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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of)
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)
Generation Assets.)

Case No. 08-917-EL-SSO **PUCO**

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.)

Case No. 08-918-EL-SSO

**MOTION REQUESTING THE PUCO ALTER OR AMEND EXISTING RATES
OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER
COMPANY PENDING REMAND
OR, IN THE ALTERNATIVE,
MOTION FOR STAY OF COLLECTION OF RATES FROM CUSTOMERS
OR
MOTION TO COLLECT SUBJECT TO REFUND
AND
MOTION FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
OHIO ENERGY GROUP,
OHIO MANUFACTURERS' ASSOCIATION,
THE OHIO HOSPITAL ASSOCIATION,
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY**

The Office of the Ohio Consumers' Counsel, on behalf of the 1.2 million residential consumers, the Ohio Energy Group, representing 22 of Ohio's most energy-intensive industries, the Ohio Manufacturers' Association ("OMA"), an association of thousands of manufacturing companies in the State of Ohio, many of whom take electric service provided by CSP and OP, the Ohio Hospital Association ("OHA"), a private

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nonprofit trade association with approximately 50 member hospitals in the combined service territories of CSP and OP, and Ohio Partners for Affordable Energy, an Ohio corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans (collectively, "Movants") file this pleading in order to protect customers of CSP and OP (collectively, "AEP Ohio" or "Companies") from continuing to pay rates determined by the Supreme Court of Ohio to be unlawful.

Movants request that the Public Utilities Commission of Ohio ("PUCO" or "Commission") act now to protect consumers from continuing to pay rates which include charges that the Ohio Supreme Court recently found to be unlawful. These charges, which are included in the rates currently being paid by customers, are for the provider of last resort ("POLR") service¹ and carrying charges on past environmental investment.²

The PUCO has the authority and responsibility to take action to protect customers. It can do so by exercising any one of the following powers it has over CSP and OP. The Commission can do so by (1) exercising its emergency powers to alter or amend existing rates, taking out the illegal elements, under R.C. 4900.16; (2) it can issue an order to stay collection of rates pertaining to the illegal charges; or (3) it can order the rates collected, including the illegal elements, subject to refund, pending outcome of the remand.

¹ The Provider of Last Resort charge is collected through a rider. Tariff Pages 69-1D of Ohio Power Tariffs and CSP tariffs set forth the cents/KWH POLR charge for each respective schedule of service. The rates currently in effect are those made effective January 1, 2010. See Attachment A.

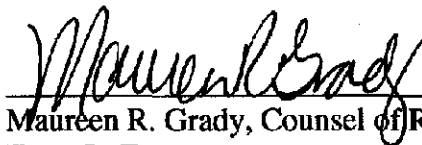
² The Commission granted the Companies' generation rates that would allow collection of "annual carrying costs for the incremental 2001-2008 environmental investments" of \$84 million for OP and \$26 million for CSP. AEP Ohio ESP Case, Opinion and Order at 24 and 28. The Companies 7/28/09 tariff filings and supporting work papers show a revenue requirement for CSP at page 60 ("Summary of Requested Rate Increase") of \$26,000,000 and for OP at page 71 of \$84,000,001, a total for both companies of \$110,000,001. See Attachment B.

Exercising any one of these three options will prevent injury to the interests of the public and will prevent irreparable harm to customers. Movants additionally seek an expedited ruling on these motions, pursuant to Ohio Adm. Code 4901-1-12(C), without the filing of memoranda, as provided by the rule. Expedited relief is especially crucial to protect the public because as each day goes by customers are being billed for charges the Supreme Court determined to be unlawful. The rate collection continues on at a staggering \$22 million per month, with the customers having no choice but to pay.

The reasons for granting these motions are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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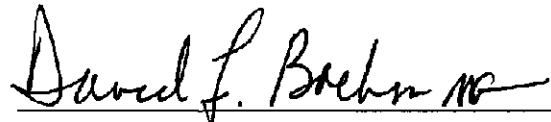
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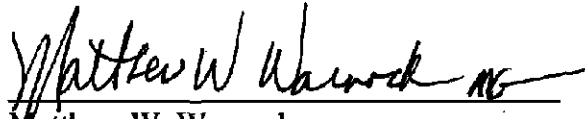
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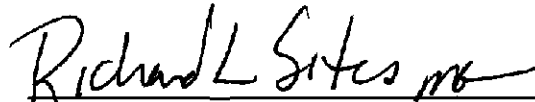
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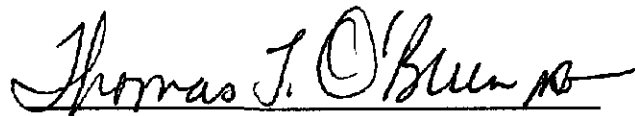


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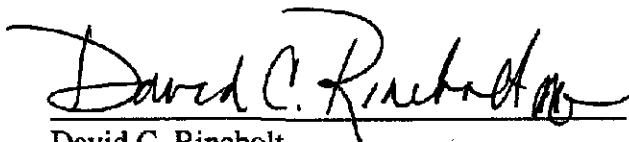


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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On April 19, 2011, the Ohio Supreme Court issued a ruling on the OCC and IEU appeal³ from this Commission's March 18, 2009 Opinion and Order. The Supreme Court's Order reversed the PUCO on three grounds -- retroactive ratemaking, provider of last resort charges, and carrying charges on environmental investment.⁴ Two of these issues -- provider of last resort ("POLR") charges⁵ and carrying charges on environmental

³ *In re Application of Columbus Southern Power Co.*, Supreme Court Case No. 2009-2022, Slip Opinion No. 2011-Ohio-1788 (April 19, 2011) ("Slip Opinion").

