

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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| In the Matter of the Application of |) | |
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| to its Corporate Separation Plan. |) | |

**INDUSTRIAL ENERGY USERS-OHIO'S BRIEF ON SECTION V.E.
OF THE ELECTRIC SECURITY PLAN APPLICATION OF
COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY**

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December 3, 2008

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I. INTRODUCTION

Amended Substitute Senate Bill 221 ("SB 221") was signed into law on May 1, 2008 by Governor Ted Strickland. SB 221, among other things, requires all electric distribution utilities ("EDUs") to establish a standard service offer ("SSO") through an electric security plan ("ESP") or market rate option ("MRO") plan. On July 31, 2008, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP" or "Companies") filed their initial ESP Application.

SB 221 requires the PUCO to issue a decision on an initial ESP within 150-days of its submission to the Commission.¹ However, in its ESP Application, the Companies assumed that the Public Utilities Commission of Ohio ("Commission") might not act upon the ESP Application within the 150-day time frame established by SB 221. The

¹ Section 4928.143(C)(1), Revised Code.

Companies therefore requested, through Section V.E. of the ESP Application, approval of a "provision that establishes a one-time rider to reflect the difference between the ESP approved rates and the rates charged under the Companies' existing standard service offer and reflects the length of time between the end of the December 2008 billing month and the effective date of the new ESP rates."² Although Section V.E. of the Companies' Application provides a high level description of how the rider might be applied, the cross examination of AEP's witness Roush revealed that many of the practical details necessary to implement this rider have not even been thought about, let alone addressed, in the Companies' Application.³

On September 24, 2008, AEP filed a Motion requesting that the Commission approve Section V.E. of its Application, arguing that the procedural schedule that had been adopted rendered it unlikely that the Commission would act upon its ESP Application within the 150-day time frame. On October 1, 2008, IEU-Ohio filed a memorandum contra ("Memorandum Contra") to AEP's September 24 Motion; AEP filed a Reply to IEU-Ohio's Memorandum Contra on October 6, 2008. To date, the Commission has not responded to these pleadings.

The presiding Attorney Examiners have isolated consideration of Section V.E. of the ESP Application from the balance of the ESP Application and have directed parties to separately address Section V.E. In accordance with this decision, IEU-Ohio hereby respectfully submits its Brief on Section V.E. of the Companies' ESP Application.

² Application at 17-18.

³ See Tr. Vol. I at 53-62.

II. ARGUMENT

A. The Commission may not consider Section V.E. of the Companies' Application and act upon this independent from its consideration of the entire ESP.

As indicated in IEU-Ohio's October 1, 2008 Memorandum Contra, AEP's Motion requesting that the Commission independently approve Section V.E. of the Application, the Companies' request is contrary to statute. A Commission ruling only on Section V.E. of the Companies' Application would inappropriately approve substantive portions of the Application in contradiction of the law. Section 4928.143(C)(1), Revised Code, states in part that:

...Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section ***if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.*** (Emphasis added).

Thus, any part of an application filed under Section 4928.143(A), Revised Code, must be evaluated as part of the total proposed ESP package, and the expected results under a proposed MRO under Section 4928.142, Revised Code, in order for it to be approved. Piecemeal consideration of Section V.E. of the Application is not permissible under SB 221, as confirmed by the language identified above.

There are other legal implications associated with the Commission taking action on Section V.E. of the Application.

At first blush, AEP's Section V.E. request, premised upon the notion that it affords the Commission more time to address the merits of its ESP Application, may

seem attractive. On closer examination, however, it may actually make things worse in the near term.

