BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO THE EXPEDITED MOTIONS TO ALTER, AMEND, STAY OR RENDER SUBJECT TO REFUND EXISTING AUTHORIZED RATES

INTRODUCTION

On April 19, 2011, the Supreme Court of Ohio issued a slip opinion in Case No. 2009-2022 regarding the 13 alleged errors raised by the Ohio Consumers' Counsel (OCC) and the Industrial Energy Users-Ohio (IEU) in connection with the Commission's 2009 decision in AEP Ohio's ESP in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO. *See* Supreme Court of Ohio Slip Opinion No. 2011-Ohio-1788 ("Slip Opinion"). The Slip Opinion reversed the Commission's ESP order on three issues and remanded two of those issues (POLR charge and environmental carrying charge) to the Commission for further consideration, since the first issue was essentially moot. The Court did not rule on the application of its decisions on rates, in fact, the Court left open the option for the Commission to provide further basis and authority for the decision the Commission

already made in a remand proceeding. Nevertheless, OCC and others ask that the Commission summarily modify authorized rates prior to conducting the remand proceeding.

Due to the Court's normal procedure for finalizing its decisions, however, a mandate from the Supreme Court is not issued until after the parties' 10-day opportunity to file reconsideration is completed. Only after the mandate is issued can jurisdiction over the case be transferred back to the Commission and the remand proceeding conducted pursuant to the Court's decision. Just as the Commission lacks jurisdiction to modify a final order during the time an appeal is pending regarding that final order (*e.g.*, the ESP order), the Commission lacks jurisdiction to change its prior decision until such time that a remand order is pending before the Commission. The procedural status at the time Movants prematurely filed their motion was just that – no mandate had been issued and the Commission lacked jurisdiction over the case. Consequently, it would be appropriate for the Commission to dismiss the motion without prejudice and require Movants to file a new request once the Commission has jurisdiction over the case. Even assuming that the Court's mandate has been issued and that the Commission considers the merits of the premature motion, however, the request must be denied because it remains premature and otherwise without merit.

The appropriate process for implementing the Court's decision, once it becomes final, is for the Commission to conduct a remand proceeding before making any prospective rate changes; this is part of the normal process and applies equally to any Court reversal involving an increase in rates (as well as any potential rate decrease involved here). Just as it would be inappropriate in another case to implement a rate

increase in response to a Court slip opinion prior to conducting a remand proceeding, it is inappropriate to do so in this case just because a *potential* rate decrease is involved. More importantly, because it is permissible under the Court's slip opinion for the Commission to conclude that neither the POLR charge nor the environmental carrying charge embedded in base generation rates need to be modified (indeed that is the appropriate result here), Movants' request is premature and improperly seeks to short-circuit the normal remand process.

As further discussed below, the Court stopped short of a vacatur regarding the Commission's approval of both the POLR charge and the environmental carrying charge. While R.C. 4903.13 explicitly allows the Court to vacate Commission orders on appeal, the Court did not do so here. The Court remanded the issues to the Commission for further consideration and that is a process that should be respected and allowed to occur. Any other application of the Court's decision to remand the issues is beyond the scope of the Court's remand. Consequently, the POLR and environmental charges remain in effect under the Court's reversal until such time as the Commission makes a determination in the remand proceeding, which will have prospective effect, if any, from that point forward. Until such time, the Commission should not presume – as the Movants do – that either charge is unlawful.

ARGUMENT

A. Movants' reliance on the Commission's emergency ratemaking authority under § 4909.16, Ohio Rev. Code, is misplaced and their request should be rejected.

All stakeholders are entitled to an orderly remand process, in which interested parties'—including the Companies – may present their positions on the basis for the POLR and environmental carrying cost charges. It is not appropriate to circumvent that process and assume a particular conclusion about what will result from it, as Movants seek to do through their request that the Commission use its emergency authority to simply eliminate the charges before the remand process has even begun. The Court did not conclude, as Movants assume, that the charges themselves are unlawful. Instead, the Court found that the record basis was inadequate for the POLR charge to be labeled cost-based and that the legal basis selected by the Commission for the environmental carrying charges was not available for that purpose. The Court instructed the Commission to reconsider on remand both whether there is an alternative rationale and evidentiary support for the POLR charges and whether there is another statutory basis, among the numerous options provided, for the environmental carrying cost charges.