⁴ *Id.*

⁵ The Commission granted the Companies' unavoidable POLR riders that would allow annual collection of "a POLR revenue requirement of \$97.4 million for CSP and \$54.8 million for OP," a total POLR for both companies of \$152.2 million. *In re AEP Ohio's First ESP Application*, Case Nos. 08-917-EL-SSO, et al., Order at 38 (March 18, 2009) ("ESP Order" in the "AEP Ohio ESP Case"). The Companies' 7/28/09 tariff filings and supporting work papers show a POLR revenue requirement for CSP at page 60 ("Summary of Requested Rate Increase") of \$97,384,098 (current rates of \$14,007,101 plus non-FAC increase of \$83,376,997) and for OP at page 71 of \$54,801,769 (current rate of \$38,091,727 plus non-FAC increase of \$16,710,042), a total POLR for both companies of \$152,185,867.

investment⁶ -- were remanded to the PUCO with the Court providing the Commission with direction as to the matters it *may* revisit, but with the admonition (at least with respect to POLR)-that however the PUCO chooses to proceed, “it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.”⁷

These unlawful charges should be eliminated. Reductions in current rates to account for these two items would decrease total annual rates by \$123.4 million for CSP and \$138.8 million for OP. Unless the PUCO appropriately reduces rates effective May 1, 2011 and eliminates these unlawful elements, higher unlawful rates could be in effect for eight months—until December 31, 2011. Roughly estimated, if rates are not reduced for these two items for that eight month period, CSP customers could pay \$82.3 million and OP customers could pay \$92.5 million in unlawful charges to the Companies, or a total of \$174.8 million. Without the requested rate reductions, customers will be paying almost \$22 million a month to the Companies for charges that the Court ruled were unlawful.

In order to prevent injury to the interests of the public and avoid irreparable harm to customers, the Movants file these Motions to request the PUCO to exercise its discretionary power under Title 49 of the Revised Code to protect the customers of the Companies.

⁶ The Commission granted the Companies’ generation rates that would allow collection of “annual carrying costs for the incremental 2001-2008 environmental investments” of \$84 million for OP and \$26 million for CSP. AEP Ohio ESP Case, Opinion and Order at 24 and 28. The Companies 7/28/09 tariff filings and supporting work papers show a revenue requirement for CSP at page 60 (“Summary of Requested Rate Increase”) of \$26,000,000 and for OP at page 71 of \$84,000,001, a total for both companies of \$110,000,001.

⁷ Slip Opinion at ¶30.

The Commission's authority to take action to protect customers can be found under various statutes (R.C. 4909.16) and case precedent.⁸

If the PUCO takes no action the Companies' customers will be required to pay unlawful rates for electric service during the remand process -- a process that could take months. In the likely event the PUCO reduces or eliminates these charges through its remand, it is unlikely customers will be able to receive remuneration for the overpayments they paid to AEP Ohio pending remand.⁹ Indeed the Court recognized there is an apparent unfairness when a decision is determined to be unlawful (retroactive ratemaking), and customers get no refund of charges unlawfully collected. However if the PUCO alters or amends the rates for the time being, taking out the illegal elements, stays the collection of those rate elements, or collects rates subject to refund, the Commission can avoid further unjust results. Accordingly, the Commission should exercise one of these three options: alter or amend the rates, grant the stay, or make the rate collections subject to refund.

II. OHIO LAW REGARDING RATES ON REMAND

A. Amendment And Alteration Of Rates According To R.C. 4909.16

The Commission's authority to exercise its powers under R.C. 4909.16 has been upheld as a constitutionally valid exercise of police power.¹⁰ The standard of review establishes that the Commission's powers under this section of the Code are

⁸ See for example, *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982); *Cinnamon Lake Utilities Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 259 (1975) where the Ohio Supreme Court noted that R.C. 4909.16 exists to protect the public interest as well as the interests of the public utility.

⁹ See for example the Court's conclusion that the retroactive ratemaking was unlawful, but the \$63 million cannot be refunded to customers. Slip Opinion at 7-8.

¹⁰ See *Inland Steel Development v. Pub. Util. Comm.* (1977), 49 Ohio St.2d 284.

discretionary.¹¹ Further the Commission need not conduct a hearing prior to declaring an emergency and exercising this power since the hearing itself could cause substantial delay, causing the exact injury the statute seeks to avoid.¹² Finally, the relief granted must amount to a temporary and not permanent alteration of rates.¹³

B. Stay Of A Commission Order

The Commission has noted that there is no controlling precedent in Ohio setting forth the conditions under which the Commission will stay one of its own orders.¹⁴ The Commission, however, has favored the four-factor test governing a stay that was supported in a dissenting opinion by Justice Douglas,¹⁵ and which has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.¹⁶ This test involves examining:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Where lies the public interest? and
- (d) Whether the stay would cause substantial harm to other parties.¹⁷

¹¹ *Duff v. PUC* (1978), 56 Ohio St.2d 367.

¹² *Id.* at 377-378.

¹³ *Seneca Hills Service Co. v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 410.

¹⁴ See *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.

