

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; 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

COLUMBUS SOUTHERN POWER COMPANY'S AND
OHIO POWER COMPANY'S MEMORANDUM CONTRA
OFFICE OF CONSUMERS' COUNSEL'S AND
APPALACHIAN PEOPLE'S ACTION COALITION'S
MOTION FOR STAY OR TO MAKE
A PORTION OF THE RATES SUBJECT TO REFUND

"AEP's proposal to continue the 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."

August 28, 2008 Motion for Extension of Time filed
by the Ohio Consumers' Counsel and others.

INTRODUCTION

Once again, the Ohio Consumer's Counsel (OCC), this time joined by
Appalachian People's Action Coalition (APAC), disregards, in fact, fails to even address,
its prior position on what it now calls "retroactive" rate increases. APAC, who already
had intervened by the time OCC had represented its acceptance of a mechanism that
would reconcile the final ESP rates in a manner that would equate initial ESP rates to a

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full year of rate recovery, did not oppose OCC's request for an extension of time or the arguments presented by OCC.

Now that the Commission has done what OCC had said would be reasonable and should be acceptable to all parties, OCC and APAC have filed a motion to stay the effectiveness of the portion of the 2009 ESP rates filed by Columbus Southern Power Company and Ohio Power Company (AEP Ohio) which reconcile the Commission's authorized ESP rates with the fact that these rates will take effect three months after the date required by Section 4928.143 (C) (1), Ohio Rev. Code. Alternatively, they ask that that portion of the rates should be made subject to refund.¹

AEP Ohio opposes both alternatives presented in the OCC/APAC motion. The Commission's Opinion and Order addressing this issue is both reasonable and lawful. In presenting its arguments for denying the OCC/APAC motion, AEP Ohio wants to make certain of its basic positions very clear. First, while AEP Ohio is disappointed that the Commission's ESP order was not issued within the 150-day statutory period, it recognizes that the demands of due process can take longer than might otherwise be anticipated. AEP Ohio's due process, however, cannot be sacrificed as the cost of satisfying other parties' procedural preferences. Further, AEP Ohio does not fault the Commission, its Staff or the intervenors for a hearing, briefing and Commission determination process which resulted in the Opinion and Order being issued on March 18, 2009. In fact, Mr. Hess' characterization of the Staff's efforts in this case most certainly applies to the parties and the Commissioners themselves. (Tr. Vol. XVIII, p.115).

¹ Industrial Energy Users-Ohio (IEU) filed a memorandum supporting the OCC/APAC motion.

Given the difficult circumstances facing the Commission and the parties, the Commission's resolution of this issue is not only lawful, but also reasonable. What is unreasonable, however, is OCC's continued attempt to sweep under the carpet its prior stance on this issue. As noted in *United States v. Winstar Corp.* 518 U.S. 839, 886 116 S. Ct. 2432 135 L. Ed. 964 (1996):

“the Government should turn square corners in dealing with the people [just as] the people should turn square corners in dealing with their government.”

OCC should turn the “square corner” of standing by its earlier position. The OCC/APAC motion should be denied.

ARGUMENT

Movants' motion should not be heard

To the extent that the Commission entertains the motion for stay at all, the request should be rejected for a number of reasons.² First, as referenced above, the OCC previously endorsed the outcome of prospective true-up as being reasonable and should now be estopped from taking a different position that suits its present purpose. *Ohio St. Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d 630, 632 (1990). That basis alone justifies denial of the motion for stay.

Movants have not shown a strong likelihood of success on the merits

² For purposes of responding to the OCC/APAC motion, AEP Ohio utilizes the same basic standard of review under *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604 (dissenting opinion of Justice Douglas). If this stay request were made before the Supreme Court of Ohio, movants would also have to comply with the requirements of Section 4903.16, Ohio Rev. Code, including the posting of a financial undertaking. It is important to note that Justice Douglas viewed satisfaction of this standard as a very high hurdle. In creating this standard Justice Douglas pointed out the unique nature of Commission orders and the thorough review given by the Commission and its experts. In fact he stated that a stay “should only be given after substantial thought and consideration – if at all....” (emphasis added) Thus, under the four-prong standard proposed by OCC/APAC a stay of a Commission order should be a rare event, if ever ordered at all. A rate order does not rise to the level of an extreme exception.

