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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 Generation 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

MEMORANDUM CONTRA AEP'S MOTION TO ESTABLISH A PROCEDURAL SCHEDULE AND MEMORANDUM CONTRA AEP'S MOTION TO REJECT ITS OWN TARIFF FILING ON MAY 11, 2011 AND MEMORANDUM CONTRA AEP'S ALTERNATIVE MOTION TO CONVERT RATES TO COLLECTION SUBJECT TO REFUND BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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May, 18, 2011

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 1.2 million residential customers of the Columbus Southern Power Company ("CSP") and the Ohio Power Company ("OP," collectively, "AEP Ohio" or "Companies"), and Ohio Partners for Affordable Energy ("OPAE"), an Ohio corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans and representing nonprofit commercial customers of AEP Ohio, oppose the motions ("Motions") filed by the Companies on May 11, 2011. The OCC and OPAE request that

the Public Utilities Commission of Ohio ("PUCO" or "Commission") affirm its Entry dated May 4, 2011 ("May Entry") that protects customers from continuing to pay rates that include unjustified components that were the subject of the recent opinion issued by the Supreme Court of Ohio. These rate components, which are included in the rates currently being paid by customers, are for the provider of last resort ("POLR") service[1] and carrying charges on past environmental investment.[2] The Commission should deny the Companies' Motions and require AEP Ohio to strictly comply with the Entry issued by the Commission on May 4, 2011 ("May Entry").

On April 19, 2011, the Ohio Supreme Court issued an opinion on appeals by the OCC and the Industrial Energy Users – Ohio ("IEU")[3] from this Commission's March 18, 2009 ESP Order. In a unanimous decision, the Supreme Court reversed the PUCO on three grounds -- retroactive ratemaking, provider of last resort ("POLR") charges, and carrying charges on environmental investment.[4]

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[1]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 First ESP Case*"). The Companies' tariff filings and supporting workpapers show a POLR revenue requirement of $97,384,098 for CSP (current rates of $14,007,101, plus a non-FAC increase of $83,376,997). *AEP Ohio First ESP Case*, Tariff Filing at 60 (July 28, 2009). The figure of $54,801,769 for OP (current rate of $38,091,727, plus non-FAC increase of $16,710,042). Id. at 71. The total for both companies is $152,185,867.

[2] The Commission granted the Companies' generation rates that would allow the collection of "annual carrying costs for the incremental 2001-2008 environmental investments" of $26 million for CSP $84 and million for OP. *In re AEP Ohio ESP Case*, ESP Order at 24 (March 18, 2009). The Companies' tariff filings and supporting workpapers show a revenue requirement of $26,000,000 for CSP and of $84,000,001 for OP, a total for the Companies of $110,000,001. *AEP Ohio First ESP Case*, Tariff Filing at 60 (CSP) and at 71 (OP) (July 28, 2009).

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

[4] Id.

Regarding the retroactive ratemaking, the Court noted that the "OCC acted with diligence and speed to secure a financial remedy. . . ."[5] The OCC's actions included a request that the Commission stay its ESP Order regarding the retroactive ratemaking pending appellate review (or, alternatively, making rates subject to refund) in order to prevent irreparable harm to residential customers.[6] The Commission, however, failed to protect customers and did not issue a stay or order rates subject to refund.[7] The Court held in favor of the OCC's argument regarding retroactive ratemaking, but confirmed the OCC's worst fears regarding irreparable harm when the Court "den[ied] OCC's refund request"[8] of an "additional increase [that] totaled $63 million."[9]

The remaining two matters reversed by the Court -- POLR charges and carrying charges on environmental investment -- were remanded to the PUCO with the Court providing the Commission with direction as to the matters it "*may*" revisit.[10] Citing its previous, unanimous decision regarding unlawful charges for the Companies' Integrated Gasification Combined-Cycle ("IGCC") proposal, the Court stated that "[r]uling on an issue without record support is an abuse of discretion and reversible error."[11] The Court stated that "[h]owever the commission chooses to proceed [on the POLR issue], it should

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[5] Id. at ¶18.