¹⁵ See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604.

¹⁶ Access Charge Decision at 5.

¹⁷ *Id.*

As discussed below, the Movants here meet this test.

C. Collection Of Rates Subject To Refund

The Commission has acted to prevent harm from occurring by ordering utilities, on an ongoing basis, to collect an existing rate increase subject to refund and subject to appropriate interest charges. The Commission has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the Commission granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.¹⁸ In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer.¹⁹

In its order setting the rehearing, the Commission approved the Company's filed tariffs but expressly found the portion of the increase granted attributable to Zimmer CWIP "should be made subject to refund, pending a rehearing on the CWIP issue."²⁰ A rehearing was held and the Commission ordered that all of the Zimmer costs should be excluded from CWIP. The Commission ordered the Company to file tariffs reducing the total revenue requirements by approximately \$13 million.²¹ The Company appealed and sought a stay of the Commission's Order on Rehearing from the Ohio Supreme Court. The Supreme Court granted the stay but subsequently affirmed the Commission's denial

¹⁸ *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982).

¹⁹ *Id.*, Opinion and Order at 8-14 (November 5, 1982).

²⁰ *Id.*, Entry at 1 (November 17, 1982).

²¹ *Id.*, Order on Rehearing (March 16, 1983).

of a CWIP allowance.²² Refunds of the revenues attributable to Zimmer -- collected from customers, subject to refund, since the issuance of the Entry on Rehearing -- were ordered by the Commission with interest.²³

Another example where the Commission has collected rates subject to refund involved the Ohio Utilities Company.²⁴ After a rate order was issued,²⁵ legislation was enacted that changed Ohio's ratemaking formula. The Commission opened an investigation to determine if the previously established rates were still reasonable in light of the new law.²⁶ The Commission determined that the rates were excessive, taking into account the new law, and ordered the Company to withdraw its tariffs and file new lower rates consistent with the PUCO's findings.²⁷ The Company sought a stay of the Commission's order, pending further review, which was granted with the condition that the utility was required to collect rates subject to refund.²⁸

²² *Columbus & Southern Ohio Electric Co. v. Pub.Util. Comm.*, (1984) 10 Ohio St.3d 12.

²³ *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing at 3 (May 1, 1984).

²⁴ *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

²⁵ *In the Matter of the Ohio Utilities Co. Application for an Increase in Rates*, Case No. 79-529-WS-AIR, Opinion and Order (January 18, 1977).

²⁶ *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (September 7, 1977).

²⁷ *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Opinion and Order (May 18, 1978).

²⁸ *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (June 7, 1978). The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. *Id.*

III. ARGUMENT

A. The Commission Should Exercise Its Authority Under R.C. 4909.16 In Order To Prevent Injury To The Public

There is established precedent for the PUCO to exercise its powers under R.C. 4909.16 in order to protect the interests of the public. The Commission has seen fit on numerous occasions to exercise its powers to protect the interests of the public and this power has been upheld on appeal by the Ohio Supreme Court. For instance, the Commission acted to prevent injury to the public when it declared that there should be a moratorium on disconnecting customers for nonpayment during the winter.²⁹ The Commission under R.C. 4909.16 modified a utilities' curtailment plans in order to grant summer relief and allow additional volumes of gas to be supplied to the grain drying industry.³⁰ The Commission acted to protect the public during a time of gas shortage by curtailing gas being supplied by gas utilities during a period of gas shortages.³¹ And the Supreme Court has opined that dramatic declines in cost of service factors would justify emergency residential customer rate relief absent an ongoing PUCO inquiry.³² The PUCO has also used its powers under R.C. 4909.16 to establish interim gas rates pending disposition of appeals by the utility from rates prescribed by ordinance.³³ Indeed the PUCO has implicitly used its authority under R.C. 4909.16 to establish an interim rate

²⁹ *Montgomery County v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171 (PUCO can declare emergency, but adjustments must not be contrary to statute).

³⁰ *General Motors Corporation v. Pub. Util. Comm.* (1978), 54 Ohio St.2d 357.

³¹ *East Ohio Gas* (21976), 45 Ohio St.2d 86.

³² *Consumers' Counsel v. Pub. Util. Comm.* (1978) 55 Ohio St. 30.

³³ *City of Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570.

pending the establishment of a permanent rate, with the interim rate being subject to true-up to offset any over or under collection. It did so in 2002.³⁴

Here there is a need to protect the interests of the public and the Commission should do so under R.C. 4909.16. The Commission should exercise its discretion to alter or amend the Companies' rates by temporarily taking out the unlawful elements during the pendency of the remand. Otherwise rates determined by the Supreme Court to be unlawful will continue to be collected from customers, with the utility likely arguing that moneys paid, even if found to be unlawful in an eventual remand order, cannot be recouped by virtue of the ban on retroactive ratemaking.

And these rates are significant amounting to \$22 million per month, and being collected over a remand process with no statutory deadline. The remand process, coupled with an appropriate evidentiary process, could stretch months and months-with a decision perhaps beyond the end of 2011, and into the new electric security plan ("ESP").

This would exacerbate the unfairness the Court recognized but could not remedy, with respect to retroactive ratemaking. Even though the Court found the Commission's actions amounted to retroactive ratemaking, which is precluded under S.B. 221, the Court determined it could not refund the \$63 million unlawfully collected. Despite the Court recognizing the apparent unfairness. The Court ruled that a refund is forbidden by law.