As a threshold matter in evaluating the likelihood of success on the merits, the Commission must first recognize that OCC/APAC and IEU-OH both factually mischaracterize the Commission's order as making the rate increases retroactive. OCC/APAC Memorandum in Support at 1; IEU-OH Memorandum in Support at 1. The Commission's order authorized approval of the three-year term for the ESPs from January 1, 2009 through December 31, 2011. Order at 64. In doing so, the Commission also provided that the revenues collected during the interim period (as authorized by the orders in Case No. 08-1302-EL-ATA) must be recognized and offset by the new rates. *Id.* Thus, the Commission did not establish retroactive rates but instead allowed for a prospective rate mechanism to implement its decision to approve the ESP for the full three-year term. In accordance with the order, AEP Ohio filed tariffs that include rates for 2009 that are designed to collect twelve months of revenue in the remaining nine months of 2009, net of the required offset for the interim rates that were previously in effect during 2009.

While the impact of the Commission's decision may effectively be the financial equivalent of having issued a decision before January 1, 2009 (in accordance with Section 4928.143(C)(1), Ohio Rev. Code), it is not the same as making rates retroactive or backbilling individual customers for service already provided and paid for. OCC/APAC is wrong in claiming that customers are "being backbilled" (OCC/APAC Memorandum in Support at 4) and IEU-OH similarly mischaracterizes the order in stating that the effect is "treating consumption in January through March as being subject to the new and higher rates" (IEU-OH Memorandum in Support at 3). The order and AEP Ohio's tariffs implementing the order do not provide for new rates during the first

quarter of 2009 and individual customers are not being re-billed for January, February and March at the higher rate. Rather, the order and AEP Ohio's implementing tariffs provide for incrementally higher rates during the nine remaining months of 2009, which rates are designed to collect, on a total company basis for CSP and OP, twelve months of revenue increase within nine months. There is no retroactive application of the new rates.

Indeed, OCC/APAC admits that "[i]n 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." OCC/APAC Memorandum in Support at 4. Supporting intervenor IEU-OH also recognizes that the Commission is "permitting AEP to recover 12 months of revenues over a nine-month period." IEU-OH Memorandum in Support at 4. This is an important distinction to recognize in this context.

Because ESP rates are not required to be formulaic or cost-based, the Commission can approve an ESP containing a set of rates and other features that is deemed in the aggregate to be more favorable than the expected results under an MRO. Consequently, the fact that the rates approved under AEP Ohio's ESP are incrementally higher in April through December 2009 than they might have otherwise been does not present a legal barrier to the Commission's approval or satisfaction of the statutory standard of review for ESP cases. In other words, this particular feature of the Commission's modified ESP (*i.e.*, allowance for prospective rates to effectively enable the collection of twelve months of revenue increase over the span of nine months) stands on equal footing with every other aspect of the ESPs when it comes to reviewing the outcome under the applicable statutory standard: the ESP in the aggregate must be more favorable than the expected

results of an MRO. Consequently, a party cannot challenge individual rates within an ESP in isolation from the plan as a whole – especially using traditional ratemaking arguments based on strict recovery of costs or recovery of an authorized level of revenue during a specified period of time. In violation of these principles, the precise purpose of OCC/APAC’s motion for stay is to challenge a single feature of the modified ESPs based on just such a traditional ratemaking analysis.

