

FILE

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

14
RECEIVED-DOCKETING DIV
2011 MAY 25 PM 3:50
PUCO

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 AND OHIO POWER COMPANY'S
MEMORANDUM IN OPPOSITION TO INDUSTRIAL ENERGY USERS-OHIO'S
MOTION REQUESTING COMMISSION ORDERS**

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2100
Facsimile: (614) 227-2270
dconway@porterwright.com

Counsel for Columbus Southern Power
Company and Ohio Power Company

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.

Technician TH Date Processed MAY 25 2011

INTRODUCTION

On April 19, 2011, the Supreme Court of Ohio issued a ruling on an appeal of this Commission's orders and entries approving an electric security plan ("ESP") for Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP Ohio" or "the Companies") for 2009 to 2011. *See In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-1788 ("Remand Decision"). Of the thirteen propositions of law presented by the appellants, which were the Office of the Ohio Consumers' Counsel ("OCC") and Industrial Energy Users-Ohio ("IEU"), the Court affirmed this Commission's orders on all but three grounds.

The first error found by the Supreme Court stemmed from the fact that AEP Ohio's ESP was not approved until March 2009. The Commission had increased AEP Ohio's rates to allow AEP Ohio to recover between April and December 2009 the additional revenue that AEP Ohio would have collected under the ESP between January and March 2009. The Court held that this was reversible error, stating that "approving rates that recouped losses due to past regulatory delay . . . violated [the Supreme Court's] caselaw on retroactive rulemaking, as well as provisions of S.B. 221." *Id.* at ¶ 10.

The second error related to this Commission's approval of AEP Ohio's recovery of provider of last resort ("POLR") charges. The Court held that there was insufficient evidence in the record to support the Commission's characterization of AEP Ohio's POLR charge as cost-based. *Id.* at ¶ 29.

The third error related to this Commission's approval of AEP Ohio's recovery of incremental environmental investment carrying costs for 2001 to 2008 under AEP Ohio's ESP. The Court concluded that S.B. 221 does not permit electric distribution utilities to recover, in an ESP, categories of costs not specifically listed in Ohio Rev. Code § 4928.143(B)(2).

After rejecting the OCC's and IEU's remaining arguments, the Court remanded this case to the Commission. *See id.* at ¶ 74. On remand, the Court held, the Commission could "revisit" the POLR charge issue, either by considering "whether a non-cost-based POLR charge is reasonable and lawful" or by hearing "evidence of [AEP Ohio's] actual POLR costs." *Id.* at ¶ 30. The Court further held that, on remand, "the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges." *Id.* at ¶ 35. The Court denied the appellants any relief with regard to the first error, however. Although AEP Ohio had collected an "unlawful rate increase" through 2009, the Court held, "the law does not allow refunds in appeals from commission orders." *Id.* at ¶ 16.

With its 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 (May 10, 2011) ("Motion Requesting Commission Orders"), IEU is now attempting to rewrite and unlawfully expand the Ohio Supreme Court's opinion in three ways.

First, IEU ignores the fact that the Court explicitly authorized the Commission to hear additional argument and evidence in support of AEP Ohio's proposed POLR and incremental environmental carrying cost charges. Instead, IEU asserts that "the Supreme Court found that the revenue that CSP and OP were authorized to collect through their respective ESPs was and is illegally excessive." (*See id.* at p. 3.) Indeed, IEU proclaims that the revenue recovery that this Commission authorized under AEP Ohio's ESP was "more compensation than that which *could* be allowed in accordance with Ohio law." (*Id.* at p. 4 (emphasis added).)

Second, IEU ignores the clear and limited scope of the Court's remand. Despite the language of the Court's remand instructions, IEU insists that "[t]he scope of the Supreme Court's

decision . . . is not limited to the remaining eight months of the current ESP.” (Motion Requesting Commission Orders at p. 6.) To the contrary, IEU asserts, there are several other “areas in which the Commission must act” in this proceeding and in other proceedings “to ensure that the economic relationship between the Companies and consumers is rebalanced[.]” (*See id.* at p. 7.)