At this time though, there is no law preventing action that could preserve the customers' rights to a refund. Indeed, there is a law that the Commission in its discretion can act under to protect customers. That law is R.C. 4909.16. Rather than leave

³⁴ See *In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry at ¶33 (Nov. 26, 2002).

customers unprotected again, Movants urge the Commission to act now and protect customers by altering the current rates or by granting a stay. Such action will not remedy the PUCO's \$63 million error, but it will prevent further harm and unfairness to customers.

B. The Commission Should Grant A Stay Preventing Collection Of The Illegal Elements From Rates As The Grounds For A Stay Are Met.

1. There is a strong likelihood that movants will prevail on the merits.

The Court determined as to the carrying charges associated with environmental investments that if the costs do not fit within the listed items in R.C. 4928.143(B)(2), then they are not authorized to be charged by statute.³⁵ The Court accordingly rejected the claims of the Company that carrying costs may be included in an ESP as an unenumerated expense based on the broad introductory language of R.C. 4928.143(B)(2).

Thus, in order for charges to be collected from customers through an ESP, such as the carrying charges for environmental investment, they must fall within the enumerated sections of R.C. 4928.143(B)(2). A review of the listed items indicates that not one of them is broad enough to encompass passing through the charges that the Companies seek to pass through.

On appeal, the Company argued only one alternative basis for the collection of its environmental investment carrying cost--Subsection B(2)(b).³⁶ That section reads as follows: "a reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an

³⁵ Slip Opinion at ¶31.

³⁶ See Merit Brief and Appendix at 32 (Mar. 5, 2010).

environmental expenditure for any electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009.” The *carrying charges* incurred that relate to pre-2009 investment, however, do not qualify. They are not environmental expenditures but rather represent the annual cost³⁷ associated with the investment of a dollar of capital asset investment, with the capital investment being the environmental expenditure.³⁸ And the statute makes it clear that the environmental expenditure itself must occur on or after January 1, 2009, the date the EDU must offer the SSO.³⁹ Certainly the General Assembly did not intend to disallow capital asset investment that pre-dates the SSO, while at the same time allowing carrying charges to be collected through the SSO on that disallowed capital asset investment. Other sections, not argued as an alternative basis by the Companies, similarly fail to allow the collection of the environmental carrying charges.

Subsection (B)(2)(c) allows the establishment of a surcharge for the life of an electric generating facility that is “newly used and useful on or after January 1, 2009 * * *.” The carrying charges in question were not the result of an expenditure for such a facility.

Subsection (B)(2)(d) provides for charges “relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or

³⁷ These costs are the annual costs associated with capital investment in environmental equipment. They include the cost of money, income tax, depreciation, other taxes, and administrative and general expenses. The carrying costs embedded in base rates are for all dollars spent on environmental projects from the beginning of the market development period through the ESP period, less offsets to purportedly recognize RSP increases. See Direct Testimony of Philip J. Nelson at 15-19.

³⁸ Testimony of Philip J. Nelson at 16-17.

³⁹ See R.C. 4928.143(B)(2)(b).

supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.” The carrying charges allowed in the Order do not have such an effect.

Subsection (B)(2)(e) allows for automatic increase or decreases in any component of the standard service offer price. This is not pertinent to the carrying charges at issue.

Subsection (B)(2)(f) allows for the utility “to securitize any phase-in, inclusive of carrying charges, of the utility’s standard service offer price * * *.” The environmental carrying charges do not serve that purpose.

Subsection (B)(2)(g) addresses future costs “relating to transmission, ancillary, congestion, or any related service required for the standard service offer * * *.” The environmental carrying charges do not qualify under this section.

Subsection (B)(2)(h) deals with ratemaking and distribution infrastructure incentives and subsection (B)(2)(i) concerns provisions regarding the implementation of economic development, job retention, and energy efficiency programs. Neither is pertinent to the collection of environmental investment carrying charges.

Indeed based upon the wording of the statute, the Commission could without the need for an evidentiary hearing accept the Court’s reversal of the order. The Commission should do so and should act quickly to eliminate the unlawful rate element from customers’ rates, which will ensure that \$73.3 million of the unlawful charges will be stopped. Remand on this issue then need only focus on how to adjust prospective phase in rates during 2012 through 2018 to account for the \$256.7 million of overvaluation of

regulatory assets caused by including unlawful environmental carrying charges as part of the capped rates collected from customers.

On POLR, the Court reversed the order on the basis that the Commission committed error in claiming that the POLR was a cost based charge, when the evidence did not support such a claim.⁴⁰ Indeed there is no record evidence to support a charge of this magnitude. Given this and the Supreme Court ruling, it is extremely unlikely that the POLR can be justified.

Based on these factors, there is a strong likelihood that the Movants will prevail on the merits regarding both of these issues on remand. This part of the stay standard is met.

2. Allowing unlawful rates to be collected pending the remand action would likely cause irreparable harm to AEP Ohio's customers.

Harm is irreparable “when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be ‘impossible, difficult, or incomplete.’”⁴¹ In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect, to determine whether to stay the proceedings.⁴²

In *Tilberry v. Body*, the Ohio Supreme Court found that the effect of a court order calling for the dissolution of a business partnership would cause “irreparable harm” to the

⁴⁰ Slip Opinion at ¶24.

