

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Application of Ohio )  
Power Company for Approval of the )  
Shutdown of Unit 5 of the Philip Sporn ) Case No. 10-1454-EL-RDR  
Generating Station and to Establish a )  
Plant Shutdown Rider. )

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**CONSOLIDATED MOTION FOR LEAVE TO FILE SUPPLEMENTAL  
COMMENTS *INSTANTER*  
AND  
SUPPLEMENTAL COMMENTS  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**April 20, 2011**

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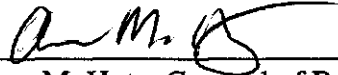
The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the nearly 612,000 residential utility customers of Ohio Power Company ("OP" or "Company") moves under Ohio Adm. Code 4901-1-12 and 4901-1-14 for the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant OCC's motion for leave to file supplemental comments in this proceeding. In this case, the Commission is evaluating whether the Company may collect, from customers, accelerated depreciation and other net-closure costs associated with the early retirement of the Philip Sporn Plant Unit 5 ("Sporn Unit 5").

Initial Comments were filed April 8<sup>th</sup> and Reply Comments are due on April 22<sup>nd</sup> by Attorney Examiner Entry dated April 15, 2011. OCC files this Motion to File Supplemental Comments *Instante*r in order to address, for the PUCO's consideration, a recent Supreme Court decision this week that impacts this case. OCC has attached to this motion the supplemental comments that OCC seeks leave to file, so that other parties

have the opportunity to address the supplemental comments in their Reply Comments and so the Commission may consider the supplemental comments for its decision. This motion is more fully explained in the following memorandum in support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
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**MEMORANDUM IN SUPPORT**

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**I. MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS**

The OCC files this motion pursuant to Ohio Adm. Code Section 4901-1-12 for good cause. The Ohio Supreme Court issued a decision yesterday that has significant bearing on this case. The Commission has granted parties authority to file supplemental comments in the past.<sup>1</sup> Attorney Examiners have the authority to issue such procedural rulings, under Ohio Adm. Code 4901-1-14.

OCC has attached to this motion the supplemental comments that OCC seeks leave to file so that other parties have the opportunity to address the supplemental comments in their Reply Comments. Accordingly, the Commission's granting of the motion will not adversely affect a substantial right of any party.

**II. COMMENTS**

In OCC's Comments filed on April 8, 2011, OCC argued that the company should not collect plant closing costs from customers because the costs have not been identified

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<sup>1</sup> See eg., *In the Matter of the Commission's Promulgation of Rules for Competitive "Retail Natural Gas Service and its Providers Pursuant to Chapter 4929, Revised Code*, Case No. 01-1371-GA-ORD, Entry on Rehearing (April 9, 2002) at 2-3.

under S.B. 221 as a recoverable cost under an electric security plan (“ESP”).<sup>2</sup> The basis for OCC’s argument was that plant closing costs were not identified as an item that may be included in an ESP and collected from customers under R.C. 4928.143(B)(2)(a-i). In OCC’s comments, OCC noted that provision began with the statement “The plan may provide for or include, without limitation, any of the following, \* \* \*.”

OCC concluded that “nowhere in that section are the closing costs of plants \* \* \*”. Additionally, OCC noted “the fact that closing costs of plant were not included is an indication that it was certainly not an item on the minds of the General Assembly as recoverable under an ESP”.<sup>3</sup>

The Supreme Court of Ohio issued a decision *In Re Application of Columbus Southern Power Co. et al.; Office of the Ohio Consumers Counsel et al.; Public Utilities Commission et al.*<sup>4</sup> on April 19, 2011. In that decision the Court clarified that the phrase “without limitation” under R.C. 4928.143(B)(2) provides substantive limits to what an electric security plan may include. The Court held that the Commission’s perception that the list of items under (a-i) are “illustrative, \* \* \* not exhaustive” is in error.<sup>5</sup> Specifically, the Court held that R.C. 4938.143(B)(2) permits plans to include only the listed items in sections a-i.:

The list limits *the type* of categories a plan may include, while the phrase “without limitation” allows *as many or as much* of the listed categories as the commission finds reasonable—subject to any other applicable limits, which we do not consider here.<sup>6</sup>

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<sup>2</sup> OCC Comments at 2-3.

<sup>3</sup> OCC Comments at 3.

<sup>4</sup> Slip Opinion No. 2011-Ohio-1788.

<sup>5</sup> Id at ¶ 33.

<sup>6</sup> Id.

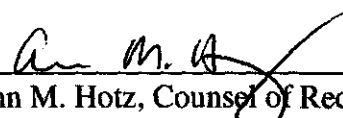
This decision by the Court must be taken into consideration by the Commission because it represents binding authority that cannot be ignored by the PUCO. When the Court's finding is applied to the costs being sought here, it is clear that AEP Ohio's request must be denied. Closing costs are not within any of the listed categories of (B)(2). For that reason, in addition to the reasons set forth in OCC's original comments, the Commission should not allow the Company to collect any of the closing costs of the Sporn Unit.

### III. CONCLUSION

For the reasons stated in the above memorandum in support the Commission should grant OCC's Motion for Leave to File Supplemental Comments *Instantly*. Based upon the Supreme Court Decision in *In re Application of Columbus Southern Power Co., et al.*, the Commission should act upon the Supplemental Comments and the decision of the Court, to not allow the Company to collect the closing costs of the Sporn Unit 5 from customers.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Comments has been served via regular U.S. Mail, postage prepaid, to the following persons on this 20th day of April 2011.

  
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