

ORIGINAL

In The  
SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,	:	Case No. 2012-2098
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio, Case No. 10-2929-
v.	:	EL-UNC, <i>In the Matter of the</i>
	:	<i>Commission Review of the Capacity</i>
The Public Utilities Commission of Ohio,	:	<i>Charges of Ohio Power Company and</i>
	:	<i>Columbus Southern Power Company.</i>
Appellee.	:	

MOTION TO DISMISS  
AND  
MEMORANDUM IN SUPPORT  
SUBMITTED ON BEHALF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO

**Samuel C. Randazzo** (0016386)  
Counsel of Record  
**Frank P. Darr** (0025469)  
**Joseph E. Oliker** (0086088)  
**Matthew R. Pritchard** (0088070)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 469-8000  
Facsimile: (614) 469-4653  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[joliker@mwncmh.com](mailto:joliker@mwncmh.com)  
[mpritchard@mwncmh.com](mailto:mpritchard@mwncmh.com)

**Counsel for Appellant**  
**Industrial Energy Users-Ohio**

**Michael DeWine** (0009181)  
Attorney General of Ohio  
  
**William L. Wright** (0018010)  
Section Chief  
**John H. Jones** (0051913)  
Counsel of Record  
**Thomas W. McNamee** (0017352)  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215-3793  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8767  
[william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)  
[john.jones@puc.state.oh.us](mailto:john.jones@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

**Counsel for Appellee**  
**Public Utilities Commission of Ohio**

FILED  
JAN 18 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .....	ii
MOTION TO DISMISS	
MEMORANDUM IN SUPPORT	
INTRODUCTION.....	1
ARGUMENT .....	1
CONCLUSION .....	5
PROOF OF SERVICE .....	7
ATTACHMENT 1	

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

<i>Consumers' Counsel v. Pub. Util. Comm'n</i> , 35 Ohio St.3d 608, 520 N.E.2d 183 (1988).....	4
<i>Consumers' Counsel v. Pub. Util. Comm'n</i> , 35 Ohio St.3d 609, 520 N.E.2d 185 (1988).....	4
<i>Consumers' Counsel v. Pub. Util. Comm'n</i> , 36 Ohio St.3d 609, 522 N.E.2d 463 (1988).....	4
<i>Holmes v. Union Gospel Press</i> , 64 Ohio St.2d 197, 414 N.E.2d 415 (1980).....	2
<i>Ramsdell v. Ohio Civil Rights Comm'n</i> , 56 Ohio St.3d 24, 563 N.E.2d 285 (1990).....	2
<i>Senior Citizens Coalition v. Pub. Util. Comm'n</i> , 40 Ohio St.3d 329, 533 N.E.2d 353 (1988).....	4, 5
<i>Zier v. Bureau of Unemployment Compensation</i> , 151 Ohio St. 123, 84 N.E.2d 746 (1949).....	2

### Statutes

R.C. 4903.10.....	2
R.C. 4903.11.....	1, 2, 3
R.C. 4905.26.....	1, 2

### Other Authorities

<i>In re Ohio Power Company</i> , No. 10-2929-EL-UNC (Entry on Rehearing) (December 12, 2012) .....	1, 2, 3
---	---------

**In The  
SUPREME COURT OF OHIO**

Industrial Energy Users-Ohio,	:	Case No. 2012-2098
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio, Case No. 10-2929-
v.	:	EL-UNC, <i>In the Matter of the</i>
	:	<i>Commission Review of the Capacity</i>
The Public Utilities Commission of Ohio,	:	<i>Charges of Ohio Power Company and</i>
	:	<i>Columbus Southern Power Company.</i>
Appellee.	:	

---

**MOTION TO DISMISS**

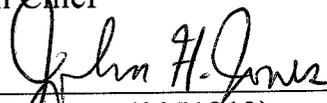
---

The Public Utilities Commission of Ohio (Commission) moves this Honorable Court to dismiss this appeal as prematurely filed in violation of statute for the reasons set forth in the accompanying memorandum.

