

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

In the Matter of the Application of Ohio)
Power Company for Approval of its) Case No. 08-918-EL-SSO
Electric Security Plan; and an Amendment)
to its Corporate Separation Plan.)

**MOTION FOR STAY OF THE RETROACTIVE COLLECTION OF AEP'S NEW
RATES FROM CUSTOMERS
OR, IN THE ALTERNATIVE,
MOTION TO MAKE RATES SUBJECT TO REFUND
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEOPLE'S ACTION COALITION**

The Office of the Ohio Consumers' Counsel, on behalf of the residential consumers, and the Appalachian People's Action Coalition (collectively, "Movants") pursuant to Ohio Adm. Code 4901-1-12, move for a stay of the effect of the retroactive collection of the new rates from customers of Columbus Southern Power Company and Ohio Power Company (collectively, "AEP Ohio" or "Companies") established in the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in the above-captioned cases on March 18, 2009. The stay is necessary in order to prevent irreparable harm to the Companies' residential customers during the pendency of the rehearing and/or appeal of the Order. In the alternative, the

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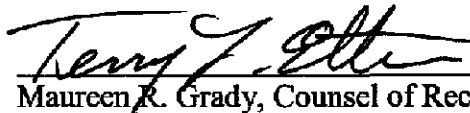
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Movants seek a ruling that AEP Ohio's retroactive collection of rates is subject to refund to customers.

While allowing the retroactive application of the new rates would cause irreparable harm to the customers that the Movants represent, no such harm would befall the Companies as a result of a stay or as a result of making the collections subject to refund. The reasons for granting the Movants' Motions are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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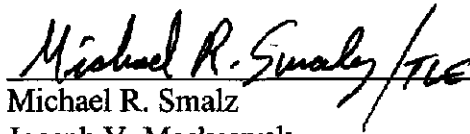
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

As background to the current unlawful attempt to retroactively collect rates from customers, the following dates and events are applicable. On July 31, 2008, AEP Ohio filed an Electric Security Plan ("ESP") seeking to raise rates to its customers under its Standard Service Offer ("SSO"). After a hearing and briefing, the Commission issued the Order modifying the ESP and granting AEP Ohio a smaller rate increase, at least initially, than the Companies had sought in their ESP. The Commission, however, made the rate increases retroactive to January 1, 2009, upon the Companies filing revised tariffs consistent with the Order.¹ AEP Ohio filed revised tariffs on March 23, 2009, signaling its acceptance of the modified ESP. The PUCO has scheduled its consideration of the tariffs for a potential ruling, for 1:30 p.m. on March 25, 2009.

¹ See Order at 72.

In order to avoid irreparable harm to customers, the Movants file this Motion to stay the retroactive collection of the new rates. The effect of the Order is that the Companies' customers will be required to pay increased rates for electric service during the rehearing, and likely appeal, of the Order² – a process that could take many months. In the event the Supreme Court overturns the PUCO's decision, it is unlikely customers will receive remuneration for the bills they paid to AEP Ohio. A stay of the retroactive collection of the new rates, or a ruling to make the collections subject to refund, is thus necessary in order to avoid this unjust result.

AEP Ohio would not be harmed by the stay that the Movants seek. If the retroactive collection of the rate increase is eventually upheld, AEP Ohio would then be allowed to collect, pursuant to the stay, the difference between the rates that were charged customers after January 1, 2009³ and the new rates approved in the Order. Similarly, AEP Ohio would not be harmed if the PUCO makes the rates subject to refund, as it will have already collected revenues from customers. The Commission should grant the stay or make the rate collections subject to refund.

II. STANDARD OF REVIEW

The Commission has noted that there is no controlling precedent in Ohio setting forth the conditions under which the Commission will stay one of its own orders.⁴ The

² The Movants do not argue the merits of the Commission's decision in this Motion, which arguments may be made in their applications for rehearing.

³ Under R.C. 4928.141(A), if there is no Commission decision on a utility's ESP filing by January 1, 2009, the utility's rates that were in effect as of July 31, 2008 continue until the Commission issues a decision.