Instead of conducting the remand process that the Court directed the Commission to execute, Movants urge the Commission to use its emergency ratemaking authority under § 4909.16, Ohio Rev. Code, circumvent the normal ratemaking process that will occur as part of the remand proceeding, and immediately eliminate the POLR and environmental investment cost-recovery charges contained in the Companies' ESPs. Movants' shoot-first-and-ask-questions-later approach should be rejected.

Section 4909.16, Ohio Rev. Code, provides as follows:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

As the Commission itself has noted, the Supreme Court has cautioned the Commission that "its power to grant emergency relief is extraordinary in nature." *In re Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order, at 6 (September 2, 2009) (citing *Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570). In *Akron Thermal* the Commission reiterated the several standards by which it is guided in exercising the discretion conferred by § 4909.16:

> As set forth by the Commission, several considerations must be examined. First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation. Next, emergency relief will not be granted pursuant to Section 4909.16, Revised Code, if the emergency request if filed merely to circumvent, and as a substitute for, permanent rate relief under Section 4909.18 Revised Code. Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.

(Case No. 09-453-EL-AEM, Opinion and Order, at 6.) Although Akron Thermal involved a somewhat different context than the instant proceeding, those considerations apply to Movants' request in this case. When applied, they compel the conclusion that

Movants' request that the Commission exercise its emergency authority under § 4909.16 should be denied.

First, Movants have not met the threshold requirement of demonstrating that an emergency exists. They claim that the Court determined that the Companies' rates are unlawful because they include the POLR and environmental investment carrying cost charges. (Motion at 8.) They conclude that the Companies are charging excessive and unlawfully high rates, and assert that constitutes an emergency. Contrary to Movants' presumption, the Court did not find that the Companies' rates are at unlawfully high levels. Rather, the Court found that the Commission had developed an insufficient evidentiary basis for the POLR charges and had relied upon an improper statutory basis for the environmental charges. In particular, with regard to the POLR charges the Court held that "the commission may consider on remand whether a non-cost-based POLR charge is reasonable and lawful [and] [a]lternatively, the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs." (Slip Opinion, at ¶ 30.) And, with regard to the environmental carrying cost charges, the Court held that"[o]n remand, the commission may determine whether any of the listed categories of [§4928.143](B)(2) authorize recovery of environmental carrying charges." (*Id.* at ¶ 35.) Accordingly, it is simply not accurate to characterize the Court's decision as one that has determined that the Companies' existing rates are excessive or unlawful. Indeed, the Companies firmly believe that, on remand, the Commission will find more than adequate evidentiary and statutory support for the Commission's previous application of POLR and environmental charges.

Even if the Movants' position that the current rates are unlawfully high were uncontroverted, their claim of an emergency would still fall short where, as here, there already is an ongoing proceeding through which the Commission may make the necessary adjustments to mitigate any excessive rates. In *Consumers' Counsel v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 30, 33, 377 N.E.2d 796, 797, the Court observed that a dramatic decline in cost of service factors would only justify emergency rate relief for residential customers "absent an ongoing Public Utilities Commission inquiry." In the instant case there is an ongoing Commission proceeding as a result of the court's remand order. As was the case with OCC's appeal in *Consumers' Counsel, supra,* Movants' request for emergency relief in this case *"seems at this point, and on this record, to be grounded upon an . . . excess of zeal . . . rather than upon a demonstrated denial of a substantial right." Id.* (emphasis added).

Second, Movants have provided no supporting evidence to demonstrate, let alone evidence that clearly and convincingly demonstrates the presence of extraordinary circumstances that constitute a genuine emergency situation. Unlike instances when the Commission has exercised its emergency authority where there is no significant debate over whether the circumstances that support the alleged emergency actually exist (*Montgomery County v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171; *General Motors Corp. v. Pub. Util. Comm.* (1978); 54 Ohio St.2d 357.; *East Ohio Gas Co. v. Pub. Util. Comm.* (1976), 45 Ohio St.2d 86), in this instance there is a substantial debate over whether the Companies rates are excessive. As will be more fully demonstrated by the Companies in the remand, the Companies firmly believe that there is ample support, evidentiary and statutory, for the POLR and environmental carrying cost charges already

approved by the Commission as reasonable. As noted above, in this case the Court has specifically allowed the opportunity for the Commission to consider on remand additional evidentiary and legal bases to support those rates.

