37

FILE

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 Including Related Accounting Authority; An Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets	)	**Case No. 08-917-EL-SSO**
and	)	
In the Matter of the Application of Ohio Power Company for Approval of Its Electric Security Plan Including Related Accounting Authority; and an Amendment to its Corporate Separation Plan	)	**Case No. 08-918-EL-SSO**

COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S
BRIEF ON
1/1/09 PLAN

INTRODUCTION

Procedural History

On July 31, 2008, Columbus Southern Power Company (CSP) and Ohio Power Company (OPCO), collectively the Companies, filed their initial application for an Electric Security Plan (ESP) under Sec. 4928.143, Ohio Rev. Code. Division (C) (1) of that section provides that the "commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date...." Consequently, the

Commission's order ruling upon these applications needs to be issued no later than December 28, 2008.

The Companies' application contemplated that Commission compliance with this statutory mandate might not be possible. Therefore, the Companies proposed a provision in their ESP (Sec. V. E.) to address that eventuality. That section proposes that if a Commission order is not timely issued the ultimately issued order would be made effective back to the beginning of the Companies' January 2009 billing cycle - - December 30, 2008. The reconciliation of the Commission's order back to the beginning of 2009 billings is proposed to occur through a one-time rider that would remain in effect for the remainder of the 2009 billing cycles with, if necessary, a true-up in the first quarter 2010.

By Entry dated August 5, 2008, the Commission set a procedural schedule in this proceeding which provided for hearings to begin on November 3, 2008. On September 5, 2008, in response to a motion for an extension of the procedural schedule filed by four intervenors, the Commission set back the commencement of the hearing to November 17, 2008.[1] Among the representations made by those intervenors as they requested more time to prepare for this proceeding, they stated the following:

> Movant believes that AEP's proposal to continue current rates and terms in effect until the final ESP rate is determined, subject to reconciliation, is reasonable.... This approach is reasonable and should be acceptable to all parties.

None of the intervenors opposed the motion for extension or the notion of implementing Sec. V. E. of the application.

[1] The motion was filed by Ohio Consumers' Counsel, Ohio Environmental Council, the Sierra Club Ohio Chapter and Ohio Partners for Affordable Energy.

Because the likelihood that the Commission's order would be issued within the statutory period was further diminished as a result of the extension, the Companies filed a motion on September 24, 2008 asking the Commission to implement Sec. V. E. of the application. Only one party - - Industrial Energy Users-Ohio (IEU) - - filed a memorandum contra that motion. The Commission has not ruled on that motion.

Pursuant to the extended procedural schedule, the intervenors filed their testimony on October 31, 2008. None of the intervenors addressed the Companies' Sec. V. E. proposal. As part of the Staff's testimony, however, Staff witness Mr. Hess filed testimony on November 10, 2008 which addressed, among other issues, Sec. V. E. of the application. Mr. Hess testified that if the Commission did not issue a timely order the Companies should continue their current rate plan. More specifically, he recommended that the Companies should be permitted to increase their generation rates by seven percent (for CSP) and eleven percent (for OPCO), keep their current Provider of Last Resort (POLR) rates in place, leave their line extension policy in place and price the Ormet load and the load of the customers formerly served by Monongahela Power Company based on the market price recommended in the prefiled testimony of Ohio Consumers' Counsel's (OCC) witness Smith. Finally, he recommended that CSP's Regulatory Asset Charge rider be eliminated.[2]

At the November 10, 2008 prehearing conference held in this proceeding, the Hearing Examiners indicated that parties would be given until noon on November 14, 2008 to file testimony in rebuttal to Mr. Hess' testimony. They further indicated that the hearing would commence with the Companies' testimony supporting Sec. V. E. of their application and then

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[2] Mr. Hess referred to this as the RTC Rider. (Staff Ex. 1, p. 9).

proceed with the limited portion of Mr. Hess' testimony concerning the rates to be effective in connection with the "January 1, 2009" issue.[3]

Testimony in rebuttal to this limited portion of Mr. Hess' testimony was filed on behalf of the Companies by Craig Baker, on behalf of OCC by Beth Hixon, on behalf of Ohio Energy Group by Stephen Baron and on behalf of Integrys Energy Services, Inc. by Samuel Wolfe. Following the presentation of these witnesses' testimony and cross examination of the witnesses, the Hearing Examiners directed that one round of briefing this issue would be permitted and that briefs must be filed by December 3, 2008. In accordance with that schedule, the Companies submit this brief.

The Companies' Position

Mr. Baker's testimony makes clear that the Companies' first preference is for the Commission to rule upon their ESP within the statutory time limit. In the event the Commission is unable to do that, the Companies continue to propose that Sec. V. E. of the application be implemented. (Tr. I, p. 198; Tr. II, p.13; Companies' Ex. 2, p.4). Finally, if the Commission were to implement a solution along the lines proposed by Mr. Hess, the Companies believe that certain adjustments to Mr. Hess' proposal should be made. (Companies' Ex. 2, pp. 4-9). During cross examination of Mr. Baker, he indicated that the true-up nature of Sec. V. E. not only protects the Companies but also protects the Companies' customers. (Tr. I, p. 206). In the context of discussing the addition of a reconciliation provision to Mr. Hess' proposal, Mr. Baker also testified that "a trueup provides a balance for both customers and the company.... What we think needs to be done is what ultimately comes out of the ESP final order should be what rates

3 The Companies noted that their Application in general and Sec. V. E. in particular, specified an effective date for the ESP of December 30, 2008. (See Tr. II, p. 23).

should be for customers starting on the first day of the billing cycle for January 2009 and the best way to accomplish that is with a trueup." (*Id.* at 229, 230).