The distinction between a temporary prospective adjustment and retroactive ratemaking is not merely “form over substance” as argued by IEU-OH (Memorandum in Support at 2). On the contrary, recognizing that the Commission’s decision allows for a prospective adjustment as part of the entire modified ESP package (and not unlawful retroactive ratemaking as alleged by OCC/APAC) exposes that the motion for stay is based on a fundamentally flawed premise and that movants do not establish a likelihood of success. Thus, it is a meaningful distinction that shows that this aspect of the Commission’s order easily fits within the Commission’s authority in approving an ESP under Section 4928.143, Ohio Rev. Code. Although AEP Ohio already recognizes this evident distinction from the order, the Commission may wish to clarify the prospective nature of its order in addressing the OCC/APAC motion for stay and indicate that it is granting an incrementally larger increase in April through December 2009 rates as part of the modified ESP package and the timing of the decision.

In a similar vein, IEU-OH also singles out the prospective temporary adjustment for attack based on its characterization that this aspect of the order is unlawful retroactive ratemaking that violates the longstanding principle established in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957) “that prohibits the PUCO

from ordering a retroactive rate increase.” IEU-OH Memorandum in Support at 2. This argument misperceives *Keco* and its progeny. The key principles in the *Keco* decision formed the so-called “filed rate doctrine” in Ohio and established that: (1) any rates set by the Commission are lawful until such time as they are set aside by the Supreme Court; (2) a utility has no option but to collect the rates set by the Commission, unless a stay order is obtained; (3) there is no automatic stay of any order and it is necessary for an aggrieved party to affirmatively obtain a stay and post a bond; and (4) no action for unjust enrichment lies to recover the rates that were subsequently determined to be unlawful because the comprehensive regulatory scheme in Title 49 abrogates any common law action in this regard.

Thus, *Keco* held that there is no retroactive remedy for rates that were charged pending rehearing and appeal and were subsequently determined to be unlawful. *Keco* addresses issues relating to a post-appeal remedy (or lack thereof) and does not restrict the Commission when initially establishing rates in a rate order. In effect, IEU-OH turns *Keco* on its head by attempting to use the principles to block the effectiveness of the Commission’s rate order during rehearing and appeal.

On a more basic level, the motion for stay provides no reason why the Commission should consider its own decision issued just last week to now be unlawful. Yet, that is the underlying assumption made by movants in the request for stay. The Commission is tasked with adjudicating an order in response to AEP Ohio’s application. That duty to reach a decision does not include providing for advance remedies to address the improbable event that the Supreme Court on appeal may disagree, especially when doing so involves a conclusion by the Commission that its own order may be unlawful.

As set forth above and as the likely subject of a more expanded discussion during the rehearing process in these cases, there is no reason for the Commission to conclude that its allowance of a prospective rate adjustment was unreasonable or unlawful.³

OCC/APAC has not established a likelihood of success on the merits of their claim that the Commission has engaged in unlawful retroactive ratemaking, let alone a strong likelihood of success. The motion merely makes a token effort to demonstrate a likelihood of success and is supported only by conclusory allegations and superficial arguments; it is woefully inadequate to demonstrate the likelihood of success on the merits. For this reason, the stay request must be denied.

Movants have not demonstrated irreparable harm absent a stay order

In addition, OCC/APAC have failed to demonstrate irreparable harm if no stay order is issued. Because OCC/APAC have failed to show a strong likelihood of success on the merits, they necessarily cannot claim any actual harm in awaiting the outcome of the rehearing and appeal process. Further, in claiming irreparable harm, movants erroneously rely on several cases. The *Tilberry v. Body* case cited by OCC/APAC dealt with the termination of a partnership leasehold. The Court stated “the sole issue presented for our determination is whether the trial court’s judicial dissolution of the instant partnership is a final, appealable order pursuant to *R.C. 2505.02*.” *Tilberry v. Body* (1986), 24 Ohio St. 3d 117, 119. The Court was considering the case to determine if it qualified as a special proceeding with a right to an immediate appeal. The Court determined that disposition of the assets without first determining whether to follow the partnership agreement or the statute would result in irreparable harm and should be

³ By endorsing the lawfulness of this aspect of the Commission’s order in the context of opposing the OCC/APAC stay request, AEP Ohio does not address the reasonableness or lawfulness of any other aspect of the Commission’s order.

