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**Via E-File**

June 3, 2016

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

***In re: Case No. 11-4920-EL-RDR and 11-4921-EL-RDR***

Dear Sir/Madam:

Please find attached the REPLY MEMORANDUM OF THE OHIO ENERGY GROUP for filing in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

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**BOEHM, KURTZ & LOWRY**

MLKkew
Encl.
Cc: Certificate of Service

**BEFORE THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
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| In The Matter Of The Application Of Columbus Southern Power Company For Approval Of A Mechanism To Recover Deferred Costs Ordered Until Ohio Revised Code 4928.144. | : | **Case No. 11-4920-EL-RDR** |
| In The Matter Of The Application Of Ohio Power Company For Approval Of A Mechanism To Recover Deferred Costs Ordered Until Ohio Revised Code 4928.144. | : | **Case No. 11-4921-EL-RDR** |

# REPLY MEMORANDUM OF THE OHIO ENERGY GROUP

Pursuant to Ohio Admin. Code 4901-1-12(B)(2), the Ohio Energy Group ("OEG") hereby submits this Reply Memorandum in response to the Memorandum Contra Ohio Energy Group's Motion to Suspend Rates ("Memorandum Contra") filed by Ohio Power Company ("AEP Ohio" or "Company") on May 27, 2016. In its Memorandum Contra, AEP Ohio attempts to maneuver around the Supreme Court of Ohio's long-established prohibition on retroactive ratemaking, citing a few anomalous and inapplicable Court cases. But AEP Ohio cannot escape the fact that its proposal to increase the lawful rates previously established by the Commission by approximately $78 million is exactly the type of retroactive ratemaking barred by the Court as contrary to Ohio law.

The Ohio Supreme Court does not set electric rates. Exclusive jurisdiction to establish rates rests with the Commission. And by law, rates must be set prospectively only. By Order issued August 1, 2012 in this docket, the Commission established the Phase-In Recovery Rider ("PIRR") carrying cost rate at the long-term cost of debt (5.34%). That remains the lawful rate until prospectively changed by a new Order of the Commission.

## ARGUMENT

### I. AEP Ohio's Request Represents A Classic Example Of Unlawful Retroactive Ratemaking.

In its Memorandum Contra, AEP Ohio concedes that the Company is seeking to retroactively increase the carrying charge rate collected through its PIRR as far back as August of 2012, when the PIRR was initially

adopted.[1] Instead of incorporating the Commission-approved 5.34% long-term cost-of-debt carrying cost rate lawfully collected from customers from August of 2012 to the present day into its proposed PIRR compliance tariff, AEP Ohio changed the carrying charge rate collected over that historic period to a 11.15% weighted average cost of capital ("WACC") rate.[2] This one change to the PIRR carrying cost rate would allow AEP Ohio to retroactively increase the lawful rates previously established by the Commission by approximately $78 million.[3] AEP Ohio's May 23, 2016 *"compliance filing"* therefore proposes to substantially harm customers by violating the Supreme Court's long established prohibition on retroactive ratemaking first announced in *Keco Industries."*[4] To comply with the *Keco* doctrine, AEP Ohio should only be allowed to increase the PIRR carrying charge rate to 11.15% *prospectively* as of the date of a future Commission order implementing the Court's June 2, 2015 decision in *In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056.[5]

## II. Ohio Law Expressly Prohibits Retroactive Rate Increases.

A litany of Ohio Supreme Court case law supports the prohibition against retroactive ratemaking first set forth in *Keco*.[6] Repeatedly, the Supreme Court has held firm to the principle that regardless of the harm or benefit to either customers or the utility, lawfully-established filed rates cannot be changed retroactively. Instead, rates must be changed prospectively only through a new Order of the Commission. In *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.,* the Court held:

> *...the statutes make clear that public utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; that* ***the schedule remains in effect until replaced by a further order of the commission; that this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter***