The Companies contend that Sec. V. E. of the application is lawful and should be adopted by the Commission. No party addressed that provision in their testimony filed in this proceeding. No party contested the implementation of that provision when its adoption was urged by the joint movants as a reasonable condition for an extension of the procedural schedule in this proceeding. Further, only one party responded to the Companies' motion to implement Sec. V. E. of their application. At most, only that party, IEU Ohio, might be permitted to contest the implementation of that provision. However, IEU Ohio's silence at the time of the joint motion for extension of the procedural schedule should act as a bar to its opposition at this time.

If the Commission were to make a determination in line with Mr. Hess' recommendation, the Companies urge the Commission to consider the modifications to Mr. Hess' proposal to which Mr. Baker testified, particularly the feature of implementing a reconciliation of the rates resulting from such a proposal and the Commission's order which ultimately resolves the application. In addition, the Commission should permit the implementation of the Companies' proposed fuel cost recovery mechanism as well as the additional POLR charges equivalent to one-half of the POLR rate increase proposed by the Companies.

ARGUMENT

Applicable Law

There is no debate concerning the mandatory nature of the 150-day deadline in Sec. 4928.143 (C) (1), Ohio Rev. Code. In distinguishing between directory and mandatory time limits in legislation, the Supreme Court of Ohio has held that the use of the word "shall" in conjunction with a time limit for action makes the time limit mandatory unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage. (*Ohio Civil Rights Commission v. Countrywide Home Loans, Inc. et al.*, (2003), 99 Ohio St. 3d 522; 2003 Ohio 4358; 794 N.E.2d 56; 2003 Ohio Lexis 2191). While statutes that fix a time limit simply for convenience or orderly procedure may be directory in nature, where the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed, the statute should be viewed as mandatory. *The State, Ex Rel. Webb v. Board of Education of the Bryan City School District et al.*, (1984), 10 Ohio St. 3d 27; 460 N.E.2d 1121; 1984 Ohio Lexis 1056)

Here, the object of the statutory provision is discernible, particularly when taken in conjunction with the mandate in Sec. 4928.141 (A), Ohio Rev. Code. That statute requires that beginning January 1, 2009 a standard service offer (SSO) for all competitive retail electric service must be provided by an electric distribution utility (EDU) and that the EDU must apply to establish the SSO in accordance with Secs. 4928.142 or 4928.143, Ohio Rev. Code. When these two provisions are viewed in the context of their becoming effective on July 31, 2008, it is clear that the 150-day time limit is mandatory and that the Commission is required to issue an order in this proceeding by December 28, 2008.

There also is no debate that the reality of the situation (based on the procedural schedule established and modified in these cases) is that the Commission will not be able to issue an order by that time which addresses all issues in this proceeding. As this brief is filed, the hearing on the application continues. Even with a severely constricted briefing schedule, it is beyond reasonable expectation to think that a timely decision can be forthcoming. If the six-week briefing schedule used in the FirstEnergy ESP proceeding were adopted, briefing, let alone deliberation and decision by the Commission, will not be completed until after the statutory deadline. The Commission's inability to resolve all issues in this case, however, does not mean that this critical statutory mandate should be disregarded.

Rather, it is up to the Commission to give effect to the legislature's clear intent that this first ESP application of the Companies be resolved within one hundred fifty days of its filing. As the sixth circuit Court of Appeals held, when faced with an agency's inability to comply with a statutory deadline to complete administrative proceedings:

> "courts must apply remedies that, as nearly as possible, promote the primary purpose of the Act."

United States v. Alcan Foil Products Div. of Alcan Aluminum Corp., 889 F. 2d 1513 (6th Cir. 1989).[4]

The clearest way to give effect to the legislature's intent in this regard is to implement Sec. V. E. of the application.

While some might argue that Sec. V. E. of the application is not permitted by S. B. 221, that argument assumes that Sec. 4928.143, Ohio Rev. Code, is prescriptive in the allowed content of an ESP. On the contrary, the content of an ESP is limited only by what the Commission ultimately approves. Sec. 4928.143 (B) (2), Ohio Rev. Code lists nine items that an ESP may provide for or include. However, that division also states that what can be provided for or included in an ESP is not limited by the listing of those nine items. The Companies' inclusion of its true-up provision is a reasonable provision, particularly in light of the constrained time limit for the Commission to rule on their first ESP application.

There is no legitimate opposition by the intervenors to the implementation of Sec. V. E. of the application. As noted in the introduction to this brief, no intervenor had filed testimony

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[4] See also *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 384 N.E. 2d 264.

opposing this aspect of the ESP. In fact, OEG's witness, Mr. Baron, now testified that OEG supports the Companies' proposal. (OEG Ex. 1, p.2). Further, only one intervenor opposed the Companies' motion to implement Sec. V. E. that was filed on September 24, 2008. However, that intervenor, IEU-Ohio did not object to the motion for extension of the procedural schedule even though the motion favorably referenced the Companies' proposal for a true-up of their current rates to the rates ultimately approved by the Commission.

