

**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.)

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

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The Office of the Ohio Consumers' Counsel ("OCC") file this application for rehearing¹ to protect 1.2 million Ohio consumers from paying millions of dollars to subsidize AEP Ohio's generation. The Power Purchase Agreement Rider ("PPA Rider") is nothing more than a bailout of affiliate-owned power plants akin to the proposal that was halted in April 2016 by the Federal Energy Regulatory Commission ("FERC") decision. Consumers would be charged millions of dollars over eight years through a PPA Rider that was approved by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in its Fourth Entry on Rehearing, issued October 12, 2016. In its Fourth Entry on Rehearing, the PUCO approved, with modifications, an electric security plan ("ESP) for AEP Ohio.

The PUCO's October 12, 2016 Entry on was unreasonable and unlawful in the following respects:

¹ This application for rehearing is authorized under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

- ASSIGNMENT OF ERROR 1: The PUCO erred when it unlawfully and unreasonably approved a PPA rider without statutory authority to do so.
- ASSIGNMENT OF ERROR 2: The PUCO erred by unlawfully and unreasonably approving the PPA rider under R.C. 4928.143(B)(2)(d) when the Utility's application failed to include the mandatory statutory filing requirements of Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i).
- ASSIGNMENT OF ERROR 3: The PUCO's decision to defer ruling on the assignments of error related to PPA Rider is unjust and unreasonable because the PUCO does not have such authority.
- ASSIGNMENT OF ERROR 4: The PUCO's ruling that AEP Ohio is not required to comply with the corporate separation requirements of R.C. 4928.17 is unlawful and unreasonable.

Respectfully submitted,

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Application for Rehearing to protect 1.2 million Ohioans from paying subsidies to AEP Ohio² in the form of a PPA Rider. The Public Utilities Commission of Ohio ("PUCO") still has the ability to reconsider its unreasonable and unlawful decisions in this proceeding. The PUCO has approved a program for AEP Ohio to charge consumers, via above market prices, millions of dollars per year for the next eight years for uneconomic generation. Under AEP Ohio's PPA Rider the government (PUCO) would require customers to guarantee (via a subsidy) the utility profits on its generating units (AEP Ohio's OVEC interest).

The subsidization of Ohio's electric utilities by its consumers must stop. In 1999 the Ohio General Assembly approved Senate Bill 3 ("S.B. 3"), which replaced cost-based regulation with competitive markets for generation in Ohio. The fundamental idea behind

² AEP Ohio refers to Ohio Power Company.

S.B. 3 is that retail customers should not now be asked to protect Ohio electric utilities from competitive generation market risks or losses. AEP Ohio is now wholly responsible for whether it is in a competitive position in the generation market. AEP Ohio should not now be subsidized and bailed out by captive consumers. Such action would run counter to a competitive market. Instead, consumers should receive the benefits of competitive market pricing as the Ohio General Assembly intended in 1999.

OCC, on behalf of Ohio's residential energy consumers, submits this Third Application for Rehearing on the PUCO's Fourth Entry on Rehearing. The PUCO should issue decisions that support Ohio energy policy, markets, and the consumer protection that state policy for competitive electric generation markets provides. The PUCO should say "yes" to lower-priced, competitive electric prices for Ohio consumers and "no" to subsidized bailouts for electric utilities at consumer expense. To protect consumers, the public interest, and sound energy policy, the PUCO should rehear its decisions, consistent with this Application for Rehearing.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute permits "any party who has entered an appearance in person or by counsel in the proceeding" to apply for rehearing in respect to "any matters determined in the proceeding."

Applications for rehearing must be filed within thirty days of the PUCO's orders.

OCC filed a motion to intervene in this proceeding on December 24, 2013. OCC's motion to intervene was granted by Entry dated April 21, 2014. OCC also filed testimony regarding AEP Ohio's electric security plan ("ESP"). OCC actively participated in the evidentiary hearing and rehearing process.

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.” Additionally, Ohio Adm. Code 4901-1-35(A) states: “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 some portions of the Opinion and Order and modifying other portions are met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Fourth Entry on Rehearing.

III. ERRORS

ASSIGNMENT OF ERROR 1: The PUCO erred when it unlawfully and unreasonably approved a PPA rider without statutory authority to do so.

R.C. 4928.143(B)(2) allows ESP plans to include only those provisions listed in the statute. The Ohio Supreme Court has ruled that “[b]y its terms, R.C. 4928.143(B)(2) allows plans to include only ‘any of the following’ provisions. It does not allow plans to

include ‘any provision.’”³ So if a provision does not fit specifically within the statute, it is not authorized.

