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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

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REMAND REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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REMAND REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

Throughout the remand proceeding, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OPCo") (collectively, "Companies") have ignored the unlawful status of the charges initially authorized by the Public Utilities Commission of Ohio ("Commission") and then struck down by the Ohio Supreme Court. Their ongoing denial is further documented by the Companies' Post-Hearing Brief. Typical of the Companies' arguments is the assertion that "the Court left open the option for the Commission to provide further basis and authority for the decisions the Commission already made."[1] What is readily apparent from the Court's decision, however, is that the

[1] Columbus Southern Power Company's and Ohio Power Company's Initial Post-Hearing Brief on Remand (Aug. 5, 2011) at 7 ("Cos. Post-Hearing Brief").

prior legal rationales were rejected by the Court and the Court will not tolerate Commission rulings that are not supported by evidence.

In the remand hearing, the Companies were required to show a proper factual and legal justification for both the pre-2009 environmental investment carrying charges and the POLR charges if they wished to restore the charges. As demonstrated by the evidence (or lack thereof) in the original record, the evidence added in the remand phase, and the Companies' Post-Hearing Brief, the Companies have failed to support factually or legally these proposed and presently unlawful charges.[2] Because the Companies have failed to do so, the Commission must, by the force of the Court's rulings, require the Companies to remove the charges from their tariffs and refund or credit charges that have been collected subject to refund. Further, the Commission must recognize the flow-through effects of the Court's decision and remove the effect of such charges from all prospective rates and charges arising from the Companies' electric security plans ("ESP").

II. CARRYING CHARGES ON PRE-2009 ENVIRONMENTAL INVESTMENTS

As demonstrated by their various pleadings, the Companies continue to wrongly assert that Section 4928.143(B)(2), Revised Code, provides a basis for recovering carrying charges for pre-2009 environmental investments. While their claim this time relies upon Sections 4928.143(B)(2)(b), (d), and (e), Revised Code, they continue to ignore the specific requirements of each provision. Because these provisions contain specific requirements that the Companies have not attempted to satisfy, the

[2] Many of the arguments raised by the Companies in support of the charges were anticipated and addressed in the Initial Remand Brief of Industrial Energy Users-Ohio ("IEU-Ohio Initial Brief") and are referenced and incorporated herein to avoid unduly extending this Reply Brief.

Commission is powerless to include the charges in lawful ESP rates. It is also important to note that none of the statutory authority relied upon by the Companies requires the Commission to include a carrying charge on pre-2009 investment in an ESP. And should the Commission venture in the direction urged by the Companies, the Court has also advised the Commission that "it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.[3]

In the case of the assertion regarding Section 4928.143(B)(2)(d), Revised Code, the Companies simply parrot prior statements that this Section includes language containing the words "charges" and "carrying costs." The Companies effectively ignore the remainder of the language in this provision that requires a showing that the charges "have the effect of stabilizing or providing certainty regarding retail electric service."[4] As their brief demonstrates, they are relying on the testimony in the original hearings as summarized by their witness, Mr. Nelson, in the remand hearing.[5] Neither the original findings[6] nor Mr. Nelson's testimony[7] demonstrates that the charges would satisfy the requirement of stabilizing or providing certainty regarding retail electric service. Indeed, Mr. Nelson testified in the remand phase of these proceedings that he is still not aware that "retail electric service" is a defined term in Section 4928.01(A)(27), Revised Code.[8] Thus, the Companies have not presented any evidence to support a finding that the

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[3] *In re Application of Columbus Southern Power Co.*, 128 Ohio St. 3d 512, 519 (2011) ("*Remand Decision*").

[4] Section 4928.143(B)(2)(d), Revised Code.

[5] Cos. Post-Hearing Brief at 11-12.

[6] Opinion and Order at 24-28 (Mar. 18, 2009).

[7] Cos. Remand Ex. 2 at 4.

[8] Tr. Vol. I at 101.

carrying charge would have the effect of stabilizing or providing certainty regarding retail electric service.

Similarly, the Companies failed to demonstrate how Section 4928.143(B)(2)(e), Revised Code, provides a basis for authorizing the carrying charge. That Section permits automatic increases in a component of the standard service offer ("SSO"). There is no demonstration that these carrying charges could be authorized as a component of an SSO, as a basis to be allowed to increase automatically.[9] Further, the Companies are not seeking authorization for an automatic increase in a component;[10] they are only seeking to include revenue calculated based on their carrying charge math in the base generation charge for the life of the ESP. Again, there is no demonstration of compliance with the statutory requirements.