It must be noted that two of the joint movants for the extension of the procedural schedule (OCC and Ohio Partners for Affordable Energy - - OPAE) withdrew their support for the implementation of Sec. V. E. now that their motion has been granted. (Tr. I, pp.27,28).[5] That OCC's earlier position concerning Sec. V. E. was different than the position taken by its witness was conceded by OCC's counsel (Tr. II, pp. 247, 248), and, in response to questioning from the bench, by Ms. Hixon. (Tr. II, pp. 262-263). While OCC argued at hearing that its agreement with Sec. V. E. only applied if it received the full extension it requested, the plain reading of the joint motion does not support such an after-the-fact rationalization for OCC's abandoning its prior support of that provision of the application. (See p. 6 of the Joint Motion and p. 5 of the Joint Reply to the Companies' memorandum contra the Joint Motion).[6] OCC's convenient change in position should be rejected by the Commission as prejudicial to the Companies and, in

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[5] The other two movants did not appear at the hearings.

[6] In that pleading, which was signed by OCC's counsel but not OPAE'S counsel, OCC stated: "If AEP'S true-up provision is adopted, which OCC does not object to , there will be no harm created by granting even the 60-day extension." (p. 4, emphasis added). By this statement, it is clear that OCC's not objecting to the Companies' true-up provision was its position irrespective of whether OCC's shorter extension were granted or "by granting even the 60-day extension." In its conclusion to that pleading, OCC stated "if AEP'S true-up proposal is adopted, AEP will not be harmed if the 150-day statutory goal is not met. AEP will be in the same position it would have been in if the order had been issued in the 150 days, as shown by the proposal that AEP made in its application with regard to the possibility of exceeding the 150-day timeline." Once again, OCC's statement was not limited to only its 60-day extension alternative.

a broader context, representing a level of advocacy before the Commission that stretches the boundaries of propriety.

It has been argued that Sec. 4928.141 (A), Ohio Rev. Code, dictates the result of the Commission failing to meet the statutory mandate for ruling on the Companies' application. This argument is not persuasive. As noted above, this section requires all EDUs to apply for either an ESP or a Market Rate Offer (MRO). It does not, however, specify a time by which such an application must be filed. For instance, while the Companies filed their application on the first date that S. B. 221 became effective, Dayton Power and Light Company (DP&L) did not file its application until October 10, 2008 (Case No. 08-1094-EL-SSO).

The significance of the lack of specificity of when a SSO application must be filed relates to a portion of Sec. 4928.141 (A), Ohio Rev. Code, on which various intervenors seem to rely. The language in question provides that:

> Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term.

Division (D) of Sec. 4928.143, Ohio Rev. Code, provides that the terms and conditions of the current rate plan are incorporated into the ESP. The EDU, however, can include incremental recovery or deferral of any costs not being recovered under its rate plan.

There is nothing in Sec. 4928.141 (A) or 4928.143 (C) (1), Ohio Rev. Code, that suggests that the Commission does not need to adhere to the 150-day time limit for ruling on the Companies' ESP application. Nor is there any reason to believe that if the General Assembly intended to specify a remedy for the Commission not meeting that statutory requirement that such a remedy would have been placed in a provision other than the provision which sets out the requirement itself. 4928.141 (A), Ohio Rev. Code, is not a default for failure to comply with the 150-day requirement. The continuation of the rate plan applies only in those instances where an EDU does not file its ESP application in sufficient time for the 150-day period to be completed. Since DP&L waited until October 10, 2008 to file its ESP application, the Commission has until March 9, 2009 to rule in that case. Consequently, in that situation the portion of 4928.141 (A), Ohio Rev. Code, quoted above has applicability. In contrast, the Companies' filed their application in time for a Commission ruling prior to January 1, 2009 and Sec. 4928.141 (A), Ohio Rev. Code, has no applicability.

Mr. Hess' testimony is based on the position that if "the Commission does not issue an Opinion and Order within the one-hundred and fifty days... the Commission should authorize the AEP companies to continue the rate plan." (Staff Ex. 1, p. 9). This position presumes that Sec. 4928.141 (A), Ohio Rev. Code, would be applicable in such a situation. If that were the case, some discussion would be needed concerning what is meant by the notion of continuing the "rate plan."

Sec. 4928.01 (A) (33), Ohio Rev. Code, defines "rate plan" as "the standard service offer in effect on the effective date of the amendment of this section by S. B. 221 of the 127th general assembly." As noted by Mr. Hess, the SSO "is a service provided by the distribution company which is dependent on past Commission orders, it's not a rate." (Tr. I, pp. 118, 122). This correct understanding of the SSO leads to the conclusion that Sec. 4928.141 (A), Ohio Rev. Code, does not contemplate that an EDU remains indefinitely trapped at its current rates if the Commission fails to resolve the EDU's ESP application within the statutory time period.

A contrary interpretation could only be based on a theory that the General Assembly simply did not care when the EDU would be able to implement its ESP. The explicit 150-day deadline in Sec. 4928.143 (C), Ohio Rev. Code, makes such a theory untenable.

