

**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 Including Related Accounting)	Case No. 08-917-EL-SSO
Authority; an Amendment to its)	
Corporate Separation Plan; and the Sale)	
or Transfer Certain Generating Assets)	
)	
In the Matter of the Application of Ohio)	
Power Company for Approval of its)	
Electric Security Plan Including Related)	Case No. 08-918-EL-SSO
Accounting Authority; and an)	
Amendment to its Corporate Separation)	
Plan)	

**THE KROGER CO.'S MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER
COMPANY'S AND OHIO POWER COMPANY'S APPLICATION FOR REHEARING**

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-35(B), The Kroger Co. submits this Memorandum Contra Columbus Southern Power Company's ("CSP") and Ohio Power Company's ("OP") (collectively "AEP") Application for Rehearing.

INTRODUCTION

On March 18, 2009, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("March 18 Order") in this proceeding approving and modifying AEP's Electric Security Plan ("ESP") Application. On April 17, 2009, AEP filed an Application for Rehearing, requesting rehearing on many aspects of the March 18 Order. AEP's Application for

Rehearing fails to established grounds for rehearing on several issues. Specifically, AEP's request for Rehearing must be denied for the following reasons:

- The Commission did not unlawfully and unreasonably expand the statutory test under Ohio Revised Code ("R.C.") 4928.143 that compares the proposed ESP to the expected results of a market rate offer ("MRO").
- The Commission did not act unlawfully or unreasonably by rejecting AEP's automatic annual increase to the non-FAC portion of AEP's generation rates.
- It was not unlawful or unreasonable for the Commission to determine that much of AEP's distribution proposal must be examined in a distribution rate case.

For the reasons more fully set forth below, the Commission must reject AEP's Application for Rehearing on these issues. Lack of comment on any issue requested for rehearing by any party to this proceeding does not indicate The Kroger Co.'s support or opposition to those issues.

ARGUMENT

I. Comparison of AEP's ESP to an MRO

In its Application for Rehearing, AEP argues that the Commission acted unlawfully and unreasonably by expanding the statutory test under R.C. 4928.143 that compares AEP's ESP to a MRO. AEP contends that its proposed ESP is more favorable than a MRO, and by modifying the ESP, the Commission expanded its authority beyond the scope of R.C. 4928.143.¹ AEP's argument is based on the faulty premise that AEP's proposed ESP is more favorable in the

¹ AEP Application for Rehearing, at 4-5.

aggregate than a MRO. Neither the March 18 Order, nor the weight of the evidence presented in this proceeding indicates this to be true.

R.C. 4928.143(C) states “the commission by order shall *approve or modify and approve* an application . . . if it finds that the electric security plan *so approved* . . . is more favorable in the aggregate as compared to the expected results that would otherwise apply under (a MRO)” (emphasis added). However, the March 18 Order did not find AEP’s proposed ESP is more favorable than a MRO. Rather, the Commission held that AEP’s ESP “*as modified by this order*, is more favorable in the aggregate as compared to the expected results” of a MRO.²

While The Kroger Co. does not agree that the modified ESP is more favorable than a MRO, clearly the Commission did not find that AEP’s proposed ESP is more favorable than a MRO. Instead, the Commission properly exercised its statutory authority to modify AEP’s ESP proposal to make AEP’s ESP more favorable than the expected results of a MRO. In doing so, the Commission acted within the explicit authority granted to it by R.C. 4928.143(C).

AEP also objects to the finding in the March 18 Order that the Commission’s authority is not limited:

“to an after-the-fact determination of whether the proposed ESP is more favorable in the aggregate. Rather, the Commission finds that our statutory authority includes the authority to make modifications supported by the evidence in the record in this case.”³

There is nothing objectionable about this finding. The Commission merely states what is self evident in R.C. 4928.143(C); that the Commission may modify AEP’s proposed ESP if it is not more favorable than an MRO.

² March 18 Order, at 72 (emphasis added).

³ AEP’s Application for Rehearing at 4-5 (citing the March 18 Order at 72).