The PUCO, in its Order adopting the ESP in this case, was unable to find a statute that *permitted* AEP Ohio’s PPA charge. Instead, the PUCO found that nothing *prohibited* the PPA charge.⁴ The question cannot be if there is anything in the statute that *prevents* the PUCO from permitting the charge, but whether there is language in the statute that *permits* the PUCO to authorize the charge. The PUCO must have explicit authority to permit the charge.

In justifying the PPA charge under R.C. 4928.143(B)(2)(d), the PUCO stated that there is nothing in “R.C. Chapter 4928 that *prohibits* AEP from providing a generation service to shopping customer as part of an ESP, as long as such service is consistent with the terms of R.C. 4928.143(B)(2)(d).”⁵ It further stated that R.C. 4928.143(B)(2)(d) “does not *preclude* authorization of a [PPA] charge.”⁶

The Supreme Court has made it clear that “[i]t is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred it by the General Assembly.”⁷ In an earlier Columbus Southern Power Company rate case, the Court held that “[w]hile the General Assembly has delegated authority to the PUCO to set just and reasonable rates for public utilities under its jurisdiction, it has done so by providing a

³ *In Re Application of Columbus Southern Power Co.* (2011), 128 Ohio St.3d 512, 947 N.E.2d 655 at 664.

⁴ Fourth Entry on Rehearing at 23 ¶50.

⁵ *Id.* (emphasis added).

⁶ *Id.* (emphasis added).

⁷ *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835, citing *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 21 O.O.3d 96, 423 N.E.2d 820; *Werlin Corp. v. Pub. Util. Comm.* (1978), 53 Ohio St.2d 76, 7 O.O.3d 152, 372 N.E.2d 592; *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.* (1975), 43 Ohio St.2d 175, 72 O.O.2d 98, 331 N.E.2d 730.

detailed, comprehensive and, as construed by this court, mandatory ratemaking formula.”⁸

The rule announced by the General Assembly and affirmed by the Court – that the PUCO is a creature of statute with limited and defined powers – should be applied in this case. When the General Assembly delegated authority to the PUCO to set rates in an ESP, it did so by providing detailed, comprehensive, and mandatory statutory requirements. Those statutory requirements are contained in Chapter 4928. But instead of specifying what R.C. 4928.143 *allows*, the PUCO said in its order that there is nothing in the statute that *prohibits*⁹ or *precludes*¹⁰ authorization.

The Court has explained that “[t]he comprehensive ratemaking formula provided by the General Assembly is meant to protect and balance the interests of the public utilities and their ratepayers alike.”¹¹ In authorizing the PPA rider, the PUCO – by its own admission – has exceeded its authorized powers. The PUCO, as an agency created by statute, must specify a statute that *permits* it to add the PPA charge on customers’ bills, not simply say that nothing *prevents* it.

The PUCO should grant rehearing on Assignment of Error No. 1.

⁸ *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835 at 838.

⁹ Fourth Entry on Rehearing at 23 ¶50.

¹⁰ *Id.*

¹¹ *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835, at 841, citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1980), 4 Ohio St.3d 91, 447 N.E.2d 733.

ASSIGNMENT OF ERROR 2: The PUCO erred by unlawfully and unreasonably approving the PPA rider under R.C. 4928.143(B)(2)(d) when the Utility’s application failed to meet the mandatory statutory filing requirements of Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i).

The PUCO itself has recognized that AEP Ohio failed to comply with mandatory filing requirements. It stated that “Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i) requires an ESP application to include a descriptive rationale and other information for any component of the ESP that would have the effect of limiting customer shopping.”¹² But then said that “the Company was not required to comply with the rule.”¹³ The PUCO said in its order that “although Ohio Adm. Code 4901:1-35-09(C)(9)(c)(i) requires an ESP application to include a descriptive rationale and other information for any component of the ESP that would have the effect of limiting customer shopping, AEP Ohio did not propose the PPA rider, at the time of filing of its ESP application, as a limitation on customer shopping for retail electric generation service and, therefore, the Company was not required to comply with the rule.”¹⁴

The PUCO is a creature of statute and only has authority provided to it under Ohio law.¹⁵ Statutes and, absent a waiver,¹⁶ rules governing ESPs are not optional; not even for the PUCO. The PUCO cannot rewrite the law.¹⁷ It must abide by the laws of the

¹² Entry at 22 ¶49.

¹³ Id.

¹⁴ Id.

¹⁵ *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.

¹⁶ AEP Ohio did not obtain a waiver of Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i).