Respectfully submitted,

**Michael DeWine** (0009181)  
Ohio Attorney General

**William L. Wright** (0018010)  
Section Chief



---

**John H. Jones** (0051913)  
Counsel of Record

**Thomas W. McNamee** (0017352)  
Assistant Attorneys General  
Public Utilities Commission of Ohio  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215-3793  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8767  
[william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)  
[john.jones@puc.state.oh.us](mailto:john.jones@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

**Counsel for Appellee**  
**Public Utilities Commission of Ohio**

---

## MEMORANDUM IN SUPPORT

---

### INTRODUCTION

To initiate an appeal from a decision of the Public Utilities Commission of Ohio (Commission) an appellant must comply with R.C. 4903.11. Compliance is jurisdictional. Where jurisdiction is lacking, this Court should dismiss an appeal. Appellant Industrial Energy Users-Ohio (“Appellant”) has initiated its appeal prematurely in violation of R.C. 4903.11 because the case appealed remains pending before the Commission. Until the Commission issues an order on rehearing, it has not issued a final order and, therefore, no appeal may be properly initiated under R.C. 4903.11. This Court should dismiss this appeal for these reasons.

### ARGUMENT

The Commission has issued a number of entries on rehearing in the case below. The last entry on rehearing was issued by the Commission on December 12, 2012. *In re Ohio Power Company*, No. 10-2929-EL-UNC (Entry on Rehearing) (December 12, 2012) (*See* Attachment E of Appellant’s Notice of Appeal). In that Entry, the Commission denied the applications for rehearing of Appellant and others who challenged the Commission’s reliance on R.C. 4905.26, and other authority, to approve a capacity charge for AEP-Ohio. *Id.* at 3, 8-10, and 12. In that same Entry, the Commission clarified that there were reasonable grounds for the Commission to initiate a complaint or

investigation under R.C. 4905.26 to determine whether existing rates may have been unjust or unreasonable. *Id.* at 9.

On January 11, 2013, the Office of the Ohio Consumers' Counsel ("OCC") filed an application for rehearing of the Commission's December 12, 2012 Entry on Rehearing (*See Attachment 1*). OCC, who is a party to the case, timely sought rehearing of the Commission's December 12, 2012 Entry on Rehearing pursuant to R.C. 4903.10. In its application for rehearing, OCC claims the Commission erred in finding that there were reasonable grounds for a complaint pursuant to R.C. 4905.26. OCC's application for rehearing asks the Commission to reconsider an issue that is directly related to Appellant's current appeal. If the Commission does not grant or deny OCC's application within thirty days from January 11, 2013, the date of filing, it is denied by operation of law pursuant to R.C. 4903.10. To date, no order has been issued on OCC's application for rehearing. Thus, the matter is still pending at the Commission and no appeal is proper at this time.

This Court has consistently held that a litigant has no inherent right to appeal and, to perfect appeal, must meet certain requirements as set forth in statutes that confer jurisdiction. *Ramsdell v. Ohio Civil Rights Comm'n*, 56 Ohio St.3d 24, 27, 563 N.E.2d 285, 288 (1990); *Zier v. Bureau of Unemployment Compensation*, 151 Ohio St. 123, 123, 84 N.E.2d 746, 746 (1949). As this Court stated, "strict adherence to the statutory conditions is essential for the enjoyment of the right to appeal." *Holmes v. Union Gospel Press*, 64 Ohio St.2d 197, 188, 414 N.E.2d 415, 416 (1980). R.C. 4903.11 sets the stage for appeal of Commission decisions:

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

R.C. 4903.11 (emphasis added). The statute expressly provides for appeal of final orders or adjudications by the Commission. A notice of appeal is only proper after entry of “. . . the order made after such rehearing.” *Id.* The Commission has yet to issue any order on OCC’s application for rehearing of the Commission’s December 12, 2012 Entry on Rehearing. Without such an order, no notice of appeal may be filed. In the absence of a proper notice of appeal, no proceeding to reverse, vacate or modify an order of the Commission may be commenced. Therefore, the current case must be dismissed for lack of compliance with R.C. 4903.11.

This Court has spoken to the proper procedure for initiating appeals of Commission decisions. On numerous occasions this Court has observed:

The requirements of R.C. 4903.10 and 4903.11 are jurisdictional. Thus, a notice of appeal of an order of the commission may not be filed with this court unless: (1) the appellant's application for rehearing has been denied by an order of the commission within the thirty-day period set forth by R.C. 4903.10; (2) the appellant's application for rehearing has been denied by operation of law due to the commission's failure to rule upon the application within that thirty-day period;

or (3) the commission has granted a rehearing and issued its decision abrogating, modifying or affirming its original order.

