

BOEHM, KURTZ & LOWRY

ATTORNEYS AT LAW
36 EAST SEVENTH STREET
SUITE 1510
CINCINNATI, OHIO 45202
TELEPHONE (513) 421-2255

TELECOPIER (513) 421-2764

Via E-File

July 29, 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 OHIO ENERGY GROUP's APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT 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,

A handwritten signature in blue ink, appearing to read "Michael L. Kurtz".

Michael L. Kurtz, Esq.
Kurt J. Boehm, Esq.
Jody Kyler Cohn, Esq.
BOEHM, KURTZ & LOWRY

MLKkew
Encl.
Cc: Certificate of Service

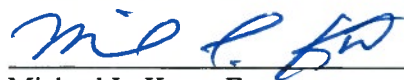
**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

**APPLICATION FOR REHEARING OF
THE OHIO ENERGY GROUP**

The Ohio Energy Group ("OEG") submits this Application for Rehearing of the June 29, 2016 Entry ("Entry") of the Public Utilities Commission of Ohio ("Commission").¹ The Entry is unlawful and unreasonable because the Commission violated the Supreme Court of Ohio's long-established prohibition on retroactive ratemaking when it permitted Ohio Power Company ("AEP Ohio" or "Company") to increase the Phase-In Recovery Rider ("PIRR") carrying charge rate lawfully in effect from August 1, 2012 through June 29, 2016.² As a result, the Company can now charge customers approximately \$78 million more than the lawful rates previously established by the Commission. The Commission should reverse its decision on rehearing. A memorandum in support of this Application for Rehearing is attached.

Respectfully submitted,



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: mkurtz@BKLawfirm.com

kboehm@BKLawfirm.com

jkylercohn@BKLawfirm.com

July 29, 2016

COUNSEL FOR THE OHIO ENERGY GROUP

¹ Ohio Adm. Code 4901-1-35.

² *Keco Industries, Inc. v. Cinci. & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (March 27, 1957) ("*Keco*").

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

MEMORANDUM IN SUPPORT

On June 29, 2016, the Commission issued the Entry approving the PIRR tariffs filed by AEP Ohio in these proceedings on May 23, 2016. Those tariffs implement AEP Ohio's proposal to change the PIRR carrying charge rate collected from customers since August 1, 2012 from the Commission-approved 5.34% long-term cost-of-debt rate to a 11.15% weighted average cost of capital ("WACC") rate.³ This one change to the PIRR carrying cost rate allows AEP Ohio to retroactively increase the lawful rates previously established by the Commission by approximately \$78 million.⁴ OEG respectfully submits that the Commission erred by permitting such a retroactive rate increase.

A litany of Ohio Supreme Court case law supports the prohibition against retroactive ratemaking first set forth in *Keco*.⁵ 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:

³ May 23, 2016 Compliance Filing, Attachment 1 at 2.

⁴ 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.

⁵ *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.

*...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 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.*⁶

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.*⁷

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."*⁸

The Commission itself has adhered to the prohibition against retroactive ratemaking set forth in *Keco* on multiple instances.⁹ And with respect to the application of the *Keco* doctrine to utilities, the Commission explained that:

⁶ *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).

⁷ *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).

⁸ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶ 11.

⁹ 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 Schwarzwald, 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).

*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 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.*¹⁰

In accordance with this precedent, the 5.34% long-term cost of debt carrying cost rate collected through the PIRR was the lawful rate from August 1, 2012 through June 29, 2016, when the Commission issued an order approving the 11.15% WACC rate. 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 therefore erred by approving AEP Ohio's request to undermine the extensive precedent flowing from *Keco* and to retroactively increase customer rates by an additional \$78 million.

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.¹¹ 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.¹² Additionally, AEP Ohio's nearly one-year delay in requesting Commission action in response to the Court's June 2, 2015 decision should not have deterred 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.

¹⁰ *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.

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

¹² *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863 at ¶ 56.

