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MEMORANDUM FOR THE SECRETARY OF DEFENSE

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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 )  
an Electric Security Plan; an Amendment to ) Case No. 08-917-EL-SSO  
its Corporate Separation Plan; and the Sale or )  
Transfer of Certain Generating Assets. )

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

ENTRY ON REHEARING

The Commission finds:

- (1) On March 18, 2009, the Commission issued its opinion and order in Columbus Southern Power Company's and Ohio Power Company's (jointly, AEP-Ohio or the Companies) electric security plan (ESP) cases (ESP Order).<sup>1</sup> By entries on rehearing issued July 23, 2009 (First ESP EOR) and November 4, 2009, the Commission affirmed and clarified certain issues raised in AEP-Ohio's ESP Order. As ultimately modified and adopted by the Commission, AEP-Ohio's ESP directed, among other things, that AEP-Ohio be permitted to recover the incremental capital carrying costs that would be incurred after January 1, 2009, on past environmental investments (2001-2008)<sup>2</sup> and approved a provider of last resort (POLR) charge for the ESP period.
- (2) The Commission's decision in the AEP-Ohio ESP cases was appealed to the Ohio Supreme Court. The Ohio Supreme Court determined that Section 4928.143(B)(2), Revised Code, does not authorize the Commission to allow recovery of items not enumerated in the section. The Court

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<sup>1</sup> *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009).

<sup>2</sup> AEP-Ohio ESP Order at 24-28, 38-40; First ESP EOR at 10-13, 24-27.

remanded the case to the Commission for further proceedings in which “the Commission may determine whether any of the listed categories set forth in Section 4928.143(B)(2), Revised Code, authorize recovery of environmental carrying charges.”<sup>3</sup> In regards to the POLR charges, the Court concluded that the Commission’s decision that the POLR charge is cost-based was against the manifest weight of the evidence, an abuse of the Commission’s discretion and reversible error. While the Court specifically stated that “we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful,” the Court noted two other methods by which the Commission may establish the POLR charge: a non-cost-based POLR charge or evidence of AEP-Ohio’s actual POLR costs.

- (3) By entry issued May 4, 2011, the Commission directed AEP-Ohio to file proposed tariffs removing the POLR charges and environmental carrying cost charges from the rates by May 11, 2011. Further, the May 4, 2011, entry directed that, if AEP-Ohio intends to seek recovery of the environmental or POLR charges pursuant to the Court’s remand, AEP-Ohio should make the appropriate filing with the Commission.
- (4) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission’s journal.
- (5) On May 16, 2011, Industrial Energy Users-Ohio (IEU-Ohio) filed an application for rehearing of the May 4, 2011, entry, which was subsequently denied by operation of law pursuant to Section 4903.10, Revised Code.
- (6) In response to various filings of the parties, the Commission issued an entry on May 25, 2011, directing AEP-Ohio to file tariff pages that reflect that the POLR riders and environmental carrying charges included in

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<sup>3</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-1788.

rates are being collected subject to refund, until the Commission specifically orders otherwise on remand. Additionally, the Commission adopted a procedural schedule for the remand proceedings in order to afford AEP-Ohio and intervenors the opportunity to present testimony and additional evidence in regard to the POLR and environmental carrying charges remanded to the Commission. The entry specified that the parties may address the amount of POLR charges at issue and the rate of interest charges applicable, if any.

- (7) On June 1, 2011, IEU-Ohio filed an application for rehearing of the May 25, 2011, entry. In its first ground for rehearing, IEU-Ohio asserts that the entry unreasonably and unlawfully fails to identify fully the flow-through effects on consumers' electric bills as necessary to comply with the Court's remand.<sup>4</sup> Specifically, IEU-Ohio identifies the following issues that should be addressed by the Commission in addition to the issues enumerated in the May 25, 2011, entry: deferrals enabled by bill increase limitations; delta revenues from reasonable arrangements and Universal Service Fund collection; calculation of base revenues; recovery of revenues through the Companies' environmental riders; and reviews of the Companies' earnings pursuant to the significantly excessive earnings test (SEET) of Section 4928.143(F), Revised Code.

IEU-Ohio admits that it would be sensible to read the Commission's May 4, 2011, and May 25, 2011, entries as a logical first step in the Commission's effort to comply with the Court's remand. IEU-Ohio, however, states that its application for rehearing was filed in light of its concern for arguments that AEP-Ohio is expected to advance in the coming days, which, if accepted by the Commission, would constrain the Commission's ability to address the full range of the revenue effects of the remanded issues.

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<sup>4</sup> IEU-Ohio notes that a full range of effects is illustrated in its motion of May 10, 2011, which requests that the Commission take additional steps to identify and address the full effects of the Court's decision. IEU-Ohio incorporates by reference its motion in its application for rehearing, which IEU-Ohio acknowledges was filed to protect its position set forth in the motion. This entry on rehearing does not address IEU-Ohio's motion of May 10, 2011.