If the Commission were to act on a piecemeal basis regarding the merits of Section V.E. of the Companies' Application, there are three potential outcomes. The Commission could accept, reject, or modify this aspect of the ESP Application. Should the Commission reject or modify any aspect of the ESP Application, the Companies may withdraw the Application (thereby terminating the application according to Section 4928.143(C)(2)(a), Revised Code, after having satisfied the Section 4928.141, Revised Code, obligation to make at least one ESP application filing) and elect to pursue the MRO option.⁴ Under these circumstances, Section 4928.143(C)(2)(b), Revised Code, requires the Commission to issue such an order continuing the provisions, terms and conditions of the most recent SSO (with expected increases or decreases in fuel costs), until a subsequent SSO is authorized under Section 4928.142, Revised Code.

Because a rejection or modification of Section V.E. of the Application triggers the right of the Companies to withdraw its Application and, in that event, establish an interim SSO that reflects increases or decreases in fuel costs, the appropriate course of action for the Commission is to not act on the merits of Section V.E. of the Application at this time.

IEU-Ohio also suggests that the reconciliation provided for by the terms of Section V.E. depends entirely on the Commission's ultimate approval of an ESP that is acceptable to the Companies. In addition to the legal and other problems created by

⁴ AEP witness Baker was unable to answer on cross-examination whether a rejection or modification of Section V.E. would result in AEP withdrawing its ESP Application. See Tr. Vol. I at 231-232; Tr. Vol. II at 59-60. The Companies could alternatively choose to refile another ESP application.

trying to separate Section V.E. from the balance of the Companies' Application, the ultimate significance of Section V.E. depends entirely on the Companies' discretion.

B. Section V.E. of the ESP Application is premised upon an incorrect interpretation of Section 4928.141, Revised Code.

As proposed by the Companies, Section V.E. is intended to address what happens in the event a new SSO is not established under either Section 4928.142 or 4928.143, Revised Code. Section 4928.141(A), Revised Code, states that until an SSO is established under either Section 4928.142 or 4928.143, Revised Code, "... the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance ..." with Section 4928.141, Revised Code. "Rate plan" is defined 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."⁵ SB 221 became effective on July 31, 2008.

SB 221 is clear. AEP's SSO in place on July 31, 2008 must continue until an SSO is established under either Section 4928.142 or 4928.143, Revised Code. This outcome is one that occurs as matter of law and not because the Commission is exercising any authority under either Section 4928.142 or 4928.143, Revised Code. As explained by Staff witness Hess on cross-examination, an SSO is defined by and provided through an EDU's tariffs.⁶ As discussed below, Mr. Hess's recommendation to modify the SSO in place on July 31, 2008 until such time as the Commission addresses the Companies' Application is therefore unlawful.

Continuing the Companies' SSO in effect on July 31, 2008 would produce results that some might view as both favorable and unfavorable for customers. While this

⁵ Section 4928.01(A)(33), Revised Code.

⁶ Tr. Vol. I at 124-125.

result does not permit the increases proposed by Staff in its alternative proposal, discussed *infra*, AEP's tariffed SSO rates that would have, by their own nature, expired at the end of 2008, such as the regulatory transition charge ("RTC"), would continue to be charged until the Commission reaches a decision in this matter.⁷ Indeed, the witness for the Office of the Ohio Consumers' Counsel ("OCC"), who appears to agree with IEU-Ohio that AEP's July 31, 2008 tariffed rates must continue until an SSO is established under either Section 4928.142 or 4928.143, Revised Code, described this consequence in her rebuttal testimony.⁸

C. Staff's Alternative 1/1/09 Plan ("Alternative Plan") does not comply with SB 221.

In his direct testimony, Staff witness Hess proposed an Alternative Plan that he asserted would permit AEP, beginning on January 1, 2009, to "continue its rate plan."⁹ But, Mr. Hess's alternative actually alters the SSO in effect on July 31, 2008 by increasing generation rates by 3% for CSP and 7% for OP, adding an additional 4% increase of generation rates for both companies, keeping AEP's provider of last resort ("POLR") rates in place, leaving AEP's line extension policy in place, and pricing Monongahela Power ("Mon Power") and Ormet loads at the market price that he attributes to OCC witness Lee Smith.¹⁰ Mr. Hess's proposed Alternative Plan does not include a true-up or reconciliation mechanism tied to the SSO ultimately established for

⁷ Staff witness Hess confirmed that the RTC charge was contained in CSP's tariffs on July 31, 2008. *Id.* at 125.

