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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 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

MOTION REQUESTING COMMISSION ORDERS TO BRING THE ELECTRIC SECURITY PLANS OF OHIO POWER COMPANY AND COLUMBUS SOUTHERN POWER COMPANY INTO COMPLIANCE WITH THE OHIO SUPREME COURT'S DECISION AND OTHER RELIEF AND MEMORANDUM IN SUPPORT

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May 10, 2011

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The Industrial Energy Users-Ohio ("IEU-Ohio") moves the Public Utilities Commission of Ohio ("Commission") to initiate further proceedings to address the proper restatement of the accounts and rates of Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") and for such further relief and orders as are necessary to assure that the Ohio Supreme Court's decision of April 19, 2011 is fully reflected in the rates and accounts of OP and CSP.[1] As the Commission recognized in its May 4, 2011 Entry, timely Commission action was necessary to address the illegally authorized revenue embedded in rates and charges currently in place. Just as importantly, the Commission should proceed on several pending and

[1] *In re Application of Columbus Southern Power Co.*, Case No. 2009-2022, Slip Op. 2011-Ohio-1788 (Apr. 19, 2011) ("*Remand Decision*")

anticipated matters so that several hundred million dollars of Ohio consumers' wealth that was wrongfully transferred to OP and CSP is properly accounted for and reflected in the decisions that the Commission must make now and in the future.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

As Ohio and the Nation were suffering the worst economic downturn since the Great Depression, CSP and OP were authorized to substantially and largely illegally increase the amount of their bills for electric service. The authorization came by way of an application for an Electric Security Plan ("ESP" or "Plan") as ordered by the Commission on March 18, 2009.[2]

On April 19, 2011, the Supreme Court found that the revenue that CSP and OP were authorized to collect through their respective ESPs was and is illegally excessive. Accordingly, the Supreme Court directed the Commission to further consider its Opinion and Order.[3]

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[2] *In the Matter of the Application of Columbus Southern Power Co for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale of Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Opinion and Order (Mar. 18, 2009) ("*2009 ESP*").

[3] *Remand Decision.*

By Entry on May 4, 2011, the Commission directed the companies to file proposed tariffs to remove the Provider of Last Resort ("POLR") charges and carrying costs associated with environmental investments made in 2001-2008 from the Companies' tariffs.[4] This Entry was a correct and necessary first step in addressing the Supreme Court's April 19, 2011 decision. The Commission's timely action is much appreciated and commendable.

For over two years, CSP and OP have been able to demand and collect from consumers more compensation than that which could be allowed in accordance with Ohio law.[5] This unjust enrichment must be corrected to the maximum extent permitted by law. As discussed below, however, the scope of the Supreme Court's decision is not limited to the immediate revenue collection effects of the decision. Because the rates the Supreme Court found illegal were driving other potential additional claims for revenue, IEU-Ohio requests that the Commission take additional necessary action to conform the authorized revenue and resulting rates and charges to the Supreme Court's decision so as to assure that customers are not saddled, going forward, with the hangover created by the Companies' consumer-funded binge.

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[4] *2009 ESP*, Entry at 2 (May 4, 2011).

[5] During this two-year period, American Electric Power ("AEP"), OP's and CSP's only shareholder, increased its common equity dividend and boasted about its regulatory success in Ohio. American Elec. Power Co., SEC Form 8-K (Oct. 19, 2010) (announcing anticipated board vote to increase dividend); American Electric Power's CEO Discusses Q1 2011 Results—Earnings Call Transcript, http://seekingalpha.com/article/264837-american-electric-power-s-ceo-discusses-q1-2011-results-earnings-call-transcript (viewed May 2, 2011).