Third, another obvious flaw in Movants' request for emergency relief is that the request seeks to circumvent the ratemaking remedy that the remand process ordered by the Court is intended to provide. Section 4909.16 is not a regulatory bulldozer to be used to override or supplant the ongoing applicable legal and regulatory and process. More specifically, all of the parties – most notably the Companies – are entitled to process before the Commission even considers changing or eliminating the POLR charge or the environmental carrying cost recovery embedded within the base generation rate. As referenced above, the Commission should, at a minimum, allow all the parties to brief and argue the remand issues prior to reaching a decision; and it may also wish to conduct a hearing or take additional evidence.

Movants also make no effort to tailor their request for emergency rate relief to the minimum amount that they contend is necessary. They simply advocate eliminating the entire amounts of both types of charges. As referenced above, there are various options on remand and, even if the Commission concludes there is a problem with one of the two charges at issue on remand, eliminating the charges is not the only option (the most extreme option) for addressing such concerns.

Perhaps not surprisingly, in light of the failure to address or meet the requirements for emergency rate relief, the authorities that Movants have cited in support of their request are not persuasive. For example, Movants' observation, citing *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, that the exercise of the Commission's emergency

authority is discretionary (Motion at 3-4) begs the question of what standards the Commission ought to apply in determining whether and to what extent it should exercise that discretionary authority. As explained above, when the criteria that the Commission has articulated are applied, it is clear that no emergency exists there is no sound basis for exercising authority to eliminate the POLR and environmental charges. Movants also note (Motion at 4) that a hearing on whether an emergency exists is not a prerequisite in all cases for the Commission to find that, in fact, an emergency does exist, again citing *Duff v. Pub. Util. Comm.* The Companies agree that there is no need to hold a separate hearing on that issue, because it is clear that there is no emergency warranting elimination of the Companies' POLR and environmental charges. Instead, the Commission should implement the remand process provided by the Court's decision to establish, on a permanent basis, appropriate statutory and evidentiary bases for those charges.

Movants' citation to *Montgomery County v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171 (where the Commission declared a moratorium on disconnection of customers for non-payment during the winter heating season), *General Motors Corp. v. Pub. Util. Comm.* (1978), 54 Ohio St.2d 357 (where the Commission modified utilities' gas curtailment plans in order to protect the grain drying industry and, thus, the State's harvest), and *East Ohio Gas Co. v. Pub. Util. Comm.* (1976), 45 Ohio St.2d 86 (where the Commission approved curtailment plans ensuring supplies of natural gas for domestic and critical public safety purposes during periods of shortages) are also inapplicable. Those cases involved circumstances of essentially uncontroverted peril to the public safety and welfare, a far cry from the circumstances that obtain in the instant case. In this

case, the Commission is dealing, on remand, with the question of the statutory and evidentiary basis for its previous decision to establish existing rates. That is the situation that applies in every case where the Court has ordered such a remand. The Court's decision did not create an emergency regarding rates any more than the Commission's original decision in this proceeding created an emergency. Ironically, the one case that Movants have cited in support of their request that did involve rates, *Consumers' Counsel v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 30, actually confirms that Movants' request in this case is misguided. As noted above, in connection with the Companies' discussion of the Movants' failure to satisfy the first criterion for exercising emergency authority, the Court in that case observed that it would be inappropriate for the Commission to exercise its emergency authority to reduce a utility's rates, even when the cost basis for the rates had dramatically declined, when there was an ongoing permanent rate making proceeding dedicated to resolving whether, and to what extent, there should be a rate reduction. *Consumers' Counsel*, 55 Ohio St.2d 30, 33, 377 N.E.2d 796, 797. In the instant case, as noted above, the remand process provides exactly that type of ongoing rate making proceeding.

Movants have not satisfied any, let alone all, of the requirements for obtaining emergency rate relief. Their request should be denied.

B. The request for a stay should be denied because a stay at this stage of the proceedings is an inappropriate remedy that would conflict with the Court's decision and, in any case, the grounds for a stay are not met.

Regarding Movants' request for stay, that remedy is inapplicable to this situation, even if the criteria for a stay were satisfied -- which they are not. Issuing a stay would violate both the letter and spirit of the Court's mandate for a remand proceeding. In

concluding that the retroactive ratemaking issue was essentially moot, the Court explicitly confirmed that the Ohio filed rate doctrine (as defined by *Keco* and progeny) "remains good law" and applies to ESP cases decided under R.C. 4928.143, making the charges challenged on appeal continue to be in effect during the appeal and through such time as the remand decision may be issued (which remand is not likely in any event to result in modification of either charge). (Slip Opinion at ¶¶ 16-17.) The opportunity for a stay is at the beginning of an appeal – not at the end.

