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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets.	)	Case No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	Case No. 08-918-EL-SSO

REPLY OF INDUSTRIAL ENERGY USERS-OHIO TO COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO INDUSTRIAL ENERGY USERS-OHIO'S MOTION REQUESTING COMMISSION ORDERS

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I. Procedural Background

On March 18, 2009, the Public Utilities Commission ("Commission") issued an Opinion and Order modifying and approving Electric Security Plans ("ESP") for Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively "Companies").[1] Based on appeals by the Industrial Energy Users-Ohio ("IEU-Ohio") and the Ohio Consumers' Counsel ("OCC"), the Ohio Supreme Court reversed and remanded the Opinion and Order to the Commission on April 19, 2011. The Supreme Court found that the Commission engaged in retroactive ratemaking when it permitted OP and CSP to collect $63 million in revenues for the time the ESP Applications were pending after January 1, 2009 and prior to the ESP becoming effective on April 1, 2009.

[1] Opinion and Order (Mar. 18, 2009).

It reversed and remanded the Opinion and Order because it found that the Commission's finding that the Provider of Last Resort ("POLR") charge was cost based was not supported by the evidence. Finally, it reversed and remanded the Opinion and Order because it found that the Commission incorrectly applied Section 4928.143(B)(2), Revised Code, as the basis for allowing OP and CSP to collect revenues for the carrying costs of environmental investments from 2001 to 2008.[2]

On May 10, 2011, IEU-Ohio filed its motion seeking that the Commission expand the scope of its review of the remand to address the full scope of the Supreme Court's decision. As outlined in the Motion and accompanying memorandum, IEU-Ohio is requesting that the Commission initiate further proceedings to address the proper restatement of accounts and rates and such further relief and orders as are necessary to assure th the Supreme Court's decision is fully reflected in accounts and rates of the Companies. Among the critical areas of concern are deferred revenues that OP will be seeking, delta revenue calculations, and determinations of significantly excessive earnings.[3]

Prior to IEU-Ohio's filing of the Motion on May 10, 2011, the Commission initiated the process of addressing the remand by its Entry issued May 4, 2011. In the May 4, 2011 Entry, the Commission directed the Companies to file proposed revised tariffs removing the revenue effects for the issues the Supreme Court remanded. The Companies responded by filing the tariffs, but also sought orders to allow the

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[2] *In re Application of Columbus Southern Power Co.*, Slip Op. 2011-Ohio-1788 (Apr. 19, 2011) ("*Remand Decision*").

[3] Motion Requesting Commission Orders to Bring Electric Security Plans of Ohio Power Co. and Columbus Power Company Co. into Compliance with the Ohio Supreme Court's Decision and Other Relief and Memorandum in Support (May 10, 2011).

Companies to continue to collect the revenues until the Commission completed a review of the remanded issues or to allow the Companies to collect the revenues subject to refund while the Commission completed a review. To protect its Motion from an argument that it failed to make an appropriate procedural response to the Commission's May 4, 2011 Entry, IEU-Ohio filed an Application for Rehearing raising the issue of the appropriate scope of the Commission's review as a result of the Supreme Court's decision.[4]

On May 25, 2011, the Commission ordered further hearing to address the effects of the remand.[5] As noted in an Application for Rehearing of the May 25, 2011 Entry that IEU-Ohio filed for reasons similar those that drove the prior Application for Rehearing, IEU-Ohio again urged the Commission to address the scope of the hearing.[6]

Also on May 25, 2011, the Companies filed their Memorandum in Opposition to IEU-Ohio's Motion.[7] They argue that any attempt to address the effects of the remand on the revenue effects of deferrals and delta revenue collection would amount to retroactive ratemaking in violation of the filed rate doctrine. They further argue that identification of issues for the analysis of earnings and their pending applications for new ESPs are inappropriate for procedural reasons. As discussed below, neither the Companies' legal claim based on the filed rate doctrine nor their procedural arguments prevent the Commission from undertaking the important task of fully recognizing the

[4] Application for Rehearing by Industrial Energy Users-Ohio of May 4, 2011 Entry (May 16, 2011).

[5] Entry (May 25, 2011).

[6] Application for Rehearing by Industrial Energy Users-Ohio of May 25, 2011 Entry (June 1, 2011).