WHEREFORE, OEG respectfully requests that the Commission reverse the aforementioned error in its Entry and issue an order requiring AEP Ohio to modify its PIRR tariff to reflect the 5.34% carrying cost rate lawfully in effect from August 1, 2012 through June 29, 2016.

Respectfully submitted,



David F. Boehm, Esq.

Michael L. Kurtz, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: (513) 421-2255 Fax: (513) 421-2764

E-Mail: dboehm@BKLawfirm.com

mkurtz@BKLawfirm.com

jkylercohn@BKLawfirm.com

July 29, 2016

COUNSEL FOR THE OHIO ENERGY GROUP

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 29th July, 2016 to the following:



Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

COLUMBUS SOUTHERN POWER COMPANY
SELWYN J DIAS, VP REG & FINANCE
850 TECH CENTER DR
GAHANNA OH 43230

SATTERWHITE, MATTHEW
1 RIVERSIDE PLAZA 29TH FLOOR
COLUMBUS OH 43215

THE KROGER COMPANY
1014 VINE STREET
CINCINNATI OH 45202-1100

*ORAHOD, TERESA
BRICKER & ECKLER LLP
100 SOUTH THIRD STREET
COLUMBUS OH 43215-4291

*ALAMI, YAZEN MR.
AMERICAN ELECTRIC POWER COMPANY
1 RIVERSIDE PLAZA 29TH FLOOR
COLUMBUS OH 43215

*SCOTT, TONNETTA Y MRS.
OHIO ATTORNEY GENERAL
180 EAST BROAD STREET
COLUMBUS OH 43215

*MCBRIDE, LAURA C. MS.
ULMER & BERNE LLP
SKYLIGHT OFFICE TOWER 1660 WEST 2ND STREET, SUITE 1100
CLEVELAND OH 44113

*GOVAN, ANDREA P MS.
BRICKER & ECKLER LLP
100 S. 3RD STREET
COLUMBUS OH 43215

*BINGHAM, DEB J. MS.
OFFICE OF THE OHIO CONSUMERS' COUNSEL
10 W. BROAD ST., 18TH FL.
COLUMBUS OH 43215

*PETRICOFF, M HOWARD
VORYS SATER SEYMOUR AND PEASE LLP
52 E. GAY STREET P.O. BOX 1008
COLUMBUS OH 43216-1008

*BARGER, BRIAN P MR.
BRADY, COYLE & SCHMIDT, LTD.
4052 HOLLAND-SYLVANIA RD.
TOLEDO OH 43623

*SMITH, CHERYL A MS.
CARPENTER LIPPS & LELAND
280 N. HIGH STREET SUITE 1300
COLUMBUS OH 43081

*RINEBOLT, DAVID C MR.
OHIO PARTNERS FOR AFFORDABLE ENERGY
231 W LIMA ST PO BOX 1793
FINDLAY OH 45840-1793

*MALLARNEE, PATTI
THE OFFICE OF THE OHIO CONSUMERS COUNSEL
10 W. BROAD ST. SUITE 1800
COLUMBUS OH 43215

*LEACH-PAYNE, VICKI L. MS.
MCNEES WALLACE & NURICK LLC
21 E. STATE ST., 17TH FLOOR
COLUMBUS OH 43215

*VOGEL, ANNE M
AMERICAN ELECTRIC POWER SERVICE CORPORATION
1 RIVERSIDE PLAZA
COLUMBUS OH 43215

*BOJKO, KIMBERLY W. MRS.
CARPENTER LIPPS & LELAND LLP
280 NORTH HIGH STREET 280 PLAZA SUITE 1300
COLUMBUS OH 43215

*OLIKER, JOSEPH E. MR.
IGS ENERGY
6100 EMERALD PARKWAY
DUBLIN OH 43016

*NOURSE, STEVEN T MR.
AMERICAN ELECTRIC POWER SERVICE CORPORATION