⁴ See *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.

Commission, however, has favored the four-factor test governing a stay that was supported in a dissenting opinion by Justice Douglas,⁵ and which has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.⁶ This test involves examining:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where lies the public interest.⁷

As discussed below, on balance the Movants here meet this test.

With regard to the alternative of making the collections subject to refund, the PUCO has, in the past, required refunds to protect customers, as discussed below in Section III.E. If the Commission does not stay the retroactive collection of the new rates, it should make the rates subject to refund.

III. ARGUMENT

A. There Is a Strong Likelihood That Movants Will Prevail on the Merits.

Any ESP must be established consistent with the language of S.B. 221, as codified in R.C. 4928.141(A). Notably, the statute does not provide for a retroactive application of the SSO rate subsequently approved in an ESP. Rather, under R.C.

⁵ See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604.

⁶ Access Charge Decision at 5.

⁷ *Id.*

4928.141(A), if the Commission failed to approve a utility's ESP by January 1, 2009, the utility's rates that were in effect as of July 31, 2008 continue until an ESP is "first established." In addition, retroactive ratemaking is not permitted.⁸ Based on these factors, there is a strong likelihood that the Movants will prevail on the merits regarding retroactive application of the new rates.

Any argument that the increase itself is not retroactive as structured by the PUCO is a matter of form over substance. In reality, the PUCO has compressed 12 months of collection of the increased rates from customers into a nine-month period, thus allowing AEP Ohio to collect the revenues from a rate differential that was produced by the PUCO not issuing an order sooner.

The compressing of 12 months of revenue into a nine-month period comes at a time when the economic conditions leave customers with little ability to absorb a new rate increase, let alone the additional burden of being backbilled for the difference between the rates approved in the Order and the rates that were in effect prior to the Order. This additional economic burden contravenes the PUCO's stated desire to be sensitive to the interests of customers in this difficult time. This need to serve the public interest is further addressed below in Section III.D.

B. Retroactive Application of the New Rates Would Cause Irreparable Harm to AEP Ohio's Customers.

Harm is irreparable "when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be

⁸ *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254. But if the PUCO allows this retroactive ratemaking, then Movants reserve their rights to later argue that there is no bar to a refund of the amounts, such as in the event the Court overturns the PUCO's decision.

‘impossible, difficult, or incomplete.’”⁹ In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect, to determine whether to stay the proceedings.¹⁰

In *Tilberry v. Body*, the Ohio Supreme Court found that the effect of a court order calling for the dissolution of a business partnership would cause “irreparable harm” to the partners because “a reversal ... on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions” – a set of circumstances that would be “virtually impossible to accomplish.”¹¹ In *Sinnott v. Aqua-Chem, Inc.*, the Ohio Supreme Court found that a lower court’s pre-trial findings could be appealed at the point they were issued because the findings allowed the case to proceed to trial.¹² The majority reasoned that “the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,”¹³ and so concluded that “[i]n some instances, ‘[t]he proverbial bell cannot be unrung and an appeal after final * * * judgment on the merits will not rectify the damage’ suffered by the appealing party.”¹⁴ Here, the bell is ringing loud that Ohio customers need the PUCO to protect their interest in a refund.

⁹ *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App. 3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App. 3d 1, 12, appeal dismissed, 78 Ohio St. 3d 1419 (1997).

¹⁰ See, e.g., *Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158, 161.

¹¹ *Tilberry*, 24 Ohio St. 3d at 121.

¹² *Sinnott*, 116 Ohio St. 3d at 164.

¹³ *Id.* at 163.

¹⁴ *Id.* at 162 (quoting *Gibson-Myers & Assocs. v. Pearce* (9th Dist.), 1999 Ohio App. LEXIS 5010, *7-*8 (compelled disclosure of a trade secret would “surely cause irreparable harm”).

