

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

In the Matter of the Application of Ohio)	
Power Company for Approval of its)	Case No. 08-918-EL-SSO
Electric Security Plan; and an Amendment)	
to its Corporate Separation Plan.)	

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**REPLY TO AEP OHIO'S MEMORANDUM CONTRA
MOTION TO COMPEL DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On June 15, 2011, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential utility customers of the Columbus Southern Power Company and the Ohio Power Company (collectively, "AEP Ohio" or the "Companies"), moved the Public Utilities Commission of Ohio ("PUCO" or "Commission") to compel the Companies to fully respond to the OCC's first set of discovery requests in these cases that the Supreme Court of Ohio remanded to the PUCO.¹ These cases have progressed on a tight timeframe since the Supreme Court of Ohio issued its opinion on appeal and the Commission issued its procedural schedule in an Entry dated May 25, 2011. That Entry

¹ *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").

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confirmed rights to discovery when it stated a “final discovery request date” of June 29, 2011.²

The OCC promptly initiated its discovery process after the May 25, 2011 Entry, with its first set of discovery being transmitted to AEP Ohio on May 27, 2011. With the exception of a single document provided to the OCC, the Companies have not responded to the first set of discovery. The OCC is entitled to timely and complete responses to its discovery inquiries. Ohio law provides that “[a]ll parties and intervenors shall be granted ample rights of discovery.”³

The Companies state that the OCC’s Motion to Compel was “prematurely filed.” This proceeding on remand is progressing on an expedited basis, and timely responses to discovery are important. Incredibly, the Companies’ counsel stated in an email on June 8, 2011, that the OCC should “file a motion to compel” regarding the first set of discovery.⁴ AEP Ohio sought confrontation rather than cooperation. The OCC’s Motion to Compel should be granted.

II. ARGUMENT

The introduction to AEP Ohio’s Memorandum Contra Motion to Compel Discovery (“Memo Contra”) highlights the inappropriate approach taken by AEP Ohio to the OCC’s first set of discovery. Rather than support its positions with legal arguments related to answers to the first set of discovery, the Companies state that they responded to later

² Entry at 4, ¶11 (May 25, 2011).

³ R.C. 4903.082.

⁴ Motion to Compel, Attachment 3.

discovery requests.⁵ Leaving aside that the OCC's Motion to Compel may have prompted AEP Ohio to respond to later discovery requests, the Companies' responses to later discovery requests provides no defense to a motion to compel responses to the OCC's initial set of discovery.

AEP Ohio's argument that arrangements were made for the deposition of the Companies' witnesses is also not a defense to a motion to compel.⁶ The Companies' argument presupposes that the OCC must choose one discovery method over another, an approach that is not contained within the PUCO's rules or any other applicable Ohio law. Responses to the initial discovery inquiries should have been available for the OCC to prepare for the depositions, and the OCC is *prejudiced* by AEP Ohio's non-responsiveness. For example, Interrogatory R2(d) requested information on "other proceedings in which the [AEP Ohio] witness has testified on the same or a similar topic. . . ."⁷ The information might have been useful in conducting the depositions. And the information remains useful; for example, AEP Ohio Witness Nelson responded to deposition questions that he had testified in several proceedings in Ohio and West Virginia, but the imprecision of his responses purely from his memory leaves the OCC without the specific identification sought in the OCC's first set of discovery.

The Companies' Memo Contra repeats the protestations stated in earlier communications to the OCC that this proceeding is "narrow [in] scope."⁸ Earlier, the

⁵ Memo Contra at 2.

⁶ Id.

⁷ Motion to Compel, Attachment 1.

⁸ Memo Contra at 5.

Companies' counsel on June 12, 2011 responded to the OCC's communications as follows:

The remand proceeding is narrow and focused on limited issues with a limited time. We are providing full access to discovery *relating to our witnesses* and the issues raised.⁹

The OCC is entitled to information on the subject of the Companies' testimony stemming from sources other than pre-filed testimony. The Companies cannot define the scope of the proceeding by the selection of topics in their written testimony. The Companies again fail to provide any legal authority that prohibits discovery inquiries regarding persons not selected by AEP Ohio as witnesses to appear at the hearing on remand.