[6] *AEP Ohio First ESP Case*, Entry at 1-2, ¶(4) (March 30, 2009).

[7] Id. at 3, ¶(9).

[8] Slip Opinion at ¶21.

[9] Id. at ¶9.

[10] Id. at ¶30 ("may revisit [the POLR] issue," "may consider . . . a non-cost-based POLR charge," "may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs") and at ¶35 ("may determine" matters regarding environmental carrying charges).

[11] Id. at ¶29.

explain its rationale, respond to contrary positions, and support is decision with appropriate evidence."[12]

On May 4, 2011, the Commission issued an entry on remand (i.e. the May Entry). The Commission "direct[ed] AEP-Ohio to file by May 11, 2011, proposed revised tariffs that would remove the POLR charges and environmental carrying cost charges associated with investments made 2001-2008, from the Companies' tariffs."[13] In the event that the Companies sought to support a POLR charge or the recovery of environmental carrying charges, the Commission "direct[ed] AEP-Ohio to make the appropriate filing in these proceedings and the Commission will establish an appropriate procedural schedule."[14]

On May 11, 2011, AEP Ohio filed tariffs (corrected on May 13, 2011) that did not eliminate the POLR rider with the pre-ESP "POLR" rates that were approved in the Companies' previous rate plan (i.e. the rate plan from before implementation of Sub. Senate Bill 221).[15] Because the PUCO-approved POLR revenue requirements in the *AEP Ohio First ESP Case* included the 2008 "POLR" charges, the Companies' tariff filing failed to comply with the May Entry that required the Companies to remove POLR charges from rates.

AEP Ohio also filed the Motions in which it argued against approval of the proposed tariffs and for an unspecified procedural schedule for the proceeding on

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[12] Id. at ¶30.

[13] *AEP Ohio First ESP Case*, May Entry at 2, ¶(4) (May 4, 2011).

[14] Id. at 2, ¶(5).

[15] *AEP Ohio First ESP Case*, Tariff Filing (May 11, 2011). The filing proposed POLR rates at pre-ESP levels. Those "POLR" rates were approved in a "Rate Stabilization Plan" case. *In re AEP Ohio RSP Case*, Case Nos. 04-169-EL-UNC, et al., Order at 27-29 (January 26, 2005).

remand.[16] In the alternative, AEP Ohio sought to continue its pre-appeal charges and to make collections of charges that were successfully challenged on appeal subject to refund.[17]

AEP Ohio's Motions should be rejected, and the Commission should enforce its May Entry. The PUCO rightfully exercised its authority on remand and eliminated the charges that the Court held were unjustified. Reducing 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.[18] Roughly estimated, if rates are not reduced for these two items for the May-December period (eight months), CSP customers could pay $82.3 million and OP customers could pay $92.5 million, for a total of $174.8 million, in unlawful charges to the Companies. Without the rate reductions ordered by the Commission, customers will be paying almost $22 million a month to the Companies for charges that the Court ruled were unjustified.

II. AEP OHIO MISCHARACTERIZES OHIO LAW REGARDING RATES ON REMAND

A. Procedures on Remand

The "Background and Overview" portion of AEP Ohio's Motions characterize procedures on remand that would be "inappropriate" (i.e. those that provide the rate relief ordered by the PUCO) and those that would be "normal" (i.e. those that continue

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[16] *AEP Ohio First ESP Case*, Motions at 6-12 (May 11, 2011).

[17] Id. at 13.