⁴¹ *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App.3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App.3d 1, 12, appeal dismissed, 78 Ohio St.3d 1419 (1997).

⁴² See, e.g., *Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158, 161.

partners because “a reversal ... on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions” – a set of circumstances that would be “virtually impossible to accomplish.”⁴³ In *Sinnott v. Aqua-Chem, Inc.*, the Ohio Supreme Court found that a lower court’s pre-trial findings could be appealed at the point they were issued because the findings allowed the case to proceed to trial.⁴⁴ The majority reasoned that “the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,”⁴⁵ and so concluded that “[i]n some instances, ‘[t]he proverbial bell cannot be unrung and an appeal after final * * * judgment on the merits will not rectify the damage’ suffered by the appealing party.”⁴⁶ Here, the bell is ringing loud that Ohio customers need the PUCO to protect their interest in a refund.

Although, as Justice Rehnquist observed, “the temporary loss of income, *ultimately to be recovered*, does not usually constitute irreparable injury,”⁴⁷ *Tilberry* and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. Here, Ohio customers affected by the Commission’s order will likely be confronted with arguments that they cannot recover the unlawful rates they have already paid even if the PUCO Order on Remand eliminates the charges. In this regard, AEP Ohio will likely assert that there is no mechanism under Ohio law that permits the

⁴³ *Tilberry* (1986), 24 Ohio St. 3d at 121.

⁴⁴ *Sinnott* (2007), 116 Ohio St. 3d at 164.

⁴⁵ *Id.* at 163.

⁴⁶ *Id.* at 162 (quoting *Gibson-Myers & Assocs. v. Pearce* (9th Dist.), 1999 Ohio App. LEXIS 5010, *7-*8 (compelled disclosure of a trade secret would “surely cause irreparable harm”).

⁴⁷ *Sampson v. Murray* (1974), 415 U.S. 61, 90 (Emphasis added).

retroactive refund of over-collections from customers, where such payments are not made subject to refund.⁴⁸

The Commission can act to protect the Companies' customers from this harm. The Commission should stay the collection of POLR and the environmental carrying charges in current rates until the remand is final.

3. A stay would further the public interest.

In the dissent in the Supreme Court case in which Justice Douglas recommended standards for a stay of a PUCO decision, he noted that PUCO Orders "have effect on everyone in this state -- individuals, business and industry."⁴⁹ That effect on customers is all the more pronounced in these difficult economic times when customers can ill afford increases in the essential service that is electricity. It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is "above all in these types of cases, where lies the interest of the public" and that "the public interest [] is the ultimate important consideration for this court in these types of cases."⁵⁰

As discussed above, the stay sought by Movants would prevent irreparable harm to AEP Ohio's customers, with no substantial harm to the Companies, as discussed below. In addition, the stay would provide some relief to customers who are already burdened by the fragile state of the economy. The public interest, therefore, would be

⁴⁸ See, e.g., *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St. 3d 344; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, ¶ 2 of the syllabus.

⁴⁹ *MCI*, 31 Ohio St.3d at 606.

⁵⁰ *Id.*

furthered by a stay of the collection of the rate elements found to be unlawful by the Ohio Supreme Court.

4. A stay would not cause substantial harm to AEP Ohio.

Any harm that the Companies will suffer if they are prohibited from collecting supplemental rates is not a legally cognizable harm because it flows from the ultra vires acts of the Commission. There is no entitlement to additional revenues, because the Commission's action in approving the collection of increased rates was an ultra vires act that is prohibited by law. To permit the Companies to claim harm based on not receiving revenues they are not entitled to collect would permit the Companies to be unjustly enriched.

C. In The Alternative, The PUCO Should Make The Rate Collections Subject To Refund.

An alternative approach to protecting customers is for the PUCO to make AEP Ohio's rate collections subject to refund. The PUCO has, in the past, ordered that utility rates should be subject to refund. In 1983, for example, the Commission determined that a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress for the Zimmer plant would be collected subject to refund to customers.⁵¹ After the Commission's action was upheld on appeal,⁵² the Commission ordered the company to refund approximately \$4.5 million to its customers.⁵³ The

⁵¹ *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

⁵² *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 12.

⁵³ *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

Commission ordered the refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

The Ohio Supreme Court determined that the rates approved in the *AEP Ohio ESP Case* were unlawful or not supported, and remanded that case to the PUCO for further consideration. The Commission should not allow AEP Ohio to continue to charge customers for rates determined to be unlawful. Otherwise customers could be irreparably harmed. Alternatively, the Commission can order the rates to be collected subject to refund on an ongoing basis. Only in this way can AEP Ohio's customers be protected from the collection of rates while the Commission considers these cases on remand.

D. Request For Expedited Ruling

Movants request an expedited ruling on this motion, pursuant to Ohio Adm. Code 4901-1-12(C). Given the magnitude of dollars being unlawfully collected every day under the current rates, Movants seek expedited treatment of these Motions. Movants were unable to reach Counsel for the Companies to ascertain whether they would agree to the request for expedited ruling.

