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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of the 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 Assets.

Case No. 08-917-EL-SSO

In the Matter of the Application of the Ohio Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Assets.

Case No. 08-918-EL-SSO

OHIO HOSPITAL ASSOCIATION'S
APPLICATION FOR REHEARING

Pursuant to Ohio Revised Code ("R.C.") Section 4903.10, the Ohio Hospital Association ("OHA") respectfully submits this Application for Rehearing of the March 18, 2009, Opinion and Order ("ESP Order") of the Public Utilities Commission of Ohio ("Commission") in the above-captioned proceedings. The Commission's ESP Order is unreasonable and unlawful in the following respects: (1) the retroactive revenue effect of the Commission's ESP Order violates well-established Ohio law and the specific mandate of R.C. 4928.141; and (2) the Commission's adoption of a POLR charge is contrary to the public interest, unsupported by the evidence of record in this case, and contradicts the recommendations of the Commission Staff.

OHA requests that the Commission reconsider and rescind its determinations concerning these issues. The reasons supporting this Application for Rehearing are given below in the attached Memorandum in Support.

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MEMORANDUM IN SUPPORT

I. RETROACTIVE REVENUE EFFECT OF THE COMMISSION'S ESP ORDER

A. The Commission Approved Rates Designed to Collect Revenues for Services Provided as of January 1, 2009 Through March 2009 Contrary to the Provision of R.C. 4928.141(A), As Well As A Long-Established Prohibition Against Retroactive Ratemaking.

The Commission's ESP Order sets the term of the ESP as of January 1, 2009, while the March 30 2009, *Entry Nunc Pro Tunc* sets the billing cycle beginning in April 2009 as the "effective" date of the new ESP rates for Columbus Southern Power Company and Ohio Power Company (collectively "AEP"). The *Entry Nunc Pro Tunc* clearly highlights that, although the new rates will not be billed until after the effective date of the ESP Order, those rates are *applicable and compensatory* for the entire effective term of the ESP plan, starting January 1, 2009.

The economic impact of the *Entry Nunc Pro Tunc* is unambiguous. Beyond changing the date on which AEP could begin billing under the new rate structure, the *Entry Nunc Pro Tunc* left undisturbed the remaining portions of the ESP Order. The overall revenue figures established by the ESP Order were unchanged by the *Entry Nunc Pro Tunc*. Simple arithmetic in tandem with the logic of the *Entry Nunc Pro Tunc* shows the Commission's intention of allowing AEP to collect twelve months worth of ESP revenues over the nine-month remainder of 2009. If this was not the intention of the Commission, some alteration to the revenue figures contained in the ESP Order would have been necessary in the *Entry Nunc Pro Tunc*.

It is telling that the Commission's ESP Order directs the Companies to reconcile the rates in effect from January through March 2009 with new rates set under the ESP, "under the new

approved ESP rates any revenues collected from customers during the interim period must be recognized and offset by the new rates and charges approved by this opinion and order.”¹ This reconciliation between the new and old rates guarantees that the newly approved rates will compensate the Companies as if these rates had been effective during the first three months of 2009, consistent with the term of the ESP – compensating the Company for past services rendered.

Indeed, AEP has confirmed that the ESP Order allows this to happen.² AEP’s reference to a twelve month period clearly contemplates calendar year 2009, January through March.

B. The Commission’s ESP Order Violates R.C. 4928.141

The General Assembly has explicitly addressed the question of the appropriate rates that should apply during the period of time prior to the approval of an electric utility’s first SSO adopted pursuant to R.C. 4928.141. Revised Code 4928.141(A) provides in part:

***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 [4928.14.2] or 4928.143 [4928.14.3] of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 [4928.14.3] 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.

The Commission recognized this provision in its December 19, 2008, Finding and Order in Case No. 08-1302-EL-ATA. That Finding and Order determined the lawful rates that would

¹ ESP Order at p. 64.