*Consumers' Counsel v. Pub. Util. Comm'n*, 36 Ohio St.3d 609, 610, 522 N.E.2d 463, 464 (1988); *Consumers' Counsel v. Pub. Util. Comm'n*, 35 Ohio St.3d 608, 520 N.E.2d 183 (1988); *Consumers' Counsel v. Pub. Util. Comm'n*, 35 Ohio St.3d 609, 520 N.E.2d 185 (1988). In the case below, the Commission has not yet issued a decision abrogating, modifying or affirming its December 12, 2012 Entry on Rehearing, which is the subject of Appellant's appeal. Where, as here, the underlying case remains pending before the Commission for further adjudication, there is no *final order* and the Court does not have jurisdiction. The Court has ruled:

Since the commission had not yet ruled on the issue being reheard when appellant filed its notice of appeal, this court has no jurisdiction to consider either the appellant's notice of appeal or its application for a stay of the commission's order.

*Consumers' Counsel*, 36 Ohio St.3d at 610.

Appellant may claim that the Commission's consideration of OCC's application for rehearing should not preclude its ability to bring this appeal. This Court, however, has held that an appeal is premature even if it is another party's application for rehearing (and not the appellant's application) that is still pending before the Commission. *Senior Citizens Coalition v. Pub. Util. Comm'n*, 40 Ohio St.3d 329, 331, 533 N.E.2d 353, 354-355 (1988). In *Senior Citizens Coalition*, OCC filed its notice of appeal while the Commission was still considering issues contained in another party's application for rehearing. OCC argued that its appeal was proper because the application for rehearing pending before the Commission was filed by another party, and that the Commission had

already issued an order regarding OCC's particular application for rehearing. *Id.* The Court disagreed and dismissed OCC's appeal. *Id.* at 333. The Court stated that "the statutes 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.* (emphasis added). Therefore, because the Commission is still considering OCC's application for rehearing, this appeal is premature and should be dismissed.

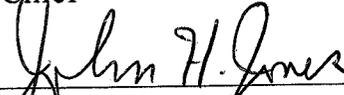
### **CONCLUSION**

This appeal is premature. OCC filed an application for rehearing in the case below, and no appeal may be initiated until after the Commission issues a final order on the rehearing. The Commission has yet to do so. In keeping with statute and prior decisions of this Court, this appeal should be dismissed without prejudice.

Respectfully submitted,

**Mike DeWine** (0009181)  
Ohio Attorney General

**William L. Wright** (0018010)  
Section Chief



---

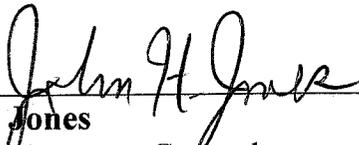
**John H. Jones** (0051913)  
**Thomas W. McNamee** (0017352)

Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215-3793  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8767  
[william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)  
[john.jones@puc.state.oh.us](mailto:john.jones@puc.state.oh.us)  
[thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

**Counsel for Appellee**  
**Public Utilities Commission of Ohio**

## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 18<sup>th</sup> day of January, 2012.

  
\_\_\_\_\_  
**John H. Jones**  
Assistant Attorney General

**Parties of Record:**

Samuel C. Randazzo  
Frank P. Darr  
Joseph E. Olikier  
Matthew R. Pritchard  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215

**Counsel for Appellant**  
**Industrial Energy Users-Ohio**

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

/s/ Kyle L. Kern

Kyle L. Kern, Counsel of Record

Melissa R. Yost

Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-9585 (Kern Telephone)

614-466-1291 (Yost Telephone)

[kern@occ.state.oh.us](mailto:kern@occ.state.oh.us)

[yost@occ.state.oh.us](mailto:yost@occ.state.oh.us)

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review     )  
of the Capacity Charges of Ohio Power,     )     Case No. 10-2929-EL-UNC  
Company and Columbus Southern Power     )  
Company.     )

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

The Office of the Ohio Consumers' Counsel ("OCC"), representing 1.3 million residential customers of Ohio Power Company (the "Utility" or "AEP Ohio") applies for rehearing of the December 12, 2012, Entry on Rehearing ("December 12 Entry") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, the OCC seeks to protect customers from paying hundreds of millions of dollars in unjust and unreasonable rates for capacity charges set by the PUCO in this case.