Finally, the Companies invoke Section 4928.143(B)(2)(b), Revised Code, as a basis for the carrying charge. While they admit that this provision is limited to a nonbypassable charge, they assert that this limitation is not important.[11] The Supreme Court, however, held that a charge must be authorized under one of the provisions listed in Section 4928.143(B)(2), Revised Code.[12] Likewise, the Companies have not demonstrated that the charge relates to construction work in progress, complies with Section 4909.15, Revised Code, satisfies the requirements in Section 4928.143(C), Revised Code or relates to an expenditure on or after January 1, 2009.[13] As a result,

[9] IEU-Ohio Initial Brief at 14.

[10] Cos. Post-Hearing Brief at 14-15.

[11] *Id.* at 15.

[12] Remand Decision, 128 Ohio St. 3d at 519-20.

[13] IEU-Ohio Initial Brief at 13.

the Companies have failed to demonstrate that Section 4928.143(B)(2)(b), Revised Code, provides a basis for including the carrying charge in ESP rates.

Beyond the Companies' failure to demonstrate a statutory basis for the inclusion of the pre-2009 carrying charge in an ESP pursuant to Section 4928.143(B), Revised Code, the Companies have provided no evidence to suggest that rates need to be increased by the amount of the carrying charge. The evidence assembled in the original evidentiary phase of these proceedings showed that the Companies (and particularly CSP) were generating high returns on common equity without the charges and also that the Companies' gross margin per MWH (prior to the ESP increase) was the highest within the AEP system.[14] The Commission's rulings since confirm that the ESP, including the pre-2009 carrying charge, allowed CSP to experience a significantly excessive earned return on common equity.[15]

In summary, the Companies have not demonstrated a basis in one of the enumerated provisions of Section 4928.143(B)(2), Revised Code, to authorize a carrying charge on pre-2009 environmental investments as part of a lawful ESP, and they have failed to show that rates without the pre-2009 carrying charge are inadequate to provide just compensation. Without such demonstrations, the Court has held that the

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[14] Ohio Energy Group Ex. 3 at 42 (on a book basis, CSP earned 22.1% and OPCo earned 11.7% in 2007).

[15] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011).

Commission may not authorize collection of the charge.[16] Thus, the Commission must reject the Companies' claim as a matter of law.

III. THE POLR CHARGE

The Companies' *Post-Hearing Brief* urges the Commission to expunge the unlawful status of their provider of last resort ("POLR") charges through the same convoluted argument that the Court rejected in the *Remand Decision*. The Companies seem to believe that if they repeat the same arguments enough times, the Court (or the Commission) will "appreciate" their position and find it acceptable.[17] More specifically, the Companies continue to chant that value to the customer equals cost to the Companies, that an irrelevant and unproven formula for valuing options can deliver an approximation of their measure of value/cost, and that the approximation is close enough as an *ex ante* estimate. On this foundation of sand, the Companies ask the Commission to authorize them to raise electric bills by hundreds of millions of dollars during the ESP period. What became clearer during the remand hearing (and what was clear during the 2008 hearing) is that the Companies are seeking an anticompetitive charge based on their notion that they have a right to be compensated in an amount equal to the value that customers might derive by switching to a competitive supplier irrespective of whether customers actually do switch.

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[16] *Remand Decision,* 128 Ohio St. 3d at 520.

[17] Cos. Post-Hearing Brief at 17.

A. The Companies Have Not Demonstrated Any Cost to Satisfy the POLR Obligation.

The Supreme Court offered the Companies two alternatives by which the Companies might make their POLR charges lawful. One alternative was to show the "actual POLR costs" of standing ready to supply a customer returning to the SSO.[18] The second alternative was to demonstrate that a non-cost-based POLR charge was reasonable and lawful.[19] During the remand hearing, the Companies' evidence was directed at the first alternative,[20] but missed badly because the Companies failed to identify any cost incurred to stand ready to supply a customer returning to the SSO. Instead, the Companies retreated to the previously rejected argument that the value of the "option" offered to customers somehow is the cost to the Companies, the same claim the Court rejected.

