

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Ohio Power Company to Update	)	Case No. 17-1156-EL-RDR
Its gridSMART Phase 2 Rider Rates	)	

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

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On January 29 2018, Ohio Power Company (AEP Ohio) filed an update to its gridSMART Phase 2 Rider, which updates the rider to reflect actual Phase 2 O&M spending and capital carrying charges from October through December 2017. Pursuant to the Commission’s February 1, 2017 Opinion and Order in Case No. 13-1939-EL-RDR, the Company’s quarterly update filing is automatically approved 30 days after filing unless otherwise ordered by the Commission. On February 5, 2018, the Office of the Ohio Consumers’ Counsel (OCC) filed comments opposing the Company’s filing and proposing alternative tariff language. On February 20, 2018, AEP Ohio filed reply comments opposing the OCC’s tariff language and indicating that Staff and the Company have been working on tariff language to address the Tax Cuts and Jobs Act of 2017 (“TCJA”) and the Supreme Court’s recent decision in *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (“*Ohio Edison*”). On February 23, the Company’s proposed tariff language was filed, which Staff endorsed through a February 26 filing in this docket:

This Rider is subject to reconciliation, including, but not limited to, refunds to customers, based upon the impact of the carrying charge rate

recovered through this Rider of changes in Federal corporate income taxes due to the Tax Cuts and Jobs Act of 2017 or based upon the results of audits ordered by the Commission in accordance with the February 1, 2017 Opinion and Order in Case No. 13-1939-EL-RDR.

The additional tariff language proposed by the Company in this case is consistent with the language proposed in several other AEP Ohio rider cases – all of which have been coordinated with Staff *See* Case Nos. 18-96-EL-RDR (Basic Transmission Cost Recovery Rider), 17-1156-EL-RDR (gridSMART Phase 2), 14-1696-EL-RDR (Distribution Investment Rider), 15-1052-EL-RDR (Advanced Energy Rider), 18-440-EL-ATA (Energy Efficiency/Peak Demand Reduction Rider), 18-441-EL-ATA (Enhanced Service Reliability Rider), 18-375-EL-RDR (Pilot Throughput Balancing Adjustment Rider), 15-1052-EL-RDR (Auction Cost Recovery Rider), and 18-191-EL-RDR (Economic Development Rider). On February 28, the Commission issued a Finding and Order to reject OCC's objections and approve the Company's tariff language. OCC filed an application for rehearing on March 30 to challenge the Finding and Order.

While OCC claims (at 2) that the Company's proposed tariff language is "limited in scope" and "does not protect consumers from unforeseen circumstances," the Commission has already approved the same language for the DIR and PPA Rider, adopting the language over OCC's similar objections. *See AEP Ohio Distribution Investment Rider Update*, Case No. 14-1696-EL-RDR, Finding and Order at 4-5 (Feb. 21, 2018); *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into An Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR *et al.* Finding and Order at 4-5 (Apr. 4, 2018). Of course, the Commission's Finding and Order in this case also adopted the language over OCC's objections. Finding and Order at 4-5. The

Commission agreed with both the Company and Staff in finding that the approved tariff language properly addressed both the Tax Cut and Jobs Act of 2017 and the *Ohio Edison* reconciliation issue. Id. The Commission went on to find that

AEP Ohio's revised proposed tariffs are consistent with the Commission's prior directives and make clear that the gridSMART Phase 2 Rider is subject to reconciliation and adjustment. We, therefore, find that AEP Ohio's amended gridSMART Phase 2 Rider tariffs should be approved, effective with the first billing cycle of March 2018.

Finding and Order at 4-5.

Indeed, the proposed tariff language properly addresses the issue presented by the Supreme Court's decision in the *Ohio Edison* case. In explicit terms, the tariff renders the gridSMART Phase 2 Rider subject to reconciliation, including for audits ordered in the *ESP III* and *PPA Rider* decisions. And the tariff language confirms that the appropriate reconciliation of the carrying charge will occur to reflect the TCJA of 2017. Hence, the Company's proposed tariff language fully resolves the issue presented by the *Ohio Edison* decision and the TCJA, as the Commission found.

But OCC's quarry here is different. OCC is trying to achieve something well beyond addressing the implications of the Supreme Court's *Ohio Edison* decision. In reality, OCC's proposed tariff language is an untimely and unlawful attempt to circumvent the controlling statutory process for challenging the legality of rates. And it is too late for OCC to pursue any challenge of the gridSMART Phase 2 Rider, not to mention the fact that OCC agreed not to oppose the gridSMART Phase 2 settlement as part of its support of the Global Settlement (Case Nos. 10-2929-EL-UNC, *et al.*)

OCC's proposed tariff language is also inappropriate because it would circumvent the established requirements under R.C. 4903.16 for staying a Commission order to

preserve the outcome of an appeal before the Supreme Court. R.C. 4903.16 as the part of the comprehensive statutory scheme governing requests to suspend a Commission decision results in OCC's request being unlawful. The statute requires an undertaking conditioned for the prompt payment of all damages caused by the delay in enforcement of the order complained of by the appellant on appeal. The statutory prerequisite of an undertaking is not an option or suggestion. An appellant such as OCC must file an undertaking in order for the Court to stay execution of or "suspend" an order. The Court has repeatedly reiterated the requirement to post a bond to secure a stay under R.C. 4903.16. *Office of Consumers' Counsel v. Public Util. Comm.*, 61 Ohio St. 3d 396, 403, 575 N.E.2d 157 (1991); *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 112, 163 N.E.2d 167 (1959); *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465 (1957). In the *Office of Consumer's Counsel* decision, the Court applied this requirement directly to a stay request filed by OCC. Specifically, the Court stated that "R.C. 4903.16 provides for the procedure that must be followed when seeking a stay of a final order of the Commission." *Id.* at 403.

In sum, aside from being designed to circumvent the Commission's existing rulings on this point and "end run" the controlling process governing Supreme Court appeals (under RC 4901.16), the OCC's continuing objection here is also a pointless academic exercise given the OCC's acceptance of the gridSMART Phase 2 Rider itself.

## **CONCLUSION**

For the foregoing reasons, the Commission should reject OCC's application for rehearing.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 9th day of April, 2018, via electronic mail .

/s/ Steven T. Nourse

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Summary: Memorandum -Ohio Power Company's Memorandum Contra the Application for Rehearing of the Office of Ohio Consumers' Counsel electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company