² *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* at 4 (March 27, 2009). “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.”

apply until the Commission approved a standard service offer (“SSO”) rate pursuant to either R.C. 4928.142 or 4928.143. That did not happen until March 18, 2009. The rates as determined in Case No. 08-1302-EL-ATA remained the lawfully effective and published rates as required by R.C. 4905.30 and 4905.32. The customers of AEP are legally entitled to rely on those rates. Neither R.C. 4928.141 nor R.C. 4928.143 gives the Commission the authority to compensate an electric distribution utility for past services provided to lawfully approved rates. The Commission is bound to keep effective rates for service in place until such time as a just and reasonable SSO has been approved and implemented. In the instant situation, the Commission has reached back to effectively revise the rate paid by customers for their electric consumption for the period between January 1, 2009 and the commencement of the April 2009 billing cycle. The Commission simply lacks the legal authority to accomplish this feat.

C. Ohio Law Prohibiting Retroactive Rates Is Well Established.

While the provisions of Amended Substitute Senate Bill 221 (“SB 221”) are clear enough in their own right, the law beyond those provisions would prevent the Commission from “truing-up” 2009 rates back to January 1.

The prohibition against retroactive ratemaking has been noted repeatedly by the Ohio Supreme Court. In *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.*, the Ohio Supreme Court explained the Commission cannot order refunds or credits to utility customers for past rates approved by the Commission, even where those rates are later found to be excessive.³ The instant situation is simply the mathematical inverse of that situation.

In *Lucas County v. Public Utilities Commission*, the Ohio Supreme Court concluded that

³ *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 1266 Ohio St. 254, 257, 141 N.E.2d 465.

the Commission had no statutory authority under which it could order refunds or service credits to consumers: "... [W]ere the commission to order either a refund or a credit, the commission would be ordering Columbia Gas to balance a past rate with a different future rate, and would thereby be engaging in retroactive ratemaking, prohibited by *Keco*."⁴ This is exactly what the Commission has done in the instant case – the rates that will be collected from customers beginning with the April, 2009 billing cycle will compensate AEP for services rendered back to January 1, 2009.

Even the United States Supreme Court has held that the Commission had no power to establish rates retroactively.⁵

C. The Commission's ESP Order Violates the Ohio and U.S. Constitutions.

This retroactive ratemaking also violates Article I, Section 10 of the United States Constitution and Article II, Section 28 of the Ohio Constitution by resetting rates for customers who had lawfully-settled expectations regarding the rates they were to be charged for electrical service.⁶ Article I, Section 10 of the U.S. Constitution provides "No State shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts...." Article II, Section 28 of the Ohio Constitution provides "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contract...." These constitutional provisions establish that

⁴ *Lucas County v. Public Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349, 686 N.E.2d 501.

⁵ *Public Utilities Com. v. United Fuel Gas Co.* (1943), 317 U.S. 456, 464 63 S. Ct. 369, 374, 87 L. Ed. 396. 401.

⁶ *Ohio Edison v. Public Util. Comm.* (1978), 56 Ohio St.2d 419, 424, 384 N.E.2d 283. "Such result would necessarily be violative of the provisions of Section 10, Article I of the United States Constitution, and Section 28, Article II of the Ohio Constitution, in that it would be an attempt to retroactively charge a regulatory order of the commission, having the effect of existing law." Cited with approval in *Columbus Southern Power Co. v. Public Util. Comm.* (1993), 67 Ohio St.3d 535, 541, 620 N.E.2d 835.

the Commission may not retroactively change one of its own ratemaking orders (Case No. 08-1302-EL-ATA) that have the effect of law.

The hazard to the public interest posed by the Commission's actions in these cases are clear: Acting without statutory authority, the Commission could just as easily decide that AEP was entitled to higher revenues for a much longer retrospective period – there is nothing magic about the January 1, 2009 date. Certainly, the fact that AEP's rate stabilization plan ("RSP") was set to expire on December 31, 2008 poses no less an impediment to the Commission setting rates retrospectively than do the terms of R.C. 4928.141 and the other prohibitions against retroactive ratemaking. This example simply illustrates the dangers to the public interest when the Commission operates outside the bounds of the law.

