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BEFORE THE
PUBLIC COMMISSION OF OHIO

In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company	)	**Case No. 09-872-EL-FAC** **Case No. 09-873-EL-FAC**
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates	)	**Case No. 09-1095-EL-RDR**
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company To Modify Their Standard Service Offer Rates	)	**Case No. 09-1906-EL-ATA**

COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S
MEMORANDUM CONTRA
IEU-OHIO'S
APPLICATION FOR REHEARING

INTRODUCTION

On February 5, 2010, Industrial Energy Users-Ohio (IEU) filed an application for rehearing of the Commission's January 7, 2010, Finding and Order in Case Nos. 09-872 and 873-EL-FAC and 09-1906-EL-ATA (the FAC and non-FAC rate adjustment cases) and a separate Finding and Order issued that same date in Case No. 09-1095-EL-RDR (the EDR case).

Besides those two orders addressing the four dockets identified by IEU, the caption of its pleading also includes Case No. 09-1094-EL-FAC and the two dockets from Columbus Southern Power Company's (CSP) and Ohio Power Company's (OPCO's) Electric Security Plan proceedings, Case Nos. 08-917-EL-SSO and 08-918-

EL-SSO, respectively. The inclusion of these three dockets is puzzling since the Commission has not issued a ruling in Case No. 09-1094-EL-FAC and while the Commission denied IEU's request to consolidate this case with the FAC and non-FAC cases as well as with the EDR case, IEU has not sought rehearing of that denial. The inclusion of the two ESP case dockets is even more puzzling. Those cases are the subject of appeals at the Supreme Court of Ohio, one of which was initiated by IEU. The record in those two dockets no longer is before the Commission.

IEU has raised five allegations of error in its application for rehearing. First, IEU argues that the Commission has no jurisdiction to consider any cases which result from its ESP orders. The basis for this claim is that the Commission lost jurisdiction to rule in the ESP cases when it was unable to issue an order in those cases within the 150-day time period allotted by R.C. 4928.143 (C) (1). Therefore, IEU argues, the Commission cannot act in cases filed as a result of the ESP approved by the Commission. IEU's next argument also reflects IEU's dissatisfaction with the ESP process. IEU argues that the Commission's January 7th orders are unlawful and unreasonable since the Commission has permitted CSP and OPCO (the Companies) to charge rates authorized in the ESP cases while the Companies continue to challenge the ESP orders themselves.

IEU actually has three arguments that are based on its dissatisfaction with the EDR and FAC cases. It argues that the Commission erred in ruling that the Economic Development Cost Recovery Riders are outside the caps established in the ESP cases. It also argues that the use by each Company of its weighted average cost of long-term debt for calculating carrying costs is unreasonable. Finally, IEU argues that the Commission

unreasonably permitted the Companies to recover delta revenues associated with their Interim Agreement with Ormet Primary Aluminum Corporation (Ormet).

For the reasons detailed below, IEU's rehearing application should be denied in its entirety. Not only are IEU's arguments lacking in any merit but they represent an attempt to reargue issues raised or that should have been raised in the ESP cases and now are on appeal to the Supreme Court of Ohio. In this connection, IEU seeks relief that is obtainable only in those ESP cases, cases which are no longer before the Commission. Further, IEU complains about the rate impacts of the EDR cases even though a portion of the costs being recovered by CSP are attributable to a special discounted rate for service to one of IEU's own members. Finally, IEU's arguments concerning the recovery of delta revenues attributable to the Interim Agreement with Ormet is based on IEU's dissatisfaction with the normal operation of the Commission-approved Fuel Adjustment Clause (FAC).

ARGUMENT

I. WHETHER THE COMMISSION "LOST JURISDICTION" IN THE ESP CASES IS NOT RELEVANT HERE, BUT THE COMMISSION DID HAVE JURISDICTION TO ISSUE THE JANUARY 7, 2010 FINDINGS AND ORDERS.

As a threshold matter, the fact is that the Commission's actions in the above dockets, while related to the Companies' ESP cases in indirect ways, was not done as part of the ESP cases. Any argument (now pending before the Supreme Court of Ohio) regarding whether the Commission "lost jurisdiction" after 150 days from the filing of the Companies' ESP applications has only an indirect bearing, at best, on the other dockets; it is not controlling or directly applicable. In other words, while IEU may challenge the decisions in the other dockets as somehow being unreasonable and

unlawful, it cannot do so through its argument that the Commission lost jurisdiction *in the ESP Cases* based on Section 4928.143, Revised Code, [a statute not directly applicable to any of the other dockets.] Thus, IEU's claim should be rejected on that basis alone. If the Commission again considers this argument, AEP Ohio offers the following arguments in opposition.