included in the recognition of the need for an appeal. This case involved civil litigation and statutes governing the winding up of a partnership agreement and the individual interest each partner has when entering into the legal classification of a partnership. The Commission and its decisions are governed by a different set of statutes that recognize the common occurrence of rate decisions ordered by the Commission and their effectiveness once ordered. The two legal classifications are simply not comparable.⁴

Similarly, OCC/APAC's use of the Court's decision in *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158 is misplaced. In *Sinnott*, the Court reviewed the finality of an order from an interlocutory appeal in a case involving an asbestos claim. The actual case dealt with the incurrence of unnecessary trial expenses serving as an injury when there was a question whether the plaintiffs satisfied a statutory prerequisite before trial. The facts before the Commission in this case do not involve a pretrial prerequisite that affects or determines the outcome of a case not yet adjudicated. By contrast, the Commission already issued its decision on the overall case.

Leaving aside OCC/APAC's case law and the distinctions to be drawn, the essence of their claimed irreparable harm is that "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." OCC/APAC Memorandum in Support at 6. This theory of irreparable harm is incredibly broad and would apply in any rehearing and appeal process in any Commission case involving utility rates. More important than its

⁴ Another case relied upon by OCC/APAC concerning the definition of irreparable harm is *FOP v. City of Cleveland*. (OCC Motion at 5). This case dealt with a FERC concern to "ensure that all wholesale buyers and sellers of electric energy can obtain non-discriminatory transmission access, that the transition to competition is orderly and fair, and that the integrity and reliability of our electricity infrastructure is maintained." *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App. 3d 1, 12, appeal dismissed, 78 Ohio St. 3d 1419 (1997). The issue in the case was the availability of electric power between two competing providers under the backdrop of the approaching hot summer months. The case did not deal with the application of Commission-ordered rates.

breadth, this definition of irreparable harm flies in the face of the *Keco* decision and its progeny.

As referenced above, *Keco* holds that Commission rate orders are effective pending rehearing and appeal and there is no automatic stay of approved rates pending appeal – regardless of whether those rates are ultimately held to be unlawful. *Keco*, 166 Ohio St. at 258-259. If every Commission order that increased a rate were considered as the basis for irreparable harm and every rate order were stayed pending rehearing and appeal, there would be no need for the *Keco* doctrine and there would be a stay issued in every such case. That is an absurd result and belies the reality that issuance of a stay order is a highly unusual and extraordinary remedy. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (DC Cir. 1985). Neither the Commission nor the Court has found it necessary or appropriate to issue stay orders on anything more than an extraordinary basis (as referenced above, any request for a stay before the Supreme Court of Ohio would involve additional requirements under Section 4903.16, Ohio Rev. Code, such as a financial undertaking, which are essentially bypassed where the Commission entertains a stay).

Ohio law simply does not consider the outcome that OCC/APAC claims is irreparable harm as being harm at all. As the Supreme Court of Ohio has held under similar circumstances, “there is no statute which requires that, during the pendency of an appeal from the order of the commission granting an increased rate, the utility must impound the increase collected or post bond to insure reimbursement to its consumers in the event the rate should ultimately be lowered.” *City of Columbus* (1959), 170 Ohio St. 105, 110, 163 N.E.2d 167, 171. It is a function of the integrated regulatory scheme in

Title 49 of the Revised Code that Commission-approved rates are effective during rehearing and appeal and that statutory design does not constitute irreparable harm.

