FILE

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

REPLY TO COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO OCC'S/OPAE'S MOTION TO REJECT TARIFFS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE," together with OCC, "Movants") file this reply[1] to Columbus Southern Power Company and Ohio Power Company's ("Companies") Memorandum In Opposition, filed May 20, 2011. In that Memorandum in Opposition, the Companies opposed Movants' Motion to Reject Tariffs in which Movants stated that the Companies failed to comply with an Entry issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission") on May 4, 2011 ("May Entry"). Movants file this

[1] This Reply Memoranda is filed consistent with Ohio Admin. Code 4901-1-12 (B)(2).

pleading ("Reply") to support the Commission's May Entry and to urge the Commission to reject the tariffs filed by the Companies. The Commission should enforce its orders in the May Entry and require the Companies to remove the full POLR charges, including the 2008 "POLR" charges that the Companies left in their proposed tariffs, pending further proceedings on remand.

II. ARGUMENT

A. The Companies Failed to Comply with the Plainly Stated PUCO Directive in the May Entry.

The Movants' Motion to Reject Tariffs was based upon the PUCO's directive to the Companies in the May Entry that POLR charges be removed from the tariffs. The Companies simply did not comply. Rather the Companies removed a portion, but not all of the approved annual POLR charges of $152 million. Specifically, the Companies left in rates $52 million in annual POLR charges on the basis that they represent "POLR" charges from the period before the implementation of the current electric security plan ("ESP").

Apparently the Companies consider that the pre-ESP "POLR" charges are separate from the PUCO approved annual $152 million in POLR charges. The $52 million mirrors the amount of "POLR" in pre-ESP rates that was approved in the Companies' prior rate plan. The prior rate plan was to continue, under R.C. 4928.141(A), only until a standard service offer ("SSO") was first authorized. The SSO was first authorized under an ESP on March 18, 2009, and the existing rate plan, the rate stabilization plan ("RSP") rates, were replaced. The SSO rates that were approved in 2009 have been in place throughout the term of the Companies' current ESP.

The Companies' SSO, that awarded annual POLR revenues of $152 million, included a base of $52 million of 2008 "POLR." By the Companies own admission, the 2008 "POLR" piece, that they have kept in the filed tariffs, has nothing to do with the Companies' responsibilities to serve as a provider of last resort or default provider. This is an opinion the Companies expressed in their ESP brief[2], even after the PUCO characterized the charges in the RSP order as "POLR"!

B. The Issues Appealed Were Properly the Subject of the May Entry that Properly Required the Removal of all the POLR Charges.

The Companies' Memorandum in Opposition alleges that their "compliance" tariffs represent a "good faith attempt to comply with the order" and "reflect the only reasonable interpretation of the remand Entry in light of the Court's Decision."[3] The Companies also argue that it is inconsistent for Movants to accept the base rate reduction for environmental charges while attacking the pre-ESP POLR charge.[4] The Commission should reject these arguments.

The Companies' interpretation of the Entry is unreasonable and illogical, and not supported by the record at the PUCO or the Court. The Companies assume that only a portion of the POLR charge was appealed by OCC and IEU, and not the $52 million that the Companies now want to attribute to the 2008 "POLR" under the RSP. A review of the March 18, 2009 Entry granting POLR shows that the Commission granted, in total,

[2] See Companies' Reply Brief filed in the ESP proceeding at 77 (Jan. 14, 2009).

[3] Memo in Opposition at 3 (May 20, 2011).

[4] Id.

POLR charges expected to provide the Companies with $456.2 million in revenues.[5] That equates to $152 million per year, which includes a portion that was formerly the "2008 POLR." OCC and IEU appealed the entire POLR charge, not the POLR charge minus the "2008 POLR" piece. Thus, when the Court remanded POLR, consistent with the issues it was presented with on appeal, it remanded the entire POLR amounts and not just a portion of POLR minus the "2008" piece.

Moreover, there is no inconsistency between accepting the Companies' tariffs taking out environmental charges, while disputing the POLR charges. The issues appealed set the scope of the remand. The appealed issues were the entirety of environmental carrying charges and the entirety of POLR charges. The Companies appropriately backed out the environmental charges. They did not back out the entirety of the POLR charges.

C. Reverting to Pre-ESP POLR Rates Violates R.C. 4928.141(A).

The Companies allege the status quo should be maintained with the RSP approved POLR remaining in place. They argue that POLR, thus, must not be reduced to zero as argued by Movants.[6] While the Companies go to great length to discuss the importance of maintaining the status quo, they miss an important legal point that the Commission must grapple with on remand: charges must comply with Ohio's statutes. Reverting back to prior existing rates (RSP rates) will not comply with the statutes, and is beyond

[5] *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, Opinion and Order at 38-40 (March 18, 2009).

[6] Memo in Opposition at 4.

the scope of the Commission's authority. The Commission is a creature of statute,[7] and must follow the law. Under R.C. 4928.141(A), as of January 1, 2009, the Companies were obligated to provide a SSO under the requirements set out in Sub. S.B. 221 ("S.B. 221"). In order to do so, they were required to apply to establish a new SSO and to seek PUCO approval of that offer. If there was no new SSO approved by the PUCO by January 1, 2009, the existing rate plan (RSP) was to continue until a SSO was first authorized by the PUCO under S.B. 221. The PUCO first authorized the SSO under S.B. 221 on March 18, 2009. Returning to pick up elements of a pre-S.B. 221 SSO cannot be done. Such a reversion would violate R.C. 4928.141(A) because the "status quo," pre-S.B. 221 rates, cannot replace the Companies' SSO rates that were first authorized under S.B. 221.