[18] These values can be obtained by adding amounts noted in footnote 1 regarding POLR charges and footnote 2 regarding environmental investment carrying charges (e.g. $97.4 million from footnote 1 and $26.0 million from footnote 2 sum to $123.4 million for CSP).

unjustified rates).[19] AEP Ohio, however, does not provide any legal citation to support its argument other than to mention of the Court's general ability to vacate a Commission decision.[20] While the Court did not specifically invoke R.C. 4903.13 in its opinion, the Court otherwise concluded that the Commission may decide the manner in which to deal with issues on remand (i.e. "may revisit" and "may determine"), provided that other legal requirements are met (such as evidentiary support for POLR charges).[21] The Commission made its initial decision regarding remand matters in the May Entry, as permitted by the Court.

The instant pleading supports the Commission's directives to AEP Ohio to file new tariffs and the initial procedure on remand that was set out in the May Entry. The undersigned parties oppose the Companies' arguments that seek to re-direct this case on remand, and oppose the Companies' non-compliance with the May Entry.

B. Stay of a Commission Order

The May Entry appropriately exercised the authority provided to the PUCO by the Court regarding remand issues to order both a reduction in rates and a procedure by which AEP Ohio could seek additional charges. The reduction in rates essentially provided a stay regarding portions of the PUCO's ESP Order, preventing the further collection of some components of rates from customers.

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[19] Id. at 4-5.

[20] Id. at 5. The Companies concede that at least one alternative exists to their desire to maintain existing rate levels. The last section of the Motions states: "In the alternative, AEP Ohio would prefer prospectively converting the rates to being collected subject to refund. . . ." Motions at 13 (May 11, 2011).

[21] Slip Opinion at ¶30 and ¶35.

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.[22] The Commission, however, has favored the four-factor test governing a stay that was supported in a dissenting opinion by Justice Douglas,[23] and which has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.[24] 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.[25]

An examination of these elements, as indicated by the May Entry, supports reductions in AEP Ohio's rates.

C. Other Bases for the Altering Rates

The Commission's May Entry is justified as a proper stay, and is also appropriate as an exercise of the PUCO's emergency powers. The Commission's authority to exercise its emergency powers under R.C. 4909.16 has been upheld as a constitutionally valid exercise of police power.[26] The standard of review establishes that the

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[22] 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 at 5 (February 20, 2003) ("Access Charge Decision").

[23] See *MCI Telecommunications Corp. v. Public Util. Comm.* (1987), 31 Ohio St.3d 604.

[24] Access Charge Decision at 5.

[25] Id.

[26] See *Inland Steel Development v. Public Util. Comm.* (1977), 49 Ohio St.2d 284.

Commission's powers under this section of the Code are discretionary.[27] 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.[28] The Companies complain that they have a "right to be heard,"[29] but they have had ample opportunity to be heard before the Commission and the Supreme Court of Ohio and they are not entitled to the continued increase in rates pending any additional procedure on remand. Finally, the relief granted in an emergency must amount to a temporary and not permanent alteration of rates.[30]

The Commission has also 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. 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.[31] In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission ("NRC") issued an order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The provision in the original order included a rate base allowance for construction work in progress that was re-evaluated in light of the NRC's order.[32] Another example where the Commission

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[27] *Duff v. PUC* (1978), 56 Ohio St.2d 367.

[28] Id. at 377-378.

[29] Motions at 8 (May 11, 2011).

[30] *Seneca Hills Service Co. v. Public Util. Comm.* (1978), 56 Ohio St.2d 410.

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

[32] Id., Opinion and Order at 8-14 (November 5, 1982).

has collected rates subject to refund involved the Ohio Utilities Company under circumstances where legislation was enacted that changed Ohio's ratemaking formula.[33]

III. THE COMMISSION'S DIRECTIVES IN THE MAY ENTRY WERE APPROPRIATE.

A. AEP Ohio Did Not Comply with the May Entry, and Its Proposed Procedure is Unreasonable.

AEP Ohio has not followed the direction given to it by the Commission in the May Entry, and its Motions should be denied.[34] The May Entry stated:

> [I]n the event that AEP-Ohio intends to seek a non-cost-based POLR charge or a POLR charge based upon costs or to seek recovery of environmental carrying charges pursuant to the Court's remand, the Commission directs AEP-Ohio to make the appropriate filing in these proceedings and the Commission will establish an appropriate procedural schedule.[35]

The PUCO provided a clear and efficient directive for the remand proceeding, matching a procedure to any proposal that AEP Ohio might file regarding rates.

