

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2018 Long-Term Forecast Report on behalf of Ohio Power Company and Related Matters.)))	Case No. 18-0501-EL-FOR
In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider.)))))	Case No. 18-1392-EL-RDR
In the Matter of the Application of Ohio Power Company to Amend its Tariffs.))	Case No. 18-1393-EL-ATA

**MEMORANDUM CONTRA AEP'S APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On November 21, 2019, the PUCO rejected AEP's proposal to force its monopoly customers to subsidize 400 MWs of solar power after finding the power is not needed. The PUCO found that AEP's proposal did not satisfy the limited exception in Ohio law (R.C. 4928.143(B)(2)(c)) that allows a utility to own or operate power plants.¹ Otherwise, Ohio law requires generating plants to be developed in the competitive marketplace, without involvement of monopoly utilities and without subsidy charges to their captive customers.

¹ *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and related Matters*, Case No. 18-501-EL-FOR et al, Opinion and Order at ¶128 (Nov. 21, 2019).

On December 23, 2019, AEP filed an application for rehearing, that, by its own admission, does not challenge the merits of the PUCO’s decision.² Instead, AEP simply asks that the PUCO “clarify” a remark made in its order that a different “legal and regulatory framework” exists in Ohio that would permit AEP (or its affiliates) to collect solar power costs from its monopoly customers.³

And AEP seeks a ruling that it can pursue a green power tariff to collect the costs of the solar power from customers,⁴ despite that issue not even being before the PUCO in this part of the case.⁵ It would seem that AEP is interested in other paths to collect solar power subsidies from its captive monopoly customers. If it is indeed AEP’s intention to charge monopoly consumers for solar power, then the PUCO should put a stop to any AEP legal maneuvering around Ohio law.

Solar power is a good thing. And AEP should focus on delivering solar power to Ohioans through competitive markets instead of through its monopoly service.

II. ARGUMENT

A. Ohio law requires applications for rehearing to address “matters determined in the proceeding.” None of the issues AEP has raised were “matters determined in the proceeding.”

1. Rehearing to clarify ways that AEP can collect solar subsidies from customers should be denied.

R.C. 4903.10 sets the jurisdictional requirements for seeking rehearing of a PUCO decision. Under that Ohio law, “any party that has entered an appearance in person or by

² *Id.*, AEP Application for Rehearing, Memorandum in Support at 4-5 (Dec. 23, 2019).

³ *Id.* at 5.

⁴ *Id.* at 6.

⁵ *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and related Matters*, Case No. 18-501-EL-FOR *et al.*, Entry at ¶32 (Oct. 22, 2018).

counsel in a proceeding *may apply for rehearing in respect to any matters determined in the proceeding.*” (emphasis added). This law reflects that to “rehear” means that the PUCO must give new consideration to the same matter it previously determined in its Opinion and Order.

It seems AEP is asking the PUCO on rehearing to clarify that it can file an application under a different Ohio law (R.C. 4905.31) and collect solar subsidies from customers through a “bypassable” retail contract.⁶ It is not clear how AEP intends the subsidy to be “bypassable.” But making standard offer customers pay to subsidize solar power on a premise that they can leave (bypass) AEP’s standard offer, is not OK. The standard offer is a competitive rate for generation that should be protective of customers, including customers who buy AEP’s generation service and customers who buy a marketer’s service but use the standard offer as a price to compare.

AEP wants the PUCO to acknowledge that a reasonable arrangement option will be “considered as subsidiary/parallel filings” linked to the settlement approved by the PUCO in AEP’s last electric security plan proceeding.⁷ It appears that AEP is gearing up for a third or even fourth attempt to charge monopoly customers subsidies for solar power plants.⁸ That is wrong generally, but it is specifically inappropriate to use the rehearing process to do so.

⁶ AEP Application for Rehearing, Memorandum in Support at 6.

⁷ *Id.*

⁸ AEP already can apply for a solar subsidy from Ohioans, consistent with recently enacted H.B.6. Under that law, in addition to customers paying nuclear and coal plant subsidies, customers will be on the hook to subsidize utility scale solar projects. *See* R.C. 3706.41; 3706.55.

AEP's request for the PUCO to rule upon matters not before it in this proceeding should be denied. These matters were not decided in this proceeding. Indeed, the PUCO specifically did not allow such issues in this part of the case.⁹ And the PUCO does not issue advisory opinions.¹⁰

The PUCO's observations that AEP wants to clarify were dicta, not holdings of the PUCO from which rehearing can be sought.