Although, as Justice Rehnquist observed, “the temporary loss of income, *ultimately to be recovered*, does not usually constitute irreparable injury,”¹⁵ *Tilberry* and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. Here, Ohio customers affected by the Commission’s order are unlikely to recover their losses in the event the Ohio Supreme Court overturns the PUCO’s decision. In this regard, AEP Ohio and the PUCO will likely assert that there is no mechanism under Ohio law that permits the retroactive refund of over-collections from customers, where such payments are not made subject to refund.¹⁶

The Commission should protect the Companies’ customers from this harm. The Commission should stay the retroactive application of the new rates until all appeals are exhausted.

C. A Stay Would Not Cause Substantial Harm to AEP Ohio.

A stay, while protecting AEP Ohio’s customers, would not harm the Companies. If the retroactive collection of the rate increase is eventually upheld, AEP Ohio would then be allowed to collect, pursuant to the stay, the difference between the interim rates that were charged customers after January 1, 2009 and the new rates approved in the Order.

Moreover the Companies have taken further actions, via an accounting application, to protect their interest in this regard. In Case No. 09-37-EL-AAM, AEP Ohio has sought accounting authority to establish a *de facto* fuel clause, allowing it to track increased fuel expenses incurred beginning January 1, 2009. AEP has asked to defer increased expenses and collect such increases in the future. If AEP’s request is

¹⁵ *Sampson v. Murray* (1974), 415 U.S. 61, 90 (emphasis added).

¹⁶ See, e.g., *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St. 3d 344; *Keco*, 166 Ohio St. 254, ¶ 2 of the syllabus.

granted, AEP will have minimized any harm it could otherwise claim if new ESP rates are not applied retroactively to January 1, 2009.

D. A Stay Would Further the Public Interest.

In the dissent in the Supreme Court case in which Justice Douglas recommended standards for a stay of a PUCO decision, he noted that PUCO Orders “have effect on everyone in this state -- individuals, business and industry.”¹⁷ That effect on customers is all the more pronounced in these difficult economic times when customers can ill afford increases in the essential service that is electricity. It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is “above all in these types of cases, where lies the interest of the public” and that “the public interest [] is the ultimate important consideration for this court in these types of cases.”¹⁸

As discussed above, the stay sought by Movants would prevent irreparable harm to AEP Ohio’s customers, with no substantial harm to the Companies. In addition, the stay would provide some relief to customers who are already burdened by the fragile state of the economy. The public interest, therefore, would be furthered by a stay of the retroactive application of the new rates.

E. In the Alternative, the PUCO Should Make the Rate Collections Subject to Refund.

An alternative approach to protecting customers is for the PUCO to make AEP Ohio’s rate collections subject to refund. The PUCO has, in the past, ordered that utility rates should be subject to refund. In 1983, the Commission determined that, with regard

¹⁷ *MCI*, 31 Ohio St.3d at 606.

¹⁸ *Id.*

to an AEP Ohio company, a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected subject to refund to customers.¹⁹ After the Commission's action was upheld on appeal,²⁰ the Commission ordered the company to refund approximately \$4.5 million to its customers.²¹

In that case the Commission ordered the refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule or reason. In this case, if the Commission does not stay the retroactive collection of the new rates, the Commission should make the rates subject to refund to protect Ohio customers.

IV. CONCLUSION

A stay of the retroactive application of the new rates would protect AEP Ohio's residential customers without harming the Companies. In the alternative, the PUCO could protect customers by ruling that the rates are subject to refund. In order to avoid unjust and irreparable harm to AEP Ohio's customers, the Commission should grant the stay sought in this Motion or rule that the rates are subject to refund.

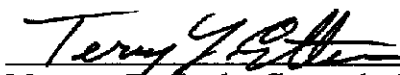
¹⁹ *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise Its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

²⁰ *Columbus & Southern Ohio Electric Co. v. Public Util. Comm.* (1984), 10 Ohio St.3d 12.

²¹ Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Stay has been served upon the below-named persons via electronic transmittal, as well as by U.S. Mail, this 25th day of March 2009.


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