Instead of complying with the PUCO's directive, AEP Ohio's Motions seek the reversal of events, stating that it "plan[s] to make a filing . . . and submits that an orderly and efficient procedural schedule *defined up front by the Commission* would help address the timing of AEP Ohio's filing and manage expectations and timing of the other Parties'

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[33] *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).

[34] Also, the Companies did not comply with the Commission's directive to file "revised tariffs that would remove the POLR charges and environmental carrying cost charges associate with investments made 2001-2008, from the Companies' tariffs." May Entry at 2, ¶2. The Companies' pleading states that the "Commission's [May] Entry presume[es] that the *entire* amounts of these charges approved as part of the Companies' ESPs should be eliminated." Motions at 8 (May 11, 2011) (emphasis sic). While AEP Ohio understood the meaning of the Commission's directive, it did not entirely eliminate the POLR charge. Representatives of public utilities are prohibited from "willfully fail[ing] to comply with any lawful order or direction of the public utilities commission . . . ." R.C. 4905.56.

[35] May Entry at 2, ¶(5) (May 4, 2011).

filings."[36] AEP Ohio apparently did not have a substantive rate proposal prepared at the time of its filing of the Motions on May 11, 2011. Although the Companies state that they seek an expedited procedural schedule,[37] they do not make a proposal for the remand proceeding or propose a procedural schedule. The OCC and OPAE are left guessing regarding AEP Ohio's planned filing, and oppose the Companies' Motions that do not provide other parties a fair opportunity to address a specified plan for the proceedings on remand. The Commission should deny the Motions and require the Companies to comply with the provisions stated in the May Entry.

Asymmetric treatment of utility and customer interests will result in unlawful rates under Ohio law. Ohio's electric services policy, R.C. 4928.02, states that Ohio seeks to ensure "reasonably priced retail electric service" to consumers. In the instant case on remand, the Companies ask the Commission for an "approach that preserves the *status quo* and continues to implement the ESP Order . . . ."[38] Commission approval at every juncture to approve higher rates for customers (especially after the PUCO's order is reversed by the Supreme Court of Ohio) would increase rates above those that are reasonable and lawful.

The OCC sought a stay to the ESP Order on the issue of retroactive ratemaking.[39] The Companies opposed the OCC's efforts, and the Commission denied a stay.[40] The

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[36] Motions at 11 (May 11, 2011) (emphasis added).

[37] Id. at 6.

[38] Motions at 11 (March 30, 2009) (italics sic).

[39] Entry at 1, ¶(4) (March 30, 2009).

[40] Id. at ¶(6) and ¶(9).

absence of stay meant that, when the Supreme Court of Ohio reversed the PUCO's decision, it did so without leaving a direct remedy for customers regarding the $63 million in the overcharges that customers paid.[41] The Court previously reversed the Commission's order in a unanimous decision regarding the OCC appeal of the order that approved approximately $24 million in charges for the Companies' proposed IGCC plant.[42] The Companies argued against a proceeding on remand that would refund any amounts collected,[43] and no proceeding on remand has taken place since the Court issued its decision in March 2008. PUCO approval of the Companies' request in the instant proceeding to maintain higher rates would provide asymmetric treatment of utility and customer interests. The ultimate effect of such treatment would be to raise rates above those that are reasonable and lawful.

B. The Commission's Procedure Should be Followed.

1. The Commission Properly Intended to Stay the Collection of Unjustified Rate Elements.

a. If the Companies submit a filing on remand, there is a strong likelihood that the OCC and OPAE will prevail on the merits against an increase in rates.