IEU argues that because the Commission was unable to issue its order in the Companies' ESP cases within the 150-day period set out in R.C. 4928.143 (C) (1) the Commission has no jurisdiction to proceed in any cases resulting from its ESP order. As if this theory is not extraordinary enough, the relief sought in this proceeding far eclipses the scope of this proceeding. IEU argues that the Commission "should require AEP-Ohio to replace its current tariffs with the tariffs that were in effect on July 31, 2008 in accordance with Sections 4928.141 and 4928.143, Revised Code." (IEU's Memorandum in Support, p.9). IEU's legal analysis must be rejected. Moreover, even if its legal analysis had merit the relief it seeks must be limited to the rates authorized in the current dockets. There would be no basis for essentially reopening the Companies' ESP cases.[1]

IEU misinterprets R.C. 4928.141, the statutory provision it seeks to enforce. R.C. 4928.141 requires all EDUs to apply for either an ESP or an MRO. It does not, however, specify a time by which such an application must be filed. For instance, while the Companies filed their applications on July 31, 2008, the first date that SB 221 became effective, an applicant might not have filed its application until September. A September filing would result in the 150-day time line expiring well beyond the end of 2008. The

[1] IEU has raised this same issue unsuccessfully in its Writ of Prohibition action before the Supreme Court of Ohio (Sup Ct. Case No. 2009-1907) and again in its Merit Brief in its direct appeal from the ESP Cases, Sup. Ct. 2009-2022.] The Commission need not give IEU yet "another bite of the apple" in this case by re-addressing the substance of IEU's argument.

significance of the lack of specificity regarding when a SSO application could be filed relates to the portion of R.C. 4928.141(A) on which IEU relies. The language in question provides that:

> Notwithstanding the foregoing provision, 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 or 4928.143 of the Revised Code****

R.C. 4928.141(A) is not a default for failure to comply with the 150-day requirement. The continuation of the rate plan applies only in those instances where the utility does not file its ESP application in sufficient time for the 150-day period to be completed before the end of 2008. There is nothing in R.C. 4928.141(A) or 4928.143(C)(1) that suggests that if the Commission does not meet the 150-day time limit for ruling on the Companies' ESP application that the Commission loses its authority to ever act on that application. Nor is there any reason to believe that if the General Assembly intended to specify a remedy for the Commission not meeting that statutory requirement that such a remedy would have been placed in a provision other than the provision which sets out the requirement itself.

The Supreme Court of the United States has considered the question of whether an administrative agency loses jurisdiction to act when it misses the time set by the legislature to act. In *Brock v. Pierce County*, (1986), 476 U.S. 253, 106 S. Ct. 1834, 90 L. Ed. 2d 248, the Court considered statutory language that required that the Secretary of Labor 'shall' issue a final determination as to the misuse of CETA (Comprehensive Employment and Training Act) funds by a grant recipient within 120 days after receiving a complaint alleging such misuse." (476 U.S. 255). The question before the Court was

whether the Secretary loses the power to recover misused funds after the expiration of the 120-day period.

The Court stated that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Brock*, 476 U.S. at 260 (note omitted). The Court went on to note that the statute in question "does not merely command the Secretary to file a complaint within a specified time, but requires him to resolve the entire dispute within that time. This is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control. There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline." *Id.* at 261. The Court concluded "the mere use of the word 'shall' in Sec. 106 (b), standing alone, is not enough to remove the Secretary's power to act after 120 days." *Id.* at 262 (note omitted).

When the Court's reasoning is applied to the Commission's authority to rule on an ESP application within 150 days of the application being filed, it is clear that the Commission does not lose its authority to act beyond the 150-day period. First, there is no statutory language in R. C. 4928.143, or elsewhere in R. C. Chapter 4928, that precludes the Commission from acting after the passage of the 150-day period. Absent such language, it should not be assumed that the General Assembly "intended the agency to lose its power to act." As for there being less drastic remedies available, the General

Assembly addressed the issue of rates being effective prior to the authorization of the Companies' ESP.