II. ARGUMENT

A. THE SUPREME COURT'S DECISION

In its April 19, 2011 decision, the Supreme Court unanimously held that the Commission's March 18, 2009 Opinion and Order violated the law in three material ways. First, the Supreme Court found that a portion of the revenue which CSP and OP were authorized to collect in 2009 resulted from improper and unlawful retroactive ratemaking.[6] The Supreme Court noted that an estimated $63 million in revenue was improperly billed to and collected from OP and CSP consumers.[7]

Second, the Supreme Court found that the evidence did not support the Commission's finding that the Companies' POLR charge was cost based.[8] Moreover, the Supreme Court strongly suggested that there was no basis for such a finding in that the Companies did not make a showing of any lost customers or any POLR-related costs.[9] Over the three years of the ESP, the Companies would receive approximately $152.2 million annually in POLR charge revenues.[10]

Third, the Supreme Court reversed the Commission's decision to include in the revenue which the Companies were authorized to collect an allowance for incremental carrying costs associated with certain environmental investments. Rejecting the Commission's and the Companies' claim that an ESP could include provisions not specifically identified in Section 4928.143(B)(2), Revised Code, the Supreme Court

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[6] *Remand Decision* at ¶¶ 7-14.

[7] *Id.* at ¶ 8.

[8] *Id.* at ¶ 29.

[9] *Id.* at ¶ 28.

[10] Opinion and Order at 40.

found that the ESP provisions must be limited to those listed in that division.[11] The Companies expected that the incremental carrying charge revenue allowance would produce an additional $110 million annually for the 2001-2008 environmental investments.[12] The Companies sought and obtained additional carrying charge revenue increases of $60 million for 2009 incremental environmental investments[13] and are requesting an additional $16.2 million in revenue increases for 2010 to be collected in the last six months of 2011.[14]

B. EFFECT OF REMAND

As the Commission implied in its Entry directing the Companies to file proposed tariffs on May 5, 2011, the revenues ordered in the initial Opinion and Order were significantly overstated due to the inclusion of the POLR charges and the carrying costs of environmental investments and the Commission is correctly proceeding to remove the effects of those charges from current rates. The scope of the Supreme Court's decision, however, is not limited to the remaining eight months of the current ESP. As discussed below, the current ESP serves as the basis for the Companies' pending application[15] and the current ESP may continue (subject to adjustment) if the

[11] *Remand Decision* at ¶¶ 31-35.

[12] Opinion and Order at 25.

[13] *In the Matter of the Application of Columbus Southern Power Co. and Ohio Power Co. to Establish Environmental Carrying Cost Riders*, Case No. 10-155-EI-RDR, Finding and Order (Aug. 25, 2010).

[14] *In the Matter of the Application of Columbus Southern Power Co. and Ohio Power Co. to Establish Environmental Carrying Cost Riders*, Case No. 11-1337-EL-RDR, Application (Mar. 18, 2011).

[15] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Application (Jan. 27, 2011) ("*2011 ESP Application*").

Companies withdraw their current ESP application or if the Commission dismisses the current application for noncompliance with statutory or regulatory requirements.[16]

As important as immediate rate relief is to consumers, there are additional and larger consequences to draw from the Supreme Court's remand.

Summarized below are some of the areas in which the Commission must act to ensure that the economic relationship between the Companies and consumers is rebalanced to the full extent permitted by law to reflect the value that the Companies improperly received through the unlawfully authorized revenue increases. Some of the needed action affects current claims to additional revenue. Others affect future claims. While the illustrations are not intended to cover all affected areas, the Commission must complete a thorough examination and reconciliation to fully comply with the Supreme Court's remand and to justly treat consumers in addition to correcting the Companies' revenue collection authorization to remove the unlawfully authorized revenue for purposes of the remaining term of the current ESPs.[17]

The first illustrative area addresses an anticipated OP proposal to establish a "phase-in rider" to collect revenue for seven years, the collection of which was deferred pursuant to the terms of the current OP ESP and, more specifically, the bill increase limitations established by the Commission. Prior to the Commission's May 4, 2011 Entry, OP estimated that the accumulated deferred revenue eligible for future collection

[16] Section 4928.143(C)(2), Revised Code.

[17] The illustrations address the effects of the remand in varying ways and their effects may overlap. As the Commission considers the remand, it will have to address the best way or combination of ways to provide value to customers.

would be $643 million by late 2011.[18] However, OP's estimate of deferred revenue eligible for future collection is a residual calculation. It is the difference between the revenue collected during the ESP period subject to the bill increase limitations and the revenue increases that would have otherwise occurred without such limitations. OP's estimate of deferred revenue is significantly excessive because embedded in the math that produced OP's estimate is an allowance for revenues which cannot be lawfully recognized for purposes of establishing rates and charges.