IV. CONCLUSION

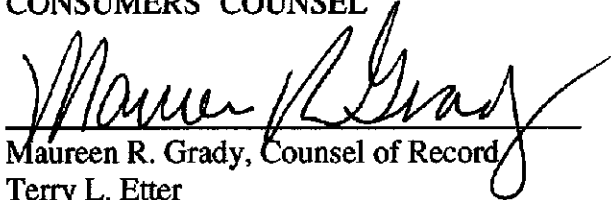
The customers of AEP Ohio should be protected so they do not have to endure any more of the unfairness resulting from the *AEP Ohio ESP Case*, an unfairness manifesting itself in the finding of the Ohio Supreme Court that retroactive ratemaking is unlawful, and yet there can be no refund for the \$63 million collected retroactively. The most direct and understandable protection this Commission has the discretion to provide is to take the unlawful elements out of rates, providing customers with a noticeably lower utility bill. The Commission can take this action to protect customers under its broad

powers to protect the public interest under R.C. 4909.16. Or the Commission could do so by exercising its powers to stay the collection of the elements of the Companies' ESP which were determined by the Court to be unlawful. And this can be done without significant harm to the utility. It is clearly in the interest of the public to grant a stay.

As a second choice alternative, the PUCO could protect customers by ruling that the rates are to be collected subject to refund. This too is a method that the Commission can use to protect consumers during the period in which the remand from the Court is being addressed. In this case, there will be no harm whatsoever to the Company since the moneys can be either disbursed to the utility or refunded to customers following resolution of these cases on remand.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Maureen R. Grady", is written over a horizontal line.

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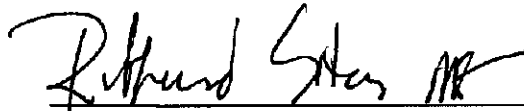
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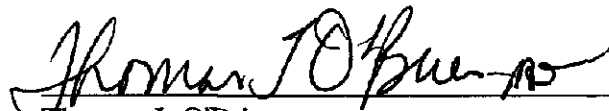


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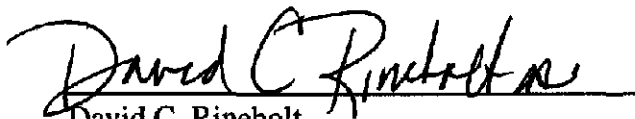
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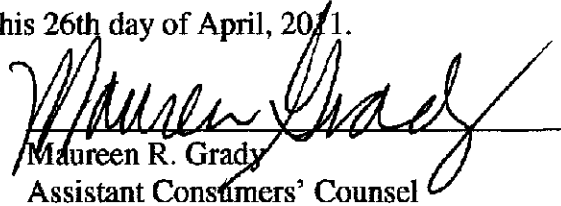
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion has been served via electronic service, to the counsel identified below (provided electronically to the Attorney Examiners) this 26th day of April, 2011.


Maureen R. Grady
Assistant Consumers' Counsel

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COLUMBUS SOUTHERN POWER COMPANY

Original Sheet No. 69-1D

P.U.C.O. No. 7

OAD - PROVIDER OF LAST RESORT CHARGE RIDER
(Open Access Distribution - Provider of Last Resort Charge Rider)

Effective Cycle 1 April 2009 through the last billing cycle of December 2009, all customer bills subject to the provisions of this Rider, including any bills rendered under special contract, shall be adjusted by the Provider of Last Resort Charge per KWH as follows:

Schedule	¢/KWH
OAD - RS	0.77546
OAD - GS - 1	0.66660
OAD - GS - 2	0.67937
OAD - GS - 3	0.52603
OAD - GS - 4	0.44595
OAD - SBS	0.54402
OAD - SL	0.25312
OAD - AL	0.22207

Effective Cycle 1 January 2010, the Provider of Last Resort Charge shall be the following:

Schedule	¢/KWH
OAD - RS	0.56955
OAD - GS - 1	0.48959
OAD - GS - 2	0.49897
OAD - GS - 3	0.38635
OAD - GS - 4	0.32753
OAD - SBS	0.39956
OAD - SL	0.18591
OAD - AL	0.16311

Customers of a governmental aggregation where the legislative authority that formed such governmental aggregation has filed written notice with the Commission pursuant to Section 4928.20 (J), Ohio Revised Code, that it has elected not to receive default service from the Company at standard service offer rates shall not be subject to charges under this Rider.

Customers that elect to take energy service from a CRES Provider and agree to pay the market price of power should they return to energy service from the Company, shall not be subject to charges under this Rider.

Filed pursuant to Orders dated March 18 and March 30, 2009 in Case No. 08-917-EL-SSO

Issued: March 30, 2009

Effective: Cycle 1 April 2009

Issued by
 Joseph Hamrock, President
 AEP Ohio

P.U.C.O. NO. 19

OAD - PROVIDER OF LAST RESORT CHARGE RIDER
(Open Access Distribution - Provider of Last Resort Charge Rider)

Effective Cycle 1 April 2009 through the last billing cycle of December 2009, all customer bills subject to the provision of this Rider, including any bills rendered under special contract, shall be adjusted by the Provider of the Last Resort Charge per KWH as follows:

Schedule	¢/KWH
OAD - RS	0.31771
OAD - GS -1	0.35875
OAD - GS -2	0.36695
OAD - GS -3	0.26354
OAD - GS -4	0.21522
OAD - EHG	0.39076
OAD - EHS	0.50548
OAD - SS	0.40104
OAD - OL	0.07760
OAD - SL	0.07737
OAD - SBS	0.25642

Effective Cycle 1 January 2010, the Provider of Last Resort Charge shall be the following:

Schedule	¢/KWH
OAD - RS	0.23366
OAD - GS -1	0.26384
OAD - GS -2	0.26988
OAD - GS -3	0.19382
OAD - GS -4	0.15828
OAD - EHG	0.28739
OAD - EHS	0.37175
OAD - SS	0.29494
OAD - OL	0.05707
OAD - SL	0.05690
OAD - SBS	0.18858

Customers of a governmental aggregation where the legislative authority that formed such governmental aggregation has filed written notice with the Commission pursuant to Section 4928.20 (J), Ohio Revised Code, that it has elected not to receive default service from the Company at standard service offer rates shall not be subject to charges under this Rider.