The Companies rely on the theories offered by Dr. Makhija and Dr. LaCasse to support their claim that the option value equals their cost. Dr. Makhija's argument that value equals cost and is reflected in equity value defies logic and simple economics and has no empirical support.[21] Dr. LaCasse's argument essentially assumes that the Companies are entitled to recover the lost revenues associated with customer choice.[22] Moreover, as demonstrated in the hearing and in IEU-Ohio's initial brief, that argument

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[18] *Remand Decision*, 128 Ohio St. 3d at 519.

[19] *Id.*

[20] The Companies hedged on the issue of whether their approach was truly based on cost. At one point in their post-hearing brief the Companies argue that "the existing POLR charge is alternatively justified because it has the effect of providing stability and certainty regarding the price customers will pay for retail electric service." Cos. Post-Hearing Brief at 28. As discussed infra, the Companies have not established any basis for non-cost-based POLR charges.

[21] IEU-Ohio Initial Brief at 29.

[22] *Id.* at 31-32.

conflicts with the Court's definition of the POLR obligation and does not demonstrate a cost.[23] Further, the Companies have little exposure to any cost associated with a returning customer because of the PJM Interconnection, Inc. election and their ability to recover purchased power through a fuel clause.[24]

In their Post-Hearing Brief, the Companies, moreover, demonstrate that the POLR charge they are asking for has nothing to do with determining the actual cost to the Companies to stand ready to serve returning customers. Instead, they make clear that they are seeking to extract, through the method of valuing their proposed POLR charge, any value customers might derive as a result of customer choice regardless of whether customers exercise this right. As the Companies define the "cost" they are attempting to recover, "[i]n simplistic terms this means that, for every $1 dollar that the Companies incur to provide the POLR optionality to customers, $1 is the measure of both the cost to the Companies and the value to the customer of the optionality."[25] Combined with their assertion that they are entitled to recover for migration losses[26] through a nonbypassable charge,[27] no customer will see any benefit from shopping. Instead, they will turn over that benefit to the Companies in the form of POLR charges. Thus, it is readily apparent that the Companies are seeking to charge customers for costs associated with the transition to competition that are no longer compensable.[28]

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[23] *Id.* at 18-27.

[24] *Id.* at 32.

[25] Cos. Post-Hearing Brief at 21-22.

[26] *Id.* at 18.

[27] *Id.* at 25.

[28] IEU-Ohio Initial Brief at 22-23.

Moreover, the charges' effect on likely new entry is also demonstrated. No customer will choose to change to a competitive retail electric service ("CRES") provider if there is no economic benefit, and under the Companies' proposal, and in violation of State policy,[29] there will be little, if any, benefit to switching.

To make their argument about "cost" work, however, the Companies have to change what the Court stated was compensable through a POLR charge. As the Court defined the POLR obligation, it is the obligation to stand ready to serve a customer who returns to the SSO of the electric distribution utility ("EDU").[30] Rather than work with that definition, the Companies try to change the meaning of the POLR obligation so that the "cost" can include lost revenues due to switching.[31] As part of this attempt, they point to Section 4928.143(B)(2)(h), Revised Code, which contains a reference to "lost revenues" as having "relevance to the present inquiry."[32] Of course, the Companies are pointing to a different provision than the one they assert is the basis for recovery of POLR charges, Section 4928.143(B)(2)(d), Revised Code, and which contains no similar language. They also ignore the significantly different context of the charges that may be recovered under Section 4928.143(B)(2)(h), Revised Code, which are related to non-competitive distribution rather than generation services. Finally, they ignore the Court's definition of the POLR obligation that clearly does not recognize any lost revenues due to customer switching as the cost of standing ready to provide service to returning customers. The Commission cannot issue a decision authorizing a POLR

[29] Section 4928.02, Revised Code.

[30] *Remand Decision*, 128 Ohio St. 3d at 517.

[31] Cos. Post-Hearing Brief at 31.

[32] *Id.* at 27.

charge that is not consistent with the Court's definition of what is compensable, and there has been no demonstration that the POLR charge can legally include the predicted value of lost revenues due to competition.