The current ESP Opinion and Order authorized OP and CSP to, individually, collect a total revenue amount part of which was collectable during the term of the current ESP and part of which was deferred for collection in the future. The portion of such total authorized revenue deferred for future collection (through a phase-in mechanism) is a subset of the total revenue collection that the Commission may lawfully authorize through the exercise of its authority in Section 4928.143, Revised Code. The amount of the revenue deferred for future collection through a phase-in mechanism must also be "just and reasonable."[19]

In keeping with this "just and reasonable" standard, the Commission must, in compliance with the Supreme Court's decision, reduce the total authorized revenue in the current ESP Opinion and Order by the amount of revenue that the Commission previously and illegally included in this total. Because the portion of the total authorized revenue that was deferred for collection is defined by a residual calculation, the deferred

[18] *2011 ESP Application,* Testimony of Phillip J. Nelson at 7-9 (Jan. 27, 2011) Given that the revenue requirement is effectively lowered by the Court's decision and the Commission's May 4, 2011 Entry, the deferral should be lower than the Companies' estimate. The Commission also has before it a fuel adjustment clause review which may also substantially affect the Companies' claim for deferrals. *In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Co. and Ohio Power Co.*, Case No. 09-872-EL-FAC, *et al.*, Application (Sept. 30, 2009).

[19] Section 4928.144, Revised Code.

revenues must be reduced by an amount equal to that portion of the revenues authorized by the Commission in its ESP order that the Supreme Court has determined are unlawful.

If OP or CSP is permitted to collect deferred revenues calculated as though the revenue amounts the Commission authorized in the current ESP Opinion and Order were lawful, the requirement that the phase-in rates are just and reasonable cannot be satisfied.

Just as importantly, failing to make the adjustment described herein will add insult to injury. Consumers' wealth was unlawfully transferred to CSP and OP during the term of the current ESP. Absent a restatement of the amount of the total revenue that is eligible for collection following the term of the current ESP (the phase-in portion), CSP and OP will be permitted to collect total revenue (the amount eligible for collection during the ESP term plus the amount deferred for future collection) that exceeds the total revenue that the Commission may lawfully authorize CSP and OP to collect regardless of the timing of such collection.

Thus, Section 4928.144, Revised Code, the recent Supreme Court decision, and simple fairness require a restatement of the amount of deferred revenue eligible for future collection to properly reflect the value associated with the Companies' unlawfully authorized revenue increases plus an appropriate allowance for carrying charges. Unless the deferred revenue balance is restated and substantially lowered, the amount of revenue increase which the Supreme Court has held to be unlawful will be embedded in the amount of revenue deferred for future collection. Unless the deferred revenue

balance is restated, the injustice of the unlawfully authorized increases will be perpetuated for seven years through a phase-in rider that ignores reality and the law.

The second illustrative area concerns the amount of revenue which OP and CSP may lawfully collect through mechanisms that allow, as permitted by the Commission, recovery of "delta revenue." Delta revenue is the revenue difference between rates and charges in a reasonable arrangement and the revenue produced by rates and charges in an otherwise applicable tariff schedule.[20] For example, the Commission has authorized delta revenue recovery as a result of a reasonable arrangement for Ormet Primary Aluminum Corporation ("Ormet").[21] The unlawful revenue increases identified by the Supreme Court are embedded in the revenue produced by the otherwise applicable rate(s) for Ormet. Thus, the amount of delta revenue eligible for collection as a result of the Ormet reasonable arrangement has been unlawfully overstated in the past and will be unlawfully overstated going forward until and unless the unlawfully authorized revenue is removed from the rates and charges in the otherwise applicable tariff schedule(s).[22]

Similarly, the operation of the Universal Service Fund or "USF" generates revenue recovery that is overstated. This fund provides bill payment assistance to income eligible residential consumers, and other consumers pay USF charges to make

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[20] Rule 4901:1-38-01(C), Ohio Administrative Code ("OAC"), provides, "'Delta revenue' means the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission."