Under R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the December 12, 2012 Entry was unjust, unreasonable, and unlawful because:

- A. The PUCO erred in finding, for the first time in this case, that there were 'reasonable grounds' for a complaint pursuant to R.C. 4905.26, and that finding was not supported by sufficient evidence, showed misapprehension or mistake, and was an attempt to cure the error after the fact.<sup>1</sup>

An explanation of the basis for this Application for Rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the claim of error above, the PUCO should modify its Entry.

<sup>1</sup> OCC files this Application for Rehearing in an abundance of caution without conceding that this additional Application for Rehearing is a prerequisite for appeal under Ohio law.

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission Review     )  
of the Capacity Charges of Ohio Power,     )     Case No. 10-2929-EL-UNC  
Company and Columbus Southern Power     )  
Company.     )

---

**MEMORANDUM IN SUPPORT**

---

**I. INTRODUCTION**

The PUCO’s December 12, 2012 Entry presents significant issues with respect to its use of R.C. 4905.26 as authority for its decisions in this proceeding. Under R.C. 4905.26, the PUCO must find that there are reasonable grounds for a complaint prior to setting a matter for hearing. But in the Commission’s December 12, 2012 Entry, the PUCO attempts to further support its decision in this case by “clarifying” that it found – in the rehearing phase – that there were reasonable grounds for complaint that AEP Ohio’s proposed capacity charge may have been unjust or unreasonable.<sup>2</sup> This clarification is not supported by sufficient evidence or Commission findings, is well after-the-fact, and procedurally flawed. Accordingly, OCC requests rehearing on this issue.

**II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. This statute provides that any party may apply for rehearing on matters decided by the Commission within

---

<sup>2</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power, Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at 9 (December 12, 2012).

thirty days after an order is issued.<sup>3</sup> An application for rehearing must be written and must specify how the order is unreasonable or unlawful.<sup>4</sup>

In considering an application for rehearing, the Commission may grant rehearing requested in an application, if “sufficient reason therefore is made to appear.”<sup>5</sup> If the Commission grants a rehearing and determines that its Order is unjust or unwarranted, or should be changed, it may abrogate or modify the Order.<sup>6</sup> Otherwise the Order is affirmed.

OCC meets both the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10 and the requirements of the Commission’s rule on applications for rehearing.<sup>7</sup> OCC is a party to the case. Its motion to intervene was granted by the Commission.<sup>8</sup> Additionally, OCC actively participated in this case, and thus, may apply for rehearing under R.C. 4903.10. OCC respectfully requests that the Commission determine that OCC has shown “sufficient reason” to grant rehearing on the matters specified below.

---

<sup>3</sup> R.C. 4903.10.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> See Ohio Adm. Code 4901-1-35.

<sup>8</sup> Entry at 3 (August 11, 2011).

### III. ARGUMENT

**A. The PUCO Erred In Finding, For The First Time In This Case, That There Were ‘Reasonable Grounds’ For A Complaint Pursuant To R.C. 4905.26, And That Finding Was Not Supported By Sufficient Evidence, Showed Misapprehension Or Mistake, And Was An Attempt To Cure The Error After The Fact.**

The Commission “clarifies” in its December 12, 2012 Entry that there “were reasonable grounds for complaint that AEP-Ohio’s proposed capacity charge may have been unjust or unreasonable.”<sup>9</sup> And the Commission asserts that “there is no precedent requiring the Commission to use rote words tracking the exact language of the statute in every complaint proceeding.”<sup>10</sup> Far from using rote words, the Commission did not cite to any of the standards in R.C. 4905.26 (or even cite to 4905.26 as precedent) until after the case was fully litigated, and subject to applications for rehearing—nearly two years later. The PUCO therefore lacks jurisdiction.

A complaint proceeding under R.C. 4905.26 may be initiated by the PUCO.<sup>11</sup> However, R.C. 4905.26 requires that it can only be done “if it appears that reasonable grounds for complaint are stated.” Then “the commission shall fix a time for hearing and shall notify complainants...thereof.”<sup>12</sup> Here though, the Commission never initially established that reasonable grounds existed for a complaint to go forward, when it opened up its investigation in December, 2010. Instead, the Commission “clarified” – two years

---

<sup>9</sup> Entry at 9 (December 12, 2012).