Customers that elect to take energy service from a CRES Provider and agree to pay the market price of power should they return to energy service from the Company, shall not be subject to charges under this Rider.

Filed pursuant to Orders dated March 18 and March 30, 2009 in Case No. 08-918-EL-SSO

Issued: March 30, 2009

Effective: Cycle 1 April 2009

Issued by
 Joseph Hamrock, President
 AEP Ohio

**Columbus Southern Power Company
Summary of Requested Rate Increase**

<u>Joint Service Territory</u>		2009			
<u>Description</u>	<u>Current Rates</u>	<u>Non-FAC Increase</u>	<u>FAC Increase</u>	<u>Total Increase</u>	<u>Total Bill % Increase</u>
FAC Components	\$52,134		\$2,332	\$2,332	1.48%
<u>Non-FAC Components</u>					
2001 - 2008 Incremental Environmental Capital Investment		\$3,513		\$3,513	2.24%
Generation Assets			\$3,062	\$3,062	1.95%
Subtotal Non-FAC	\$55,664	\$3,513	\$3,062	\$6,575	4.19%
POLR	\$932	\$5,547		\$5,547	3.53%
Distribution	\$14,541	\$782		\$782	0.50%
Energy Efficiency and Peak Demand Reduction		\$0		\$0	0.00%
Transmission Cost Recovery	\$19,029			\$0	0.00%
Other*	\$14,564	(\$4,149)		(\$4,149)	-2.64%
Total	\$157,062	\$5,693	\$5,394	\$11,087	7.06%

<u>Total</u>		2009			
<u>Description</u>	<u>Current Rates</u>	<u>Non-FAC Increase</u>	<u>FAC Increase</u>	<u>Total Increase</u>	<u>Total Bill % Increase</u>
FAC Components	\$592,970,277		\$27,011,065	\$27,011,065	1.60%
<u>Non-FAC Components</u>					
2001 - 2008 Incremental Environmental Capital Investment		\$26,000,000		\$26,000,000	1.54%
Generation Assets			\$22,666,667	\$22,666,667	1.35%
Subtotal Non-FAC	\$413,483,083	\$26,000,000	\$22,666,667	\$48,666,667	2.89%
POLR	\$14,007,101	\$83,376,997		\$83,376,997	4.95%
Distribution	\$325,881,560	\$17,532,627		\$17,532,627	1.04%
Energy Efficiency and Peak Demand Reduction		\$0		\$0	0.00%
Transmission Cost Recovery	\$173,515,049			\$0	0.00%
Other*	\$163,217,722	(\$57,998,189)		(\$57,998,189)	-3.45%
Total	\$1,683,074,791	\$68,913,434	\$49,677,732	\$118,591,167	7.05%

* Includes effects of expiring Regulatory Asset Charges, Expiring Line Extension Surcharges, Universal Service Fund, Advanced Energy Fund, kWh Tax and other miscellaneous items.

Columbus Southern Power Company - Calculation of Non-FAC and FAC Generation Charges