¹⁷ *In re: Application of Columbus S. Power Co.*, Slip Opinion No. 2-016-Ohio-1608, par 49 (“[i]n construing a statute, we may not add or delete words.”), citing *State ex rel. Cincinnati Bell Tel. Co. v. Publ. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N. E.2d 68, ¶32.

state of Ohio. In this case the PUCO erred when it failed to require AEP to comply with Ohio Adm. Code 4901:1-35-03(C)(9)(c)(i).

If AEP Ohio is seeking to collect money from its customers, governing regulations mandate that AEP must set forth that component in the ESP application and include a descriptive rationale regarding that component.¹⁸ The rule is not optional, and requires the following:

(C) An SSO application that contains a proposal for an ESP *shall* comply with the requirement set forth below.

(9)(c) Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, *shall* include, at a minimum, the following information:

(i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification *shall* be provided.

(ii) a description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, which will be deferred of future recovery, together with the carrying costs, amortization periods, and avoidability of such charges.

(iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.¹⁹

The PUCO approved the PPA rider as a purported limitation on customer shopping. Ohio Adm. Code 4901:1-35-03(C)(9)(c), issued under the authority of R.C. 4928.143, clearly require that *any* application filed pursuant to R.C. 4928.143 *must*

¹⁸ See Rule 4901:1-35-03(C)(9)(c).

¹⁹ Ohio Adm. Code 4901:1-35-03(C) and 4901:1-35-03(C)(9)(c)(emphasis added).

include a listing of all components that have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. AEP Ohio never asserted that the PPA rider would prevent, limit, or inhibit customer shopping for retail generation service in its application. In fact, as the PUCO acknowledged, “AEP Ohio witness Allen, did, at one point, testify that he believes that the PPA rider, as proposed, is *not* a limitation on customer shopping.”²⁰ And there was no waiver granted, let alone requested, of mandatory Ohio Adm. Code 4901:1-35-03(C)(9)(c).

The PUCO’s reliance on an intervening party’s testimony is insufficient to remedy the problems with AEP Ohio’s application.²¹ In order to comply with Ohio Adm. Code 4901:1-35-03(C)(9)(c), the *application* had to include the PPA component and it did not. What the PUCO established by shoe-horning the PPA into the ESP at a later date constitutes regulation by ambush. Governing regulation requires that parties be made aware – in a utility’s application – of what a utility is proposing. Such notice is crucial to parties’ ability to prepare a case and, by extension, the PUCO’s ability to understand the case based on a robust record. That is why the language is mandatory. The PUCO cannot avoid this requirement. AEP Ohio’s application did not contain the mandatory filing requirements. It was fatally inadequate.

The PUCO unreasonably ruled that the PPA rider is a limitation on customer shopping for retail generation service under R.C. 4928.143(B)(2)(d). The PUCO unreasonably relied upon an intervening party’s testimony when Ohio Adm. Code 4901:1-35-03(C)(9)(c) requires that AEP Ohio include specific filing requirements in its

²⁰ See *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385, Opinion and Order at 22 February 25, 2015) (emphasis added).

²¹ See *id.* at 22 (relying on OEG Witness Taylor’s testimony).

application. AEP Ohio's failure to comply with the mandatory filing requirements of Ohio Adm. Code 4901:1-35-03(C)(9)(c) cannot be remedied after-the-fact through hearing.

The PUCO should grant rehearing on Assignment of Error No. 2.

ASSIGNMENT OF ERROR 3: The PUCO's decision to defer ruling on the assignments of error related to the PPA rider is unjust and unreasonable because the PUCO does not have such authority.

On May 28, 2015, the PUCO, by Second Entry on Rehearing, granted, in part, and denied, in part, the applications for rehearing filed regarding the ESP 3 Order. The PUCO, however, deferred ruling on the assignments of error related to AEP Ohio's PPA rider, which was approved in the ESP 3 Order as a placeholder rider set at zero.

In later applications for rehearing, various parties, including the OCC, stated that the PUCO erred when it deferred ruling on the assignments of error related to the PPA rider because the PUCO had no authority to do so under R.C. 4903.10. In the Fourth Entry on Rehearing, the PUCO denied these assignments of error. First, the PUCO found that these arguments were moot because it had already addressed the assignments of error related to the PPA Rider.²² Further, the PUCO ruled that deferring ruling was within its authority to manage its dockets.²³ Finally, the PUCO stated that, contrary to OCC's position, nothing in R.C. 4903.10 *precluded* the PUCO from considering the applications for rehearing in a bifurcated fashion.²⁴

²² See PUCO Fourth Entry on Rehearing at ¶94.

²³ Importantly, the PUCO does not state which Ohio Revised Code provision gives it the authority to defer ruling on an application for rehearing. See Fourth Entry on Rehearing at ¶94.