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> The Commission has held “Section 4905.26, Revised Code, permits customers to file complaints or objections to any rate or classification of a utility and, if **reasonable grounds are shown**, the Commission will set the matter for hearing and the burden of proof shall be upon the complainant” (emphasis added). 1990 Ohio PUC LEXIS 947 (Ohio PUC 1990) at 11.

later in its December 12, 2012 Entry – that reasonable grounds for a complaint were set forth in its December 8, 2010 Entry in this case.<sup>13</sup>

But a review of that December 8, 2010 Entry shows that there was no finding of reasonable grounds.<sup>14</sup> In fact, there are only two findings in the PUCO's December 8, 2010 Entry. First, the Commission stated that it is adopting as a state compensation method for AEP-Ohio the current capacity charges set in the PJM auction (i.e. Reliability Pricing Model "RPM" market-based pricing).<sup>15</sup> Second, the Commission found that "a review is necessary in order to determine the impact of the proposed change<sup>16</sup> to AEP-Ohio's capacity charges."<sup>17</sup>

But neither of these findings establishes that there are reasonable grounds for a complaint to proceed on the basis that the newly adopted state compensation mechanism (RPM market-based capacity) may be unjust and unreasonable. To the contrary, the Commission's December 8, 2010 Entry actually adopts market-based RPM capacity pricing as the state compensation mechanism.<sup>18</sup> Thus the Commission's "clarification" included in its December 12, 2012 Entry is not supported by a review of past Commission findings, specifically the December 8, 2010 Entry. Accordingly, the Commission's finding included in its December 12, 2012 Entry is a product of misapprehension or mistake.<sup>19</sup> As such, the PUCO's December 12, 2012 Entry is

---

<sup>13</sup> Entry at 9 (December 12, 2012).

<sup>14</sup> A review of the December 8, 2010 Entry also shows that the Commission relied only on Sections 4905.04, 4905.05, and 4905.06 of the Revised Code to grant the Commission authority in this proceeding.

<sup>15</sup> Entry at 2 (December 8, 2010).

<sup>16</sup> The "proposed change" referred to AEP's application at FERC to establish cost based rates.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> See, e.g., *Delphos v. Pub. Util. Comm.*, (1955), 137 Ohio St. 422.

unreasonable and unlawful.<sup>20</sup> And because the PUCO failed to meet the requirements of R.C. 4905.26, it has no jurisdiction to change the capacity rates, as it ultimately did.

The case law amplifying R.C. 4905.26 is abundantly clear.<sup>21</sup> The Ohio Supreme Court has held that “[n]otwithstanding the broad scope of the statute...the “reasonable grounds for complaint” requirement of R.C. 4905.26 must be met before the PUCO is required to order a hearing. That *requirement applies whether it is the PUCO, or any other party, which initiates the proceeding under R.C. 4905.26.*”<sup>22</sup>

And the Supreme Court of Ohio has held that reasonable grounds for the complaint must be included therein: “R.C. 4905.26 requires that reasonable grounds for complaint be stated . . . This *prerequisite should apply whether the Commission begins such a proceeding on its own initiative or on the complaint of another party.*”<sup>23</sup>

Prerequisite means that finding reasonable grounds for a complaint is a requirement or condition that must be satisfied prior to an evidentiary hearing.

In *Western Reserve Transit Authority v. Public Utilities Com.*, the Supreme Court of Ohio found that although the procedural requirements contained in R.C. 4905.26 were clear, they were not observed by the Commission in that case.<sup>24</sup> Because the Commission failed to meet those requirements the Supreme Court of Ohio reversed the Commission. Specifically, in *Western Reserve*, the Commission, after considering a Complaint filed by Western Reserve Transit Authority stopped short of meeting the

---

<sup>20</sup> See *New York Centr. R. Co. v. Railroad Commission* (1907), 6 Ohio N.P. 273.