Based on the view that Sec. 4928.141 (A), Ohio Rev. Code, has applicability to the potential situation of the Commission being unable to rule on the Companies' ESP application by the statutory deadline, however, the Commission would need to determine how the Companies' SSO should be continued. As Mr. Hess noted, the current SSO encompasses more than what was addressed in the Companies' Rate Stabilization Plan (RSP) approved by the Commission in Case No. 04-169-EL-UNC. The SSO goes "all the way back to the ETP cases [the Companies' Electric Transition Plans approved in Case Nos. 99-1729-EL-ETP (for CSP) and 99-1730-EL-ETP (for OPCO)] to encompass the entire set of standard service offer plans that are proposed by this company." (Tr. I, p.97).

If the Commission agrees that Sec. 4928.141 (A), Ohio Rev. Code, is applicable to the situation facing the Companies and their customers, it should adopt, as a starting point, Mr. Hess' understanding of what is meant by the notion of continuing their rate plan. However, the three issues addressed in Mr. Baker's discussion of Mr. Hess' proposal also should be adopted to moderate the impact of subsequent reconciliation.

The idea of reconciling the rate changes arising from the continuation of the rate plan to the Commission's ultimate order on the Companies' ESP application is not precluded by the statutory language in Sec. 4928.141 (A), Ohio Rev. Code. Absent any prohibition against such a reconciliation, the Commission should conclude that adding the reconciliation feature to Mr. Hess' proposal (as supported by Mr. Baker and Mr. Baron) is a lawful and reasonable way to give meaning to both Sec. 4928.143 (C) and 4928.141 (A), Ohio Rev. Code.

The implementation of a portion of the increase proposed by the Companies to their POLR charge also would be permissible if Sec. 4928.141 (A), Ohio Rev. Code, has applicability. The POLR charge was adopted as part of the Companies' RSP case and continuing the POLR charge with the addition of a portion of the Companies' proposed increase to that charge also is permissible and appropriate.

Finally, the implementation of the Companies proposed fuel and fuel-related cost recovery mechanism is permissible. During the rate unbundling process inherent in the Companies' ETP cases, the Companies' placed an Electric Fuel Clause rate into the total generation rates which, subject to increases pursuant to their RSP case, survive to this day. Mr. Baker's proposal to separate the fuel mechanism from the existing bundled generation rate and re-start a fuel and fuel-related cost recovery mechanism is permissible under the premise that the rate plan goes back to the ETP cases.

Therefore, assuming that Sec. 4928.141 (A), Ohio Rev. Code, is applicable to a situation in which the Commission is unable to meet the statutory deadline for resolving the Companies' ESP application, Mr. Hess' adjustments, along with the modifications proposed by Mr. Baker, should be implemented.

There is one final way to consider the Commission's options. The Commission can decide to issue its ultimate ESP order in phases, with the first phase being issued prior to December 28, 2008 and the second phase being issued shortly thereafter with the condition of reconciliation. With such an approach, the Commission would be acting pursuant to Sec. 4928.143 (C), Ohio Rev. Code, and would not need to consider the arguments presented by some intervenors that the relief under Sec. 4928.141 (A), Ohio Rev. Code is limited or even non-existent. Implementing this phased approach, with reconciliation, would leave to the

Commission's discretion how much of the eventual ESP order should be implemented initially. Mr. Hess' proposal, as modified by Mr. Baker, could be adopted under this approach. The reconciliation feature would protect both the Companies and their customers from the differences between the first phase of the ESP order and the second and final phase of the ESP order.

Evidence Supporting the Companies' Position

Based on the preceding discussion of the applicable law, the Commission should determine the most reasonable and least controversial method for giving effect to the legislative intent that the first ESP application be resolved within one hundred fifty days. The Companies' proposed Sec. V. E. fits that description. As Mr. Roush testified, under Sec. V. E. of the application, the Companies' current rates would remain unchanged until the Commission rules upon the ESP application.[7] Once the ruling is made, a one-time rider would be implemented. The rider "would be designed to collect the difference between the approved ESP rates and the actual rates charged to customers during the period between the end of the December 2008 billing month and the effective date of the approved ESP rates." (Companies' Ex. 1, p.16; Tr. I, pp. 41-42). If necessary, there would be a true-up in the first quarter of 2010 to assure that the rider did not over-collect or under-collect the difference. (*Id.*)[8] OEG's witness, Mr. Baron, supported the Companies' Sec. V. E. proposal. (OEG Ex. I, p. 2).

During cross examination of Mr. Roush, some questions were raised regarding details of certain ESP provisions (interruptible service, alternate feed service and net metering for

[7] The only exception to retaining existing rates is that riders that are scheduled to expire at the end of 2008 "would by their very nature go ahead and expire at the end of 2008…." (Tr. I, pp.71-72).

[8] Counsel for the Ohio Manufacturers Association (OMA) mistakenly and repeatedly interpreted the first quarter 2010 true-up as the Companies indicating that the Commission need not issue its order in this case until the latter part of 2009 and therefore the true-up would occur in 2010. (Tr. I, p. 17; Tr. II, p. 56). This imaginative interpretation of the Companies' proposal misses the obvious intent of truing-up the reconciliation itself. (See Mr. Baker's Testimony at Tr. II, pp. 57-58).

hospitals) and how those matters would be treated in the reconciliation process. (Tr. I, pp. 59-63). Mr. Roush indicated that to the extent those details would need to be addressed he would expect the Commission to address such matters in a preliminary order addressing the ESP and/or in the Commission's ultimate ESP order. (Tr.I , pp.78,79).

