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 Pursuant to Section 4928.143, Revised Code, 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

OHIO POWER COMPANY'S MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S SECOND APPLICATION FOR REHEARING

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I. INTRODUCTION

On April 25, 2018, the Public Utilities Commission of Ohio (Commission) modified and adopted the August 25, 2017 Joint Stipulation and Recommendation (Stipulation). On May 25, 2018, multiple parties filed applications for rehearing in these proceedings, including Ohio Power Company (AEP Ohio), Retail Energy Supply Association (RESA), Interstate Gas Supply, Inc. (IGS) and the Office of the Ohio Consumers' Counsel (OCC). On June 20, 2018, the Commission issued an Entry on Rehearing granting all of the applications for rehearing for further consideration of the matters raised. A mere thirty days later, OCC complains that the Commission has taken too long to consider the rehearing arguments, even though OCC acknowledges that the Commission is legally permitted to grant rehearing for the purpose of further consideration. The Commission should deny OCC's second application for rehearing of the Commission's June 20, 2018 Entry on Rehearing, for the reasons explained below.

II. LAW AND ARGUMENT

The 30-day period for an initial rehearing decision under R.C. 4903.10 has no application once the rehearing is granted; the statute simply does not impose a timeline or mandatory deadline for the Commission to complete the additional process and issue a substantive decision on issues raised on rehearing after it has granted rehearing to fully consider those issues. Moreover, although OCC is narrowly concerned about a subset of its own rehearing arguments being quickly decided, OCC ignores that the Commission will also need to address other parties' rehearing arguments. The brief time the Commission has taken thus far to consider the multiple rehearing applications presented in this case cannot be properly characterized as unreasonable or unduly dilatory.

OCC's own pleading sets forth the key reasons the Commission should reject OCC's application for rehearing. First, OCC acknowledges (Memo in Support at 4) that the "Entry on Rehearing is not a final appealable order" and "under Ohio law the PUCO has authority to implement its Order, regardless of challenges made through the rehearing process." Next, OCC admits (*id.*) that the Supreme Court of Ohio "has ruled that the PUCO may grant applications for rehearing for the limited purpose of allowing additional time to consider them" – though OCC goes on to second-guess the Commission's exercise of its own discretion. Finally, OCC points out (*id*. at 5-6) that it may pursue extraordinary relief from the Supreme Court if OCC believes the Commission is exceeding its statutory authority. Thus, from a legal perspective, OCC's own pleading acknowledges that granting rehearing for further consideration is permitted and that the decision is not final and appealable until the Commission issues a final rehearing ruling on all of the pending rehearing applications.

This conclusion holds true even if the Commission were to rule on OCC's application for rehearing before addressing the other rehearing applications. In other words, the decision is not final and appealable until the last rehearing request is ruled upon. The Supreme Court has characterized the integrated rehearing process, found in R.C. 4903.10 and 4903.11, as follows:

> [B]oth R.C. 4903.10 and 4903.11 are jurisdictional. Therefore, because R.C. 4903.10 links all the parties through notice requirements and because an order issued after a rehearing may modify or even abrogate previously issued orders, we construe it to establish the rehearing process as an integrated whole, with each application for rehearing potentially affecting the position of other parties to the proceedings.

Senior Citizens Coalition v. Public Utilities Com., 40 Ohio St. 3d 329, 333, 533 N.E.2d 353 (1988) (citations omitted). The Court in *Senior Citizens* concluded that the combined effect of R.C. 4903.10 and 4903.11 is to "link all parties in the rehearing process following issuance of the commission's original order and, in effect, hold the original order hostage to the outcome of the

final rehearing." *Id*. at 332-333. Thus, while OCC may be uncomfortable waiting, it is stuck with the situation until the Commission rules on all of the pending rehearing requests.

OCC also expends considerable effort (Memo in Support at 6-8) attempting to distinguish selective facts about the Commission's recent rejection of a similar request by OCC in a FirstEnergy electric security plan (ESP) case, Case No. 14-1297-EL-SSO *et al*. Yet, nothing in the FirstEnergy rehearing order indicates that the Commission based the timing of its rehearing decision there solely on specific factors, or that it would impose those same reasons as constraints in other cases. And, since the Commission issued that order, the Commission has rejected arguments nearly identical to those OCC presents here in two other cases, including AEP Ohio's last ESP case. *See In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO *et al.*, Sixth Entry on Rehearing, at ¶19 (Feb. 23, 2017); *In re Application of Dayton Power and Light Co. to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 16-395-EL-SSO, Second Entry on Rehearing (Jan. 31, 2018). The factors the Commission may or may not have considered determinative in reaching its holding in the *FirstEnergy ESP* case simply do not dictate the Commission's approach in this case.

The bottom line is that OCC merely disagrees with how the Commission exercises its own procedural discretion in deciding rehearing issues in this proceeding. Ironically, OCC's own effort to coerce the Commission into more quickly deciding the rehearing issues through this additional rehearing application will necessarily delay the Commission's efforts to issue a final order in this proceeding, as the Commission now has to consider and address OCC's new rehearing arguments. In any case, there is no legal basis for OCC to require the Commission to

decide the rehearing issues on OCC's desired schedule – and OCC cites no such authority in its second rehearing application.

Finally, OCC also improperly objects (Memo in Support at 3, 5) to the fact that the Commission did not order the ESP rates to be collected subject to refund. This claim is untimely and cannot be pursued further on rehearing or appeal. OCC did not seek such relief earlier in the proceeding or raise that concern about the Opinion and Order in its first application for rehearing. Nor did the Commission address anything concerning that issue for the first time in its first entry on rehearing. Thus, OCC is barred under R.C. 4903.10 and 4903.11 from raising this issue and cannot pursue it further on rehearing or appeal. *See, e.g., Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA et al., Third Entry on Rehearing, ¶ 13-16 (Nov. 5, 2008) (denying as untimely an application for rehearing of a second entry on rehearing, where the party's assignment of error related to a decision originally set out in a much earlier order and not altered by the second entry on rehearing).

III. CONCLUSION

OCC's application for rehearing lacks substantiation and undermines the requested relief in its own pleading. OCC's claims about the ESP rates being effective subject to refund are untimely and improperly raised. OCC's attempt to require the Commission to act on OCC's

desired timeline is misguided and ironically will cause a delay of the final order ostensibly sought by OCC. It should be rejected.

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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 30th day of July, 2018.

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