<sup>21</sup> See, e.g., (where the PUCO has previously found that R.C. 4905.26 “requires that the Commission shall set such a complaint for hearing only when reasonable grounds for a complaint are stated.”<sup>21</sup>

<sup>22</sup> *Allnet Communications Services, Inc. v. Public Utilities Com.*, 32 Ohio St. 3d 115, 117 (Ohio 1987), citing to *Ohio Utilities Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 12 O.O. 3d 167, 389 N.E. 2d 483 (emphasis added).

<sup>23</sup> *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 154 (1979) (emphasis added).

<sup>24</sup> *Western Reserve Transit Authority v. Public Utilities Com.*, 39 Ohio St. 2d 16 (Ohio 1974), at \*19.

statute when it found: “(2) [i]t appears that, pursuant to Section 4905.26, Revised Code, there may be reasonable grounds for the complaint stated within the complaint.”<sup>25</sup> The Court held that such a “tentative” finding for “reasonable grounds” was not sufficient to meet the requirements of R.C. 4905.26.<sup>26</sup> In other words, reasonable grounds for a complaint must actually exist before the PUCO can order a hearing pursuant to R.C. 4905.26.<sup>27</sup> But in the current proceeding, the PUCO “clarified” that there are reasonable grounds two years later, in response to applications for rehearing. It clearly did not make such a finding in its December 8, 2010 Entry.

As stated above, the Commission now contends that its December 8, 2010 Entry is indicative that the Commission found reasonable grounds for a complaint that the proposed changes to AEP Ohio’s capacity charge may be unjust or unreasonable.<sup>28</sup> But such an allegation is inconsistent with the findings in the December 8, 2010 Entry<sup>29</sup> (as previously explained) as well as a later Attorney Examiner Ruling. To this end, on August 11, 2012, the Attorney Examiner established a procedural schedule setting the case for hearing, with the stated purpose to “establish an evidentiary record on a state compensation mechanism.”<sup>30</sup> In addition, the Commission ordered “[i]nterested parties [to]develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity

---

<sup>25</sup> Id. at \*2.

<sup>26</sup> Id. at \*19.

<sup>27</sup> *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St. 2d 154 (1979).

<sup>28</sup> Entry at 9 (December 12, 2012).

<sup>29</sup> There the Commission set RPM priced capacity as the state compensation mechanism. Presumably, the Commission would not establish a rate that is unjust or unreasonable and in the very same order find that the rate it just set may be unjust and unreasonable. But this is exactly what the Commission’s argument boils down to.

<sup>30</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power, Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry at 2, August 11, 2012.

cost recovery mechanism.”<sup>31</sup> Thus, the “reasonable grounds” alleged to be found in the Commission’s December 8, 2010 Entry (to examine AEP Ohio’s proposed capacity charge) were clearly intended to be developed through the evidentiary hearing where an evidentiary record on the state compensation mechanism would be developed. But this is inconsistent.

Finally, regulated rates, outside of an Electric Security Plan (“ESP”) proceeding, can only be changed in one of two ways – through the filing of a rate case under R.C. 4909.18, or through the filing of a complaint case under R.C. 4905.26. In its October 17, 2012 Entry, the Commission found that it had authority under R.C. 4905.26 to set the newly adopted capacity rate for AEP Ohio. But the Commission never properly determined, when it initiated the complaint case, that the capacity rates may be unjust and unreasonable. That failure means that the Commission was without jurisdiction to ultimately change the capacity rates that AEP Ohio receives.

Moreover, the Commission, in establishing new capacity rates, never made the ultimate finding that the rates were unjust or unreasonable in order to justify a change in a rate under R.C. 4905.26. That is, the PUCO never found that PJM RPM prices are unjust or unreasonable. Yet this is exactly what is required before a rate change may be ordered under R.C. 4905.26. The Commission found that a state compensation mechanism “based on RPM pricing **could risk** an unjust and unreasonable result for AEP-Ohio.”<sup>32</sup> The Commission’s finding equates merely to a finding that the RPM pricing may be unjust and unreasonable. It therefore falls short of a determination that RPM-based capacity rates *are in fact* unjust and unreasonable, as indicated by the concurring opinions

---

<sup>31</sup> Entry at 4 (March 14, 2012).