II. THE POLR CHARGED APPROVED BY THE COMMISSION IS UNREASONABLE

The acceptance of a modified, bypassable version of AEP's proposed Provider of Last Resort ("POLR") Rider, purportedly designed to compensate it for the risks associated with customer shopping,⁷ is unreasonable and unlawful in the following respects. The POLR charge approved by the commission contradicts the recommendations of the Commission Staff, is unnecessary in light of the low risk of shopping, and was based upon a pricing model not intended to be used for the purpose of pricing shopping risk.

⁷ Tr. Vol. III, p. 151, lines 9-13 (AEP witness Hamrock) and Tr. Vol. VI, p. 215 line 24 through p. 216, line 7.

A. The Staff recommended that the POLR rider be denied.

The Staff strongly recommended that the “AEP companies not be allowed their requested provider of last resort (POLR) charge.”⁸ Contrary to this recommendation, the Commission improperly granted AEP a modified version of its POLR rider, albeit with a modestly reduced revenue requirement attached. OHA strongly supports a return to the position of Commission Staff that AEP not be allowed their “slippery” request for a POLR charge.⁹ The \$97.4 million revenue requirement underlying the modified POLR has no more support in the record than did AEP’s incredible initial proposal.

B. The POLR rider is unnecessary because of the risk of shopping is virtually nil.

AEP itself admitted that there is virtually no shopping in AEP’s Ohio territories.¹⁰ Compensating AEP for this nonexistent risk defies common sense. Yet, the Commission (based upon no evidence), concluded that there is some risk of customer shopping, and thereby adopted a reduced POLR charge. This conclusion is simply baseless and unreasonable.

During the hearings, Kroger witness Higgins explained:

The POLR charge proposed by AEP for the three-year duration of the ESP is in excess of \$500 million for the two utilities. This strikes me as rather stiff premium for utility customers to pay when few customers have actually shopped in the AEP Ohio service territories since the onset of direct access.¹¹

This idea was important enough to bear repeating in the Ohio Manufacturers’ Association’s brief:

⁸ Staff Exhibit 1 at p. 4, lines 3-4.

⁹ Staff Exhibit 1, p. 4, lines 3-4.

¹⁰ Tr. Vol. XI, p. 46, lines 8-12.

¹¹ Kroger Exhibit 1 at p. 11, lines 6-14.

What make[s] this POLR charge particularly egregious is that, under the company's ESP, the customer is required to pay this charge regardless of whether the customer is even aware of this "right," regardless of whether the customer has any desire to possess this right, and regardless of whether the customer has any intention to exercise this right. And, the companies will continue to collect almost \$115 million – year after year – even if not one single customer were to "shop!"¹²

It is clear that the Commission erred in adopting a POLR charge that compensates AEP for nonexistent shopping risks.

C. The Black-Sholes model relied upon by AEP was not intended to be used for the purpose of pricing shopping risk.

The Black-Sholes pricing model that AEP employs in calculating its POLR charge was not designed to be, and is not, used in energy markets.¹³ In fact, the Black-Scholes model originally was designed to price stock options,¹⁴ and there has been no evidence of its use anywhere but in pricing stock and/or coal options.¹⁵

¹² Brief of the Ohio Manufacturers' Association on the Columbus & Southern Power Company and The Ohio Power Company's Electric Security Plan ("OMA Brief"), p. 8.

¹³ Tr. Vol. VI, p. 180, lines 6-9 (explaining that the Black-Scholes model has only been seen being used by "financial traders"). See also Tr. Vol. VI, p. 239 (explaining that the Black-Scholes model was designed to price stock options).

¹⁴ Tr. Vol. VI, p. 239, lines 17-20.

¹⁵ Tr. Vol. VI, p. 243, lines 3-14.

III. CONCLUSION

WHEREFORE, the Ohio Hospital Association respectfully urges the Commission to grant its application for rehearing.

Respectfully submitted on behalf of
OHIO HOSPITAL ASSOCIATION



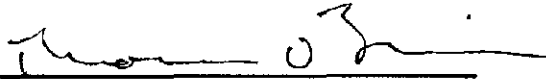
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CERTIFICATE OF SERVICE

I hereby certify that the OHIO HOSPITAL ASSOCIATION'S APPLICATION FOR REHEARING was served by electronic mail on the parties of record listed below this 17th day of April 2009.


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