

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. 16-1852-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.)))	Case No. 16-1853-EL-AAM

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Ohio Power Company for Authority to)
Establish A Standard Service Offer) Case No. 16-1852-EL-SSO
Pursuant to R.C. 4928.143, In the Form of)
an Electric Security Plan.)

In the Matter of the Application of Ohio)
Power Company for Approval of Certain) Case No. 16-1853-EL-AAM
Accounting Authority.)

APPLICATION FOR REHEARING

The Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing¹ to protect the 1.2 million residential consumers of the Ohio Power Company ("AEP") from paying potentially hundreds of millions of dollars in charges under an unlawful and unreasonable Electric Security Plan ("ESP"). Most consumers will not use or benefit from programs approved as part of the ESP, even though all consumers will be forced to subsidize them. And consumers will be forced to subsidize renewable generation even though AEP has not shown that such generation is needed.

On December 14, 2015, AEP filed a settlement in Case No. 14-1693-EL-RDR that, among other things, established charges under the Power Purchase Agreement Rider ("PPA Rider") and set the rider's term to extend through May 31, 2024.² In the settlement, AEP agreed to file a separate application with the PUCO to, along with other proposals, extend the term of ESP 3 to coincide with the term of the PPA Rider, through

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

² 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-EL-SSO, September 7, 2016 Entry at 2.

May 31, 2024.³ The PUCO adopted the settlement, with certain modifications, on March 31, 2016.⁴ On May 13, 2016, AEP filed an application in Case No. 13-2385-EL-SSO to amend its ESP to, among other things, extend its term through May 31, 2025.⁵ To “avoid an unnecessarily extensive and potentially confusing record in the ESP 3 Case and to eliminate possible confusion for customers,” AEP was ordered to refile its application to extend ESP 3 in this docket, consistent with the settlement in Case No. 14-1693-EL-RDR approved in a separate docket.⁶

AEP filed what it described as an Amended Application on November 23, 2016.⁷ On August 25, 2017, AEP filed a settlement.⁸ The settlement was adopted and approved, as modified, by the PUCO on April 25, 2018.⁹ In response to various applications for rehearing, the PUCO issued an Entry on Rehearing, granting rehearing for further consideration of the matters specified in the applications for rehearing.¹⁰ AEP filed tariff sheets in compliance with the PUCO orders and entries.¹¹ Accordingly, AEP is now charging customers under an ESP that is currently on rehearing.

³ *See id.*

⁴ *See id.* at 3.

⁵ *See id.*

⁶ *See id.*

⁷ *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. 16-1852-EL-SSO, November 23, 2016.

⁸ *See id.* at Joint Stipulation and Recommendation, August 25, 2017.

⁹ *See id.* at Opinion and Order, April 25, 2018.

¹⁰ *See* PUCO Entry on Rehearing, Case No. 16-1852-EL-SSO, June 20, 2018.

¹¹ *See, e.g.*, Docket at May 4, 2018; May 8, 2018; May 30, 2018; and May 31, 2018.

To protect consumers, OCC files this application for rehearing regarding the PUCO's Entry on Rehearing. The Entry on Rehearing harms customers and is unreasonable and unlawful in the following respect:

Assignment of Error: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order, all without ordering rates be collected from customers subject to refund. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Entry on Rehearing delays judicial review of its order adopting and approving the settlement. It precludes parties from exercising their rights to appeal a PUCO order to the Supreme Court of Ohio ("Court") -- a right that is established under R.C. 4903.10, 4903.11 and 4903.13.

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 Entry on Rehearing as requested by OCC.

Respectfully submitted,

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I. INTRODUCTION

The Public Utilities Commission of Ohio (“PUCO”) still has the ability in this proceeding to protect 1.2 million Ohioans from paying massive unwarranted charges to AEP to subsidize programs that most consumers will not use and are unnecessary. Requiring all consumers to pay for electric vehicle charging stations and microgrids, even though most of them will not use either, is unreasonable and unlawful. And approving a charge for renewable generation, when AEP made no showing that such generation is necessary, is unreasonable and unlawful. Although the precise cost of such charges is unknown, because AEP did not know the costs, it could be in the hundreds of millions of dollars.