<sup>32</sup> October 17, 2012 Entry at 18 (emphasis added).

of Commissioners Porter and Slaby. In those concurring opinions the Commissioners claim that “[o]ur opinion of this result, in this case, should not be misunderstood as it relates to RPM; *by joining the majority opinion we do not, in any way, agree to any description of RPM-based capacity rates as being unjust or unreasonable.*”<sup>33</sup>

But the Commission’s December 12, 2012 Entry states:

...the Commission may establish new rates under Section 4905.26, Revised Code, **if the existing rates are unjust and unreasonable, which is exactly what has occurred in the present case.** In the Interim Relief Entry, the Commission determined that RPM-based capacity pricing could risk an unjust and unreasonable result for AEP-Ohio and subsequently confirmed, in the Capacity Order, that such pricing would be insufficient to yield reasonable compensation for the Company’s capacity service.<sup>34</sup>

Again, R.C. 4905.26 requires that reasonable grounds are found that a rate is unjust or unreasonable. It is not enough that the rates “may” be unjust and unreasonable. The Commission attempts to rectify its decision by stating that reasonable grounds existed to examine AEP Ohio’s proposed cost-based capacity charge, but the Entries speak for themselves. The Commission’s assertion that it found RPM capacity to be unjust and unreasonable is unsound because there had to be reasonable grounds that RPM capacity prices are unjust and unreasonable. There were not.

#### IV. CONCLUSION

To protect customers, the Commission should grant OCC’s application for rehearing and modify its December 12, 2012 Entry.

---

<sup>33</sup> Opinion and Order at 1 (July 2, 2012), concurring opinion.

<sup>34</sup> Entry at 9 (December 12, 2012) (emphasis added).

Respectfully submitted,

BRUCE J. WESTON  
OHIO CONSUMERS' COUNSEL

/s/ Kyle L. Kern

Kyle L. Kern, Counsel of Record  
Melissa R. Yost  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-9585 (Kern Telephone)  
614-466-1291 (Yost Telephone)  
[kern@occ.state.oh.us](mailto:kern@occ.state.oh.us)  
[yost@occ.state.oh.us](mailto:yost@occ.state.oh.us)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Application for Rehearing of the Office of the Ohio Consumers' Counsel* was served on the persons stated below via electronic transmission, this 11th day of January, 2013.

/s/ Kyle L. Kern

Kyle L. Kern  
Assistant Consumers' Counsel

## SERVICE LIST

Thomas.lindgren@puc.state.oh.us  
Werner.margard@puc.state.oh.us  
John.jones@puc.state.oh.us  
Steven.beeler@puc.state.oh.us  
dboehm@BKLlawfirm.com  
mkurtz@BKLlawfirm.com  
sam@mwncmh.com  
fdarr@mwncmh.com  
joliker@mwncmh.com  
mpritchard@mwncmh.com  
cmooney2@columbus.rr.com  
drinebolt@ohiopartners.org  
haydenm@firstenergycorp.com  
Paul.Wight@skadden.com  
John.Estes@skadden.com  
cendsley@ofbf.org  
Amy.spiller@duke-energy.com  
rsugarman@keglerbrown.com  
BarthRoyer@aol.com  
Gary.A.Jeffries@dom.com  
Gregory.dunn@icemiller.com  
Christopher.miller@icemiller.com  
rihart@hahnlaw.com  
rremington@hahnlaw.com  
djmichalski@hahnlaw.com

stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com  
Jeanne.Kingery@duke-energy.com  
whitt@whitt-sturtevant.com  
campbell@whitt-sturtevant.com  
vparisi@igsenergy.com  
mswhite@igsenergy.com  
lmcaster@bricker.com  
ricks@ohanet.org  
tobrien@bricker.com  
tsiwo@bricker.com  
mhpeticoff@vorys.com  
zkavitz@taftlaw.com  
myurick@taftlaw.com  
dane.stinson@baileycavalieri.com  
Dorothy.Corbett@duke-energy.com  
bpbarger@bcslawyers.com  
dconway@porterwright.com  
cmoore@porterwright.com  
derekshaffer@quinnemanuel.com  
Greta.see@puc.state.oh.us  
Sarah.parrot@puc.state.oh.us

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**1/11/2013 4:12:10 PM**

**in**

**Case No(s). 10-2929-EL-UNC**

**Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Gina L Brigner on behalf of Kern, Kyle Ms.**