13

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets.	))))))	Case No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)))))	Case No. 08-918-EL-SSO

REPLY TO AEP'S MEMORANDUM CONTRA TO THE MOTION TO STAY NEGOTIATIONS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE SIERRA CLUB OHIO CHAPTER, AND THE NATURAL RESOURCES DEFENSE COUNCIL

I. SUMMARY

The Office of the Ohio Consumers' Counsel, the Sierra Club, Ohio Chapter, and the Natural Resource Defense Council (together "Movants"), file this reply to Columbus Southern Power Company and Ohio Power Company's ("Companies") Memorandum Contra filed on October 6, 2008.[1] Companies opposed Movants' Motion for a Stay of Negotiations, which Movants filed on October 1, 2008.

[1] The Companies served their Memorandum Contra after 5:30 p.m. on October 6, 2008. The Companies, in an e-mail sent the very next day, indicated they did not object to having the pleadings considered as being served the following day. Thus, OCC files its reply according to three days (per the Entry dated August 5, 2008) calculated from service of the Memo Contra being achieved on October 7, 2008.

There is no question that the Companies' electric security plan ("ESP") applications are complex and voluminous. Additionally, the importance of these applications cannot be overlooked. These applications affect the rates paid by the Companies' customers into the foreseeable future. And the applications are the first of their kind under SB 221, which rewrote the regulatory scheme under which Ohio electric utility customers will be paying for electricity. Indeed it is a brave new world for Ohio utility customers, one never experienced before, and one fraught with uncertainty, change, and alarming increases in electricity prices.

While the Companies can claim that ongoing settlement discussions will not keep Movants from doing lawful discovery, the truth of the matter is that Movants are ill-equipped to simultaneously pursue double tracks -- settlement and litigation. While the difficulties of pursing litigation and settlement are not new to Movants, the compressed time frame under SB 221 exacerbates the difficulties of such an approach.

In order "for settlement discussions to have a reasonable chance of success" parties must be knowledgeable and conversant with all aspects of the case -- and that only occurs after parties have sufficiently prepared their cases. Without sufficient discovery and review by experts, parties are not sufficiently knowledgeable about the issues to make informed decisions. Hence, the first prong of the stipulation test cannot possibly be met.

Without a stay of the negotiations, the Companies' residential customers will suffer irreparable harm because once a stipulation is signed parties' rights to fully prosecute the case can be affected. When a stipulation is docketed with the Commission the focus of the proceeding generally shifts from the reasonableness of the application to

whether the stipulation satisfies statutory criteria -- and the three-prong test. It has been argued that this procedure limits the ability of non-signatory parties to have their case in chief fully considered on discrete elements of the utility's application. Typically, once the negotiating parties have reached a settlement, it is difficult for other parties to make substantial changes to a stipulation. The Commission accords substantial weight to a stipulation, which makes it very difficult for non-signatory parties to present evidence to rebut the stipulation.

II. ARGUMENT

The Companies began negotiations in this case on September 25, 2008. They have scheduled another discussion for Friday, October 10, 2008. According to the Companies, for settlement discussions "to have a reasonable chance of success, the Companies believe that they must proceed on a regular basis and with a sense of urgency..."[2] Additionally, the Companies argue that discovery and further analysis of the application may continue even while settlement discussions are ongoing.[3] The Companies argue the settlement negotiations do not keep Movants from doing all the lawful discovery that they desire.[4] Moreover, the Companies argue that none of the statutory provisions cited by Movants authorize the Commission to forbid one party to a proceeding from discussing settlement with willing parties.[5]

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[2] Memorandum Contra of Columbus Southern Power Company and Ohio Power Company To the Motion to Stay Negotiations at 2 (Oct. 6, 2008)("Memo Contra").

[3] Id.

[4] Id.

[5] Id.