The Companies reject the idea that their employees could be "compell[ed] . . . to be deposed or forced to testify,"¹⁰ but the OCC is entitled to compel such attendance by subpoena according to the Commission's rules.¹¹ Later, the Companies admit that "there are situations where individuals may possess unique personal knowledge . . . and such individuals could conceivably be compelled to testify even if not offered voluntarily."¹²

⁹ Motion to Compel, Attachment 3 (portion of email string authored by Steve Nourse on June 12, 2011) (emphasis added).

¹⁰ Memo Contra at 7. AEP Ohio notes that the OCC responded to a request for the identification of persons answering discovery requests by stating: "See individual responses to discovery." Memo Contra at 8. AEP Ohio does not state that the individual responses by the OCC were inadequate. In contrast, AEP Ohio's response to OCC Interrogatory 1 shows that the Companies limited their response to only a named AEP Ohio witness. These are not analogous responses or situations.

¹¹ Ohio Adm. Code 4901-1-25. The practice before the PUCO is well-known to AEP Ohio, whose employees (i.e. not named witnesses) were identified through discovery and compelled to attend depositions in the case involving the Companies proposed integrated gasification combined-cycle ("IGCC") generating plant. *In re AEP Ohio IGCC Generating Plant Proposal*, Case No. 05-376-EL-UNC, Notice to Take Deposition (July 19, 2005) and Motion for Subpoena of Mary Zando (August 1, 2005). After AEP Ohio failed to comply with discovery in that case (id., OCC Motion to Compel (July 14, 2005)), the Attorney Examiner provided OCC the opportunity to introduce evidence by means of calling AEP Ohio employees to the stand if the situation arose. Id., Entry at 1 (September 7, 2005). AEP Ohio employees did not appear, but only because AEP Ohio agreed to the admission of documents without the appearance of their employees. The documents admitted included, in part, AEP Ohio's internal communications regarding the proposed generating plant. Id., Letter and attached documents (September 6, 2005).

¹² Memo Contra at 7.

The Companies have presented no legal authority supporting their apparent position that they may unilaterally decide in which proceedings they have the obligation to identify persons working on a subject matter who may then be compelled to respond to further questioning.

The Companies also failed to identify communications and provide documents relating to their communications with other parties. On one hand they argue that the request presents an “undue burden,” and on the other hand they argue that counsel is “not aware of any responsive documents.”¹³ The OCC’s first set of discovery seeks the identification of the communications, not simply documents. The essence of AEP Ohio’s communications regarding the OCC’s first set of discovery -- that the Companies can unilaterally limit the scope of the proceeding and respond to discovery based upon that scope -- leads the OCC to question the Companies’ “good faith search” to identify communications with other parties.¹⁴ AEP Ohio should have determined which communications took place and respond to the OCC’s discovery. The PUCO should compel this action.

III. CONCLUSION

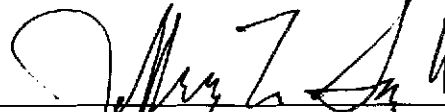
The issues on remand in these cases involve large financial stakes for customers. The Companies should provide full responses to the OCC’s first set of discovery requests so that the OCC, on behalf of residential customers, may fully participate in this proceeding. The OCC’s Motion should be granted.

¹³ Memo Contra at 11.

¹⁴ Id.

Respectfully submitted,

JANINE MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

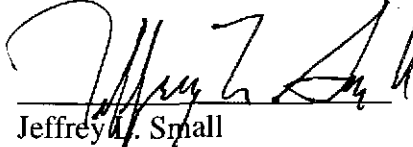
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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Reply* was served via electronic mail, this 27th day of June 2011.


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