²⁴ See Fourth Entry on Rehearing at ¶94.

The PUCO's ruling is unlawful and unreasonable because it is not authorized by statute to consider the parties' applications for rehearing in a bifurcated fashion. The PUCO is a creature of statute.²⁵ It may only exercise the authority conferred on it by the General Assembly.²⁶ The PUCO cannot rewrite the law.²⁷ The PUCO's justification that nothing in the R.C. 4903.10 *prevents* it from deferring a ruling is wrong. The PUCO may only do what it is *authorized* by statute to do. Nothing in R.C. 4903.10, or any other statute, authorizes the PUCO to bifurcate the parties' applications for rehearing. The PUCO has exceeded its authorized powers.

The PUCO should grant rehearing on Assignment of Error No. 3.

ASSIGNMENT OF ERROR 4: The PUCO's ruling that AEP Ohio is not required to comply with the corporate separation requirements of R.C. 4928.17 is unlawful and unreasonable.

In the latest applications for rehearing, several parties argued that AEP's PPA rider allows AEP to unlawfully evade R.C. 4928.17's corporate separation requirements.²⁸ R.C. 4928.17(A) states, in part:

Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric

²⁵ *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.

²⁶ See *Disc. Cellular, Inc. v. PUC*, 112 Ohio St. 3d 360, 373 (2007).

²⁷ *In re: Application of Columbus S. Power Co.*, Slip Opinion No. 2-016-Ohio-1608, par 49 ("[i]n construing a statute, we may not add or delete words."), citing *State ex rel. Cincinnati Bell Tel. Co. v. Publ. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N. E.2d 68, ¶32.

²⁸ Fourth Entry on Rehearing at 23.

service, **unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section....**²⁹

Specifically, Constellation and RESA state that the ESP 3 Order is unlawful to the extent that it approves a PPA rider without prior PUCO approval of a corporate separation plan under R.C. 4928.17(A). RESA contends that the OVEC PPA was not provided to the PUCO for its review, and, therefore, the PUCO cannot determine whether the agreement extends any undue preference or advantage, as required by R.C. 4928.17(A)(3).

In the Fourth Entry on Rehearing the PUCO denied these assignments of error. In doing so, the PUCO must have interpreted R.C. 4928.17 to mean that a utility's compliance with the corporate separation statute is required unless the proposed program is authorized under sections 4928.142 or 4928.143.³⁰ Because it found that the PPA Rider was authorized under R.C. 4928.143(B)(2)(d), the PUCO found that the exception in 4928.17 applied and it had not erred.³¹

The PUCO's ruling is unreasonable and unlawful. The PUCO has misinterpreted the statute. A plain reading of R.C. 4928.17 requires that the PUCO identify language in R.C. 4928.143 or 4928.142 that demonstrates that the corporate separation provisions do not apply. The PUCO did not do that. Instead, the PUCO interpreted the statute to mean that R.C. 4928.17 does not apply if the proposed program satisfies the conditions in R.C. 4928.142 or R.C. 4928.143. Such a reading could not possibly comply with the General Assembly's intention when it wrote the statute. Indeed, such a tortured reading of the statute would nullify R.C. 4928.17 regarding the majority of proposed programs. We

²⁹ R.C. 4928.17 (emphasis added).

³⁰ Fourth Entry on Rehearing at 24.

³¹ Fourth Entry on Rehearing at 23.

must presume that the General Assembly intended a "just and reasonable result" in enacting a statute.³²

A plain reading of R.C. 4928.17 and R.C. 4928.143(B)(2)(d), and reading the statutes in *pari materia*, would require that the program proposed under the latter meets the requirements of the former. That is not the case here.

The PUCO should grant rehearing on Assignment of Error No. 4.

IV. CONCLUSION

The PUCO should grant rehearing on OCC's claims of error and modify or abrogate its October 12, 2016, Fourth Entry on Rehearing. Granting rehearing as requested by OCC is necessary to ensure that AEP Ohio customers are not subject to unreasonable and unlawful charges. These unlawful charges would include an ESP plan that does not produce lower prices than a market rate offer and a government ordered subsidy of utility generation by customers that, under the law, should be enjoying the fiscal benefits of Ohio's competitive generation market. In order to protect Ohioans, the OCC requests that the PUCO rehear its Fourth Entry on Rehearing, consistent with this application for rehearing.

³² R.C. 1.47(c); *Disc. Cellular, Inc. v. PUC*, 112 Ohio St. 3d 360, 367 (2007).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Application for Rehearing was served via electric transmission upon the parties this 5th day of December 2016.

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Summary: App for Rehearing Third Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.