The Companies further argue that the parties are precluded from addressing the definition of the POLR obligation by the Court's decision, arguing that the parties are bound by the Commission's prior determination to recognize migration risk as a basis for a POLR charge.[33] They assert without citation that "neither OCC nor IEU raised a claim that the POLR obligation did not include the risk of a customer leaving the SSO."[34] This assertion, however, is incorrect. As demonstrated by the Application for Rehearing, IEU-Ohio challenged the POLR charge authorized by the Commission on the basis that the modeling was invalid, that the model did not include the actual costs of providing POLR, and was tied to ridiculous assumptions about shopping.[35] Clearly, all aspects of the POLR charge, beginning with the basis on which it should be calculated were challenged. Likewise, the Supreme Court's *Remand Decision* was not limited to so narrow a view of what the Commission is to decide. As the Court understood the question, the Companies could attempt to demonstrate their actual costs or provide a non-cost-based rationale to stand ready to serve returning customers.[36] Finally, the Companies themselves have placed the issue before the Commission. In defining "cost," moreover, the Companies have incorrectly included lost revenues due to customer migration. As a result, the Companies' direct evidence in the

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[33] Cos. Post-Hearing Brief at 32-34.

[34] *Id.* at 33.

[35] Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 15-18 (Apr. 16, 2009).

[36] *Remand Decision*, 128 Ohio St. 3d at 519.

remand phase of these proceedings placed the question of what is properly compensable at issue. The Companies' attempt to argue otherwise is without merit.

B. The Companies' Calculation of the "Cost" of Satisfying the POLR Obligation Is Grossly Overstated.

As the Companies point out, the Commission has a long history attempting to define the costs of standing ready to provide SSO service to returning customers.[37] That history, however, includes at least two statements (including one in this case) by the Supreme Court in which the Court has advised the Commission to carefully consider what it is attributing as costs of the POLR obligation.[38] The concern about properly identifying the costs attributable to the POLR obligation is particularly apparent in this case. As noted in IEU-Ohio's Initial Brief, any indications of "cost" associated with the Companies' version of the POLR obligation indicate that the output of the Companies' valuation model grossly overstates whatever costs might actually be attributable to the cost of standing ready to serve a returning customer under the SSO.

First, the Companies have not demonstrated any out-of-pocket costs.[39] Nor are they likely to do so, given that they can recover capacity charges through their PJM Interconnection, Inc., election from CRES providers and their ability to recover fuel and purchased power costs through their fuel clauses.

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[37] Cos. Post-Hearing Brief at 25.

[38] *Remand Decision*, 128 Ohio St. 3d at 518.

[39] IEU-Ohio Initial Brief at 24.

Second, they have claimed that POLR costs arise because of retail sales lost as a result of competition, a position that makes no sense since a lost sale does not impose any costs on the Companies.[40]

Third, the Companies' measurement of lost revenues ignores operating and commercial realities. A lost retail sale gives rise to other sales and revenue opportunities that the Companies do not net against any lost retail sales revenue.[41]

Fourth, the Companies ignore the fact that actual retail customer shopping has either been insignificant (in the case of OPCo) or minimal (in the case of CSP). In 2010, CSP reported a change in load of approximately 3% due to migration; OPCo's load change has not been significant.[42] The Companies reported a gross margin loss of $16 million in 2010 due to retail customer shopping and before reflecting any offsetting revenue from other sales opportunities.[43] The Companies have neither reported nor identified any costs associated with standing ready to serve returning customers. In contrast, the POLR charge was expected to generate $152 million in revenue annually for the Companies.

The Companies, nonetheless argue that they have real costs due to shopping and that the Black-Scholes valuation ("formula") properly measures that cost. Both arguments find no support in the evidence.

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[40] *Id.* at 32

[41] The Companies acknowledged that they seek to mitigate lost revenues associated with competition through off system sales. IEU-Ohio Remand Ex. 6 at 161.

[42] *Id.* at 31.

[43] *Id.* at 161.

As repeatedly noted, the Companies have not demonstrated any actual costs related to their POLR obligation. The Companies' method for determining the value of the proposed POLR charge, the Black-Scholes formula, furthermore, is incapable of measuring the cost of the POLR obligation. As Dr. LaCasse herself demonstrated, if the Black-Scholes method is capable of measuring anything in this context (and that is doubtful), it measures revenue that may be lost as a result of shopping forecasted based on unreal and absurd assumptions about the amount of switching. Moreover, the formula requires the satisfaction of certain assumptions such as the lack of transaction costs, the ability of customers to switch, the volatility of the market price, and the distribution of returns that do not exist, making the use of the model to calculate an option value inappropriate.[44] Moreover, the formula does not purport to measure the cost of standing ready to provide service.[45] Using the formula to establish the cost of satisfying the POLR obligation simply does not make sense.