In fact, Movants already unsuccessfully pursued this remedy. In the early stages of the appeal in Case No. 2009-2022, Movants filed a motion to suspend Commission orders approving rates and motion to require past collections retroactive rates to be escrowed, which was rejected by the Court on February 3, 2010. OCC also pursued another failed attempt to seek a stay of this same Commission order before the Supreme Court of Ohio in Case Nos. 2009-1620. Before that on March 25, 2009, the Movants requested that the Commission stay its own order (the same one currently in question) and the Commission declined to do so. Just as the Court held that OCC failed to avail itself of the remedy of a timely stay in connection with the appeal of the ESP order, it remains the case that Movants are pursuing the wrong remedy and doing so in a fashion that circumvents the normal process. The Court ordered a remand proceeding and that is what the Commission should do – not an untimely stay order affecting its 2009 decision or a modification of the approved rates to become approved subject to refund.

It also makes no sense for the Commission to arrive at a snap judgment that overturns the Commission's decision to adopt a "package deal" in the ESP order. AEP Ohio's ESP, approved by the Commission, necessarily reflects a total package that the

Commission held to be more favorable, in the aggregate, than the expected results under an MRO. The orders in the ESP Cases were issued pursuant to R.C. 4928.143. Regarding approval of an ESP, the General Assembly provided that the Commission shall approve an ESP *if it is* more favorable, *in the aggregate*, than the expected results of an MRO for that utility. Ohio Rev. Code Ann. 4928.143(C)(1) (2010). In deciding AEP Ohio's ESP Cases, the Commission repeatedly found that the ESP (including the non-bypassable POLR charge and the environmental carrying charge) met this standard. (ESP Cases, Opinion and Order at 72; Entry on Rehearing at 51.) The Commission should carefully consider any unilateral rate adjustments as part of the remand, not rush to judgment as Movants' suggest.

Since the remand proceeding is the last stage of the "dust settling" around the ESP order, any modification of the package ESP deal during the remand proceeding could still trigger AEP Ohio's right to withdraw under division (C)(2) of the ESP statute. In particular, on March 23, 2009, when the Companies filed their compliance tariffs under the ESP Order in these dockets, they explicitly indicated that they "do not waive their right under § 4903.10, Ohio Rev. Code, to seek rehearing or their right under § 4928.143 (C)(2), Ohio Rev. Code, regarding withdrawal of their Application." Subsequently, the Companies' attempt to reserve their right to withdraw until after the ESP plan was finalized through rehearing and appeal was litigated on rehearing. IEU challenged the Commission's holding on appeal, through Proposition of Law No. 2. The Court refused to address the issue yet, because AEP Ohio has not yet attempted to withdraw. (Slip Opinion at ¶ 48.)

If there are modifications during the remand proceeding that cause AEP Ohio to withdraw from the ESP, the prior rate plan will become effective and AEP Ohio can re-file either an ESP or an MRO. Thus, any modifications on remand could conceivably result in AEP Ohio withdrawing from the ESP and/or permanently bypassing ESPs altogether by filing a Market Rate Offer to finish 2011 (and thereby preclude the need to rule on AEP Ohio's post-2011 ESP currently pending before the Commission in Case Nos. 11-346-EL-SSO et al.) While that is not AEP Ohio's preference, the outcome of the remand proceeding could force AEP Ohio to seriously entertain one of those options.

These considerations not only support a decision to leave the original components of the ESP undisturbed, including the POLR charge and the environmental carrying charge embedded within base generation rates, but also support extreme caution in considering an interim modification of the ESP prior to completion of the remand proceeding. Because a stay is not an appropriate remedy to consider at this stage of the proceedings, the Commission need not even apply the criteria for stay such as the likelihood of success on the merits. But if the Commission does choose to evaluate those issues at this stage, it should find that the criteria supporting a stay are absent.