D. The Court Stated that Only Provisions That Are Explicitly Listed in R.C. 4928.143(B)(2) are Authorized.

The Companies insist that the 2008 POLR costs do not relate to the issues/concerns expressed by the Court as the basis for reversing the ESP POLR increase.[8] The Companies believe Movants are attempting to "extrapolate" the Court's decision on environmental carrying charges to exclude the 2008 POLR, which they believe is improper.[9] These arguments should fail.

The 2008 POLR costs that the Companies are trying to maintain in rates must have some basis in law to be collected. The Court in its broad ruling on environmental

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[7] *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 22 Ohio Op. 3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St. 2d 153, 21 Ohio Op. 3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St. 2d 302, 18 Ohio Op. 3d 478, 414 N.E.2d 1051.

[8] Memo in Opposition at 5.

[9] Id. at 6.

charges made that perfectly clear—if the provision does not fit within one of the categories listed following R.C. 4928.143(B)(2), it is not authorized.[10] On remand, the Companies bear the burden on POLR of substantiating their charges. If they are given the opportunity to present evidence on POLR, the PUCO must, in ruling on remand, be cognizant of the Court's directives and should make all efforts to issue an Order on remand that complies with the Court's ruling.

E. Parties Must Have the Opportunity to Address the Companies' New Arguments, Including the Appropriateness of Replacing the ESP POLR Rates with Pre-Existing "POLR" Charges.

The Companies argue that Movants are exceeding the scope of the remand by questioning the level of POLR left in the filed tariff. This, according to the Companies, is an untimely challenge of the PUCO's order where the PUCO adopted the Companies' 2008 POLR.[11] Movants contend, however, that this does not amount to an untimely challenge or collateral attack on POLR.

The remand, if opened up to allow AEP the opportunity to present more evidence,[12] would also open up the opportunity for parties, such as Movants, to challenge the evidence presented. If the Companies make arguments that RSP 2008 POLR expenses support new POLR charges on remand, they will have opened the door to countervailing arguments on this issue. Thus, the Companies' own actions would create the opportunity to challenge the evidence presented.

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[10] *In re: Application of Columbus Southern Power Co.*, Slip Op. No. 2011-Ohio-1788 at ¶31-32.

[11] Memo in Opposition at 7.

[12] Movants urge the PUCO to limit the evidence allowed to be presented on remand given the doctrine of *res judicata* that requires plaintiffs to present every ground for relief in the first action, or be forever barred from asserting it. *State v. Slider*, 2010-Ohio-5952, stating that "issues regarding the scope of remand , however, are best considered using res judicata principles" (relying in part on *State v. Gillard* (1997), 78 Ohio St.3d 548).

F. Customers Should Not Continue to Pay Unfair and Unreasonable Rates that the Supreme Court of Ohio Determined are Unsubstantiated.

The Companies believe that it would be unfair and unreasonable to conclude that AEP Ohio intentionally disregarded the Entry of the Commission, as argued by the Movants.[13] But the Companies' actions speak for themselves, especially in light of statements made in pleadings, which statements the Companies seek to explain away after the fact.[14]

If there is anything that is unfair and unreasonable it is the fact that customers continue to pay rates that the Supreme Court of Ohio determined are not substantiated by the record. The PUCO acted expeditiously to correct this and issued a May 4, 2011 Entry requiring the removal of all POLR charges as well as environmental carrying charges from rates charged to customers. The Companies, however, failed to comply with the PUCO's May Entry. The Companies' actions have thus far thwarted the PUCO from implementing reduced rates in the month of May.

The Companies should have filed tariffs that complied with the PUCO's May Entry, and the Commission could have expeditiously approved such tariffs. Instead, more filings have occurred to correct the Companies' filing, more entries will likely be issued along with additional delay, and the Companies will collect additional money from customers through the continuation of rates that the Supreme Court of Ohio determined were unjustified. On a monthly basis, $22 million in charges to customers are at issue.

And it is likely that the Companies will argue that once the revenues are collected, they cannot be returned to customers even if the PUCO rejects the charges on remand. If

[13] Memo in Opposition at 8-9.

[14] See Footnote 1, of the Companies Reply to IEU's Objections and Memo in Opposition.

the Companies' position is accepted, this sequence of events will result in a replay of the unfairness that the Court recognized with respect to retroactive rate collections.[15] This unfairness to customers should not be tolerated. The PUCO should put a stop to the Companies' delay tactics and require the Companies to immediately file tariffs that remove all POLR charges.

III. CONCLUSION

The Commission should grant Movants' Motion to Reject the Tariffs because the tariffs fail to comply with the PUCO's May Entry. The Commission should, as requested by Movants, order AEP Ohio to immediately file tariffs that comply with its May Entry – tariffs that take out the entire POLR charge, including $52 million of "2008 POLR" charges. Doing so will help assure that the Companies' customers receive the full protection ordered by the PUCO in the May Entry, pending the resolution of these issues on remand.

[15] *In re Application of Columbus Southern Power Co.*, Slip Op. No. 2011-Ohio-1788 at ¶17.

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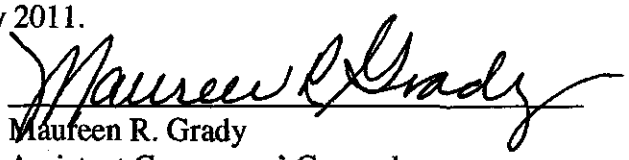
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply to Columbus Southern Power Company and Ohio Power Company Memorandum in Opposition* has been served upon the below-named persons via electronic transmittal, as well as by U.S. Mail, this 23rd day of May 2011.



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