

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Fuel	)	
Adjustment Clauses of Columbus	)	Case No. 09-872-EL-UNC
Southern Power Company and Ohio	)	Case No. 09-873-EL-UNC
Power Company.	)	

In the Matter of the Application of	)	
Columbus Southern Power Company	)	
and Ohio Power Company for	)	
Administration of the Significantly	)	Case No. 10-1261-EL-UNC
Excessive Earnings Test Under Section	)	
4928.143(F), Revised Code, and Rule	)	
4901:1-35-10, Ohio Administrative	)	
Code.	)	

ENTRY

The Attorney Examiner finds:

- (1) By Opinion and Order issued on March 18, 2009 and Entry on Rehearing issued on July 23, 2009, in *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets and 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*, in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO (AEP-Ohio ESP cases), the Commission modified and approved electric security plans (ESP) that, among other things, established fuel adjustment clause (FAC) mechanisms, under which Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or Companies) can recover prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations.
- (2) On May 14, 2010, in Case Nos. 09-872-EL-FAC and 09-873-EL-FAC, AEP-Ohio filed its 2009 report of the management/performance and financial audits of its FAC (FAC cases). Motions to intervene in the FAC cases were

timely filed by, and the request to intervene granted to the following entities: the Office of the Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), and Ormet Primary Aluminum Corporation (Ormet). The hearing in the FAC cases commenced, as scheduled, on August 23, 2010, and concluded on August 24, 2010. Briefs and reply briefs were filed on September 23, 2010, and October 15, 2010, respectively.

- (3) Pursuant to the directives of Section 4928.143(F), Revised Code, the Commission is required to evaluate the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings.
- (4) On September 1, 2010, in Case No. 10-1261-EL-UNC, AEP-Ohio filed an application for the administration of the significantly excessive earnings test (SEET), as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.).
- (5) By entry issued September 21, 2010, as amended on October 8, 2010, a procedural schedule was established for the SEET proceeding. Pursuant to the SEET procedural schedule, motions to intervene were due by October 8, 2010.
- (6) Motions to intervene in the SEET case were timely filed by, and the request to intervene granted to the following entities: OCC, IEU-Ohio, Ohio Partners for Affordable Energy (OPAE), Ohio Energy Group (OEG), Appalachian Peace and Justice Network (APJN), Ohio Manufacturers Association (OMA), and Ohio Hospital Association (OHA).
- (7) The SEET hearing commenced, as scheduled, on October 25, 2010, and concluded on November 1, 2010.
- (8) On November 5, 2010, The Kroger Company (Kroger) filed a motion to intervene in the SEET case. Kroger argues that although its motion for intervention is not timely, in accordance with the provisions of Rule 4901-1-11(F), O.A.C., the Commission can grant the motion under extraordinary circumstances. Kroger contends that it was not served with a copy of AEP-Ohio's SEET filing as a party to the Companies' ESP proceeding and further argues that the time frame for intervention in this matter was shorter than usual in

Commission proceedings. For these reasons, Kroger asserts that it was unaware of AEP-Ohio's SEET proceeding until after the deadline for intervention had past.

Kroger submits that if it is granted intervention in this matter it will not attempt to dispute or add to the record and its participation will not unduly delay the proceeding. Kroger states that its purpose for requesting intervention is to allow it an opportunity to offer input on how any refund of significantly excessive earnings is distributed among the customer classes.

- (9) The parties to the SEET case filed their initial briefs on November 19, 2010, and their reply briefs on November 30, 2010.
- (10) On November 30, 2010, AEP-Ohio, Staff, OHA, OMA, Kroger, and Ormet filed a Stipulation and Recommendation (Stipulation) to resolve all issues raised in the SEET and FAC proceedings.
- (11) Initially, AEP-Ohio filed a memorandum contra Kroger's motion to intervene in the SEET case but, as a part of the Stipulation, AEP-Ohio agrees to withdraw its opposition to Kroger's request to intervene.
- (12) On November 15, 2010, OCC and APJN filed a joint memorandum contra Kroger's motion to intervene. OCC and APJN reason that Kroger has failed to demonstrate extraordinary circumstances to justify its late request for intervention. OCC and APJN argue that AEP-Ohio was not required to serve Kroger with a copy of the SEET filing or the other pleadings in this case, as it is Kroger's duty to be aware of cases filed with the Commission, like the other parties that timely filed a request for intervention. Further, OCC and APJN argue that the parties to AEP-Ohio's SEET proceeding will be unfairly prejudiced if Kroger's request is granted since the hearing has concluded and the parties' opportunity to issue discovery or explore Kroger's position has passed.
- (13) In response, Kroger offers that the Ohio Supreme Court has held that the statutes and rules governing intervention should be "generally liberally construed in favor of intervention."

Kroger rationalizes that the Court's reasoning includes late request for intervention. Kroger notes that the Commission granted late requests for intervention in AEP-Ohio's ESP proceeding, acknowledging that it was the first such proceeding for the electric utilities, and further notes that the Commission has granted late requests for intervention in other electric utility matters. Kroger emphasizes that the novel issues presented in this case and the policy to favor intervention justify approving Kroger's request for intervention. The movant reiterates that its request for limited intervention as to the allocation of any refund ordered is a distinct issue that will require additional deliberation beyond what has already occurred in this proceeding. Kroger contends that no party to this case represents Kroger's interest particularly as to a refund of significantly excessive earnings.

- (14) The Attorney Examiner finds that Kroger's request for intervention is untimely and that Kroger has not demonstrated extraordinary circumstances sufficient to grant Kroger unlimited intervention in the SEET proceeding. However, to the extent that Kroger is requesting limited intervention, only as to the allocation of any refund, if ordered by the Commission, the request is reasonable and should be granted. We are not convinced, as asserted by OCC and APJN, that granting Kroger limited intervention as to the allocation of any ordered refund of significantly excessive earnings is prejudicial to the other parties. Further, limited intervention on this specific issue will not delay the SEET proceeding. Accordingly, Kroger's motion for limited intervention as to the allocation of any refund, if any, is granted.
- (15) The Stipulation proposes a procedural schedule for the consideration of the Stipulation. The signatory parties propose the following procedural schedule:

December 1, 2010	Written testimony in support of the Stipulation;
December 6, 2010	Written testimony in opposition to the Stipulation;

December 9, 2010                      Evidentiary hearing on the  
Stipulation commences;

December 15, 2010                      Briefs due in support of or in  
opposition to the Stipulation.

In light of the fact that the parties have already filed their briefs and reply briefs in both the SEET and FAC cases and that both cases are ripe for decision, we find the proposed procedural schedule to consider the Stipulation avoids unduly delaying the processing of the cases. Accordingly, the parties should comply with the schedule presented above.


It is, therefore,

ORDERED, That Kroger's motion for limited intervention is granted. It is, further,

ORDERED, That the parties comply with the procedural schedule set forth in finding 15. It is, further,

ORDERED, That a copy of this entry be served upon all parties and other interested person of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

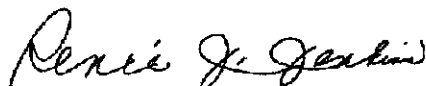


By:      Greta See  
         Attorney Examiner

/vrm<sup>msd</sup>

Entered in the Journal

**DEC 01 2010**



Renee J. Jenkins  
Secretary