Current Base Generation Charges	Residential												Shopping				Total
	GS1	GS2	GS3	GS4RP	AL	SL	SS1	SS2	SS3	AL	SL	SS1	SS2	SS3	AL	SL	
Less: Existing Special Contracts	336,332,960	24,939,605	119,189,676	331,382,421	82,980,505	2,622,277	1,430,096	-	-	-	-	-	-	-	-	-	980,390,366
Property Tax Credit Rider	(16,408,597)	(1,277,927)	(6,913,974)	(15,186,364)	(4,535,403)	(137,355)	(72,696)	-	-	-	-	-	-	-	-	-	(44,370,210)
Municipal Income Tax Rider	(11,331,267)	(472,815)	(2,382,597)	(7,357,763)	(2,381,274)	(24,135)	(18,876)	-	-	-	-	-	-	-	-	-	(23,501,519)
Franchise Tax Rider	807,058	29,807	144,743	580,913	27,107	4,002	3,267	-	-	-	-	-	-	-	-	-	1,586,579
Power Acquisition Rider	4,689,707	228,400	1,118,167	4,467,942	1,677,216	34,816	25,063	-	-	-	-	-	-	-	-	-	12,261,330
Generation Cost Recovery Rider	14,904,322	1,107,138	6,291,512	14,699,324	4,126,327	125,295	66,028	-	-	-	-	-	-	-	-	-	40,319,542
Total Generation Charges	343,706,618	25,748,538	122,844,013	342,744,561	86,220,643	2,968,616	1,526,635	-	-	-	-	-	-	-	-	-	1,077,398
Less: Embedded FAC	(120,500,207)	(10,002,403)	(49,305,840)	(156,452,031)	(47,124,577)	(1,489,254)	(1,105,004)	-	-	-	-	-	-	-	-	-	(260,815,077)
Non-FAC Generation Charges	187,106,410	15,694,535	73,538,163	147,242,530	28,096,066	1,459,362	451,631	-	-	-	-	-	-	-	-	-	816,583,289
2001-2008 Incremental Environmental Carrying Cost 6.26%	8,921,312	906,247	4,690,400	5,268,554	1,640,932	91,868	28,399	-	-	-	-	-	-	-	-	-	35,864
Adjusted Non-FAC Generation Charges	145,727,722	16,670,662	78,228,563	152,503,913	27,736,998	1,548,161	480,030	-	-	-	-	-	-	-	-	-	852,443,053
Generation Assets (4 Months of Designed 3 Month Collection)	5.48%	7,518,016	869,814	4,036,759	8,071,503	1,430,666	73,847	24,758	-	-	-	-	-	-	-	-	22,696,867
Total Non-FAC Generation Charges	153,245,738	17,530,708	82,305,322	160,577,622	28,167,554	1,627,892	504,788	-	-	-	-	-	-	-	-	-	875,139,920
Embedded FAC Rate @ Meter	0.0077722	0.0077722	0.0077722	0.0077722	0.0077722	0.0077722	0.0077722	-	-	-	-	-	-	-	-	-	0.0077722
Secondary Primary Sub-Trian	0.0089664	0.0089664	0.0089664	0.0089664	0.0089664	0.0089664	0.0089664	-	-	-	-	-	-	-	-	-	0.0089664
Wm by Voltage	0.0283571	0.0283571	0.0283571	0.0283571	0.0283571	0.0283571	0.0283571	-	-	-	-	-	-	-	-	-	0.0283571
Secondary Primary Sub-Trian	7,429,101,256	282,312,084	1,719,237,518	4,880,657,032	0	53,787,343	38,769,122	349,286	71,223,280	79,039,460	2,391	0	0	0	0	0	0
Embedded FAC S	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Secondary Primary Sub-Trian	206,600,207	10,062,203	47,747,005	129,426,700	0	1,493,254	1,105,004	-	-	-	-	-	-	-	-	-	0
Total	206,600,207	10,062,203	47,747,005	129,426,700	0	1,493,254	1,105,004	-	-	-	-	-	-	-	-	-	0
Annualized FAC Target Increase	\$12,193,158	\$308,384	\$236,723	\$7,861,421	\$3,389,962	\$221,870	\$143,882	(\$7,86)	(\$47,519)	(\$38,600)	\$6	\$2,130,093	\$2,240	\$26,236,134			
FAC Rate Increase	1.0518	0.0018270	0.0006761	0.0001448	0.0013402	0.0041264	0.0036162	N/A	N/A	N/A	N/A						
Secondary Primary Sub-Trian	1.0233	0.001402	0.0010604	0.0012865	0.0011629	0.0011629	0.0011629										
Annualized FAC Rate	0.0293962	0.0293473	0.0296811	0.0296890	0.0291124	0.0316866	0.0313854										
Secondary Primary Sub-Trian	0.0270096	0.0279468	0.0274170	0.0276290	0.0271629	0.0271629	0.0271629										

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Ohio Power Company
Summary of Requested Rate Increase

SBS

<u>Description</u>	<u>Current Rates</u>	2009			
		<u>Non-FAC Increase</u>	<u>FAC Increase</u>	<u>Total Increase</u>	<u>Total Bill % Increase</u>
FAC	\$20,460		\$719	\$719	0.41%
<u>Non-FAC Components</u>					
2001 - 2008 Incremental Environmental Capital Investment		\$12,206		\$12,206	6.94%
Generation Assets		\$0		\$0	0.00%
Subtotal Non-FAC	\$72,410	\$12,206		\$12,206	0.00%
POLR	\$1,521	\$667		\$667	0.38%
Distribution	\$44,241	\$2,432		\$2,432	1.38%
Energy Efficiency and Peak Demand Reduction		\$0		\$0	0.00%
Transmission Cost Recovery	\$31,224			\$0	0.00%
Other*	\$8,038	\$0		\$0	0.00%
Total	\$175,894	\$15,305	\$719	\$16,024	9.11%

Total

<u>Description</u>	<u>Current Rates</u>	2009			
		<u>Non-FAC Increase</u>	<u>FAC Increase</u>	<u>Total Increase</u>	<u>Total Bill % Increase</u>
FAC	\$491,997,042		\$12,052,826	\$12,052,826	0.74%
<u>Non-FAC Components</u>					
2001 - 2008 Incremental Environmental Capital Investment		\$84,000,001		\$84,000,001	5.15%
Generation Assets		\$0		\$0	0.00%
Subtotal Non-FAC	\$498,313,473	\$84,000,001		\$84,000,001	0.00%
POLR	\$38,091,727	\$16,710,042		\$16,710,042	1.02%
Distribution	\$315,126,552	\$17,326,269		\$17,326,269	1.06%
Energy Efficiency and Peak Demand Reduction		\$0		\$0	0.00%
Transmission Cost Recovery	\$182,695,594			\$0	0.00%
Other*	\$104,521,951	(\$14,053)		(\$14,053)	0.00%
Total	\$1,630,748,339	\$118,022,258	\$12,052,826	\$130,075,084	7.98%

* Includes effects of expiring Line Extension Surcharges, Universal Service Fund, Advanced Energy Fund, kWh Tax and other miscellaneous items.

Ohio Power Company - Calculation of Non-FAC and FAC Generation Charges

[illegible]