Third, IEU simply ignores the Supreme Court's holding that “any refund order would be contrary to [Court] precedent declining to engage in retroactive rulemaking.” Remand Decision at ¶16 (quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21). IEU begs to differ. Instead, according to IEU, “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.” (Motion Requesting Commission Orders at p. 8 (emphasis added).) Thus, to comply with the Ohio Supreme Court's remand instructions, IEU insists that this Commission must (1) assume that AEP Ohio's POLR and environmental carrying cost charges are excessive, before holding any remand hearing on these issues; (2) go beyond the two issues specifically discussed in the Court's remand instructions; and (3) do exactly what the Supreme Court of Ohio has said this Commission may *not* do: refund lawfully charged rates to AEP Ohio's customers.

As explained below, the relief that IEU has requested here is improper. To the extent that IEU is seeking to recoup what it sees as overcharges during the term of the 2008 ESP, before the Ohio Supreme Court's Remand Decision, IEU is not entitled to relief. However IEU may choose to phrase it, IEU is seeking a refund, and the Court has already reiterated that ratepayers may not obtain refunds of payments made pursuant to Commission-authorized tariffs. And to the extent

IEU's arguments relate to issues currently being considered in other proceedings, such as the SEET test or the Companies' 2011 ESP, those arguments should not also be considered in this proceeding. For these reasons, as further explained below, the Commission should deny IEU's Motion.

II. LAW AND ARGUMENT

A. Reducing AEP Ohio's Future Recovery of Deferred Fuel Costs to Offset AEP Ohio's POLR and Environmental Carrying Cost Charges Would Be Impermissible, Retroactive Ratemaking.¹

AEP Ohio's ESP contains a Fuel Adjustment Clause (FAC) mechanism "to recover prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations" during the term of the ESP. (Opinion and Order at p. 14 (Mar. 18, 2009).) To prevent rate shock, the Commission ordered that AEP Ohio's new ESP rates be phased in over the three years of the ESP. Authorized increases were capped at 7% for CSP and 8% for OP in 2009, 6% for CSP and 7% for OP in 2010, and 6% for CSP and 8% for OP in 2011. (*Id.* at p. 22.) This was accomplished by "deferring a portion of AEP Ohio's annual incremental FAC costs" over the course of the ESP. (*Id.* at p. 20.) "The amount of the incremental FAC expense that [is] recovered from customers [is] limited so that total bill increases [will] not" exceed the caps. (*Id.*) Consistent with R.C. 4928.144, the deferred FAC expenses will then be recovered over seven years after the term of the ESP "via an unavoidable surcharge," with carrying costs. (*Id.* at pp. 20, 22-23.) IEU calls this surcharge a "phase-in rider." (Motion Requesting Commission Orders at p. 7.)

¹ The responsive points made in this section are virtually identical to the responsive points made in section 1.a. of AEP Ohio's Memorandum in Opposition to IEU's May 10, 2011 Motion in these cases (which is also being filed the same day as this Memorandum Opposing Rehearing).

IEU's Motion makes no mention of the FAC mechanism in AEP Ohio's approved ESP. Instead, IEU describes the portion of AEP Ohio's annual incremental FAC costs that have been deferred between 2009 and 2011 as simply "a subset of the total revenue collection" authorized under AEP Ohio's ESP, and asserts that those "deferred 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." (*Id.* at pp. 8-9.) In other words, IEU is ordering the Commission to reduce AEP Ohio's future approved recovery under the ESP to make up for what IEU says is the companies' "unjust enrichment" in the past. (*Id.* at p. 4.)