Finally, the attempts to prove the accuracy of the model all suffered from fundamental flaws.[46] Thus, it does not matter if the formula used conservative or liberal inputs[47] or that the model gave results that were close to the results from a Monte Carlo simulation[48] because the formula was measuring the wrong thing with bad data. As a result, the product of that exercise is useless as a basis for the Commission's decision in this hearing.

[44] IEU-Ohio Initial Brief at 33-37.

[45] IEU-Ohio Remand Ex. 1 at 25.

[46] *Id.* at 37-41.

[47] Cos. Post-Hearing Brief at 40-43.

[48] *Id.* at 43-46.

In an apparent last gasp, the Companies offer one more comparison to justify the reasonableness of their POLR charges.[49] In their Post-Hearing Brief, the Companies have inserted a table of what they assert are the POLR charges of two other EDUs and those of the Companies.[50] The information regarding the EDU POLR charges is outside the record of this proceeding and there has not been an opportunity to test the usefulness of this information to the determination of the reasonableness of the Companies' proposal. *The danger of allowing the record to be improperly* supplemented through a brief is exposed when the Dayton Power and Light Company and Duke Energy ESP settlements are reviewed. The charge attributed to Dayton Power and Light Company was a charge established under a pre-ESP rate plan that was continued by agreement.[51] The number asserted by the Companies for Duke Energy is inconsistent with the stipulation which states that residential customers will not be charged a standby charge.[52] Additionally, the stipulations in those settlements specifically preclude their use as Commission precedent.[53] Thus, the attempt to add to

[49] IEU-Ohio, the Office of Consumers' Counsel ("OCC"), and Ohio Partners for Affordable Energy have filed motions to strike this portion of the brief.

[50] Cos. Post-Hearing Brief at 30.

[51] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation (Feb. 24, 2009) at 4 (continuation of the RSS charge).

[52] *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Stipulation and Recommendation at 33 (Oct. 27, 2008).

[53] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation (Feb. 24, 2009) at 18 (stipulation has no precedential effect); *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Stipulation and Recommendation at 2 (Oct. 27, 2008) (stipulation has no precedential value).

the record through the brief provides no basis for the Companies' claim and also was improper.

In summary, the Supreme Court identified what the Companies had to do to overcome the unlawful status of the POLR charges if the Commission permitted the Companies to present further evidence. The Companies could either present a case supporting recovery of their actual costs for standing ready to serve returning customers or provide a non-cost basis to support a POLR charge. The Companies did neither. Instead, they chose to argue that they should be permitted to recover the lost revenues they might have (based on a host of invalid assumptions) due to customer choice and to base that argument on a formula that has no ability to measure potential lost revenue accurately. The Companies' reported gross margin loss in 2010 (before considering revenue offsets arising from other sales opportunities) shows the magnitude of the forecast error that resulted from the defective math of the Companies value-equals-cost formula. On this record, the Commission must reject the Companies' demand to continue their POLR charges.

IV. THE FLOW-THROUGH EFFECTS OF THE REMANDED ISSUES MUST BE ADDRESSED

As demonstrated in the hearing, the Court's remand requires the Commission to also consider how the resolution of these issues will affect future rates. If the Commission finds that the pre-2009 environmental charges and the POLR charges cannot be authorized, the Commission should order the Companies to file revised tariffs and to refund or credit amounts currently being collected subject to refund. The Companies, however, challenge the Commission's authority to address the other flow-through effects of the Court's decision, raising issues the Commission has already rejected and suggesting that the Commission is precluded from preventing further illegal recovery under the illegal rates.

Initially, the Companies argue (again) that the remand hearing cannot address the flow-through effects of the Supreme Court's decision. The Commission has already ruled twice that it does have this authority and will consider the evidence presented by the parties.[54] The Companies' argument raises nothing new to support its position and should be rejected.

Second, the Companies also argue that the filed rate doctrine prevents the Commission from addressing the flow-through effects, but as IEU-Ohio has previously argued and the Commission has implicitly recognized by allowing IEU-Ohio and OCC to proceed with its evidence on flow-through effects, the filed rate doctrine does not apply to charges that have not been set.

As noted above, the Companies presented this argument to the Commission previously, and the Commission has nonetheless concluded that nothing prevents IEU-Ohio from presenting evidence and arguing these issues. Effectively, the Companies are inviting the Commission to reverse the decision it made in the June 22, 2011 Entry on Rehearing, and the July 19, 2011 Entry. The Commission should not accept that invitation.