⁸ Rebuttal Testimony of Beth E. Hixon at 7. IEU-Ohio believes, however, that Ms. Hixon's opinion that current line extension requirements expire on December 31, 2008 is in conflict with the requirement in Section 4928.141, Revised Code.

⁹ Prefiled Testimony of J. Edward Hess at 9.

¹⁰ *Id.*

the Companies.¹¹ Further, Mr. Hess's Alternative Plan would, if approved, allow AEP to collect additional revenue over and above the revenue that is available under the current SSO. If approved, his Alternative Plan would expand the percentage increases by adding an increase to cover the "delta revenue" associated with providing service to former Monongahela Power customers. This added increase element of Mr. Hess's Alternative Plan is contrary to the current "rate plan."

Presently, former Mon Power customers pay for electric service in accordance with CSP's SSO. As part of the Commission-approved transfer of Mon Power's Ohio facilities and customers to CSP, the Commission authorized CSP to solicit market-priced power supplies associated with providing service to former Mon Power customers. AEP tracks the difference in revenues it collects from former Mon Power customers served under CSP's tariffed rates and the market price for power obtained through the request for proposals. The Commission permitted AEP to collect this difference in revenues through a rider that distributes the revenue shortfall across all of CSP's customers. This is accomplished through CSP's power acquisition rider ("PAR").¹² Collection of the PAR, however, is part of and constrained by the discretionary 4% generation increase mechanism permitted under AEP's rate plan.¹³

The Staff's Alternative Plan reflects a similar concept. Rather than allowing AEP to collect the difference between the request for proposal price and the revenues AEP collects from former Mon Power customers served at CSP's tariffed rates, the

¹¹ *Id.*

¹² *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, Case No. 05-765-EL-UNC, Opinion and Order at 15-17 (November 9, 2005).

¹³ *Id.* at 17-18.

Alternative Plan would allow AEP to collect the difference between a forecast market price and the revenues AEP collects from former Mon Power customers served under CSP's tariffed rates, presumably through the PAR. However, rather than constraining this such that revenues collected through PAR must fall within the 4% discretionary increase, the Alternative Plan would allow AEP to collect the PAR revenues in addition to the automatic 4% discretionary generation increase. As such, the Alternative Plan is a modification to, rather than a continuation of, AEP's current rate plan.

Similarly, the Staff's Alternative Plan also proposes changes to AEP's rate plan relative to how service is provided to Ormet. Under a Stipulation approved by the Commission for the January 1, 2007 through December 31, 2008 period, Ormet is served by AEP through a reasonable arrangement pursuant to Section 4905.31, Revised Code. Under that Agreement, Ormet pays \$43 per megawatt hour ("MWh") for generation service.¹⁴ Pursuant to the Stipulation, on an annual basis AEP files, at the Commission, an estimated market-based price associated with providing generation service to Ormet. AEP calculates the difference between the estimated market-based price for providing generation service to Ormet and the \$43 per MWh price that is actually collected from Ormet under the contract and, during the term of the contract, AEP is permitted to offset this revenue difference through amortization of its Ohio Franchise Tax phase-out regulatory liability.¹⁵ If AEP fully amortizes the Ohio Franchise Tax phase-out regulatory liability before its reasonable arrangement with Ormet terminates, AEP is permitted to recover that revenue difference through a surcharge on

¹⁴ *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company*, Case No. 05-1057-EL-UNC, Supplemental Opinion and Order at 5 (November 8, 2006).