Regarding carrying charges associated with environmental investments, these costs do not fit within the listed items in R.C. 4928.143(B)(2), and the result of the

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[41] Slip Opinion at ¶9 and ¶21. Ironically, the absence of a remedy for customers results from the Court's decision to not order rate changes retroactively while the Companies received $63 million in overcharges as the result of Commission-approved rate-setting that was itself found by the Court to be retroactive.

[42] *Industrial Energy Users-Ohio v. Public Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶1.

[43] Id., AEP Ohio Memorandum Contra OCC Motion for Refund (October 2, 2008); AEP Ohio Memorandum Contra IEU Motion for Refund (October 2, 2009).

Court's opinion is that they are not authorized to be charged by statute.[44] The Court rejected the claims by the Companies (and the PUCO) that carrying costs may be included in an ESP as an un-enumerated 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 Companies argued only one alternative basis for the collection of its environmental investment carrying cost -- Subsection B(2)(b).[45] That section permits "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 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 cost[46] associated with the investment of a dollar of capital asset investment, with the capital investment being the

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[44] Slip Opinion at ¶31.

[45] See AEP Ohio Merit Brief and Appendix at 32 (March 5, 2010).

[46] 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.

environmental expenditure.[47] And the statute makes clear that the environmental expenditure itself must occur on or after January 1, 2009, the date the EDU must offer the SSO.[48] 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, bypassibility, standby, back-up, or 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 ESP 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.

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[47] Testimony of Philip J. Nelson at 16-17.

[48] See R.C. 4928.143(B)(2)(b).

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 accept the Court's reversal of the order without the need for an evidentiary hearing. 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 overvalued phase-in assets caused by including unlawful environmental carrying charges as part of the capped rates collected from customers.

On POLR, the Court reversed the ESP 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.[49] There is no record evidence to support the POLR charge. Given this and the Supreme Court ruling, it is unlikely that the POLR can be justified.

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[49] Slip Opinion at ¶24.

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

b. Allowing unjustified 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.'"[50] 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.[51]

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 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."[52] 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.[53] The majority reasoned that "the incurrence of unnecessary trial expenses is an injury that cannot be

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[50] *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).

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

[52] *Tilberry* (1986), 24 Ohio St. 3d at 121.

[53] *Sinnott* (2007), 116 Ohio St. 3d at 164.

remedied by an appeal from a final judgment,"[54] 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."[55] 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,"[56] *Tilberry* and *Sinnott* illustrate that economic harm becomes 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 retroactive refund of over-collections from customers, where such payments are not made subject to refund.[57]

The Commission's May Entry takes an important first step towards protecting 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.

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[54] Id. at 163.

[55] 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").

[56] *Sampson v. Murray* (1974), 415 U.S. 61, 90 (emphasis added).

[57] See, e.g., *Lucas County Commissioners v. Public 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.

c. The stay furthers 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."[58] 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."[59]

As discussed above, a stay of that portion of the ESP Order that was reversed by the Supreme Court of Ohio would prevent irreparable harm to AEP Ohio's customers. The public interest, therefore, is furthered by the PUCO's action that stays the collection of the rate elements held to be unjustified by the Ohio Supreme Court.

d. A stay does 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

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[58] *MCI*, 31 Ohio St.3d at 606.

[59] Id.

revenues they are not entitled to collect would permit the Companies to be unjustly enriched.

2. The Commission May Otherwise Immediately Alter Rates to Prevent Injury to the Public.

Established precedent exists for the PUCO to exercise its powers under R.C. 4909.16 in order to protect the interests of the public. The May Entry is an example of the PUCO acting to protect further injury to the public. The May Entry should be enforced.

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.[60] 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.[61] 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.[62] 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.[63] The PUCO has also used its powers under R.C. 4909.16 to

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

[61] *General Motors Corporation v. Public Util. Comm.* (1978), 54 Ohio St.2d 357.

[62] *East Ohio Gas* (21976), 45 Ohio St.2d 86.