1 RIVERSIDE PLAZA, 29TH FLOOR
COLUMBUS OH 43215

*RANDAZZO, SAMUEL C. MR.
MCNEES WALLACE & NURICK LLC
21 E. STATE STREET, 17TH FLOOR
COLUMBUS OH 43215

*MICHALSKI, DAVID J MR.
HAHN LOESER & PARKS LLP
200 PUBLIC SQUARE SUITE 2800
CLEVELAND OH 44114

*WHITT, MARK A
WHITT STURTEVANT LLP
THE KEY BANK BLDG 88 E BROAD ST STE 1590
COLUMBUS OH 43215

INTERSTATE GAS SUPPLY INC
MATTHEW WHITE
6100 EMERALD PARKWAY
DUBLIN OH 43016

*HAND, EMMA F MS.
DENTONS US LLP
1301 K STREET, NW SUITE 600, EAST TOWER
WASHINGTON DC 20005

STINSON, DANE
BRICKER & ECKLER
100 S. THIRD STREET
COLUMBUS OH 43215

SECHLER, JOEL E
CARPENTER LIPPS & LELAND LLP
280 PLAZA, SUITE 1300 280 NORTH HIGH ST
COLUMBUS OH 43215

*SPENCER, KEN MR.
ARMSTRONG & OKEY, INC.
222 EAST TOWN STREET 2ND FLOOR
COLUMBUS OH 43215

*PRITCHARD, MATTHEW R. MR.
MCNEES WALLACE & NURICK
21 EAST STATE STREET #1700
COLUMBUS OH 43215

YURICK, MARK S.
TAFT STETTINIUS & HOLLISTER LLP
65 EAST STATE STREET SUITE 1000
COLUMBUS OH 43215-4213

*DARR, FRANK P MR.
MCNEES, WALLACE & NURICK LLC
21 E. STATE STREET 17TH FLOOR
COLUMBUS OH 43215

HAND, EMMA F
SONNENSCHN NATH & ROSENTHAL LLP
1301 K STREET NW SUITE 600 EAST TOWER
WASHINGTON DC 20005

ETTER, TERRY
OHIO CONSUMERS' COUNSEL
10 W. BROAD STREET SUITE 1800
COLUMBUS OH 43215

OHIO FARM BUREAU FEDERATION
CHAD A. ENDSLEY
280 N. HIGH STREET, PO BOX 182383
COLUMBUS OH 43218-2383

ALEXANDER, N TREVOR

CALFEE HALTER & GRISWOLD LLP
41 S HIGH STREET 1200 HUNTINGTON CENTER
COLUMBUS OH 43215

BENTINE, JOHN
AMERICAN MUNICIPAL POWER , INC.
1111 SCHROCK ROAD SUITE 100
COLUMBUS OH 43229

GARBER, GRANT W
JONES DAY
PO BOX 165017 SUITE 600
COLUMBUS OH 43216-5017

UNITED WAY OF JEFFERSON COUNTY
501 WASHINGTON STREET P.O. BOX 1463
STEUBENVILLE OH 43952

MOONEY , COLLEEN L ATTORNEY
231 WEST LIMA STREET
FINDLAY OHIO 45840

DIRECT ENERGY BUSINESS LLC SR MGR OF GOV'T
& REG AFFAIRS
TERESA RINGENBACH
1001 LIBERTY AVENUE SUITE 1200
PITTSBURGH PA 15222

GRADY, MAUREEN
OFFICE OF CONSUMERS' COUNSEL
10 W. BROAD STREET SUITE 1800
COLUMBUS OH 43215-3485

SITES, RICHARD ATTORNEY AT LAW
OHIO HOSPITAL ASSOCIATION
155 EAST BROAD STREET 15TH FLOOR
COLUMBUS OH 43215-3620

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/29/2016 5:13:39 PM

in

Case No(s). 11-4920-EL-RDR, 11-4921-EL-RDR

Summary: App for Rehearing Ohio Energy Group (OEG's) Application for Rehearing and Memorandum in Support electronically filed by Mr. Michael L. Kurtz on behalf of Ohio Energy Group