Further, the Commission's task was far more significant than IEU's proposed consequence would suggest. The Commission not only had to "resolve the entire dispute" but the ESP case was a case of first impression as the Companies' application was filed on the day that R.C. 4928.143 became effective. Being a case of first impression was enough to present significant difficulties for resolving the Companies' ESP application within 150 days even if that were the only ESP case the Commission had to decide within that 150 days. However, as is evident from the Commission's August 5, 2008, Entry in the Companies' ESP proceeding, the Commission had other ESP proceedings filed on the same date as the Companies' application and the Companies' application was scheduled for hearing after the other applications were to begin hearings in their cases. (Entry, pp. 1, 2).

Because of the Commission's Staff's limited availability the Companies' hearing was scheduled to begin on November 3, 2008 - - just 55 days before the conclusion of the 150-day period to rule on the application. Then, at the request of certain intervenors, and over the Companies' objection, the hearing date was set back 14 days, leaving only 41 days from the start of the hearing to the 150-day deadline. (*ESP Cases*, Entry, September 5, 2008, pp. 1, 2). With or without the postponement of the hearing, it must be agreed that the Commission faced a "substantial task" with real world difficulties "beyond [its] control." Based on these factors affecting the Commission's new responsibilities arising from SB 221and all of the Commission's long-standing responsibilities to regulate other utility industries, there is no reason to believe that the General Assembly "intended such

drastic consequences to follow" from the Commission's inability to meet the 150-day deadline. IEU's arguments to the contrary should be rejected on rehearing.

II. THE COMMISSION'S JANUARY 7, 2010 FINDINGS AND ORDERS SHOULD NOT BE CONDITIONED ON THE COMPANIES "AFFIRMATIVELY ACCEPTING" THEIR ESP AND CSP WITHDRAWING ITS APPEAL OF THE APPROVED ESP.

IEU again raises, through section II.B. of its application for rehearing, that the Companies should be prevented from collecting the rates authorized by the Commission in the *ESP Cases* and argues that the Commission should condition further collection of the ESP rates on the Companies "affirmatively accepting" the modified ESP. (IEU's Memorandum in Support, p. 12). As with many of the claims raised in IEU's application for rehearing, this claim amounts to an attempt to re-litigate the ESP cases and/or improperly expand the list of issues that it can pursue on appeal to directly or indirectly challenge the ESP decision (e.g., through circuitous challenges in related cases such as the ones at bar). This approach should not be entertained by the Commission as it is not directly pertinent to the January 7 Finding and Order being challenged here.

In any case, it appears to be IEU's position that the Companies' exercise of their statutory right to file for rehearing and appeal in some manner precludes them from implementing the dictates of the Commission's ESP Opinion and Order. There is no support anywhere in R.C. Chapter 4928, or elsewhere in Ohio law, for IEU's position. If a utility seeks rehearing and appeal from a Commission order which provided benefits to the utility in the form of increased rates, the utility need not postpone the implementation of the increased rates. Similarly, there is no support for the notion that an electric utility must decide whether to withdraw its ESP application based solely on the Commission's

order modifying and accepting the ESP, without the benefit of knowing whether and how rehearing, and ultimately, appeal, might amend its prior order.

There is nothing in R.C. Chapter 4928 to support IEU's notion that an electric utility must exercise a "Hobson's choice" between: (1) foregoing its right to rehearing and registering immediate withdrawal from a modified ESP (even though the Commission's order is not final and the decision could be modified on rehearing or appeal), or (2) pursuing rehearing/appeal and continuing to charge its pre-ESP rates while rehearing applications are filed and considered by the Commission. Rather, as the Companies previously have stated, their decision of whether to exercise the right of withdrawal can only be meaningfully exercised after the Commission issues a final order and appeals are decided (including any potential remand proceeding).

IEU's reliance on R.C. 4928.141 offers no support for its argument. A Standard Service Offer (SSO) now has been authorized by the Commission. The March 30, 2009 Entry in the *ESP Cases* authorizing tariffs conforming to the Opinion and Order to become effective cannot be any clearer evidence of this fact. Therefore, IEU's arguments regarding R.C. 4928.141have been moot for nearly a year since an SSO under R.C. 4928.143 has been authorized.

The right to withdraw an ESP application under R.C. 4928.143 (C) (2), contains no time restriction; nor is there any suggestion in that provision that filing for rehearing or waiting for a Commission order on rehearing before determining whether to withdraw an ESP application precludes the electric utility from implementing the rates authorized by the Commission. IEU's rehearing application regarding this issue should be denied.