A. For Settlement Discussions To Have A "Reasonable Chance Of Success" The Parties Must Be Sufficiently Knowledgeable About The Issues Presented By The Companies' ESP Plans. Movants Have Not Had The Opportunity To Fully Prepare And Hence Stipulation Discussions Are Premature At This Time.

The General Assembly found that ESP cases are "demanding of the Commission's expertise and guidance;" when the General Assembly required the Commission to hold a hearing under R.C. 4928.141. In other words, the General Assembly required that the Commission provide interested parties "a meaningful opportunity to be heard."[6] Under R.C. 4903.082, "a meaningful opportunity to be heard" includes "ample rights of discovery."

Parties in these cases are in the throes of case preparation. In some instances, consultants to parties have recently been approved. Written discovery is still being prepared. Depositions are more than likely to be scheduled. There is much to be learned over the next month and a half.

If settlements are based upon the little investigation permitted before the negotiations began in this case, the settlements (especially partial settlements with fewer than all parties) may not reflect good public policy and fail to meet the first prong of the stipulation standard. It is in the public interest to have well-informed and knowledgeable parties participating in negotiations to achieve a fair outcome for the public. Rushing negotiations before parties can discover all the potential landmines in a filing is never a

[6] *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Gas Rates in Its Service Area; In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in Its Service Area; In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Change Depreciation Accrual Rates for Gas Distribution Facilities*, Case No. 92-1463-GA-AIR, et al, Opinion and Order at 38 (August 26, 1993).

defensible course of action. Indeed, the first prong of the stipulation test requires that the negotiations are a product of lengthy negotiations between "knowledgeable parties."

The parties with whom the Companies are currently negotiating have limited interests in this proceeding. Those entities now negotiating may be in a position to settle this case based on narrow limited interests. This is not the case for all of the Movants. OCC and parties such as the Sierra Club, Ohio Chapter must be concerned with protecting the interests of a distinct class of customers. This attempt by the Companies to strong-arm Movants into the midst of negotiations should be rebuked by the Commission.

The Companies' attempt to prematurely resolve these applications interferes in the "meaningful opportunity to be heard" because the negotiations focus on a final product to individual parties with limited interests rather than actually discovering the implications of the multiple and various aspects to the application on entire classes of customers. Without sufficient discovery parties will not have the knowledge necessary to meet the first prong of the stipulation test. And for this reason in particular the Commission should stay the negotiations until after the Staff's testimony is filed.

B. Movants Are Unable To Simultaneously Pursue Two Tracks In This Case –Settlement And Litigation -- Due To The Complexities Of The Applications And The Fact That Movants Are Actively Involved In At Least Two Other ESP Cases. Thus, It Is Not Reasonable To Assume That Movants Can Continue Discovery And Further Analysis While Settlement Negotiations Are Ongoing.

While the Companies have the luxury of focusing their massive resources on their filings alone, other interested parties, including Movants, have their limited resources stretched to cover not just the Companies' ESP filings, but also ESP filings by Duke

Energy Ohio and the FirstEnergy Companies.[7] Hence, while the Companies can claim that ongoing settlement discussions will not keep Movants from doing lawful discovery, the truth of the matter is that Movants are ill-equipped to simultaneously pursue double tracks -- settlement and litigation.

While the difficulties of simultaneously pursing litigation and settlement are not new to Movants, the compressed time frame under SB 221 exacerbates the difficulties of such an approach. With 150 days for the entire start-to-finish process for the Companies' ESP plans, Movants are at a distinct disadvantage. The applications must be fully analyzed. In order to analyze the applications, Movants must be well aware and conversant with all aspects of SB 221, and must be able to integrate into the analysis the provisions of the Commission's rules enacting SB 221, which are still evolving. SB 221 has brought extreme changes to electric utility regulation, and these changes and provisions are untested. In short, there is so much to do, with little time.