The relief IEU is requesting is directly contrary to the Ohio Supreme Court's opinion in this proceeding and for a half-century before that. As the Court held in its Remand Decision and in prior opinions, "the law does not allow refunds in appeals from commission orders." Remand Decision at ¶ 16; see also *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (holding, "[t]he General Assembly . . . prohibit[s] customers from obtaining refunds of excessive rates that may be reversed on appeal."). Indeed, the Supreme Court of Ohio squarely rejected IEU's theory of relief, holding in the *Keco* case itself that a *ratepayer may not obtain "[r]estitution based on the ground of unjust enrichment . . . to recover [an] increase in rates charged by a public utility under an order of the Public Utilities Commission, where such order is subsequently reversed by the Supreme Court on the ground that it is unreasonable and unlawful."* *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 255-56, 141 N.E.2d 465 (emphasis added).

IEU would undoubtedly argue that it is seeking to reduce AEP Ohio's recovery in the future, not to obtain a refund of rates already charged and collected. That argument elevates form over substance, and the Ohio Supreme Court has already held that it will not ignore

substance. As noted above, the Commission in this proceeding increased AEP Ohio's recovery under the ESP between April and December 2009 to make up for AEP's inability to collect under the ESP's approved rates for the first three months of 2009. The Court held that this was "retroactive ratemaking," even though "the commission did not authorize AEP to rebill customers for usage from January through March[.]" Remand Decision at ¶ 10. Regardless of form, the Court held that the Commission's rate increase "reached the same financial result" as rebilling AEP Ohio's customers, *id.*, and thus was unlawful.

Under the same logic, "restat[ing] and substantially lower[ing]" AEP Ohio's future recovery under the ESP in order to return "[c]onsumers' wealth" that IEU asserts was "unlawfully transferred to CSP and OP" (Motion Requesting Commission Orders at p. 9) would not be permitted. The relief that IEU is demanding would "reach[] the same financial result" as asking the Commission to refund the POLR and environmental charges paid during 2009-2011. IEU is requesting that the Commission refund ratepayers' payments, in substance if not in form, even though more than fifty years of Ohio Supreme Court precedent prohibits that remedy.

IEU complains that denying its requested relief would be contrary to "simple fairness." (*Id.*) But as the Supreme Court held in its ruling on appeal in this proceeding, "[a]ny apparent unfairness . . . remains a policy decision mandated by the larger legislative scheme." Remand Decision at ¶ 17. The statute allows a party appealing a Commission order to obtain a stay of execution of the order so long as the appellant posts a bond "conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of[.]" Ohio Rev. Code § 4903.16. IEU did not seek a stay of the Commission's orders and entries approving AEP Ohio's ESP and did not post a bond. Having failed to exercise its rights under statute to stay the effect of AEP Ohio's ESP pending appeal, IEU should not be heard to

complain now about "the injustice of the unlawfully authorized [rate] increases" (Motion Requesting Commission Orders at p. 10) under that ESP.

It is absolutely critical that both CSP and OPCo preserve the probability of recovery assumption for their deferred fuel costs, as that assumption is the key basis for recording and maintaining the regulatory asset on their balance sheet. A contrary treatment of the deferrals would raise the issue of whether they are recoverable in the future and would run afoul of R.C. 4928.144 under which the Commission created these regulatory assets. The fuel deferrals must remain certain for future recovery since those deferrals were approved as part of a phase-in plan established under Section 4928.144, Revised Code. Counsel advises that Section 4928.144, Revised Code, mandates recovery of such deferrals through a nonbypassable surcharge.

The deferred fuel is a regulatory asset that relates to the fuel adjustment clause (FAC) which was already approved in the ESP proceeding (ESP Order at page 24). The deferred fuel is the shortfall not paid by the ratepayer for fuel already utilized for energy already consumed. A regulatory asset is the deferral of a cost, representing the difference in timing for recognition of that cost. A regulator like the PUCO can allow the deferral of a cost (pursuant to the Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) Section 980) as it provides a probability for recovery in the future. The Commission has recognized this principle through its statement on page 16 of its June 30, 2010 order in Case No. 09-786-EL-UNC that "the Commission understands that to cast an unacceptable level of doubt on the recovery of a deferral, particularly a large deferral, will severely dampen the electric utility's willingness to agree to deferrals." In the case of deferred fuel, the Commission provided that any deferred fuel at the end of the ESP (December 2011) would be recovered in an unavoidable surcharge and recognized by CSP and OPCo over the period 2012 through 2018 (Entry on

Rehearing, pages 6-10 and ESP Order at pages 20- 24). The same principles apply to other previously-authorized regulatory assets which IEU now attempts to collaterally attack.

