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**BEFORE THE**
**PUBLIC UTILITIES COMMISSION OF OHIO**

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| **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 Security Plan; and an Amendment to its Corporate Separation Plan.** | ) ) ) ) ) | **Case No. 08-918-EL-SSO** |

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# AEP OHIO'S MEMORANDUM IN OPPOSITION TO IEU OHIO'S APPLICATION FOR REHEARING

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## BACKGROUND

On May 4, 2011, the Commission issued an Entry that directed Columbus Southern Power Company (CSP) and Ohio Power Company (OPCo) (collectively "AEP Ohio" or "the Companies") to submit revised tariffs that would, if accepted and approved for filing by the Commission remove the increases approved as part of the Companies' ESPs recovered through their Provider of Last Resort (POLR) charges and their 2001-2008 incremental environmental investment carrying cost charges.

On May 15, 2011 Industrial Energy Users-Ohio (IEU) filed an application for rehearing of the Commission' May 4 Entry. In its first ground for rehearing IEU states that the Commission's May 4 Entry is unreasonable and unlawful because it did not "fully identify the flow through effects on consumers' electric bills" that, IEU contends, must be addressed in order to comply with the Supreme Court of Ohio's April 19, 2011 Remand Decision. Essentially, IEU's first ground for rehearing simply repackages its May 10, 2011 "Motion Requesting Commission Orders to Bring the Electric Security Plan of Ohio Power Company and Columbus Southern Power Company into Compliance with the Ohio Supreme Court's Decision and Other Relief."

In its second ground for rehearing IEU urges the Commission to expand the Court's Remand Decision from a reversal of the Commission's ESP order establishing charges for 2001-2008 environmental investment carrying costs to also include a reversal of the Commission's completely separate ESP decision to allow the Companies to establish separate charges to

recover carrying costs for 2009-2011 environmental investments. IEU requests the Commission to suspend the Companies' incremental environmental investment carry cost (EICC) for 2009.[1]

## ARGUMENT

### 1. IEU's First Ground for Rehearing Should Be Denied

#### 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.[2]

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

[1] The Companies' current request to include in their EICC riders costs for their incremental 2010 environmental investments remains pending in Case No. 11-1337-EL-RDR.

[2] The responsive points made in this section are virtually identical to the responsive points made in section II.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).

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.)

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.

**2. IEU's Second Ground for Rehearing Should be Denied Because It Is Beyond the Scope of the Court's Remand Decision, Seeks to Bypass the Requirements for Seeking Rehearing and Appeal of Commission's Decision, and Is Meritless.**

The Commission addressed and approved a provision for the Companies' ESPs through which they would recover carrying costs on their incremental environmental investments made during 2009, 2010, and 2011. (ESP Opinion and Order, at pp. 28-30.) That decision was made separate and apart from the decision to approve a provision to allow for the recovery of carrying costs for their 2001-2008 incremental environmental investments. (*Id.* at pp. 24-28.) Neither IEU nor any other party sought rehearing of the Commission's decision to approve recovery of carrying costs on 2009, 2010, and 2011 incremental environmental investments. Nor did IEU or any other party raise on appeal to the Ohio Supreme Court any claim of an error in the

Commission's decision to include a provision in the Companies' ESPs that would enable them to recover carrying costs for their 2009, 2010, and 2011 environmental investments.

Consequently, the Commission's decision to permit the Companies to recover their 2009, 2010, and 2011 incremental environmental investment carrying costs became final and non-appealable. Not surprisingly, the Court's Remand Decision does not address, let along purport to reverse, the Commission's decision to approve that ESP provision and the charges established pursuant to that provision, which enable the Companies to recover those carrying costs. Rather, the Court's ruling in ¶ 35 of the Decision was explicitly issued in response to OCC Proposition of Law No. 6, which only challenged the non-fuel generation rate increase that was based on pre-ESP environmental investment carrying charges.

IEU's effort now, through the second ground of its May 10 application for rehearing of the May 4 Entry, to attack that aspect of the Commission's final order approving the Companies' ESPs must be rejected. It is an effort to bypass the rehearing statute, Ohio Rev. Code §4903.10, and the statute governing the filing of appeals of the Commission's final orders, Ohio Rev. Code § 4903.11. Not surprisingly, IEU's request is outside the scope of the Court's Remand Decision, which is limited to a reconsideration, on remand of the statutory basis for recovery of the carrying costs for 2001-2008 environmental investments:

> In its sixth proposition of law, OCC argues that R.C. 4928.143(B)(2) does not permit AEP to recover *certain* carrying costs associated with environmental investments. That section states, "The [electric security] plan may provide for or include, without limitation, any of the following," and then lists nine categories of cost recovery. OCC argues that this section permits plans to include *only listed* items; the commission and AEP argue that (B)(2) permits *unlisted* items. We agree with OCC. . . .
>
> For the foregoing reasons, we reverse the commission's legal determination that R.C. 4928.143(B)(2) permits ESPs to include unlisted items. On remand, the commission may determine whether any of the

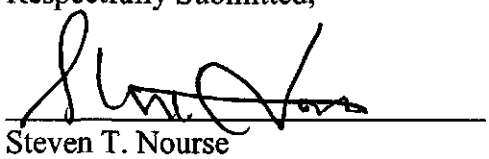
> listed categories of (B)(2) authorize recovery of environmental carrying charges.

Remand Decision at ¶¶ 31, 35 (emphasis added). IEU's request to suspend the Companies' tariff riders that allow them to recover their carrying costs for 2009 incremental environmental investments must be denied.

## CONCLUSION

For the foregoing reasons, Columbus Southern Power Company and Ohio Power Company respectfully request that the Commission deny IEU's Application for Rehearing.

Respectfully Submitted,



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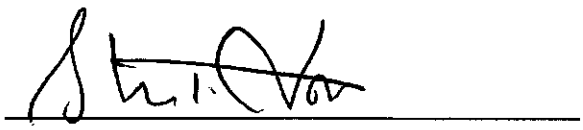
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum in Opposition has been served upon the below-named counsel and Attorney Examiners via electronic mail this 25th day of May, 2011.



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