[7] Columbus Southern Power Co. and Ohio Power Co.'s Memorandum in Opposition to Industrial Energy Users-Ohio's Motion Requesting Commission Orders (May 25, 2011) ("Memorandum Contra"). They further filed a memorandum contra to the May 16, 2011 IEU-Ohio Application for Rehearing that states the same arguments as in their Memorandum in Opposition to the May 10, 2011 Motion.

effects of the Supreme Court's decision on current and future revenue claims by the Companies.

II. Argument

A. Deferred Revenues

In its Motion and supporting Memorandum, IEU-Ohio identified several areas which are affected by the Supreme Court's remand on the Companies' revenue claims under the current ESP and their pending applications for new ESPs. The first related to OP's attempt to recover up to $642 million in deferred revenues resulting from the bill limiter in its current ESP. In a response that can best be described as an admission that the Companies are seeking to over-collect revenues under the current ESP, CSP and OP assert that restating the deferred revenues would violate the filed rate doctrine and upset their accounting for the deferrals. Contrary to the Companies' arguments, however, the filed rate doctrine is not implicated, accounting rules do not permit the Commission to ignore the orders of the Supreme Court, and Section 4928.144, Revised Code, requires the Commission to assure that any authorizd recovery of deferrals is just and reasonable. Thus, the Commission should, indeed must, address the effect of the remand on OP's deferred revenues.

The assumption implied but not demonstrated by the Companies' argument is that the Companies are collecting revenues subject to an approved tariff.[8] To establish that premise, the Companies point to the Commission's March 18, 2009 Opinion and Order as a basis for concluding that there is some sort of claim to a fixed amount of deferrals on the Companies' books. The Companies' detailed description of the

[8] Section 4905.32, Revised Code.

Commission's Opinion and Order explains that the Companies were permitted to defer amounts in excess of bill limiters,[9] but notably absent from the discussion is any rate mechanism or the suggestion that the deferrals were not subject to reconciliation.[10] Moreover, the Companies' characterization of the deferrals as fuel expense (a characterization that itself is questionable since fuel is simply the residual amount used by the Commission to adjust the deferrals) subverts their own argument. The Commission has and is continuing to review the fuel adjustment clauses ("FAC") of each company.[11] As noted in IEU-Ohio's Motion, OP is already at substantial risk of not recovering deferrals as a result of the 2009 FAC review. Thus, there is nothing fixed in the accounting of the revenue deferrals that would constitute a filed rate based on the Commission's Opinion and Order.

More importantly, the Companies misapply the filed rate doctrine. Initially, the Companies rely on the Supreme Court's decision in this case to assert that the Commission cannot review the levels of the deferrals. The filed rate problem in this case arose when the Commission permitted the Companies to recover three months of rate increases, $62 million, prior to the effective date of the tariffs authorized by the Opinion and Order. Finding that the Commission engaged in retroactive ratemaking, the Supreme Court stated that "present rates may not make up for dollars lost 'during the

[9] Memorandum Contra at 5 (May 25, 2011).

[10] Opinion and Order at 20 (Mar. 18, 2009).

[11] *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case No. 09-872-EL-FAC *et al.* Similar reviews are pending for 2010 fuel costs. *See, e.g. In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Co. and Ohio Power Co.*, Case No. 10-1286-EL-FAC *et al.*

pendency of commission proceedings,'"[12] and concluded that "the commission violated the law when it granted AEP additional rates to make up for regulatory delay."[13] The filed rate doctrine, however, prevented the Court from ordering a refund of the $62 million already collected from customers.[14] In contrast, IEU-Ohio seeks to have the Commission address the revenues the Company will be seeking through the phase-in rider from 2012 to 2017 as a result of the bill limits. Inasmuch as the Companies will be seeking additional revenues of up to $642 million and inasmuch as the Commission has not determined whether any of the deferred revenues are properly collectable, there is no basis to assert that the filed rate doctrine as applied in this case to the January-March 2009 revenue recovery prevents the Commission from requiring the Companies to restate the deferred revenues.

The Companies' reliance on the *Lucas County* case is similarly misplaced.[15] In the *Lucas County* case, the Supreme Court agreed that the Commission properly dismissed a complaint seeking a refund when the complaint was filed after the challenged rates had been collected. In affirming the Commission's decision, the Supreme Court stated, "The Public Utilities Commission of Ohio is not statutorily authorized to order a refund of, or credit for, charges previously collected by a public utility where those charges were calculated in accordance with an experimental rate program which was approved by the commission, but which has expired by its own

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[12] *Remand Decision* at ¶ 11, quoting *Lucas County Commissioners v. Pub. Util. Comm'n*, 80 Ohio St. 3d 344, 348 (1997).