1. There is not a strong likelihood that Movants will prevail on the merits

Regarding the primary consideration of the likelihood of success on the merits, the Movants wrongly characterize the two charges that would be remanded back to the Commission for further consideration as being "unlawful" even though the opinion did not vacate the Commission's approval of the charges or otherwise declare the charges to be unlawful. As referenced above, in remanding the two charges for further

consideration, the Court made it clear that it was not determining whether the charges need to be modified but merely questioned the supporting rationale for these two charges and directed the Commission to reconsider the basis supporting the charges. (Slip Opinion at ¶¶ 30, 35.) It is for the Commission to reconsider whether the charges remain appropriate. That can only properly occur after a debate of the merit arguments after due process is afforded to the Companies and other parties. Thus, while AEP Ohio can briefly summarize the reasons why Movants should not prevail on the merits here, this expedited response is no substitute for all parties being fully heard on the merits during the full-blown remand proceeding.

In order to examine the flawed merits underlying Movants' motion, the Slip Opinion must be examined more closely. Regarding the POLR charge, the Court noted the following about the Commission's basis for the POLR charge:

> [The Commission] described the charge as cost-based. "[T]he POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith * * *." (Emphasis added.) Likewise, it stated that it was allowing recovery of "estimated POLR costs." (Emphasis added.) Again on rehearing, the commission stated that it had "determined that the Companies should be compensated for the cost of carrying the risk associated with being the POLR provider." (Emphasis added.) This characterization of the POLR charge as cost-based lacks any record support; therefore, we reverse the portion of the order approving the POLR charge.

(Slip Opinion at ¶ 24.) Ultimately, the Court concluded that the decision lacked evidence to support the Commission's "characterization of this charge as based on cost" and it held that "the manifest weight of the evidence contradicts the commission's conclusion that the POLR charge is based on cost." (Slip Opinion at ¶ 29.)

Significantly, though the Court was not clear from the ESP Order about the basis for the POLR charge, it emphasized that the remand proceeding need not change the result ordered in the ESP order:

> To be clear, we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful, and the commission may consider on remand whether a non-cost-based POLR charge is reasonable and lawful. Alternatively, the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs. However the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.

(Slip Opinion at ¶ 30.) Thus, the conclusory assumption made by Movants that the POLR charge and environmental carrying cost embedded in the base generation rate are "unlawful" squarely conflicts with ¶ 30 of the Slip Opinion. Indeed, the Court went out of its way to make it very clear that the reversal and remand to the Commission regarding the POLR charge does not need to result on modifying the POLR charge (let alone summarily eliminating it per Movants' extreme position), nor does the remand suggest that the Commission's use of the Black-Scholes model is legal objectionable.

On remand, the Commission can reinforce its decision to authorize the POLR charge, by clarifying its reasoning, better explaining its basis for the charge and reviewing the evidentiary record support for that result. The Court's decision does not preclude continuing reliance on the Black-Scholes model or the related testimony and evidence supporting the approved POLR charge. Based on the extensive development the record, the Commission adopted a nonbypassable POLR charge reflecting 90 percent of the *estimated POLR costs* presented by the Companies. The Commission understood that these estimated POLR costs were not necessarily to be incurred by the Companies during the term of the ESP, but that the POLR charge was to compensate the Companies

for the expected costs of doing so – whether or not the Companies internalized the risk or covered the risks through external hedging-type transactions.

The Commission's Entry on Rehearing in the ESP Cases stated that "the Commission carefully considered all of the arguments, testimony, and evidence in the proceeding and determined that the Companies should be compensated for the cost of carrying the risk associated with being the POLR provider, including the migration risk." (ESP Cases, Entry on Rehearing at 26.) On remand, the facts can be clarified and explained regarding the ESP Order's reference to AEP Ohio costs. While the Court did not understand the reference to cost since AEP Ohio did not establish in the record that it had incurred specific costs at the time of the ESP hearing and while the Court did not fully understand the Commission's analysis and the evidence of record on this complex matter, the remand proceeding presents the Commission with a second chance to explain its decision and clarify it for the Court. Contrary to the position advanced by Movants, the remand should not represent an opportunity to summarily strip away charges that were approved by the Commission after fully litigating the case. The Court itself asked the Commission to reconsider the charges and, as discussed above, the POLR charge was clearly a key component to the ESP package deal approved by the Commission.

Therefore, the POLR charge should not be cast aside lightly – especially since doing so may force AEP Ohio to consider withdrawing from the ESP. There is abundant evidence and support in the record for the POLR charge, including:

- The testimony of J. Craig Baker (Cos. Ex. 2, 2A and 2B)
- All of the law and evidence of record discussed in the Companies Initial Brief at pages 41-51
- All of the law and evidence of record discussed in the Companies Initial Brief at pages 72-80
- AEP Ohio's April 27, 2009 Memorandum in Opposition to Rehearing at

8-11.