[1] Memorandum Contra at 3.
[2] May 23, 2016 Compliance Filing, Attachment 1 at 2.
[3] Assuming that the Commission acts to change AEP Ohio's carrying cost rate this month, AEP Ohio would only be entitled to collect 31 months of an 11.15% WACC carrying cost rate (from June 2016 through December 2018). 31 months/77 total months of PIRR charge = 40% and 40% of approximately $130 = $52 million. $130 million - $53 million = $78 million.
[4] *Keco Industries, Inc. v. Cinci. & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (March 27, 1957) ("*Keco*").
[5] While OEG's Motion to Suspend Rates indicated that AEP Ohio could increase the PIRR carrying cost rate possibly as soon as June 1, 2015, Supreme Court case law reflects that the current 5.34% PIRR carrying cost rate is the lawful rate until the Commission issues an Order implementing the Court's decision to reinstate the WACC rate. *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm'n*, 46 Ohio St. 2d 105, 116-17, 346 N.E.2d 778, 786 (1976).
[6] *In re Application of Columbus S. Power Co.,* 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863; *Lucas Cty. Comm'rs v. Pub. Utilities Comm'n of Ohio,* 80 Ohio St. 3d 344, 686 N.E.2d 501 (1997); *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655; *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.,* 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829; *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E. 2d 853.

> ***of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order.*** *This holding is consistent with the basis of this court's jurisdiction, with precedent and established practice, and with the statutory framework for public utility ratemaking.*[7]

Subsequently, in *Lucas Cty. Comm'rs v. Pub. Utilities Comm'n of Ohio*, the Court explained that:

> *...utility ratemaking by the Public Utilities Commission is prospective only. The General Assembly has attempted to balance the equities by* ***prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeals,*** *while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal. In short, retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme.*[8]

In 2011, the Supreme Court stated that:

> *A rate increase making up for revenues lost due to regulatory delay is precisely the action that we found contrary to law in Keco. "[A] utility may not charge increased rates during proceedings before the commission seeking same[,] and losses sustained thereby"—that is, while the case is pending—"may not be recouped."*[9]

The Commission itself has adhered to the prohibition against retroactive ratemaking set forth in *Keco* on multiple instances.[10] And with respect to the application of the *Keco* doctrine to utilities, the Commission explained that:

> *The Supreme Court of Ohio has ruled that the difference between rates established pursuant to a remand upon reversal of a Commission order and the higher rates collected during the consideration of the appeal from that order is not recoverable in an action by a consumer. Keco Industries, Inc. et al. v. The Cincinnati & Suburban Bell Telephone Co., 166 OS 254, 141 NE2d 465 (1957). The Commission is of the opinion that this principle would also apply*

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[7] *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm'n*, 46 Ohio St. 2d 105, 116-17, 346 N.E.2d 778, 786 (1976) (emphasis added).

[8] *Lucas Cty. Comm'rs v. Pub. Utilities Comm'n of Ohio*, 80 Ohio St. 3d 344, 348, 686 N.E.2d 501, 504 (1997) (emphasis added).

[9] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶ 11.

[10] Entry Denying Application for Rehearing, *In the Matter of the Regulation of the Elec. Fuel Component Contained Within the Rate Schedules of the Dayton Power & Light Co. & Related Matters,* 86-07-EL-EFC (Apr. 14, 1987); Opinion and Order, *Green Cove Resort 1 Owners' Ass'n*, 00-1595-ST-CRC (Dec. 19, 2002); Entry on Rehearing, *In the Matter of the Application of Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.. in the Matter of the Complaint & Appeal by the Toledo Edison Co. from an Ordinance of the Vill. of Holgate Regulating the Price for Elec. Serv..,* 76-1061-EL-CMR (July 26, 1978); Entry, *In the Matter of the Complaint of the Lucas Cty. Commissioners, Complainants*, 95-1135-GA-CSS (Mar. 21, 1996); Entry on Rehearing, *In Re Telecommunications Act of 1996*, 96-1310-TP-COI (June 22, 2000); Order on Rehearing, *In the Matter of the Application of the Cleveland Elec. Illuminating Co. for Auth. to Amend & Increase Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv..,* 85-675-EL-AIR (Nov. 12, 1986); Opinion and Order, *In the Matter of the Complaint of A. Michael Schwarzwalder, Complainant*, 76-837-EL-CSS (Sept. 6, 1978); Opinion and Order on Remand, *In the Matter of the Application of Toledo Edison Co. for Auth. to Change Certain of Its Filed Schedules Fixing Rates & Charges for Elec. Serv.. in the Matter of the Complaint & Appeal by Toledo Edison Co. from an Ordinance of the Vill. of Holgate Regulating the Price for Elec. Serv..,* 76-1061-EL-CMR 2 (Dec. 19, 1979); *In Re Columbus S. Power Co.,* 08-917-EL-SSO (July 23, 2009).