- (8) On June 10, 2011, AEP-Ohio filed a memorandum contra IEU-Ohio's application for rehearing of the May 25, 2011, entry. With respect to IEU-Ohio's first ground for rehearing, the Companies argue that adjustments to their future recovery of deferred fuel costs or delta revenues to offset the POLR and environmental carrying cost charges would constitute impermissible retroactive ratemaking, contrary to the Court's decision in these cases and in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254. Additionally, AEP-Ohio asserts that IEU-Ohio's arguments with respect to the SEET are irrelevant to the remand proceedings, which are not the proper forum for addressing IEU-Ohio's position on how the SEET should be applied by the Commission.
- (9) The Commission notes that the May 25, 2011, entry established a procedural schedule for addressing the Court's remand of these cases, which includes the filing of intervenor testimony on June 23, 2011, and an evidentiary hearing to commence on July 12, 2011. The remand proceedings established in the May 25, 2011, entry will afford IEU-Ohio the opportunity to offer testimony and present its arguments, as well as to respond to any arguments advanced by the Companies, which the Commission will then consider at that time. The May 25, 2011, entry thus does not preclude IEU-Ohio from asserting, during the remand proceedings established by the entry, that the Commission should consider any flow-through effects on customers' bills, as may be necessary to comply with the Court's remand. Accordingly, with this clarification, IEU-Ohio's first ground for rehearing, as set forth in its application for rehearing of the May 25, 2011, entry, should be denied.
- (10) In its second ground for rehearing, IEU-Ohio argues that the May 25, 2011, entry unreasonably and unlawfully fails to suspend the Companies' Environmental Investment Carrying Cost Rider (EICCR) tariffs or direct the Companies to file tariffs that permit collection subject to refund. Relying on the Court's decision with respect to 2001-2008 incremental environmental investment carrying cost charges, IEU-Ohio asserts that the ESP Order fails to

identify any statutory basis for recovery of 2009 incremental environmental investment carrying cost charges. According to IEU-Ohio, the entry is thus unlawful and unreasonable because it fails to address the effect of the Court's decision on AEP-Ohio's EICCR.

- (11) In response, the Companies state that IEU-Ohio's second ground for rehearing should be denied as it is beyond the scope of the Court's remand, which is limited to a reconsideration of the statutory basis for recovery of 2001-2008 incremental environmental investment carrying costs. Further, AEP-Ohio argues that IEU-Ohio seeks to bypass the requirements for seeking rehearing and appealing an order of the Commission, as set forth in Sections 4903.10 and 4903.11, Revised Code. AEP-Ohio maintains that no party sought rehearing or appealed the issue of recovery of carrying costs on 2009, 2010, and 2011 incremental environmental investments and that the Commission's decision to permit recovery of these costs is a final, non-appealable order that may not be challenged by IEU-Ohio at this stage in the proceedings.
- (12) The Commission notes that, in the ESP Order, we approved AEP-Ohio's recovery of carrying costs on incremental environmental investments for the ESP period (2009-2011), with such recovery to occur through annual proceedings.<sup>5</sup> In a separate section of the ESP Order, we also approved the Companies' recovery of carrying costs incurred after January 1, 2009, on past environmental investments for the period of 2001-2008.<sup>6</sup> Although the latter decision was appealed to the Court by the Ohio Consumers' Counsel (OCC), the Commission's approval of the Companies' recovery of carrying costs for 2009, 2010, and 2011 incremental environmental investments was not an issue that was appealed by OCC, IEU-Ohio, or any other party. Neither was the issue raised on rehearing before the Commission by any party to these proceedings.

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<sup>5</sup> AEP-Ohio ESP Order at 28-30.

<sup>6</sup> AEP-Ohio ESP Order at 24-28.

With respect to the issue of the 2001-2008 incremental environmental carrying costs, OCC clearly stated in its notice of appeal that “[t]he Commission erred by requiring customers to pay, on a going forward basis, carrying charges on environmental investments made from 2001 through 2008....”<sup>7</sup> Likewise, OCC asserted in its application for rehearing before the Commission that “the Commission erred by requiring customers to pay carrying charges for an environmental investment that was made from 2001 through 2008....”<sup>8</sup> Thus, the issue that was decided by the Court and remanded to the Commission is whether there is a statutory basis for AEP-Ohio’s recovery of the 2001-2008 incremental environmental carrying costs. IEU-Ohio admits as much in its application for rehearing, stating that the “Court’s decision was limited to the revenue effects of the 2001-2008 incremental environmental investment carrying costs.”<sup>9</sup>

Sections 4903.10 and 4903.11, Revised Code, set forth the jurisdictional requirements for seeking rehearing and appealing a Commission order. As neither IEU-Ohio nor any other party appealed the Commission’s decision with respect to recovery of carrying costs on incremental environmental investments for 2009, 2010, and 2011, or even sought rehearing on this issue, our approval of such recovery is a final and non-appealable order of the Commission and is not subject to attack at this point in the proceedings. Accordingly, we find that IEU-Ohio’s second ground for rehearing in its application for rehearing of the May 25, 2011, entry should be denied.

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<sup>7</sup> *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Notice of Appeal (September 10, 2009) at 2.

<sup>8</sup> *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Application for Rehearing (April 17, 2009).

<sup>9</sup> *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Application for Rehearing (June 1, 2011) at 7.

It is, therefore,

ORDERED, That the application for rehearing filed by IEU-Ohio on June 1, 2011, be denied. It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all persons of record in these cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Paul A. Centolella

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Steven D. Lesser

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Andre T. Porter

  
Cheryl L. Roberto

SJP/sc

Entered in the Journal

**JUN 22 2011**



Betty McCauley  
Secretary