¹⁵ *Id.*

other retail customers. However, any such surcharge must also fall within the 4% discretionary generation increase mechanism AEP is permitted under its existing rate plan.¹⁶

The Staff's Alternative Plan would substitute an updated market price estimate, as provided by OCC witness Lee Smith, for the market price estimates AEP has historically used, and calculate the difference between this market price and the \$43 per MWh price paid by Ormet under its contract (which is currently scheduled to expire on December 31, 2008). The Staff's Alternative Plan would then subject other retail customers to a surcharge to collect this "delta revenue" difference. However, the surcharge would be in addition to, rather than falling within, the 4% discretionary generation increases permitted under AEP's existing rate plan. Thus Staff's Alternative Plan is a modification to, rather than a continuation of, AEP's existing rate plan and is precluded by Section 4928.141, Revised Code, unless and until the Commission issues an order establishing a new SSO under Sections 4928.142 or 4928.143, Revised Code, which is acceptable to the Companies.

Also, the Ormet-related aspect of the Staff's Alternative Plan assumes an extension of the existing Ormet contract that, by its express terms, expires on December 31, 2008. Upon the expiration of the contract, Ormet will, by default, receive service under one of AEP's currently approved rate schedules. The Stipulation approved by the Commission does not permit AEP to calculate and collect the difference between a market-based price estimate and the revenues it actually collects from Ormet after December 31, 2008. Thus, the implicit assumptions in Staff's Alternative Plan (i.e., Ormet's current contract is extended and AEP is permitted to

¹⁶ *Id.* at 5-6.

recognize and collect the difference between an estimated market price for generation and Ormet's contract price) are, in fact, modifications to AEP's current rate plan.¹⁷

AEP, while continuing to favor Section V.E. of its Application, submitted rebuttal testimony suggesting modifications to Mr. Hess's Alternative Plan that, if adopted, would cause Mr. Hess's Alternative Plan to include provisions that make Mr. Hess's Alternative Plan more like AEP's proposed ESP. More specifically, AEP recommended changes to Mr. Hess's Alternative Plan that would add: a true-up or reconciliation component; the Companies' proposed fuel adjustment clause ("FAC"); and at least half of the Companies' proposed POLR increase.¹⁸

The Ohio Energy Group's ("OEG") testimony indicates that OEG supports Section V.E. of the Companies' Application. In the alternative, and if the Commission were to adopt Mr. Hess's Alternative Plan, OEG supports limiting generation increases to 7% for CSP and 11% for OP.¹⁹

As explained above, Section 4928.141, Revised Code, controls in this situation and the Staff's Alternative Plan, like AEP's Section V.E. proposal, violates this provision of SB 221. Mr. Hess's Alternative Plan, Mr. Hess's Alternative Plan with AEP's proposed modifications, nor OEG's variation on Mr. Hess's proposal, is a continuation of AEP's SSO in effect on July 31, 2008 and, are, therefore unlawful proposals.

¹⁷ Even if it is assumed that the Ormet contract is extended, any difference between an estimated market price for generation and Ormet's contract price would need to be collected within the 4% discretionary increase to be consistent with AEP's current rate plan.

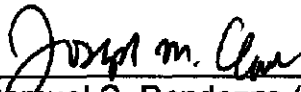
¹⁸ Limited Rebuttal Testimony of J. Craig Baker at 6-9.

¹⁹ Rebuttal Testimony of Stephen J. Baron at 2-3.

III. CONCLUSION

For the reasons discussed herein, the appropriate course of action for the Commission is to not act on Section V.E. of the Application at this time. The Commission should also find, as a matter of law, that if it does not act on the Companies' Application within the statutory deadline, AEP's SSO rates, as reflected in its approved tariff in effect on July 31, 2008, must continue until the Commission authorizes an ESP or MRO.

Respectfully submitted,

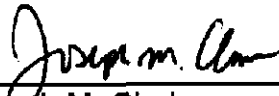


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Brief on Section V.E. of the Electric Security Plan Application of Columbus Southern Power Company and Ohio Power Company* was served upon the following parties of record this 3rd day of December, 2008, via electronic transmission, hand-delivery or first class mail, postage prepaid.



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