The OCC, on behalf of Ohio's residential energy consumers, submits this application for rehearing on the PUCO's Entry on Rehearing. Because the PUCO's decision violated Ohio law and the policy underlying the law, OCC seeks rehearing.

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, which was granted. OCC also filed testimony regarding the settlement and participated in the evidentiary hearing on the settlement.

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: “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 Entry and modifying other portions is met here. The PUCO should grant and hold rehearing on the matters specified in this Application for Rehearing, and subsequently abrogate or modify its Entry. The PUCO’s ruling was unreasonable or unlawful in the following respects.

III. ASSIGNMENT OF ERROR

Assignment of Error: The PUCO erred by granting rehearing to allow itself more time to issue a final appealable order, all without ordering rates be collected from customers subject to refund. By doing so, the PUCO fails to fulfill its duty to hear matters pending before it without unreasonable delay and with due regard to the rights and interests of all litigants before it. The PUCO's Entry on Rehearing delays judicial review of its order adopting and approving the settlement. It precludes parties from exercising their rights to appeal a PUCO order to the Ohio Supreme Court -- a right that is established under R.C. 4903.10, 4903.11 and 4903.13.

The Supreme Court of Ohio has held that, "[i]t is the duty of the commission to hear matters pending before the commission without unreasonable delay and with due regard to the rights and interests of all litigants before that tribunal."¹² This duty is described, with defined parameters, under R.C. 4903.10.

Under R.C. 4903.10, the General Assembly established a 30-day process for the PUCO to either grant or deny rehearing. Under the statute, if the PUCO does not grant or deny the applications within 30 days, the applications are denied by operation of law. This provision is to ensure that the PUCO resolved applications in timely manner--30 days under the statute. The statute is designed to enforce the axiom that "justice delayed is justice denied."¹³

The timely resolution of applications for rehearing (within 30 days) is important because an order of the PUCO cannot be appealed as a "final order" until the PUCO has substantively ruled on all rehearing applications or the rehearing has been denied by

¹² *State ex rel. Columbus Gas & Fuel Col. v. Pub. Util. Comm.*, 122 Ohio St. 473, 475 (1930).

¹³ *See, e.g., Moeller v. Moeller*, 1993 Ohio App. LEXIS 50 (C.A. 9th Dist.) (finding that a similar statute, R.C. 2701.02, setting forth the time limit in which courts must render decisions on certain matters, was designed to enforce the axiom that "justice delayed is justice denied.")

operation of law.¹⁴ Yet while the Entry on Rehearing is not a final appealable order, customers are being charged rates that are being challenged on rehearing.¹⁵ This happens because under Ohio law the PUCO has authority to implement its Order, regardless of challenges made through the rehearing process. The law (R.C. 4903.10) makes clear that the filing of an application for rehearing does not excuse compliance with the order or operate to stay or postpone enforcement of the order.

The PUCO, however, has routinely been exceeding the 30-day review by instead employing a process under which rehearing has been extended by months, and in some cases, even years.¹⁶ And while the Court has ruled that the PUCO may grant applications for rehearing for the limited purpose of allowing additional time to consider them,¹⁷ the

¹⁴ See R.C. 4903.11.

¹⁵ There are few exceptions to this. The exceptions provide that through a special order of the PUCO, the filing of an application may stay the order. Also, if parties file an application prior to the effective date of the order the order is stayed, "unless otherwise ordered by the commission."