B. IEU Also Improperly Attempts to Undercut AEP Ohio's Lawful and Previously-Authorized Recovery of Delta Revenue from Reasonable Arrangements and USF Charges.

The second issue that IEU seeks to raise in its Motion focuses on “delta revenue” recovery that the Commission has authorized as a result of AEP Ohio's reasonable arrangements with Ormet. IEU claims that “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).” (Motion Requesting Commission Orders at p. 10.) IEU also claims that, in a similar fashion to its delta revenue example, “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).” (*Id.* at p. 11.)

To the extent that IEU is seeking to recover what it calls “overstated” revenue over the course of the 2008 ESP (*id.* at p. 10), these arguments regarding delta revenue and USF charges suffer from the same flaws that require rejection of IEU’s argument regarding the deferrals. The delta revenue eligible for collection as a result of the reasonable arrangement with Ormet is the result of the difference between the lawfully approved filed rate that Ormet would have been charged, absent the reasonable arrangement, and the reasonable arrangement’s lawfully approved filed rate. The delta revenue *already* collected has been based on the difference of two filed rates. The delta revenue collected *in the future* will likewise be the difference between the filed

rates in effect in the future. Consequently, each rate that has been or will be charged is related to the delta revenue – the tariff rate that Ormet would have been charged, absent the reasonable arrangement; the rate charged to Ormet pursuant to the reasonable arrangement; and the rate charged to other customers to recover delta revenue – have been, are, and will be the approved filed rates. Similarly, all of the Companies' USF charges have been, are, or will be the approved filed rates.

Hence, contrary to IEU's claim, the amount of delta revenue eligible for collection as a result of the Ormet reasonable arrangement has not been "unlawfully overstated in the past" and will not be "unlawfully overstated going forward." Similarly, there has been no overstatement in the past, and there will be no overstatement in the future, of USF charges. AEP Ohio's delta revenue as a result of the Ormet reasonable arrangement and AEP Ohio's USF charges between April 2008 and April 2011 have been based on the Commission-approved rates in effect at the time. "[U]ntil such time as they were set aside by the Supreme Court, they were . . . the lawful rates and the *only* rates which could be collected by the utility." *Keco Industries*, 166 Ohio St. at 258.

Thus, any effort to claw back revenues already collected, either through delta revenue or USF charges, based on a theory that rates other than the approved filed rates should have been used in the past to determine delta revenue or USF charges would also clearly violate the prohibition against retroactive ratemaking. *See In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-1788, at ¶ 16; *Lucas Cty. Commrs.*, 80 Ohio St.3d at 348; *Keco Industries*, 166 Ohio St. at 255-56.

C. IEU's Arguments Regarding SEET Jurisdictionalization Are Irrelevant to This Proceeding.

A third “illustrative area” that IEU contends requires the Commission’s attention on remand involves the operation of the significantly excessive earnings test (SEET). What IEU believes must be done with regard to the SEET in light of the Court’s Remand Decision is not clear. All that IEU offers in that regard is the statement that “[i]f the Commission properly jurisdictionalizes the income statement and the balance sheet values that drive the SEET determination (as IEU 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.” (Motion Requesting Commission Orders at p. 11.) This is simply a reiteration of IEU’s position advanced in the Companies’ SEET proceeding, Case No. 10-1261-EL-UNC, that reviewed the earnings for the Companies during 2009 and applied the SEET to them, and which IEU is pursuing in an appeal to the Ohio Supreme Court, Case No. 2011- 0751.