III. THE COMPANIES' ECONOMIC DEVELOPMENT COST RECOVERY RIDERS ARE PROPERLY OUTSIDE THE RATE INCREASE CAPS ESTABLISHED IN THEIR ELECTRIC SECURITY PLAN CASES.

IEU takes issue with the Commission's conclusion that the EDR is outside the ESP rate caps. One of IEU's arguments for placing the EDR inside the caps is that the Commission's decision "piles on additional increases for customers at a most precarious time for Ohio's economy." (IEU's Memorandum in Support, p. 14). In this regard, IEU seems to miss the point. If the EDR were inside the caps, the FAC deferrals and the associated carrying charges which are based on the Companies' Weighted Average Cost of Capital would increase. IEU's argument, which would result in more FAC deferrals, is inconsistent with its argument that the carrying charge associated with the EDR should be based on short-term debt instead of on long-term debt. R.C. 4905.31 (E), Ohio Rev. Code, provides for recovery of costs "in conjunction with any economic development and job retention program of the utility... including recovery of revenue foregone as a result of any such program.". IEU's argument regarding the EDR's exclusion from the Commission-authorized rate caps, if accepted, would result in increased costs for customers.

Further, it must be noted that the Companies are not collecting additional revenues as a result of their EDR filings. The revenues that will be collected through the EDR in 2010 are the equivalent of the revenues the Companies would have collected under their GS-4 tariffs but for the special contracts approved by the Commission in Case No. 09-119-EL-AEC and Case No. 09-516-EL-AEC.

The Commission properly decided that its earlier recitations of items that were outside the ESP rate caps were not exhaustive and that the EDR belongs outside those caps. IEU's arguments to the contrary should be rejected on rehearing.

IV. THE USE OF EACH COMPANY'S WEIGHTED AVERAGE LONG-TERM COST OF DEBT FOR CALCULATING CARRYING COSTS ASSOCIATED WITH THE COMPANIES' ECONOMIC DEVELOPMENT COST RECOVERY RIDERS WAS PROPER.

IEU repeats its opinion that the carrying charge rate to be applied to the delta revenues associated with the EDR should be based on each Company's short-term debt rate. IEU asserts that the Commission "made no inquiry as to whether a short-term rate ...would provide a lower interest rate that customers will pay for AEP-Ohio to carry this debt on its books." (IEU Memorandum in Support, p.16).

It is clear from IEU's argument that it believes that the selection of a carrying charge rate should be driven by what results in the lowest cost to customers, rather than by what is the most appropriate rate. The sort of regulatory treatment proposed by IEU is simplistic and should be rejected. Moreover, IEU's statement that customers "need every break they can get on their bills" appears to overlook that some of the delta revenues for which IEU's members are responsible are attributable to the rate discount obtained by a fellow-member of IEU.

IEU's support for use of a short-term debt rate reflects the apparent belief that the Companies issue specific debt to finance the carrying costs related to the EDR. As the Companies explained in their December 9, 2009 memorandum opposing IEU's motion for a hearing, they do not finance their activities on that sort of piecemeal basis. The Companies' financing reflects a mix of common equity, preferred equity and debt. While

a Weighted Average Cost of Capital would yield the appropriate carrying cost, the Companies proposed using a carrying cost based on long-term debt.

IEU's contention that the Commission made no inquiry concerning IEU's proposal is without merit. The very portion of the Commission's order to which IEU refers as support for its opinion contradicts IEU's position. The Commission specifically rejected IEU's proposed use of short-term debt finding instead that use of long-term debt, as proposed by the Companies, "is a more appropriate mechanism for calculating carrying charges...." (Finding and Order p. 9). Therefore, rehearing on this issue should be denied.

V. THE COMMISSION HAS NOT RULED ON THE COMPANIES' APPLICATION IN CASE NO. 09-1094-EL-FAC AND THE COMPANIES' FAC RATES WILL BE RECONCILED WITH THE OUTCOME OF CASE NO. 09-1094-EL-FAC.