In the event there is any doubt regarding the ongoing propriety of the POLR charge, the Commission should allow AEP Ohio to provide additional evidence through testimony and hearing to support the finding and conclusion that the Black-Scholes model provides an appropriate basis for estimating the Companies' POLR costs.

Regarding the environmental carrying charge challenged in OCC's Sixth Proposition of Law, the Court noted that "OCC argues that R.C. 4928.143(B)(2) does not permit AEP to recover certain carrying costs associated with environmental investments." (Slip Opinion and ¶ 31.) In the ESP Order at 28, the Commission permitted AEP Ohio to adjust its base generation rate is include "incremental capital carrying costs that will be incurred after January 1, 2009, on past environmental investments (2001-2008) that are not presently reflected in the Companies' existing rates, as contemplated in AEP Ohio's RSP Case." The environmental carrying charge for pre-ESP investments was embedded in AEP Ohio's base generation rates and was the topic of OCC's Sixth Proposition of Law.[1]

The Court agreed with OCC's position that division (B)(2) of the ESP statute "permits plans to include only listed items; the commission and AEP argue that (B)(2) permits unlisted items. (Slip Opinion at ¶ 31.) In particular, the Court re-interpreted the ESP statute as follows:

By its terms, R.C. 4928.143(B)(2) allows plans to include only "any of the

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[1] Separately, the Commission authorized AEP Ohio to recover a carrying charge for incremental environmental investments made during the ESP term, based on the Environmental Investment Carrying Charge Rider (EICCR). (ESP Opinion and Order at 28; Entry on Rehearing at 14.) The EICCR was not the subject of OCC's Sixth Proposition of Law and, consequently, was not part of the Court's reversal or at issue in the remand proceeding.

> following" provisions. It does not allow plans to include "any provision." So if a given provision does not fit within one of the categories listed "following" (B)(2), it is not authorized by statute.

(Slip Opinion at ¶ 31.) While this aspect of the Court's decision may be the most significant precedential aspect of the decision and may end up restricting the breadth and scope of the statute more so than previously understood by the Commission, the Court's holding did not invalidate AEP Ohio's environmental carrying costs embedded within the base generation rate.

As with the POLR charge holding, the Court again carefully avoided a conclusion that the environmental carrying costs are not appropriately recovered under the ESP statute.

> For the foregoing reasons, we reverse the commission's legal determination that R.C. 4928.143(B)(2) permits ESPs to include unlisted items. On remand, the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges.

(Slip Opinion at ¶ 35.) Thus, contrary to the assumption made by Movants that the environmental carrying charge is unlawful, the Court's holding clearly places the next determination in the Commission's hands and does not dictate the outcome of that analysis. On remand, the Commission simply needs to determine whether another portion of the ESP statute supports recovery of environmental carrying costs.

For example, division (B)(2)(d) of the ESP statute authorizes the Commission to establish "terms, conditions, or charges relating to … carrying costs …" That provision provides the Commission with an alternative basis to support the continued recovery of the challenged environmental carrying charge. In addition, at least two other subdivisions of ESP statute also provide a statutory basis for the environmental carrying

cost charges: (B)(2)(b) (an environmental expenditure for any generating facility of the electric distribution utility) and (B)(2)(e) (which authorizes automatic increases in any component of the standard service price).

In sum, there is no basis to conclude that Movants will prevail on the merits in demonstrating in the remand proceeding that either the POLR charge or the environmental carrying charge is unlawful. On the contrary, the Court explicitly recognized that the Commission may decide to retain the *status quo* and preserve the balanced package deal approved in the ESP order. The alternative legal support for the environmental charge is an issue that can be fully explored in the remand proceeding.

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

First and foremost, Movants improperly refer to the Commission approved rates as unlawful. The rates being charged by AEP Ohio are valid Commission approved rates. As discussed throughout this memorandum in response to the Movants' motion, the Court merely remanded the proceeding to the Commission to operate within the scope of its remand and did not vacate or invalidate the existing rate validly on file with the Commission. Ultimately, because Movants have failed to show a strong likelihood of success on the merits, they necessarily cannot claim any actual harm in awaiting the outcome of the remand process.