The Commission declined to accept IEU’s legal arguments in Case No. 10-1261-EL-UNC regarding “jurisdictionalization” of the Companies’ balance sheets and income statements. There is no basis for concluding that the Court’s Remand Decision supports IEU’s unique, and incorrect, perspective on jurisdictionalizing balance sheets and income statements for purposes of the SEET under Ohio Rev. Code §4928.43.(F). The Remand Decision is irrelevant to IEU’s position on the SEET. Moreover, the proper forum for IEU to advance the arguments regarding the proper application of the SEET is not in this proceeding to implement the Court’s Remand Decision.

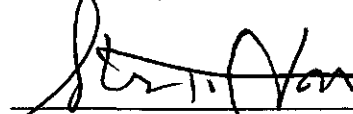
D. IEU's Concerns Regarding The Companies' Pending ESP Application Are Premature and Best Addressed in the Proceeding for the 2011 ESP.

The fourth “illustrative area” that IEU asserts merits the Commission’s attention on remand is “the relationship between the Companies’ ESPs . . . and the plan filed in the 2011 ESP Application. IEU claims that the “foundation” for the pending 2011 ESP is excessive, as a result of the Court’s Remand Decision. IEU’s criticism is misguided and, in any event, is premature. *It is misguided because the criticism is properly directed, if at all, at the pending 2011 ESP Application, not the remand proceeding for the 2008 ESP. It is premature because any possible impact, if any, on the pending 2011 ESP will not be possible to debate, let alone resolve, until the conclusion of the remand proceeding.*

III. CONCLUSION

For the reasons stated above, Columbus Southern Power Company and Ohio Power Company respectfully request that the Commission deny IEU's Motion Requesting Commission Orders.

Respectfully Submitted,



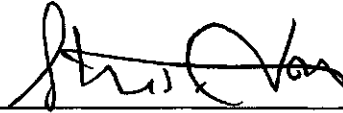
Steven T. Nourse
Matthew J. Satterwhite
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2100
Facsimile: (614) 227-2270
dconway@porterwright.com

Counsel for Columbus Southern Power
Company and Ohio Power Company

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 25th day of May, 2011.



Steven T. Nourse

sbaron@jkenn.com
lkollen@jkenn.com
charlieking@snavely-king.com
mkurtz@bkllawfirm.com
dboehm@bkllawfirm.com
grady@occ.state.oh.us
etter@occ.state.oh.us
roberts@occ.state.oh.us
idzkowski@occ.state.oh.us
dconway@porterwright.com
jbentine@cwslaw.com
myurick@cwslaw.com
khiggins@energystrat.com
barthroyer@aol.com
gary.a.jeffries@dom.com
nmoser@theOEC.org
trent@theOEC.org
henryeckhart@aol.com
nedford@fuse.net
rstanfield@nrdc.org
dsullivan@nrdc.org
tammy.turkenton@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us
sam@mwncmh.com
lmcaster@mwncmh.com
jclark@mwncmh.com
drinebolt@aol.com
cmooney2@columbus.rr.com
sarah.parrot@puc.state.oh.us

ricks@ohanet.org
tobrien@bricker.com
david.fein@constellation.com
cynthia.a.fonner@constellation.com
mhpetricoff@vssp.com
smhoward@vssp.com
cgoodman@energymarketers.com
bsingh@integrysenergy.com
lbell33@aol.com
kschmidt@ohiomfg.com
sdebroff@sasllp.com
apetersen@sasllp.com
sromeo@sasllp.com
bedwards@aldenlaw.net
sbloomfield@bricker.com
todonnell@bricker.com
cvince@sonnenschein.com
preed@sonnenschein.com
ehand@sonnenschein.com
erij@sonnenschein.com
tommy.temple@ormet.com
agamarra@wrassoc.com
steven.huhman@morganstanley.com
dmancino@mwe.com
glawrence@mwe.com
gwung@mwe.com
stephen.chriss@wal-mart.com
lgearhardt@ofbf.org
cmiller@szd.com
gdunn@szd.com
greta.see@puc.state.oh.us