Questions also were posed to Mr. Roush challenging his inability to quantify the impact of the reconciliation proposal. (Tr. I, pp. 44-50). As Mr. Roush repeatedly explained, the Companies' proposal is for a reconciliation based on the substance of the Commission's ultimate order. Since no one knows what, if any, modifications to the proposed ESP the Commission will direct, or when the Commission's order will be issued, it is not possible at this time to quantify the impact of implementing Sec. V. E. of the application. (Tr. I, pp. 44, 45, 47, 48, 53 and 66).

Mr. Roush also explained that the reconciliation process would not violate the Companies' proposal to limit rate increases in each year of the ESP period to approximately fifteen percent. While the increases in the remaining months of 2009 after the Commission's ultimate ESP order is issued could exceed the fifteen percent target, over the entire course of 2009, including the first months of 2009 during which no rate increase had occurred, the target increase of approximately fifteen percent would be met to the same practical extent and effect as if the order had been issued by the statutory deadline. (Tr. I, pp. 73-74). Mr. Baker concurred that while the percentage increase at the point in time the true-up rider becomes effective could exceed fifteen percent, the increase over the entire year would conform to the approximate fifteen percent target set by the Companies. (Tr. II, p. 78).

Mr. Baker also testified that the "true-up" proposal "is the fairest resolution of the Commission being unable to meet the 150-day requirement. "If implemented, all parties would be left in the position they would have been in, had the Commission been able to meet the

150-day requirement. I believe this remedy would best preserve the intent of the General Assembly to have a new Standard Service Offer in effect by the start of the January 2009 billing cycle if the Companies filed their applications on a timely basis." (Companies' Ex. 2, p. 4; See also Tr. I, pp. 229-230, referenced in the introduction portion of this brief). Further, Mr. Baker testified that the Companies' Sec. V. E. proposal could be implemented even if the Commission modified the proposed ESP in a manner which led the Companies to withdraw their ESP proposal. (Tr. I, p. 218). Mr. Baron agreed that the reconciliation feature provides an equitable result. (Tr. II, pp. 89-90).

Mr. Baker also was cross examined by OCC's counsel about the Companies' intent to have its application in general, and Sec. V. E. in particular, effective on a bills-rendered basis at the beginning of the January 2009 billing cycle. From OCC's questions it seems that OCC might believe that Commission-approved rates should be implemented on a service-rendered basis. This distinction is not an immediate issue under the Companies' Sec. V. E. proposal, since rates would not change until the Commission final order issued in this case. The distinction would be an issue under Mr. Hess's proposal and under the Companies' ultimate reconciliation proposal. As with OCC's recent change of heart concerning the reasonableness of Sec. V. E., OCC should not be heard to challenge this timing of the implementation of new rates. Even Ms. Hixon agreed that when OCC stated that Sec. V. E. was reasonable and should be accepted, they were agreeing to the entirety of that proposal, including the portion of the proposal which would have new rates be effective from the end of the December 2008 billing cycle. (Tr. II, pp. 253, 256).

Even if it were not for OCC's prior acceptance of the Companies' proposal for implementing rates on a bills-rendered basis, the Commission should adhere to its standard practice of implementing new rates on a bills-rendered basis. This approach avoids the need for issuing pro rata bills for the first month of implementation of new rates. Moreover, OCC's witness, Ms. Hixon not only fails to raise this issue, her testimony contemplates the Companies' current rates remaining in effect "if the Companies do not have Commission-approved standard service offers under the ESP or a Market Rate Option ("MRO") as of January 1, 2009." (OCC Ex. 3, p.3).

Mr. Hess' Proposal

Mr. Hess' proposal rejects the Companies' Sec. V. E. proposal. While he does not state any reasons for his position, it appears that he opposes the notion of reconciliation. (Staff Ex. 1, p. 9). Instead, Mr. Hess proposes that CSP be permitted to increase its generation rates by seven percent and OPCO be permitted to increase its generation rates by eleven percent. In addition, Mr. Hess would have the Commission leave in place the current POLR rates and the current line extension policies. He would price at the market prices contained in the testimony of OCC's witness Smith, the loads of Ormet and of the customers located in the service territory previously served by Monongahela Power Company (Mon Power).[9] Finally, he recommends that CSP's RTC be eliminated. (*Id.*). The increases resulting from Mr. Hess' recommendation would be based on the allocation methodology that was approved in the Commission's prior orders comprising the Companies' SSO. (Tr. I, p.119). Mr. Hess made clear that his proposal was consistent with continuing the Companies' rate plans, not modifying those plans. (Tr. I, pp. 129, 132).

Regarding the pricing of the former Mon Power customers' load, Mr. Hess testified that the special pricing provisions approved in Case No. 05-765-EL-UNC are part of the rate plan

[9] On cross examination, Mr. Hess testified that for the Ormet load he used a market price of $ 63.58/MWH. (Tr. I, pp. 136-137).

since they are related to the RSP. (Tr. I, p. 98). The reason given by Mr. Hess for using Ms. Smith's market price was that even though the Mon Power arrangement contemplated using a market price resulting from a Request for Proposal for sufficient power to serve that load, time did not permit the use of such an approach. (Tr. I, pp. 103, 104 and 109).