Movants seek to rewrite the process of a remand from the Supreme Court of Ohio in spite of the Court's own precedent dictating that such action is uncalled for when a case is remanded. (*See Cleveland Electric Illum. Co. v. Pub. Util. Comm'n Ohio*, 1976, *46 Ohio St. 2d 105*; *346 N.E.2d 778* finding that Commission orders on remand should

allow the remand process to occur before changing rates based upon the Supreme Court of Ohio's decision.) The Commission approved a standard service offer and that rate stands today until or if it is further modified after the remand proceedings. The compliance with a process contemplated by the Court already does not rise to the level of irreparable harm. In fact, abandoning the appropriate process and denying AEP Ohio the ability to collect the Commission approved rate without a ruling on the complete remand from the Court would result in a violation of AEP Ohio's procedural rights and be a better example of irreparable harm. That is because the Commission already approved this rate and found it reasonable and to take that ability to recover away, even if only temporary, violates what the Commission has already found to be reasonable.

To support a claim for irreparable harm the Movants rely on the same case law offered by the OCC in its previous failed attempt to seek a stay of this same Commission order before the Supreme Court of Ohio in Case Nos. 2009-1620 and 2009-2022. In that stay request, OCC relied on the *Tilberry v. Body* (1986), 24 Ohio St. 3d 117, case and the *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158 cases that are again relied upon by the Movants, at pages 12 and 13 of the current motion.

Just as those cases did not hold any weight in the debate of the previous failed attempt to stay this Order, they do not now have any impact on the facts of this Order at this later date awaiting the remand proceeding at the Commission. The *Tilberry v. Body* case dealt with the termination of a partnership leasehold. The Court stated "the sole issue presented for our determination is whether the trial court's judicial dissolution of the instant partnership is a final, appealable order pursuant to *R.C. 2505.02*." *Tilberry* at 119. The Court was considering the case to determine if it qualified as a special proceeding

with a right to an immediate appeal. The Court determined that disposition of the assets without first determining whether to follow the partnership agreement or the statute would result in irreparable harm and should be included in the recognition of the need for an appeal. This case involved civil litigation and statutes governing the winding up of a partnership agreement and the individual interest each partner has when entering into the legal classification of a partnership. The Commission and its decisions are governed by a different set of statutes that recognize the common occurrence of filed rates and their effectiveness once ordered until officially changed. The two legal classifications are simply not comparable.

Similarly, the Movants use of the Court's decision in *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158 is again misplaced. In *Sinnott*, the Court reviewed the finality of an order from an interlocutory appeal in a case involving an asbestos claim. The actual case dealt with the incurrence of unnecessary trial expenses serving as an injury when there was a question whether the plaintiffs satisfied a statutory prerequisite before trial. The facts before the Commission in this case do not involve a pretrial prerequisite that affects or determines the outcome of a case not yet adjudicated. By contrast, the Commission is set to receive the Order back on remand with an offer by the Court to support the decision with record evidence and to show legal compliance under S.B. 221.

The Supreme Court of Ohio already rejected the basis of the Movants' justification for the establishment of irreparable harm on October 29, 2009. Just as the request was previously denied by the Supreme Court of Ohio, it is appropriate for the Commission to again deny the motion for a stay. Public utility law is a unique area of

law with a direct appeal to the Supreme Court of Ohio. With that unique area of law comes some process that must be respected. The Supreme Court of Ohio already recognized that a stay pending a remand hearing is not appropriate. The Commission should not disturb that rationale and find that there is irreparable harm to a situation where a Commission approved rate is being charged and collected. Movants have failed to show a strong likelihood of success on the merits, they necessarily cannot claim any actual harm in awaiting the outcome of the remand process.

3. A stay would not further the public interest

Movants argument that a stay would further the public interest is without merit. A stay would only serve to deny AEP Ohio the Commission approved rate that is still valid. The rate approved by the Commission was the standard service offer approved under the new S.B. 221 for AEP Ohio. That legislative change by the General Assembly provided the Commission with great discretion in approving standard service offers. The Commission weighed all elements of the case and came to the result it did based on the record. The Court remanded the matters to the Commission to clarify certain factual matters that the Court found were inconclusive and to verify the statutory basis for some costs. Additionally, a stay of the March 2009 Order would only serve to financially harm AEP Ohio without any basis that the result of the Commission order should be any different.