¹⁶ See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO (Sixth Entry on Rehearing) (December 7, 2016) (granting rehearing allowing PUCO more time to consider OCC/NOAC and others' application for rehearing); *In the Matter of the Application of Ohio Power Company*, Case No. 13-2385, Third Entry on Rehearing (July 27, 2015)(granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). A substantive Entry on Rehearing was finally issued on November 3, 2016, more than a year later. *In re: Duke Energy Ohio*, Case No. 14-841-EL-SSO, Entry on Rehearing (May 28, 2015) (granting rehearing allowing PUCO more time to consider OCC and others' application for rehearing). *In the Matter of the Application of The Dayton Power and Light Company for Authority to Issue and Sell and Amount Not to Exceed \$490 Million of First Mortgage Bonds, Debentures, Notes, or Other Evidences of Indebtedness or Unsecured Note*, Case No. 13-0893-EL-AIS, Entry on rehearing (Sept. 4, 2013) (Granting application for rehearing filed by OCC for the limited purpose of further consideration) No final entry. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013-2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR, and 12-2192-EL-POR, Entry on rehearing (Jan. 14, 2015)(Granting the application for rehearing by FirstEnergy, OCC, OMAEG, and Environmental Groups be granted for further consideration) No final entry. *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider*, Case No. 14-1186-EL-RDR, Entry on Rehearing (May 28, 2015)(Granting application for rehearing by The Kroger Company and Joint Applicants, including OCC, for further consideration).

¹⁷ See, *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, (2004), 102 Ohio St.3d 301, 304.

Court's ruling is being unreasonably applied in a manner that impedes timely judicial review of PUCO rulings, prejudicing would-be appellants. Judicial review can be thwarted when rehearings are granted for allowing more time (months or even years) for consideration. While rehearing remains pending, the utility continues to collect uneconomic subsidies costing consumers millions of dollars.¹⁸ Compounding the harm to customers is the PUCO's failure to order the charges to customers be collected subject to refund.

Delaying judicial review matters to Ohioans because of Court precedent¹⁹ that generally precludes refunds to customers for rates already charged. Each day that the PUCO delays issuing a final order, is a day that rates are charged to customers without an opportunity to stop these unnecessary charges and without a likely recourse to a refund for customers.

The delay in ruling upon OCC's application for rehearing harms customers because customers must pay increased rates that are not paid subject to refund or not stayed. The delay in a substantive ruling on OCC's latest application for rehearing forecloses OCC from seeking relief from the Supreme Court of Ohio, including relief (non-payment of disputed rates) by staying the charge of rates. While OCC may pursue extraordinary relief²⁰ from the Court, even without a ruling on rehearing, that relief is

¹⁸ A factor that contributes to harm to customers is that the PUCO as a matter of course denies requests to stay rates or collect rates subject to refund. A ruling granting a stay of rates, or collecting rates subject to refund, would potentially limit the harm to customers that is occurring when the PUCO delays issuing a final order. Typically, the PUCO has not ordered such relief.

¹⁹ *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St.3d 254, 257 (1957).

²⁰ Through a writ of procedendo or prohibition.

generally unavailable. Based on past experience,²¹ the Court will deny such relief on the theory that there is an "adequate remedy at law" -- an appeal from the eventual PUCO final order.

Rehearing should be granted (or denied), substantively addressing OCC's latest application for rehearing. A final appealable order should be issued. Granting more time to consider issues raised on rehearing unreasonably delays the issuance of a final order all the while customers are paying higher, unwarranted charges. Under the PUCO's practice, there is no denial of the application for rehearing, either by law or by entry. Thus, there is no final order. This makes it impossible for parties to exercise their rights under R.C. 4903.11 and 4903.13 to appeal PUCO decisions to the Court. And because the PUCO has not ordered a stay of the rates, its rulings unduly delay any relief customers can seek, resulting in immediate and material harm to customers.²²

An OCC application for rehearing, very similar to this one, was recently denied by the PUCO in FirstEnergy's²³ ESP proceeding.²⁴ The PUCO denied OCC's application for rehearing for two main reasons, both of which are not applicable to this proceeding. First, the PUCO stated that the sheer complexity of the proceedings and volume of record

²¹ See, e.g., *State of Ohio ex rel. OCC et al. v. Alan R. Schriber et al.*, Case No. 2009-0710, Entry (June 17, 2009) (denying the writ of prohibition because the issues raised in the complaint could be resolved on appeal).