Although he stated that the Ormet load was not a part of the RSP case, the special pricing provisions for Ormet which were approved by the Commission in Case No. 05-1057-EL-CSS tied the Companies' ability to recover the difference between the generation rate paid by Ormet and the generation market price to be administratively determined by the Companies, subject to the Commission's approval, to the RSP provision allowing additional increase in the Companies' generation rates. Therefore, Mr. Baron's reliance on the Ormet pricing mechanism being implemented "more than two and one half years after AEP's RSP rate plan was filed…."(OEG Ex. 1, p. 7) is irrelevant. The Ormet matter is not separate from the Companies' rate plan.

There were a number of questions posed to Mr. Hess concerning the components of Ms. Smith's proposed market prices. (Tr. I, pp. 140-107). While Mr. Hess was unable to address these questions, he testified that he chose Ms. Smith's market prices since they had been recommended by OCC's witness. (Tr. I, pp.105, 107). To the extent that a more precise market price might be appropriate for either the Mon power-related load or the Ormet load, the Companies' proposal to couple Mr. Hess' proposal with a reconciliation will have the effect of placing the Companies and their customers in the position they would have been in had the Commission been able to decide these issues by the statutory deadline. Therefore the market price differences that might exist are not sufficient reasons to reject this portion of Mr. Hess' proposal.

Mr. Hess' proposal regarding the pricing of the Mon Power load at market was criticized as allowing a double recovery of that pricing since Mr. Hess also was recommending, as part of his proposed seven percent generation rate increase for CSP, recovery of the "four percent" increase provided for in the RSP case. (OEG Ex. 1, p. 8). Mr. Baker, testified, however, that such a criticism was not supportable. (Companies' Ex. 2, p. 9; Tr. I, p. 203). The basis for Mr. Baker's testimony is that Mr. Baron did not fully recognize the extent of the permitted generation rate increase under the RSP. As Mr. Baker noted, the RSP provided an **average** four percent generation rate increase.[10] Based on Mr. Baker's calculation, CSP has available, not just a four percent increase, in addition to the annual three percent generation rate increase, but a remaining $21 million of "headroom" that has not been consumed under the average four percent increase that is permissible. This amount would be more than be sufficient to recover the market price treatment suggested by Mr. Hess, in addition to the four percent increase incorporated into his proposed seven percent generation rate increase for CSP.

Mr. Baker suggested three basic modifications to Mr. Hess' proposal if the Commission were otherwise inclined to adopt the approach presented by Mr. Hess. Mr. Baker's first recommendation concerning Mr. Hess' proposal was that if that proposal were adopted, "the Commission should make such a plan subject to reconciliation." Companies' Ex. 2, p.5). The reasons supporting this feature have been thoroughly discussed earlier in this brief and will not be repeated here. It is worth noting, however, that the Companies believe this is a critical feature that should be incorporated into Mr. Hess' proposal, or into any other proposal that is adopted.

Mr. Baker also suggested that the Companies' proposed FAC mechanism should be incorporated into Mr. Hess' proposal. Mr. Baker testified that this aspect of the ESP represents a sizable portion of the total rate impact of the ESP. (*Id.* at 6). The extent of this impact results

[10] See Case No. 07-63-EL-UNC, Opinion and Order, p. 26, October 3, 2007.

from the fact that current fuel costs are not reflected in the Companies' rates. (*Id.*). The exclusion of the FAC from Mr. Hess' proposal is problematic even if the reconciliation provision is adopted as part of his proposal. This is because "depending on the length of time needed to resolve this proceeding, [the absence of the FAC will] increase the catch-up payments customers would need to make as part of the reconciliation." (*Id.*). The exclusion of the FAC from Mr. Hess' proposal without reconciliation would, as Mr. Baker characterized it, "result in confiscation of the Companies' property." (*Id.*).

Whether the inability to recover fuel and fuel-related costs as part of Mr. Hess' proposal would result in an unconstitutional confiscation of property is not the point Mr. Baker was making. What is important is that Mr. Baker's understanding of the intent of S. B. 221 "is to let people put in fuel clauses if you do not have one." (Tr. I, p. 208). "Senate Bill 221 provides, as far as we're concerned, that effective 1/1/09 we should be able to put an active fuel adjustment clause in place and, therefore, any inability for us to recover the dollars that we spend buying fuel in order to provide service to customers we think of as a confiscation." (*Id.* at 227). That "failure to recover fuel would have a significant impact on the company. When I look at 2008, for example, relative to what we believe is in rates, we came up about $150 million short." (*Id.* at 223).

As a final matter associated with the inclusion of the FAC in Mr. Hess' proposal, Mr. Baker testified that if his recommendation were accepted, then the percentage increases to the generation rates Mr. Hess discusses would be limited to the non-FAC portion of those rates. (Companies' Ex. 2, p.7; Tr. I, pp. 199-200).

The third modification to Mr. Hess' proposal to which Mr. Baker testified was that one-half of the Companies' proposed POLR charge increase should be implemented at this time.

