor may be examined by any participant to these proceedings."¹² The draft audit report will undoubtedly contain conclusions, results, or recommendations formulated by the auditor. However, those preliminary conclusions, results, or recommendations may be modified in the final audit

⁹ Staff is to receive a copy of the audit. But Staff is not considered a party for purposes of discovery. See Ohio Adm. Code 4901-1-16(I). OCC does not object to the Staff receiving a copy of the draft audit.

¹⁰ See for example, comments of FirstEnergy to draft audit report, *In the Matter of Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company et al*, Case No. 11-5201-EL-RDR.

¹¹ OCC has served discovery on AEP Ohio seeking to obtain a copy of the draft audit report. At this date, there has been no response to that discovery.

¹² Entry at ¶ 9 (Apr. 16, 2014).

report filed for all interested parties to see. Thus, all participants are entitled to examine the draft audit simultaneously.

The PUCO's Entry allows the Utility access to information (the draft audit report) that is relevant to the proceeding. Yet the PUCO does not permit other parties that same access. This is an inherently unfair process that prevents parties from obtaining true and full disclosure of relevant facts. The Entry impedes OCC and others from developing a full and fair record.

The Entry is unlawful and unreasonable and should be reversed. At the very least to even the playing field, the PUCO should order the draft report to be presented to all parties simultaneously. Any conclusions, results, or recommendations formulated by the Auditor should be examined by all parties, even if such conclusions are contained in a draft audit.¹³ Additionally, all parties should be permitted to comment upon the draft audit report with the final audit report being formulated after considering all parties' input.

B. An independent auditor should be independent. It is as simple as that.¹⁴

By Entry dated April 16, 2014, the Commission ordered a series of audits to be performed by an independent contractor.¹⁵ The Commission indicated that it would "solely direct the work of the auditor." The Commission also ruled that "[a]ny

¹³ See Entry at ¶ 9 (Apr. 16, 2014).

¹⁴ *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Toledo Edison Company and Related Matters*, Case No. 86-05-EL-EFC, Supplemental Opinion and Order at 15 (July 16, 1987).

¹⁵ Entry at 9 (Apr. 16, 2014).

conclusions, results, or recommendations formulated by the auditor may be examined by any participant to these proceedings.”¹⁶

Independent auditors are indispensable guarantors of public trust. An independent and objective auditor is essential to the process, as AEP Ohio itself acknowledged earlier in this proceeding.¹⁷ AEP in fact, raised an issue concerning the independence of one of the auditors in this proceeding. It complained that PUCO chosen auditor could not serve as an independent auditor on the double recovery issue due to its prior work in the AEP Ohio capacity case.¹⁸ The PUCO, in an abundance of caution responded to AEP’s concerns, and to “avoid even an appearance of conflict of interest” it ordered that a different auditor be selected.¹⁹

But, despite the PUCO’s concern with avoiding “even an appearance of impropriety,” it nonetheless ordered the non-public draft reports of the auditor to be provided to the Utility (and no other party). In doing so, the PUCO sanctioned a process where one party gets an opportunity to review a non-public draft audit report and provide comments on that report to the auditor. This process undermines the independence of the auditor.

Notably the PUCO took no steps to limit the Utility’s review of the draft audit report. For instance it did not limit the Utility’s review to a review to determine if information contained in the audit constitutes trade secrets, and therefore should not be

¹⁶ Entry at 9 (Apr. 16, 2014).

¹⁷ *In the Matter of the Application of the Fuel Adjustment clauses for Columbus Southern Power company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC et al., Application for Rehearing at 8 (Jan. 3, 2014).

¹⁸ *Id.*

¹⁹ *Id.*

released. Nor did it relegate the utility's review to correcting mathematical errors. Instead the Utility is given carte blanche review of the draft audit report, allowing it to provide substantive comments to the draft report. These substantive comments could include challenges to the audit conclusions, results, or recommendations.

By allowing the Utility to provide substantive comments that challenge or dispute the findings of the audit reports, the PUCO is permitting the Utility to influence the outcome of the Final Audit Report. The final audit report (filed ten days later) may then reflect the Utility's input, calling into question the independence of the audit.

The conclusions, results, and recommendations of the auditor contained in audit reports—draft or final—should be made available equally to all parties at the same time. And all parties, not just the Utility, should be permitted to provide substantive comments on the draft audit.

The PUCO has in the past approved of arrangements where interested parties (not just one party) receive a copy of a draft audit report and may challenge the draft audit findings.²⁰ Providing the draft audit to all interested parties at the same is also consistent with the fundamental requirement for procedural fairness to all parties.²¹

The PUCO erred in setting up a process which allows one party (and no one else) to influence the conclusions, results, and recommendations of an auditor that are

²⁰ *In the Matter of the Application of The Toledo Edison Company for Authority to Amend and to Increase Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service; In the Matter of the Investigation into the Perry Nuclear Power Station; In the Matter of the Investigation into the Beaver Valley Nuclear Power Station*, Case No. 88-171-EL-AIR, Opinion and Order (Jan. 31, 1989) adopting Stipulation and Recommendation requiring draft of management performance audit to be provided to interested parties on Audit Panel.

²¹ *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light Company and Related Matters*, Case No. 86-07-EL-EFC, Opinion and Order at 22 (Feb. 18, 1987) (holding that where all intervenors did not receive a copy of the audit at the same time, there was a fundamental unfairness).

contained in a draft audit report. This process threatens the independence of the final audit. The PUCO should reverse.

IV. CONCLUSION

The PUCO erred in setting up a review process for the draft audit report of the independent auditor which allows the utility (and no other party) to preview the draft audit and comment upon the findings. This is fundamentally unfair and calls into question the independence of the auditor.

The PUCO should reverse its Entry, and instead allow all parties to simultaneously receive the draft audit report. Additionally, the PUCO should permit all parties to review and comment upon that draft audit report, with the final audit report being filed thereafter.

Respectfully submitted,

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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 21st day of August, 2015.

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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.