The remanded Court's action allows the Commission to maintain its reasoned conclusion from its initial approval of the standard service offer, and allows the new legislative scheme to work. Movants' proposal to abandon the findings of the Commission and ignore the Commission's result would not be in the public interest

because it would oppose the system established by the General Assembly to address the problems facing the regulated electric industry. Again, despite the Movants' characterizations, these are lawful rates. These are Commission approved rates on remand from the Supreme Court of Ohio and should not be adjusted or changed in any manner other than once reaffirmed or modified on the remand order. Deviation from the process dictated by the Supreme Court of Ohio for remands in *Cleveland Electric Illum. Co. v. Pub. Util. Comm'n Ohio*, 1976, *46 Ohio St. 2d 105*; *346 N.E.2d 778*, or the filed rate doctrine inherent in the revised code and applied in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), would be against the public interest.

4. A stay would cause substantial harm to AEP Ohio

The next factor for evaluating a stay request is whether a stay would cause substantial harm to other parties. Movants justification for a lack of substantial harm to AEP Ohio is to rely on its mistaken assertion that the Commission order in this case was *ultra vires* or beyond the legal authority of the Commission. The Movants' choice to ignore the effect of a Commission Order until vacated, reversed or modified, even on remand, is fatal to the analysis.

As discussed above a stay would serve to undermine the Court's guidance on how to handle a remand and interrupt a still valid Commission rate prior to the any opportunity for any due process on remand if that order were to change. Simply put, Movants seek to create a new process that ignores the Commission's regulatory practices and deny AEP Ohio the standard service offer validly in effect at this exact moment. The

possibility that it could change is not a reason to change. The Commission should move forward with its remand proceedings, once it regains jurisdiction over the case.

C. Movants' alternative request, to make the Companies' existing authorized rates subject to refund prior to conducting the remand proceeding, is also without merit.

Movants' final request, made in the alternative, is that the Commission make AEP Ohio's currently effective rates subject to refund. This request is flawed in several ways. First, as is the case with the emergency authority request and the stay request, it both attempts to circumvent and pre-judge the remand process. In short, it conflicts with the remand process. Second, at its core it is a reiteration of the request for emergency rate relief and the stay request. For the reasons provided above in response to both of those arguments – principally that the Movants have not demonstrated that there is an emergency and they have not demonstrated a substantial likelihood of success on the merits of the stay request – this alternative request is likewise without merit. Third, the request, which seeks in essence to convert the Companies existing filed rates into interim rates, is untimely. The existing rates are the Companies approved filed rates. Unless and until they are revised on remand, they must remain the Companies' filed rates. This concept is part-and-parcel of the filed rate doctrine that was strongly reaffirmed in the Slip Opinion.

Movants' citation to the Commission's order in CSP's 1981 Zimmer construction-work-in-progress (CWIP) rate case, Case No. 81-1058-EL-AIR, is inapposite. In that case, the Commission ordered a rate reduction, after rehearing. CSP obtained a stay of the rate reduction pending completion of its appeal of the rehearing order to the Supreme

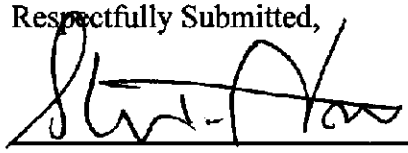
Court of Ohio. Notably, CSP filed an undertaking in order to obtain that stay in accordance with the requirements of § 4903.16, Ohio Rev. Code. Accordingly, the procedural posture of that stay request, before the rates became final approved rates after rehearing, before the Court had heard the resulting appeal, and after having filed an undertaking, is completely different than the circumstances of Movants' alternative request in this case. Again, this is a matter that the Slip Opinion strongly endorses and was the basis for denying OCC relief on the retroactive rate issue, even though the Court agreed with the merits of argument.

Movants' alternative request to make the Companies' rates subject to refund is meritless and should be denied also.

CONCLUSION

For the foregoing reasons, the Commission should deny the Movants' request for a stay or modifying the two involved charges to prospectively charged subject to refund. Rather, upon receiving the Court's mandate to be issued, the Commission should establish an orderly schedule to consider the remand issues. The process should allow affected parties an opportunity to address the merits through briefing and potentially through additional testimony or hearings. The Commission should not accept Movants' bid to short-circuit the remand process envisioned by the Court in its opinion.

Respectfully Submitted,



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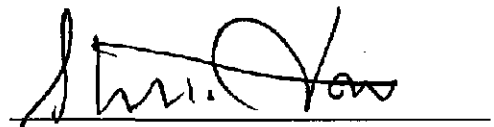
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum in Opposition has been served upon the below-named counsel and Attorney Examiners via electronic mail this 3rd day of May, 2011.



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