(Companies' Ex. 2, pp. 7-8). Mr. Baker testified that the Companies' one-tenth of a cent POLR charges are the lowest in the State, with Duke's, DPL's and the FirstEnergy Companies' POLR charges being about three times, six times and twenty-one to twenty-five times, respectively, higher than the Companies' POLR charges. (*Id.* at 8). Even with implementing as much as one-half of the proposed POLR charge increase, the Companies' POLR charge still would be at about the level of Duke's charge and below the POLR charge for DPL and the FirstEnergy Companies. As with the FAC, exclusion of a POLR increase also would work to unnecessarily expand the impact of subsequent reconciliation.

Even with the POLR and FAC modifications to Mr. Hess' proposal, the increase "would be still a moderate step on day one toward an ultimate Commission order on ESP." (Tr. I, p. 214). Moreover that modified proposal still would be more favorable in the aggregate than a Market Rate Offer. As Mr. Baker testified:

> I think the test is whether or not it is better than the MRO. And we have shown that, as far as I'm concerned, in our testimony, that it is in the aggregate better than the MRO. Any of the plans that we are talking about here are less than the ESP as filed, therefore, I would argue that it is better than the MRO and, therefore, okay for the Commission to approve it. (Tr. I, pp. 215-216).

Based on Mr. Baker's testimony, if the Commission were to accept Mr. Hess' proposal as a starting point it should modify that proposal in accordance with Mr. Baker's testimony.

Finally, OEG's witness, Mr. Baron, opposed Mr. Hess' proposal based on historic earnings by CSP and OPCO. As the Companies have made clear throughout this proceeding, historic earnings are irrelevant under S. B. 221. The focus of S. B. 221 on earnings under an ESP is reflected in the "significantly excessive earnings test." Under that test, the Commission will look back on each year of the ESP to determine whether the EDU made significantly excessive earnings. Moreover, as Mr. Baker testified, the historic return for CSP, which seemed to be the primary focus of Mr. Baron, come about from the effects of the AEP Interconnection Agreement associated with three gas-fired generating units "that the company took the risk on because we expected we'd be taking those units to market." (Tr. II, pp. 69-70). It would be manifestly unfair to deny the Companies timely rate relief as contemplated by S. B. 221, because of historic earnings arising from risks the Companies' took under the prior regulatory regime. Mr. Baron's concerns in this regard should carry no weight.

OCC's Proposal

OCC sponsored the testimony of witness Hixon. For the reasons previously discussed the Commission should not give any weight to her testimony. OCC has abandoned its earlier acceptance of the Companies' proposed Sec. V. E. now that it received one of the alternative extensions that it requested. Without dismissing Ms. Hixon's testimony as impermissible, there will be no consequences associated with OCC's behavior.[11] Ms. Hixon's testimony should be disregarded also because of the confusion in the record regarding whether she actually was expressing OCC's positions in this case. While she seemed to think she was presenting the position of OCC (Tr. II, p. 264), her counsel twice asserted that Ms. Hixon "could give her opinion but not the OCC's opinion." (*Id.* at 239; see also p.255).

Ms. Hixon also testified that Mr. Hess' proposal to keep the line extension policy tariffs in place should be rejected. Her testimony misses the point. The line extension tariffs are the same as the non-rider provisions of the Companies' distribution rates. There is no more reason to terminate the line extension portion of the distribution tariffs than the tariffs for distribution

[11] The Companies do not assert that Ms. Hixon was personally responsible for this last minute change of position. She just happened to be the witness chosen to deliver OCC's new position.

service themselves. Moreover, Ms. Hixon conceded on cross examination that some line extension policy needs to be in place beginning January 1, 2009 (Tr. II, p. 216), and that she has made no recommendation in that regard. (*Id.* at 219). Her suggestion that this dilemma should be resolved in a distribution rate case simply is unrealistic. (*Id.*). The Companies' ESP addressed their line extension policies and the Companies are entitled to rely on the expectation that the Commission would resolve this proceeding within the statutory deadline. OCC's apparent willingness to create regulatory uncertainty where none need exist is inappropriate and Ms. Hixon's proposal regarding the line extension tariffs should be rejected.

PJM Demand Response Programs

As explained by witness Roush in his direct testimony, AEP Ohio does not believe it is appropriate for retail customers receiving regulated, standard service offer rates to resell utility power at market-based rates through the PJM demand response (PJM DR) programs operated in the wholesale market. (Companies' Ex. 1, pp. 6-7). There are several major reasons supporting the Companies' position and those matters will be addressed in the subsequent merit briefs concerning the full three-year term of the ESP. The question addressed at this time is merely how to address the PJM DR programs within any ESP order that precedes the Commission's ultimate order in this proceeding. The Companies submit that a solution exists to preserve both parties' positions without prejudice pending a decision on the merits. The Commission should specify that any retail customers who register under the PJM demand response programs for the 2009-2010 planning period prior to issuance of the final ESP decision do so at their own risk.

In his rebuttal testimony concerning the 1-1-09 plan, Integrys witness Wolfe expressed two concerns applicable to the interim period: (1) treatment of CSP and OPCO customers who are currently committed to participating in the PJM DR programs for the 2008-2009 planning period, and (2) status of the issue during the upcoming enrollment opportunity for the 2009-2010 planning period that starts January 5, 2009. (Integrys Ex. 1, p. 4). As explained below, the first concern is moot and the second concern can be addressed without prejudice to either parties' position on the merits.

