

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 )  
Amendment to its Corporate Separation )  
Plan; and the Sale or Transfer of )  
Certain Generating 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

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM IN SUPPORT  
OF OCC'S 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**

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March 25, 2009

Attorneys for Industrial Energy Users-Ohio

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**MEMORANDUM IN SUPPORT**

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On Thursday, July 31, 2008, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively "Companies" or "AEP") filed an application for approval of a standard service offer ("SSO") under Section 4928.143, Revised Code ("ESP Application"). On March 18, 2009, after this case was fully litigated, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("Order") modifying and approving AEP's ESP Application. From a structural standpoint, with limited exceptions, the Commission utilized the framework of AEP's ESP Application, which amounted to a 15% total bill cap with deferrals. But the Order reduced the cap levels such that total bills for 2009 may not exceed 7% and 8%, respectively, for CSP and OP.<sup>1</sup> Also, the Commission specified that the effective date of the new rates is retroactive to January 1, 2009, and, thus, allowed AEP to collect the full amount of the 2009 rate increase over the balance of 2009.

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<sup>1</sup> It is important to note that by utilizing this framework, depending on what fuel costs turn out to be, a significant portion of the true cost of the ESP will not be known until some point in the future and, by reducing the cap levels, the Commission effectively increased the potential amount of the deferrals (inclusive of carrying costs) that customers will pay through a nonbypassable charge during the period 2012 through 2018.

AEP filed revised tariffs on March 23, 2009 to implement the Commission's Order. Today, March 25, 2009, the Office of the Ohio Consumers' Counsel ("OCC") moved for a stay of the effect of the retroactive collection from customers of the new rates in order to prevent irreparable harm to customers during the pendency of the rehearing and/or appeal process of the Order. In the alternative, OCC requested a ruling that AEP's collection of rates be subject to refund (hereinafter "Motion").

Industrial Energy Users-Ohio ("IEU-Ohio"), whose members purchase substantial amounts of electric and related services from AEP, fully participated in all aspects of AEP's ESP proceeding and will be significantly and negatively impacted by the rate increases authorized by the Commission's Order. For this reason and those described below, IEU-Ohio supports OCC's Motion. However, IEU-Ohio wants to make clear that the stay is being requested because of the potential immediate impact of the Commission's retroactive Order and not as an indication that there are not other fundamental factual and legal errors in the Order.<sup>2</sup>

The Commission's directive that the rate increases are effective as of January 1, 2009 violates the longstanding principle established in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957) (hereinafter "*Keco*") that prohibits the PUCO from ordering a retroactive rate increase.

Any argument that the Commission may make that the increase itself is not retroactive as structured in the Order would be a form over substance argument. The math indicates that the Commission has compressed 12 months of collection into a nine-month period allowing AEP to catch up on the lag in revenue collection that was produced by the Commission not issuing an order sooner. AEP could not recover 12

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<sup>2</sup> IEU-Ohio will raise these other significant legal and factual errors in an application for rehearing.

months of revenue calculated at the increased rates without treating the consumption in January through March as being subject to the new and higher rates. Had the Commission wanted to give AEP an opportunity to have a full year to collect the new rates, it could have started the three-year ESP with the April billing cycle (using a fiscal year rather than a calendar year to measure the term) or simply added the delta to a deferral for future recovery to make the 2009 outcome less onerous on customers and to allow the ultimate deferral to be determined based on the lawful and reasonable rates that ultimately emerge in this proceeding. However, the practical result of condensing the revenue collection period is that the rates will be higher than would be the case if the authorized revenue was recoverable over a 12-month period.

Additionally, it is important to note that allowing AEP to collect 12 months of revenue over a nine-month period comes at a time when the economic conditions leave customers with little ability to absorb a new burden and violates the Commission's own prior rulings and those within the Order itself.

The Commission stated, "we believe that a phase-in of the increases is necessary to ensure rate or price stability and to mitigate the impact on customers during this difficult economic period...." On that basis, the Commission imposed the rate caps identified above. Notwithstanding the caps and the logic for the caps, based upon our preliminary analysis, it appears that condensing the revenue collection period increases the rates (in some cases significantly) above the cap levels, rendering the caps meaningless.

Similarly, on December 19, 2008 and February 25, 2009, the Commission issued orders approving rates for the interim period until the Commission issued an order on

AEP's ESP.<sup>3</sup> While, in the orders in Case No. 08-1302-EL-ATA, the Commission rejected AEP's arguments that it must be made whole for 2009, the Commission now appears to be granting AEP's request by permitting AEP to recover 12 months of revenues over a nine-month period.

IEU-Ohio supports OCC's Motion and agrees that it is necessary to avoid irreparable harm to customers. Accordingly, IEU-Ohio supports OCC's Motion for the reasons stated herein and on the same bases as are set forth by OCC in its Motion filed this same day, as are fully incorporated herein for reference, and respectfully requests that the Commission grant the stay or rule that the rates are subject to refund.

Respectfully submitted,



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<sup>3</sup> *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-1302-EL-ATA, Finding and Order at 2 (December 19, 2008) and Finding and Order at 2 (February 25, 2009). Specifically, the December Finding and Order stated:

Pursuant to Section 4928.141(A), Revised Code, the Commission finds that until a standard service offer is first approved by the Commission in accordance with Section 4928.142 or Section 4928.143, Revised Code, the electric utility's standard service offer in effect on July 31, 2008 shall continue. Therefore, the Companies' standard service offer rates contained in the tariff schedules in effect on July 31, 2008 should continue from January 1, 2009 until such time as the Commission approves new standard service offer rates in accordance with Section 4928.142 or Section 4928.143.

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum in Support of OCC's 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* was served upon the following parties of record this 25<sup>th</sup> day of March 2009, via electronic transmission, hand-delivery or first class mail, postage prepaid.

  
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