²² PUCO Fourth Entry on Rehearing at 38, Case No. 13-2385-EL-SSO, et al., (November 3, 2016); PUCO Second Entry on Rehearing at 78, Case No. 14-1693-EL-RDR, et al., (November 3, 2016).

²³ "FirstEnergy" consists of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

²⁴ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, PUCO Seventh Entry on Rehearing (February 1, 2017) (While the OCC does not agree with the PUCO's decision in the Seventh Entry on Rehearing, the current application for rehearing should not be misconstrued as a collateral attack on the PUCO's Seventh Entry on Rehearing).

evidence is a “quintessential example” of the reason why the PUCO has authority to grant rehearing for the limited purpose of further consideration.²⁵ For example, the PUCO noted that there were 11 applications for rehearing to consider on a record that spanned 51 days of hearing. The PUCO stated that granting rehearing without thorough review of the arguments raised in the applications for rehearing would be irresponsible and of no value to any of the parties to the proceeding.²⁶

Such rationale lacks merit and applicability to the present case. OCC’s chief concern here is not with the pace at which the PUCO issues its orders. Indeed, the OCC fully supports the PUCO’s efforts to issue just and reasonable decisions. However, when requests to have charges stayed or implemented subject to refund are denied, coupled with the inability to appeal the issue or compel refunds for rates already charged, then the PUCO’s lengthy decision-making process produces an unjust and unreasonable situation. If the PUCO wishes to grant itself more time to consider the issues, then it should likewise grant more time before the rates from those issues can be charged to Ohio consumers. Otherwise consumers are being subject to immediate and irreparable material harm though the ongoing payment of unwarranted charges.

In addition, the PUCO’s rationale that it needed more time to review the 11 applications for rehearing on a record spanning 51 days of hearing is not applicable here. Here, only three applications for rehearing were filed. And those three applications for rehearing contained less than 15 assignments of error between them. In addition, naturally, the issues in each successive application for rehearing become smaller in

²⁵ PUCO Seventh Entry on Rehearing at 5, Case No. 14-1297-EL-SSO (Feb. 1, 2017).

²⁶ PUCO Seventh Entry on Rehearing at 5, Case No. 14-1297-EL-SSO (Feb. 1, 2017).

number and more focused in content. Here, the PUCO did not have to wade through a dozen applications for rehearing containing a multitude of broad and technical arguments. The issues were few, clear, and concise.

The PUCO's second reason for denying OCC's application for rehearing in the FirstEnergy ESP proceeding was that no party was prejudiced by the granting of rehearing because the charges OCC complained of did not take effect until January 1, 2017.²⁷ The same is not true in this proceeding.²⁸ Here, residential consumers, who are being charged under the extended ESP, were being prejudiced when the Entry on Rehearing was issued and are being prejudiced now.

The PUCO should not be able to deter judicial review of its decisions by failing to issue a timely final appealable order. Rehearing should be granted, with the PUCO issuing substantive findings on OCC's claimed errors, so that a final appealable order is issued. This will allow parties to exercise their statutory rights to appeal the PUCO's decisions.

IV. CONCLUSION

To protect customers from unnecessary charges, the PUCO should grant rehearing and abrogate or modify its Entry on Rehearing. This would ensure that parties, including OCC, can exercise their statutory right to appeal the PUCO decisions in a timely manner. Such action will help to protect the interests of the residential customers that OCC represents.

²⁷ PUCO Seventh Entry on Rehearing at 5, Case No. 14-1297-EL-SSO (Feb. 1, 2017).

²⁸ OCC is not conceding that the same is true in Case No. 14-1297-EL-SSO.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Second Application for Rehearing was served on the persons stated below via electronic service, this 20th day of July 2018.

/s/ William J. Michael

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Summary: App for Rehearing Second 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.