Black's law dictionary defines *dicta* in the following manner:

In general. A statement, remark, or observation. *Oralis dictum*; a gratuitous or voluntary representation; one which a party is not bound to make. 2 Kent, Comm. 480. *Simplex dictum*; a mere assertion; an assertion without proof. Bract, fol. 320. The word is generally used as an abbreviated form of *obiter dictum*, "a remark by the way;" that is, an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a Question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. See *Railroad Co. v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327; *In re Woodruff* (D. C.) 96 Fed. 317; *Hart v. Stribling*, 25 Fla. 433, 6 South. 455; *Buchner v. Railroad Co.*, 60 Wis. 264, 19 N. W. 56; *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *State v. Clarke*, 3 Nev. 572. *Dicta* are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself. *Obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside

⁹ *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and related Matters*, Case No. 18-501-EL-FOR et al, Entry (Jan. 14, 2019) (deferring certain issues to phase 2, including green tariff issues).

¹⁰ See, e.g., *In the Matter of the Complaint of WorldCom, Inc., AT&T Corp. and Time Warner Telecom of Ohio v. City of Dayton*, Case No. 03-324-AU-PWC, Opinion at ¶4 (Aug. 19, 2003); *Ohio Power*, Case No. 86-01-EL-EFC Entry (Nov. 14, 1986); *Allnet v. Ohio Bell*, Case No. 86-771-TP-CSS, Entry (Nov. 5, 1986); *In re: Worldcom v. Dayton*, Case No. 03-324-AU-PWC, Entry on Rehearing at ¶4 (Aug. 19, 2003).

for the time from the main topic of the case to collateral subjects, *Ittohrbach v. Insurance Co.*, 62 N. Y. 47, 58, 20 Am. Rep. 451.

The PUCO's statement about the legal and regulatory framework to charge customers solar plant subsidies was a gratuitous or voluntary representation by the PUCO. It was also an assertion without proof, concerning law and policy. The PUCO's remark was not essential to its determination that there was no need for the solar power. The PUCO's remark did not embody the resolution or determination of the PUCO and was made without argument. The PUCO's utterance was an opinion not upon the point or question pending. The PUCO has wisely ruled that rehearing does not lie on matters that are dicta.¹¹

Consistent with the plain language of R.C. 4903.10 and PUCO precedent, AEP's application for rehearing on the PUCO statement is not proper. AEP has not demonstrated that it seeks rehearing on any matter actually determined in the Opinion and Order. The PUCO should deny the application. *See, e.g., In the Matter of the Application of Ohio Power Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio Plan for 2017 through 2020*, Case No. 16-574-EL-POR, Entry on Rehearing (Feb. 8, 2017) (denying application for rehearing by environmental intervenors, related to two sentences that were dicta).

¹¹ *In the Matter of the Application of Ohio Bell Telephone Company for Authority to Amend Certain of its Intrastate Tariffs*, Case No. 84-1435-TP-AIR, Rehearing Entry at ¶27 (Feb. 4, 1986).

2. Rehearing to clarify that AEP can collect solar subsidies from customers in other ways should be denied.

In its application for rehearing, AEP also asks the PUCO to confirm that it can pursue collecting solar subsidies from its customers through two additional ways: (1) through a bypassable green tariff (which has been applied for by AEP but not ruled upon);¹² and (2) through a series of reasonable arrangements that AEP has referenced in a “preliminary filing,” with no details).^{13 14}

Because these issues were not ruled upon by the PUCO, there is nothing for the PUCO to “rehear.” AEP’s rehearing request should be denied as deficient under R.C. 4903.10.

B. The PUCO should deny AEP’s requests for an advisory ruling on ways AEP can collect more power plant subsidies from its captive customers.

In its application for rehearing, AEP is asking the PUCO to advise that it can collect solar subsidies from captive customers through two other means: reasonable arrangements and its proposed green power tariff.¹⁵ The PUCO should steer clear of AEP’s attempt to lure it into pre-approving economic development arrangements and green tariffs that can result in AEP collecting more solar subsidies from its customers. (It appears that AEP will have access to subsidies for solar power through House Bill 6.)

¹² *In the Matter of the Application of Ohio Power to Amend its Tariffs*, Case No. 18-1392-EL-ATA.

¹³ *In the Matter of the Application of Ohio Power for Establishment of Renewable Reasonable Arrangements with Multiple Non-Residential Customers*, Case No. 19-2037-EL-AEC.

¹⁴ AEP Application for Rehearing, Memorandum in Support at 6.

¹⁵ AEP Application for Rehearing, Memorandum in Support at 6.