[63] *Consumers' Counsel v. Public Util. Comm.* (1978) 55 Ohio St. 30.

establish interim gas rates pending disposition of appeals by the utility from rates prescribed by ordinance.[64]

A need exists to protect the interests of the public, and the Commission recognized this need in the May Entry that is also supported by the provisions contained in R.C. 4909.16. Such action was an appropriate response to the Supreme Court of Ohio's opinion. Maintaining the "*status quo* and continu[ing] to implement the ESP Order until such time as a remand decision is made. . . "[65] will not provide needed relief to customers. The Commission should enforce its actions to alter the Companies' rates by temporarily removing unjustified rate elements while the remand is pending. Otherwise rates determined by the Supreme Court to be unjustified will continue to be collected from customers, with the utility likely arguing that monies paid (even if found to be unlawful in an eventual remand order) cannot be recouped by virtue of the ban on retroactive ratemaking.

And the increased rates are significant, amounting to $22 million per month. Under the PUCO's May Entry, these rate collections would stop and would not be collected during the remand process. The remand process, coupled with an appropriate evidentiary process matched to the Companies' filing,[66] could stretch for months while increased charges are collected by the Companies. But the Commission's prompt action in its May Entry has thus far met with delay from the Companies in the form of tariff filings that do not comply with the May Entry and have submitted the Motions that do not

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[64] *City of Cincinnati v. Public Util. Comm.* (1948), 149 Ohio St. 570.

[65] Motions at 11 (March 30, 2009) (italics sic).

[66] See May Entry at 2, ¶(5) ("the Commission will establish an appropriate procedural schedule").

address the merits of the issues on remand. In addition, the Companies simultaneously argued against a reduction in rates, and have asked the Commission to retract the protection that the PUCO ordered for customers during the remand.

A delay in rate reductions would exacerbate the unfairness that the Court recognized in its Opinion when it referred to the OCC's "hollow victory" that did not result in the return of monies retroactively collected from customers.[67] Even though the Court held the Commission's actions amounted to retroactive ratemaking, which is precluded under S.B. 221, the Court determined it could not directly refund the $63 million unlawfully collected.

No law exists at this time that establishes the customers' right to a refund without affirmative Commission action. However, the Commission may immediately act to protect customers under R.C. 4909.16. Rather than leave customers unprotected again, the Commission should follow through with the rate reduction directed by the May Entry. The Commission should enforce its May Entry to protect customers. Such action will not remedy the PUCO's $63 million error from the retroactive ratemaking, but it will prevent further harm and unfairness to customers that may result.

An alternative approach to protecting customers, but less favored by the OCC and OPAE, is for the PUCO to make AEP Ohio's rate collections subject to refund. The Ohio Supreme Court determined that the rates approved in the *AEP Ohio First ESP Case* were not supported by evidence, and remanded that case to the PUCO for further consideration. The Commission should not allow AEP Ohio to continue to charge

[67] Slip Opinion at ¶17.

customers for rates determined to be unsubstantiated. Customers could be irreparably harmed by any further delay in reducing rates following the Court's opinion.

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 First ESP Case*. This unfairness has already manifested itself from reversal of the Commission's Order regarding retroactive ratemaking while at the same time finding no direct means to refund the $63 million collected retroactively. The most direct and understandable protection this Commission can provide is to take the unlawful elements out of rates -- all the unlawful elements and not just those selected by AEP Ohio. This result, already ordered by the Commission in its May Entry, will provide customers with a noticeably lower utility bill. The Commission should enforce its May Entry.

AEP Ohio's Motions are a step backward that would prevent customers from receiving reduced bills for the remainder of 2011. The Motions should be denied.

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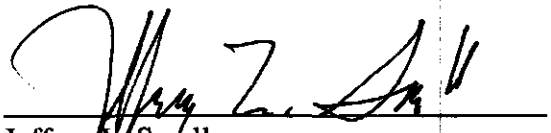
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum Contra has been served via electronic service, to the counsel identified below this 18th day of May, 2011.



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