Moreover, as IEU-Ohio has also previously pointed out, the Companies misapply the filed rate doctrine. Initially, the Companies rely on the Supreme Court's decision in this case.[55] 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

[54] Entry at 7 (July 19, 2011); Entry on Rehearing at 4 (June 22, 2011).

[55] Cos. Initial Brief at 54.

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 pendency of commission proceedings,'" and concluded that "the commission violated the law when it granted AEP additional rates to make up for regulatory delay." The filed rate doctrine, however, prevented the Court from ordering a refund of the $62 million already collected from customers. 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 2018 as a result of* the bill limits. Inasmuch as the Companies will be seeking additional revenues estimated at $642 million and inasmuch as the Commission has not determined whether any of the deferred revenues are allowable, the Court's holding concerning the filed rate doctrine does not prevent the Commission from requiring the Companies to restate the deferred revenues or take into account the remand in addressing other related issues such as delta revenue recovery.

The Companies' reliance on the *Lucas County* case[56] is similarly misplaced. 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

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

terms."[57] 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, it instead would be setting the just and reasonable level of the prospective recovery as required by Section 4928.144, Revised Code, and adjusting the recovery of other revenues in a manner consistent with the terms of the remand.

The ability of the Commission to adjust the phase-in amounts is not a new concept to this Commission or CSP. As noted previously, in the 1991 CSP rate case, the Commission applied the terms of the Zimmer Restatement Case settlement to reduce a booked allowance for funds used during construction ("AFUDC") to restate the rate base for the Zimmer plant because the amounts booked were inconsistent with proper regulatory accounting and the terms of the settlement.[58] Thus, neither regulatory policy nor the law prevents a proper restatement of a regulatory asset balance prior to the point in time when amortization through rates and charges begins.

Finally, the Companies argue that the phase-in rates relate to deferred costs and not deferred revenues.[59] Once again, this argument misses the point. What is at issue is whether the deferrals are properly calculated. Under Section 4928.144, Revised Code, customers may not be charged an unreasonable amount for the deferrals. The amounts the Companies have indicated that they will be seeking are grossly overstated by the millions of dollars due to the illegal environmental carrying charges and POLR

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[57] *Id.* at 349 (emphasis added).

[58] *In the Matter of the Application of Columbus Southern Power Co. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 15-18 (May 12, 1992).

[59] Cos. Remand Brief at 57.

charges. If the Commission fails to act on those deferrals and assure that they are properly restated as they should have been from the beginning of the current ESP, the Companies will extract from customers amounts yet to be charged that are overstated. This transfer of wealth from customers to the Companies is not permitted by the Commission's order setting up the deferrals, the statute authorizing the deferrals, Commission practice, and certainly not by Generally Accepted Accounting Principles.

Once the Commission determines that the environmental charges and POLR charges are not properly in rates, the Commission also will need to synchronize these results with its disposition of issues in other proceedings based on the calculation of delta revenues and the pending ESP[60] to assure that the flow-through effects of its decision are properly implemented.

V. CONCLUSION

The Commission has an opportunity to correct some fundamental errors in the first Opinion and Order issued in this case over two years ago. Based on the original Opinion and Order, the Commission claimed that the resulting rates would be the lowest in the State, yet authorized charges that were illegal and improperly raised customer bills by about $1.5 billion during the ESP period during a time when customers were trying to cope with the challenges of the Great Recession. The Commission allowed the Companies to collect part of this revenue during the ESP term and authorized the portion above certain bill limits to be collected during a period commencing in 2012. The record evidence shows that the revenue associated with the illegal charges is

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

embedded in the $1.5 billion total authorized revenue and that the inclusion of these illegal charges inflated the amount subject to collection in 2012 and thereafter.

Given the opportunity to do so by the Commission, the Companies have asked the Commission to do further damage to the law and their customers by expunging the unlawful status of the pre-2009 environmental investment carrying charges and the POLR charges. Based on the evidence and the law, IEU-Ohio urges the Commission to promptly put an end to an unlawful wealth transfer that has lasted too long and to fully reflect the elimination of the unlawful charges in all future rates and charges that may arise as a result of the ESP approved and modified herein by the Commission. The law prevents the Commission from undoing the damage done to customers as a result of the retroactive rate increases that allowed the Companies to illegally collect about $65 million. But neither the law nor good reasons stand in the way of the Commission's duty to put this matter right going forward.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Remand Reply Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 12th day of August, 2011 via electronic transmission, hand-delivery or first class mail, postage prepaid.

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