AEP is no stranger to power plant subsidies. AEP already charges its consumers to subsidize uneconomic coal plants.¹⁶ AEP also has a history of charging hundreds of millions of dollars for consumer subsidies of economic development arrangements.¹⁷ Under so-called “reasonable” arrangements, monopolies like AEP make deals with certain consumers for discounted electric rates that are subsidized by other customers. And the green power tariff option AEP wants to pursue (separately filed as Case No. 18-1392-EL-ATA) could also require non-participating monopoly customers to subsidize other customers who want solar power.

The PUCO should decline to issue an advisory ruling to AEP on the power plant subsidy issues, consistent with its general policy against issuing advisory opinions.¹⁸ Instead, the PUCO should address these issues in the two cases already pending with the PUCO, after a full record is developed in those cases. Doing so would be consistent with the PUCO’s responsibility under Ohio law to base its decision on findings of fact derived from a fully developed record in the proceeding. *See* R.C. 4903.09.

Both the green tariff case and the reasonable arrangement case are not ripe for PUCO review. To date, in its economic development case (Case No. 19-2037-EL-AEC), AEP has provided no details about the “reasonable arrangements.” AEP merely claims that there will be future applications that will request the PUCO to approve individual

¹⁶ Since January 1, 2017 through August 31, 2019, AEP customers have paid approximately \$72 million in OVEC coal plant subsidies.

¹⁷ Since 2009, AEP customers have paid over \$400 million to subsidize AEP’s economic development arrangements with mercantile customers.

¹⁸ *See, e.g., In the Matter of the Complaint of WorldCom, Inc., AT&T Corp. and Time Warner Telecom of Ohio v. City of Dayton*, Case No. 03-324-AU-PWC, Opinion at ¶4 (Aug. 19, 2003); *Ohio Power*, Case No. 86-01-EL-EFC Entry (Nov. 14, 1986); *Allnet v. Ohio Bell*, Case No. 86-771-TP-CSS, Entry (Nov. 5, 1986); *In re: Worldcom v. Dayton*, Case No. 03-324-AU-PWC, Entry on Rehearing at ¶4 (Aug. 19, 2003).

arrangements with non-residential customers.¹⁹ Likewise, AEP's green tariff filing has not been vetted due to the PUCO ruling designating it as a phase 2 issue, ironically at the request of AEP.²⁰ Moreover, the PUCO's Opinion and Order deemed phase 2 of this proceeding not necessary because the threshold phase 1 issue -- requiring a demonstration of need for the solar facilities -- had not been met.²¹

The PUCO decided this case based on the record developed, consistent with its duties and responsibilities under R.C. 4903.09. The PUCO should decline to speculate on what it may or may not do when presented with specific circumstances, such as individual reasonable arrangements, in the future. *See, e.g. In the Matter of the Complaint of the Office of Consumers' Counsel v. Western Reserve Telephone Company*, Case No. 92-1525-TP-CSS, Entry on Rehearing at 3 (May 18, 1994). AEP's request for an advisory opinion (and a clarification) should be denied.

III. CONCLUSION

Renewable energy is a good thing. But that good thing can and should be supplied to consumers through the competitive market (which AEP corporate can do via its

¹⁹ *In the Matter of the Application of Ohio Power Company for Establishment of Renewable Reasonable Arrangements with Multiple Non-Residential Customers*, Case No. 19-2037-EL-AEC, Application at ¶6 (Nov. 15, 2019).

²⁰ *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and related Matters*, Case No. 18-501-EL-FOR et al, AEP Motion to Strike (Jan. 7, 2019).

²¹ *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and related Matters*, Case No. 18-501-EL-FOR et al, Opinion and Order at ¶128 (Nov. 21, 2019).

competitive non-monopoly affiliates).²² We hope that is where AEP is heading now, but its filing creates concern.

In the market, risks for competitive services should be borne by investors and not by a monopoly's captive customers under state regulation. In Ohio's 1999 deregulation law, the vision is for delivering lower prices and greater innovation to millions of Ohioans through power plant competition. Let's try that for the benefit of Ohioans.

Ohio law precludes granting AEP's application for rehearing. The rulings AEP seeks are not related to any matters determined by the PUCO in this proceeding and thus fail to meet the rehearing requirements of Ohio law. Additionally, AEP asks for advisory rulings that the PUCO generally does not issue. The correct course for the PUCO to follow is to deny AEP's application and instead consider the issues AEP raises, if even appropriate, after there is a fully developed record in AEP's other pending cases.

²² See, e.g., *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and Related Matters*, Opinion and Order at ¶126 (Nov. 21, 2019).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission this 2nd day of January 2020.

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Summary: Memorandum Memorandum Contra AEP's Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.