[21] *In the Matter of the Application of Ormet Primary Alum. Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus Southern Power Co.*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009).

[22] The Commission's Opinion and Order approving the Ormet special arrangement also provides for deferral accounting for some delta revenue. *Id.* at 5 & 10. As with the deferrals created by the revenue increase limiters in the current ESP, the Commission should consider the effect of the Supreme Court's decision on the Ormet deferrals.

OP and CSP whole for the difference in the amount collected from income eligible customers and the amount such customers would have paid on the otherwise applicable rate. As in the case of the delta revenue illustration above, the unlawfully authorized revenue caused the otherwise applicable rate to be higher than the lawful rate and, in turn, increased the magnitude of the USF charges that have been paid and will continue to be paid until the unlawfully authorized revenue and all of its implications are stripped from all rates and charges (including riders).

The third illustrative area involves the effect of the unlawfully authorized revenue increases and the operation of the retrospective significantly excessive earnings test ("SEET").[23] Revenues unlawfully authorized and collected must, for ratemaking and SEET purposes, be classified, dollar for dollar, as revenues the utility actually received as a result of the ESP (after taxes, the revenues become net income on the Companies' income statements). If the Commission properly jurisdictionalizes the income statement and the balance sheet values that drive the SEET determination (as IEU-Ohio has previously and unsuccessfully – to this point – argued is required by Ohio law), the SEET can provide the Commission with an opportunity to rectify, at least in part, the effect of unlawfully authorized and collected revenue.

The fourth illustrative area concerns the relationship between the Companies' current ESPs (with the embedded unlawfully authorized revenue therein) and the plan filed in the 2011 ESP Application. The revenue produced by the current ESPs (including the embedded unlawfully authorized revenue) provides the revenue

[23] Section 4928.143(F), Revised Code.

foundation for the 2011 ESP.[24] This foundation is excessive by the unlawfully authorized amount of revenue and is itself unlawful to that extent.

In summary, the Supreme Court has determined that the Commission authorized CSP and OP to unlawfully bill and collect increased revenue. More than two years have passed since the Companies implemented the unlawful authority to increase revenue, rates, and charges over the objections of every consumer group that participated in these proceedings. Hundreds of millions of dollars of consumers' wealth have already been unlawfully transferred to the Companies, and this unlawful wealth transfer will be perpetuated in numerous ways until the Commission strips away all the effects of the unlawfully authorized revenue increases.

III. CONCLUSION

The scope of the Commission's work and the opportunities available to the Commission to ensure that at least some measure of consumers' wealth unlawfully transferred to the Companies is prospectively restored to consumers (perhaps in equivalent value) are not confined to the remaining term of the current ESP. The Court's decision, justice, and a common sense appreciation for the challenging effects of the Great Recession on Ohio consumers require the Commission to exhaust all of the considerable opportunities to make sure that the burden of unlawfully authorized revenue increases and their equally unlawful aftershocks are lifted from the backs of consumers as quickly and as thoroughly as possible.

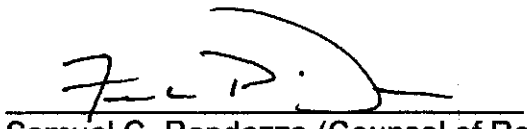
The remanded issues have serious consequences on the expected OP filing for authority to begin collecting deferred revenue, the measurement and collection of delta

[24] *2011 ESP Application*, Testimony of David Roush, Exhibit DMR-2 (Jan. 27, 2011).

revenues, the measurement and establishment of various riders, the starting point for the pending 2011 ESP, and, properly done, the annual SEET review. The remand, therefore, must go beyond the correction of the currently authorized revenue for the balance of term of the current ESP, and this public interest mission must be commenced promptly.

The Commission, through this proceeding and several pending and expected proceedings, must and should correct and mitigate the massive and illegal consumers' wealth transfer that unjustly enriched OP, CSP and their one shareholder.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion Requesting Commission Orders to Bring the Electric Security Plans of Ohio Power Company and Columbus Southern Company into Compliance with the Ohio Supreme Court's Decision and Other Relief* was served upon the following parties of record May 10, 2011 via electronic transmission, hand-delivery or first class mail, postage prepaid.

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