In its Application for Rehearing, AEP spends several pages arguing that the Commission has no authority to modify AEP's ESP. However, R.C. 4928.143(C) specifically grants the Commission to modify ESP proposals. R.C. 4928.143(C) states that "the commission by order shall approve *or modify and approve*" an ESP proposal. The Commission did not find that AEP's proposed ESP more favorable than the expected results of a MRO on the basis of the record presented in this hearing.

II. Automatic Adjustment to the Non-FAC Portion of Generation Rates

As part of its ESP application, AEP proposed automatic increases in non-FAC generation rates of 3% and 7% annually for CSP and OP respectively. In the March 18 Order, the Commission correctly and lawfully rejected this proposal, and instead adopted a proposal limiting AEP's recovery of the cost of environmental investments actually incurred. In its Application for Rehearing, AEP fails to offer adequate justification why there should be a rehearing based on this issue.

As noted above, R.C. 4928.143(C) authorizes the Commission to modify and approve an ESP application. In rejecting AEP's proposed automatic increase of the non-FAC rates, the Commission has lawfully modified AEP's ESP in accordance with R.C. 4928.143(C). In its Application for Rehearing, AEP argues that "SB 221 specifically provides for such increases during the term of an ESP."⁴ R.C. 4928.143(E), which AEP relies on to reach this conclusion, reads, "the (ESP) *may* provide for or include . . . automatic increases or decreases in any component of the standard service offer price."⁵ The key word in this sentence is *may*. This language is permissive. While the ESP may provide for automatic increases in AEP's non-FAC rates, it is not required to provide for such increases if no support on the record is found for

⁴ AEP Application for Rehearing, at 15.

⁵ R.C. 4928.143(E)

doing so. In the March 18 Order, the Commission lawfully modified AEP's ESP to eliminate automatic increases in AEP's non-FAC rates.

Notwithstanding that the Commission was within its statutory authority to modify AEP's ESP proposal to exclude automatic increases in AEP's non-FAC rates, AEP has also not offered any factual support on the record for automatic increases. In its Application for Rehearing, AEP suggests that the Commission should not consider "economic conditions" when deciding to reject AEP's proposal, because economic conditions are also adversely affecting AEP's ability to operate its generating facilities.⁶ The record shows that the Commission was referring to the economic conditions of deflation and the downward revision of cost increases.⁷ Decreasing costs do not adversely affecting AEP's ability to operate its generating facilities, and quite the opposite, is a legitimate reason to reject AEP's proposed automatic rate increase to recover increased costs.

Finally, AEP argues that it should receive an automatic annual rate increase because an ESP "must have a sufficient degree of flexibility built into it in recognition of (AEP's) limited opportunities to respond to generation cost increases."⁸ It is not clear how an automatic increase in costs is more "flexible" than a recovery mechanism that allows AEP to recover costs actually incurred. With an automatic rate increase, a fixed percentage increase must occur no matter what the circumstance; with a recovery mechanism that allows AEP to recover actual costs, an increase may or may not occur depending on the circumstances. It is clear the latter of the two options allows for more flexibility. AEP should be required to show increased costs in order to

⁶ AEP Application for Rehearing, at 15.

⁷ The Commission agrees with Staff that "we are entering a recessionary, and possibly a deflationary, period and any expectations of price increases need to be revised downward". March 18 Order at 28-29

⁸ AEP Application for Rehearing, at 16.

recover costs and the Commissions modification to AEP's proposed ESP was perfectly reasonable in this regard.

As noted above, the Commission has the statutory authority to exclude an automatic annual non-FAC rate increase from AEP's ESP. Further, AEP has offered no support to justify an automatic rate increase. For these reasons, the Commission must not grant rehearing on this issue.