Mr. Baker clarified on the stand that the Companies' position in this case "was not intended in any way to jeopardize anyone who had already signed up for a 2008-2009 planning year. Once they have – PJM has permitted them to do so, I think they need to finish out that year without any restrictions. Even if the Commission were to come forward and prohibit on a forward-looking basis, I wouldn't want to put those customers in jeopardy for PJM having already signed them up." (Tr. I, p. 179). Thus, it is clear that the first concern outlined by Integrys witness Wolfe is moot. Indeed, Mr. Wolfe acknowledged during cross examination that Mr. Baker's testimony resolved Intergrys' first concern about continued participation during the current 2008-2009 planning period. (Tr. III, p. 22).

As to Integrys' second concern about the upcoming enrollment for the 2009-2010 planning period, Mr. Baker testified as follows:

> The implication I believe in Mr. Wolfe's testimony is the customers should continue to be able to do this because they may have made investments in their facilities which allows them to participate currently. In my view those customers were fully aware that AEP is opposed to the participation through RTOs. We've been opposing it at a state level. We've been opposing it at a FERC level and a decision to make that investment was a risk that those customers chose to take that at some point that may no longer be available to them. So I don't see that as a reason specifically to take a position by the Commission in 2009 that those customers could participate in a 2009-2010 planning year. (Tr. I, p.180).

Hence, because prospective enrollees for the upcoming 2009-2010 planning year have long been on notice that AEP has opposed participation by retail customers and would enroll at their own risk pending resolution of the issue by the Commission in this case.

Mr. Wolfe agreed that the PUCO has a right to decide the question that the Companies have presented in this case as to the participation by retail customers in the PJM DR programs. (Tr. III, p. 25). He also acknowledged that the October 2008 FERC Final Rule[12] gave State commissions the right to opt out of the PJM DR for the retail customers in their jurisdictions.[13] (Tr. III pp. 30-31, 33). As a related matter, Mr. Wolfe also admitted that, aside from addressing any interim period caused by extension of the Commission's decision in this case into 2009, there is already uncertainty today concerning retail customers in the Companies' service territory registering and participating in the PJM DR programs for the 2009-2010 planning period. (Tr. III, p. 24).

Mr. Wolfe acknowledged that registration for the 2009-2010 planning period is open until March 2, 2009. (Tr. III, p. 22). Thus, even assuming a Commission order in this case deciding the PJM DR program participation issue in favor of the Integrys position was issued as late as mid-February, Mr. Wolfe agreed that retail customers would have enough time to register in advance of the March 2 deadline –allowing for the ten-day PJM review period to ensure that

[12] *Wholesale Competition in Regions with Organized Electric Markets* (Docket Nos. RM07-19-000 and AD07-7-000), 125 FERC ¶ 61,071 (October 17, 2008) ("Final Rule"). The Final Rule is contained in 18 CFR Part 35.

[13] Integrys witness Wolfe also referenced a requirement within the FERC's October 2008 Final Rule for a "statewide order" but was not able to explain the basis or origin for that concept. (Tr. III, pp. 31-33, 34). The FERC's Final Rule explicitly only permitted participation by retail customers "unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate." Final Rule at ¶ 154. *See also* 18 CFR 35.28(g)(1)(B)(3)(iii). The FERC made clear that a State commission had full veto power over retail participation by stating that "we will not require a retail electric regulatory authority to make any showing or take any action in compliance with this rule." Final Rule at ¶ 155. And FERC provided that the RTO may require "certification that participation is not precluded by the relevant electric retail regulatory authority." Final Rule at ¶ 158. The Companies note that the PUCO itself has petitioned for rehearing of the Final Rule to assert that FERC should have specified even more explicit authority over PJM DR program participation by requiring State commission approval as a mandatory prerequisite.

the registration met all of the informational requirements and was accepted.. (Tr. III, pp. 36-37). In other words, as long as the Commission decides the merits of the ESP case (including the PJM DR program participation question) by mid-February, everyone agrees that no position is prejudiced pending that ruling.

By contrast, allowing customers to register in the PJM DR programs during the period prior to the issuance of the final ESP order would prejudice the Companies' position on the merits. Mr. Wolfe acknowledged that, even if the Commission agreed with the Companies' in deciding the merits of the ESP cases, allowing customers to register prior to the issuance of the final ESP order would defer implementation of such a Commission decision for those customers until June 2010 (after the 2009-2010 planning period). (Tr. III, pp. 29-30). Thus, even a merit decision in favor of the Companies' position would be negated for a full half of the ESP term if retail customers are able to register during pre-ESP order period. This is unnecessary and unduly prejudices the Companies' position.

CONCLUSION

The Companies continue to believe that Sec. V. E. of their ESP application is lawful and reasonable and should be implemented by the Commission as soon as possible. If the Commission determines that a proposal similar to Mr. Hess' proposal should be implemented it should incorporate the changes proposed by the Companies to his proposal. No other changes should be incorporated, other than making clear that the Companies' position concerning PJM demand response programs is adopted as part of the Commission's pre-ESP final order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Brief on 1/1/09 Plan was served by electronic mail upon the individuals listed below this 3rd day of December, 2008. by/sb

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