While the Movants can appreciate the Companies' desire to have an ESP plan approved within the statutory timeframe of 150 days, Movants believe that case preparation efforts, and not negotiations, should be the focus at this stage. Moreover, the Companies have presented a solution to the problem of not meeting the 150 days – a one-time rider to reflect the difference between the ESP approved rates and the current rates for the length of time from January 2009 until the effective date of the new ESP rates. This is a solution supported by Movants.

[7] Moreover, many of Movants are involved in numerous other proceedings before the PUCO as well.

C. The Commission Has Authority To Stay Negotiations As Part Of Its Broad Statutory Powers Contained In Chapter 49 Of The Ohio Revised Code.

While the Companies claim that the Movants are asking the Commission to forbid one party to a proceeding from discussing settlement with one or more other willing parties, this is a mischaracterization of Movants' motion. While informal discussions may naturally occur, the settlement negotiations going on currently have a Commission stamp of approval by virtue of the fact that they are occurring at the Commission and are being facilitated by Commission Staff.

Movants ask that instead the Commission encourage the parties to fully develop their cases before entering into negotiations with the Companies. The most appropriate time for negotiations, especially negotiations that occur with the Commission's stamp of approval, would be after the Staff files testimony. The filing of Staff testimony creates a focal point for discussion -- a focal point that is missing from any of the discussions predating Staff's testimony.

The Commission has authority to stay the Companies' negotiations based upon its authority under R.C. 4901.13 to govern proceedings, as previously recognized by the Supreme Court.[8] Additionally, the Commission may order stays of negotiations under its general supervisory power as set forth in R.C. 4905.06 and under its jurisdiction as established under R.C. 4905.05. The Companies' vague statements that "it is not apparent that the Commission even has authority to grant" the motion are not supported by any legal analysis or argument and thus should be disregarded.

[8] *Akron & Barberton v. Public Utilities Commission of Ohio*, 165 Ohio St. 316 (May 31, 1956).

III. CONCLUSION

The Commission should grant the Motion for a stay of negotiations in order to ensure that any resulting stipulation is the result of negotiations made by knowledgeable parties. Granting the Motion may also lead to having a diversity of interests participating in any settlement, which strongly testifies to the reasonableness of a settlement.[9] Otherwise, the first prong of the stipulation standard is not met.

Moreover, the Commission should recognize the hardship created by forcing Movants to simultaneously pursue settlement and litigation in the extreme time constraints put upon the parties by SB 221. The Commission should encourage parties to expend efforts preparing their cases, and re-establish settlement discussions after the Staff testimony is filed.

[9] See for *example In the Matter of the Restatement of the Accounts and Records of the Cincinnati Gas & Electric Company, the Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, Opinion and Order at 7 (Nov. 26, 1985) (where the Commission first adopted the three prong standard to determine whether a settlement should be adopted.)

Respectfully submitted,

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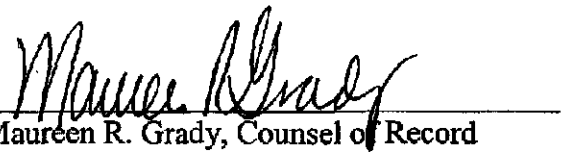

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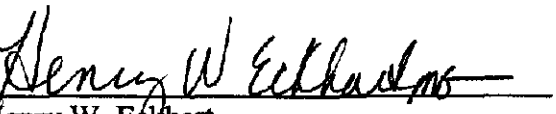

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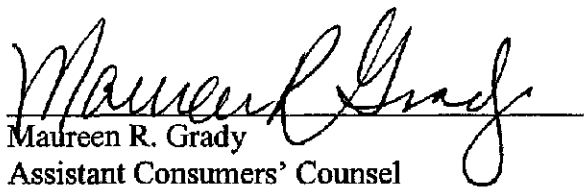
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply to Columbus Southern Power Company and Ohio Power Company Memorandum Contra Motion to Stay Negotiations* has been served upon the below-named persons via electronic transmittal, as well as by regular U.S. Mail, postage prepaid, this 10th day of October, 2008.



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