III. Deferment of Distribution Issues to a Distribution Rate Case

In its ESP Application, AEP proposed to recover costs associated with four new distribution system related initiatives ("Distribution Initiatives").⁹ Along with the Distribution Initiatives, AEP requested a 7% and 6.5% annual rate increase in distribution rates for CSP and OP respectively. In the March 18 Order, the Commission rejected AEP's proposed distribution rate increase. In doing so, the Commission lawfully and reasonably deferred the decision to implement all but one of the Distribution Initiatives to a distribution rate case.¹⁰

In its Application for Rehearing, AEP argues, "the Commission's conclusion that a distribution rate case is 'the only way' to evaluate AEP Ohio's ESRP unavoidably conflicts with the express provisions" of R.C. 4928.143(B)(2)(h). AEP concludes that because R.C. 4928.143(B)(2)(h) authorizes single issue ratemaking, it is unlawful for the Commission to defer the decision to implement the Distribution Initiatives to a distribution rate case.¹¹ With this statement, AEP confuses the meaning of R.C. 4928.143(B)(2)(h).

⁹ The Distribution Initiatives include an enhanced vegetation initiative, an enhanced underground cable initiative, a distribution automation initiative, and an enhanced overhead inspection and mitigation initiative (collectively "Enhanced Service Reliability Plan" or "ESRP"). March 18 Order, at 30.

¹⁰ The Commission denied all of the distribution initiatives except for AEP's vegetation initiative. March 18 Order at 32.

¹¹ AEP Application for Rehearing, at 27-28.

R.C. 4928.143(B)(2)(h) provides that “the (ESP) *may* provide for or include . . . provisions regarding the utility’s distribution service, including . . . provisions regarding single issue ratemaking.” While R.C. 4928.143(B)(2)(h) authorizes an ESP to provide for provisions regarding single issue ratemaking, it does not require that the Commission approve all provisions for single issue ratemaking proposals in an ESP. Therefore, the Commission was well within its authority to reject AEP’s single issue ratemaking proposals, as it did in the March 18 Order.

In the March 18 Order, the Commission acknowledges that 4928.143(B)(2)(h) authorizes single issue ratemaking. However, the Commission correctly notes that R.C. 4928.143(B)(2)(h):

requires the Commission to examine the reliability of the electric utility's distribution system . . . Given AEP-Ohio's proposed ESRP, the only way to examine *the full distribution system*, the reliability of such system, and customers' expectations, as well as whether the programs proposed by AEP-Ohio are “enhanced” initiatives (truly incremental), is through a distribution rate case where all components of distribution rates are subject to review¹².

The Commission therefore recognizes that while it may be possible to resolve some distribution system issues through single issue ratemaking, it cannot resolve the specific issues presented by AEP’s Distribution Initiatives without looking at the full distribution system in a distribution rate case. The Commission’s determination that a distribution rate case is the “only way” to resolve the issues presented in the Distribution Initiatives does not indicate that a distribution rate case is the only way to resolve all distribution issues. The Commission accepts the premise that some distribution issues may be resolved by single issue rate making.

¹² March 18 Order, at 32 (emphasis added).

The Commissions decision to defer many of AEP's distribution rate proposals does not contradict the mandates of R.C. 4928.143(B)(2)(h). By deferring these issues to a distribution case, the Commission took the lawful and reasonable approach. Therefore, AEP's request for rehearing on this basis must be denied.

CONCLUSION

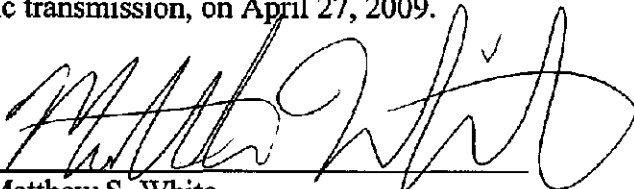
R.C. 4928.143(C) unequivocally allows the Commission to modify AEP's proposed ESP. Further, the Commission acted lawfully and reasonably by modifying AEP's ESP to reject the automatic non-FAC rate increase and to defer many of the distribution issues to a distribution rate case. Therefore, the Commission must deny AEP's application for rehearing on the issues discussed herein.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties of record or as a courtesy, via electronic transmission, on April 27, 2009.


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