IEU argues that the Commission "approved the up-front recovery through the FAC of the delta revenue amounts proposed by AEP-Ohio despite not issuing a companion order approving AEP-Ohio's Application in the Ormet Interim Reasonable Arrangement case." (IEU Memorandum in Support, p. 17).[2] IEU goes on to argue that it is "unreasonable to collect delta revenues from customers through the FAC that have not yet been found to be just and reasonable.... " and that "approval of the up-front delta revenue recovery associated with the Ormet interim reasonable arrangement before issuing an order in the Ormet Interim Reasonable Arrangement Case essentially negates the Commission's previous Orders and runs contrary to its express intent to thoroughly

[2] While not entirely clear, it appears that IEU's reference is to Case No. 09-1094-EL-FAC, not to Case Nos. 08-1138-EL-AAM and 08-1339-EL-UNC. See IEU's Footnote 27 which refers to a filing in Case No 09-1904-EL-FAC.

explore the delta revenue amounts associated with the Ormet interim reasonable arrangement." (Id. at 17, 18).

It appears that IEU partially misunderstands what was requested in the Companies' November 13, 2009 filing in Case No. 09-1094-EL-FAC and in their December 1, 2009 filing in Case Nos. 09-872 and 873-EL-FAC. The former filing was made in response to the Commission's July 15, 2009 order in Case No. 09-119-EL-AEC (the Ormet long-term contract case) wherein the Commission directed the Companies to file an application to recover the appropriate amounts of the unrecovered FAC deferrals authorized by the Commission in the Interim Agreement The Companies' request was that "the Commission approve the recovery through each Company's FAC of the cumulative balance of the unrecovered FAC deferrals under the Interim Agreement, plus associated carrying costs accrued through October 31, 2009, and associated carrying costs to be accrued through the full recovery of the regulatory asset deferrals identified in this application." (Companies' Application, p. 5).

As shown in the Companies' December 1, 2009 filing in Case Nos. 09-872/873-EL-FAC, CSP can only be characterized as recovering a portion of the Ormet Interim Agreement deferrals. CSP Schedule 1 shows that only a portion of the RA, calculated on Schedule 3 and including the Ormet Interim Agreement deferral recovery, is reflected in the current FAC rate due to being limited by the rate caps. OP is not recovering any of the Ormet Interim Agreement deferrals presently (OP Schedule 1 shows that none of the RA is being recovered and only a portion of the FC is currently reflected in rates, with the remainder being deferred). This was explained in the Companies' FAC filing. At page 2 of that filing, the Companies noted the following regarding Schedule 2 of the filing:

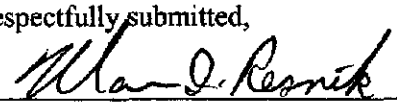
> For CSP, these FC rates are projected to be lower than the proposed FAC rates. This results in some recovery of CSP's under-recovery balance during the 1st quarter of 2010. Conversely, for OPCo, the FC rates on Schedule 2 are substantially higher than the proposed FAC rates, so OPCo's under-recovery balance will continue to grow during the 1st quarter of 2010.

To the extent CSP's recovery of its RA component includes Ormet Interim Agreement deferrals, those amounts can be reconciled with the final decision in Case No. 09-1094-EL-FAC and passed back to customers through the FAC. Moreover, to preclude recovery by CSP of the deferrals in question until the Commission resolves Case No. 09-1094-EL-FAC would leave the deferrals to continue accruing carrying charges, thereby increasing CSP's customers' ultimate cost associated with the Ormet Interim Agreement deferrals. IEU's objections are without merit and should be denied on rehearing.

CONCLUSION

For the foregoing reasons, the Commission should deny IEU's application for rehearing in its entirety.

Respectfully submitted,

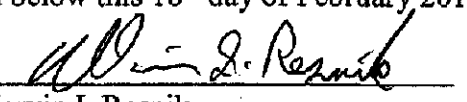


Marvin I. Resnik, Counsel of Record
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
Email: miresnik@aep.com
stnourse@aep.com

Counsel for Columbus Southern Power and
Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra IEU-Ohio's Application for Rehearing was served by U.S. Mail upon the individuals listed below this 16th day of February 2010.



Marvin I. Resnik

David Boehm
Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

Samuel C. Randazzo
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick, LLC
Fifth Third Center
21 East Third Center
17th Floor
Columbus, Ohio 43215-4228

Clinton Vince
Douglas Bonner
Daniel Barnowski
Emma Hand
Keith Nusbaum
Sonnenschein Nath & Rosenthal LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005

Janine L. Migden-Ostrander
Consumers' Counsel
Maureen Grady
Michael Idzkowski
Gregory Poulos
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215