A stay order would cause AEP Ohio substantial harm

The next factor for evaluating a stay request is whether a stay would cause substantial harm to other parties. As a feature of the ESP that provides revenue increases to AEP Ohio, the prospective temporary adjustment can be considered a factor that provides some benefit to AEP Ohio. Imposing a stay on a portion of the Commission-authorized revenue increase would have the effect of limiting AEP Ohio's access to needed funding requirements at a time when it is increasingly difficult to obtain such funds from other sources.⁵

Because OCC/APAC and IEU-OH have not provided a basis for the Commission to presume its order is unlawful in this respect, it would be unfair to AEP Ohio and harm its interests to issue a stay of execution for this feature of the order. In this regard, OCC/APAC also claims that AEP Ohio's accounting application in Case No. 09-37-EL-AAM protects its interests separate and apart from the ESP order. OCC/APAC Memorandum in Support at 6-7. This argument is also without merit, since the accounting application remains pending and only would have covered part of AEP Ohio's fuel-related costs, and for only a limited period of time.

The public interest is not served by a stay order

The final factor to consider in evaluating a stay request is the public interest. Because the movants have not established a strong likelihood of success on the merits and do not show irreparable harm simply by virtue of the fact that a rate increase is

⁵ Even making a portion of the revenue increase subject to refund will adversely affect AEP Ohio's financing capabilities.

involved, it does not serve the public interest to stay the temporary prospective adjustment provision within the Commission's order. The prospective adjustment is a significant feature of the modified ESP package crafted within the Commission's order and it should not be surgically removed just because certain parties object to it. It is not in the public interest for the Commission to abandon years of sound regulatory policy and create a new automatic stay standard based solely on an increase in rates.

OCC/APAC's alternative request to make a portion of the rate subject to refund is also without merit

As an alternative to its request for a stay, OCC/APAC requests the Commission to make the collection of a portion of rates subject to refund. OCC relies upon the Commission's November 17, 1982 Entry in Case No. 81-1058-EL-AIR (*The Zimmer CWIP Case*) to support its request. The Commission's decision to make rates subject to refund in the Zimmer CWIP Case has no application to this proceeding, and the OCC/APAC request for a stay should be denied.

In the Zimmer CWIP Case the Commission issued its Opinion and Order on November 5, 1982, granting, in part, Columbus & Southern Ohio Electric Company's request for a rate increase. In its order the Commission included a construction work in progress (CWIP) allowance for a portion of the company's investment in the Zimmer nuclear plant. A week later, on November 12, the Nuclear Regulatory Commission (NRC) issued an order suspending construction at Zimmer. On November 17, 1982 the Commission issued an Entry approving tariffs implementing the entire rate increase it had authorized in its Opinion and Order, including the portion attributable to the Zimmer CWIP allowance. However, in light of the significant changed circumstances at Zimmer, the Commission made the Zimmer CWIP-related portion of the rate increase subject to

refund. In addition, by a separate Entry also issued on November 17, 1982, the Commission granted rehearing for the purpose of considering the impact of the changed circumstances at Zimmer on its decision to include Zimmer costs in the CWIP allowance for the company.

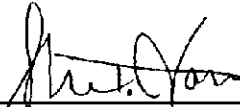
In the instant case, there has been no change in circumstances since the issuance of the Commission's March 18, 2009, Opinion and Order, let alone changes that might undercut or conflict with the Commission's rationale for permitting recovery of annualized 2009 revenue increases over the remainder of 2009. Nor has the Commission concluded that circumstances have changed sufficiently to warrant granting rehearing for the purpose of reconsidering its decision on that issue. Consequently, the Commission's Entry in the Zimmer CWIP Case provides no support for OCC's alternative request to make rates subject to refund.

OCC/APAC have not demonstrated that the rate issue they raise in their motion is unique from any other Commission rate determination. OCC/APAC's refund alternative, if granted, would open the door to placing any component of any rate increase order under a refund obligation pending rehearing and appeal. Such a result is neither reasonable nor permissible.

CONCLUSION

For the foregoing reasons, OCC/APAC's motion for stay or, in the alternative, motion to make rates subject to refund should be denied.

Respectfully submitted,



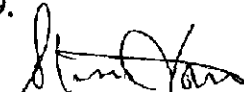
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Motion for Stay or to Make a Portion of the Rates Subject to Refund was served by electronic mail upon the individuals listed below this 27th day of March, 2009.



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