*to an action by a utility to recover the difference between rates collected during the pendency of an appeal of rate reduction, and higher rates which may be established on remand.*[11]

In its Memorandum Contra, AEP Ohio tries to weave a convoluted path to get around the simple legal principle explicitly set forth in *Keco*, citing a few anomalous and inapplicable Court cases. Yet AEP Ohio fails to cite *any* case in which a utility was allowed to retroactively *increase* the rates previously approved by the Commission due to a Court decision, which is exactly what the Company asks the Commission to do in this case (by a large order of magnitude, no less). In the 1982 *River Gas* case cited by AEP Ohio, the Commission *decreased* gas rates on its own initiative in order to comply with a newly adopted rule requiring such a rate decrease.[12] And in the recent Court decisions related to AEP Ohio, the Court ordered a reexamination of the Commission's decision with respect to energy credit issues as well as a prospective rate *decrease*.[13] In none of these cases did the Court find that the Commission could retroactively *increase* the lawful rates previously approved by the Commission. Hence, AEP Ohio's inapplicable case law is insufficient to overcome the breadth of precedent barring retroactive rate increases such as the one it now proposes.

Properly applying the *Keco* doctrine to AEP Ohio's request will not offend any principles of equity. AEP Ohio's customers have repeatedly been forced to absorb substantial costs later found to be unlawful by the Court as a result of *Keco's* prohibition on retroactive ratemaking. For instance, the *Keco* doctrine precluded a refund of $63 million to customers stemming from AEP Ohio's first ESP case.[14] And *Keco's* prohibition on retroactive ratemaking foreclosed customers from receiving a refund of $368 million in unlawful provider-of-last-resort charges collected by AEP Ohio.[15]

Under AEP Ohio's logic, if the Court had issued a decision rejecting the cost of debt carrying cost rate when there was only $1 million left for the utility to collect under the PIRR, then the Company would be entitled to a $129 million retroactive rate increase. Such an extreme and one-sided result would be barred by *Keco* and its progeny. AEP Ohio claims that it is *"entitled to collect the full impact of the Commission's deferral under R.C.*

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[11] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base & Rate of Return of the Ohio Utilities Co.*, 77-1073-WS-COI (Aug. 23, 1978) at 1.
[12] *River Gas v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 513-14, 433 N.E.2 568, 571-72 (1982).
[13] *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608 at ¶40; *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607 at ¶57.
[14] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.
[15] *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 at ¶ 56.

*4928.144, inclusive of carrying costs."*[16] OEG agrees. But the 5.34% long-term cost of debt carrying cost rate was the lawful rate from August 1, 2012 through the present day. Ohio law now bars AEP Ohio from obtaining restitution for the time period when the 5.34% long-term cost-of-debt was lawfully in effect. The Commission should therefore reject AEP Ohio's request to undermine the extensive precedent flowing from *Keco* so that the Company can retroactively charge customers another $78 million through the PIRR.

That AEP Ohio waited nearly a year to request Commission action in response to the Court's June 2, 2015 decision cannot deter the Commission from properly applying the *Keco* doctrine. The Commission cannot violate a fundamental principle of Ohio law because of AEP Ohio's delayed action. However, we do believe that in order to provide AEP Ohio with the full lawful benefit to which it is entitled, a new Commission Order prospectively increasing the PIRR carrying charge rate should be issued expeditiously.

## CONCLUSION

**WHEREFORE,** for the foregoing reasons, the Commission should reject AEP Ohio's May 23, 2016 compliance filing and should find that AEP Ohio can only collect the 11.15% WACC carrying cost rate through the PIRR prospectively beginning on the date of a future Commission Order approving that rate.

Respectfully submitted,

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June 3, 2016

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[16] Memorandum Contra at 6.

## CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) or ordinary mail, unless otherwise noted, this 3rd day of June, 2016 to the following:

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Summary: Reply Ohio Energy Group (OEG) Reply Memorandum electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group