[13] *Id.* at ¶ 14.

[14] *Id.* at ¶¶ 15-16.

[15] *Lucas County Commissioners v. Pub. Util. Comm'n*, 80 Ohio St. 3d 344, 348 (1997).

terms."[16] Again, the complaint sought to recover a refund of moneys already collected from customers. As previously noted, IEU-Ohio is not seeking a Commission order of a refund. If the Commission takes the actions recommended by IEU-Ohio's Motion, it instead would be setting the just and reasonable level of the prospective recovery as required by Section 4928.144, Revised Code.

The Companies' real complaint, however, is that they may be placed at risk for the deferred balances and have to expense them. As the Companies explain, under applicable accounting rules they may be required to expense immediately those deferrals for which they cannot show a probability of recovery.[17] As a statement of fact, they have described the accounting rule and the problem it creates for the Companies; as a statement of the Commission's legal obligation, however, the accounting rules are irrelevant to the proper determination of what may be properly collected. The Commission is bound by Section 4928.143, Revised Code, to allow the recovery of certain defined revenues, and nothing more.[18] As the Supreme Court has determined, the Companies have failed to demonstrate, and cannot demonstrate, that they are entitled to the POLR and environmental investment carrying costs revenues. The applicable accounting rules do not prevent the proper restatement of the deferred revenues.

The legal requirements for setting the proper deferral revenues likewise point the Commission to the correct result. Section 4928.144, Revised Code, requires the

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[16] *Id.* at 349.

[17] Memorandum Contra at 8.

[18] *Remand Decision* at ¶ 32.

Commission to authorize a "just and reasonable" phase-in. By definition, a legal phase-in must recover only properly collectable revenues.

Thus, the Commission must address the deferred revenues so that the Commission carries out its legal responsibility. Certainly accounting rules do not prevent that review, and the filed rate doctrine does not apply.

B. Delta Revenues

Similarly, the Companies argue that the filed rate doctrine protects them from any Commission action to correct the calculation of delta revenues used to set economic development and universal service fund riders. Once again, however, the Companies misapply the filed rate doctrine. Each of these riders is subject to a true-up so that the Companies receive only the amount to which they are entitled. To the extent that the Companies try to collect revenues on rates that contain elements ruled illegal, the Commission must intervene.

C. SEET and Pending Application

Likewise, the Companies misstate the effect of the remand to the application on Section 4928.143(F), Revised Code, the significantly excessive earnings test, and the effect of the remand on the pending ESP cases. The basic argument the Companies advance is that another proceeding will be the proper place to raise IEU-Ohio's arguments. In part, IEU-Ohio agrees. To the extent that either Company is recovering significantly excessive earnings as a result of recovery of revenues to which it has no entitlement, the annual earnings review offers the Commission a means to address the revenue problem by returning the excess to customers as required by Section 4928.143(F), Revised Code, as it has done in the past. Additionally, the Companies

made clear in their 2011 ESP filings that they were basing future ESP revenues on their current ESP revenues.[19] However, these upcoming proceedings will depend on the Commission clearly delineating the effect of the remand. Any suggestion otherwise ignores that the Companies' current ESPs are driving other matters directly and indirectly.

III. Conclusion

For the reasons outlined in the Motion and Memorandum in Support, IEU-Ohio urges the Commission to initiate proceedings to address the proper restatement of accounts and rates of the Companies. The Companies in their Memorandum in Opposition have not offered any viable reason to avoid that action. By granting the Motion, the Commission will take a significant step in assuring that the Companies do not continue to extract revenues from customers to which they are not entitled.

Respectfully Submitted,

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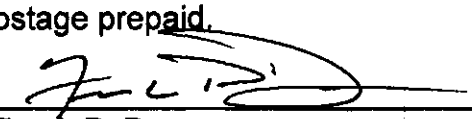
[19] *In the Matter of the Application of Columbus Southern Power Co. and Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Testimony of David Roush (Jan. 27, 2011).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply of Industrial Energy Users-Ohio to Columbus Southern Power Company's and Ohio Power Company's Memorandum in Opposition to Industrial Energy Users-Ohio's Motion Requesting Commission Orders* was served upon the following parties of record on June 1, 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.



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