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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 Generation 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

MOTION TO STRIKE PORTIONS OF COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S REPLY BRIEF ON REMAND
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY
AND
INDUSTRIAL ENERGY USERS-OHIO

The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE"), and Industrial Energy Users-Ohio ("IEU") move to strike portions of the Reply Brief on Remand ("Reply Brief") filed by Columbus Southern Power Company and Ohio Power Company (collectively, the "Companies") on August 12, 2011.[1] The motion to strike applies to two separate passages of the Reply Brief.

The first portion of the Reply Brief that should be stricken relates to the following sentence contained on page 7: "The Companies' existing POLR charges are well in line with the POLR charges the Commission has approved for the other Ohio EDUs.

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[1] This phase of the proceeding is on remand from the Supreme Court of Ohio. *In re Application of Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788.

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Companies' Initial Merit Filing on Remand, at 19-20." The second portion of the Reply Brief that should be stricken relates to the following sentence and accompanying footnote 6 contained on page 25: "However, the Commission need look no further than Ms. Medine's audit report in the Companies' 2010 fuel adjustment clause proceedings, Case No. 10-268-EL-FAC, et al., where she notes, at page 3-22, note 19, that "[t]he standard industry tool to evaluate an option [i.e. for coal] is the Black-Scholes model."

The reasons this Motion to Strike should be granted are further explained in the following memorandum in support.

Respectfully submitted,

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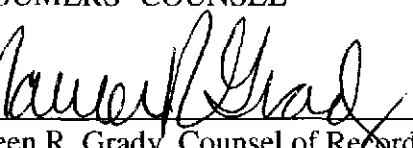

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MEMORANDUM IN SUPPORT

On August 12, 2011, parties filed reply briefs in this proceeding on remand from the Supreme Court of Ohio. In a portion of the Companies' Reply Brief at page 7, the Companies present material (as though it were evidence) related to comparing the Companies' POLR rates to those of other EDUs, referring to the Companies' Initial Merit Filing on Remand[2] that is not evidence in this proceeding.[3] The Companies purport to use this information to argue that the POLR charges being collected are reasonable vis-à-

[2] The Companies' Initial Merit Filing on Remand was a pleading containing legal arguments and was not marked as an exhibit or moved into evidence in this proceeding. The Initial Merit Filing was made in response to the Commission's May 4, 2011 Entry permitting AEP Ohio to come back with a new filing to substantiate the POLR charge and/or the environmental carrying charge. See Initial Merit Filing at 2. There the Companies argued that it would be unfair, unreasonable, and constitute disparate treatment of AEP Ohio if the PUCO were to eliminate the entire POLR. AEP Ohio argued as well that the AEP Ohio POLR charges are comparable to Duke and DP&L.

[3] This is not the Companies' first attempt to slide this information into the record. Another attempt was contained in the Companies' Initial Brief on Remand that references the same information. In response to that attempt, OCC, OPAE, and IEU moved to strike portions of the Companies' Initial Brief on Remand.

vis the other Ohio electric distribution utilities.[4] The Companies also present a footnote to an audit report filed in a separate Public Utilities Commission of Ohio ("PUCO") proceeding (Case No. 10-268-EL-FAC, et al.), which they attribute to OCC Witness Emily Medine. The Companies argue that the Commission can weigh the significance of the footnote material and allege that OCC's and OPAE's citation (in their Post Hearing Brief on Remand) to testimony presented by Ms. Medine in the first phase of this electric security plan ("ESP") proceeding "opened the door to work done on behalf of the Commission that contradicts this earlier statement."[5] Alternatively, and seemingly recognizing the evidentiary weakness in their position, the Companies ask that administrative notice of the PUCO ordered audit report be taken at this late date when the record is closed.

The material found in the Companies' Reply Brief that is complained of in this Motion to Strike is not evidence nor is it properly part of the record. It cannot be relied upon by the PUCO as a basis to make a decision on POLR. Although the Companies previously identified the comparability of the various POLR rates in their Initial Merit filing, it was not offered as part of the Companies' direct or rebuttal case. The material was not made available for any party to cross-examine in the remand proceeding. To consider the material submitted now would be highly prejudicial to the intervenors in this case.

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[4] The danger in permitting this information to be used to support the Companies' claims is particularly apparent in their use of the Duke Energy information as Duke Energy ESP stipulation does not support the claim that there is a standby charge for residential customers.

[5] The citation to the EVA Management Performance Audit report does not contradict Ms. Medine's testimony that AEP does not use the Black Scholes model to price coal; neither does it contradict Ms. Medine's testimony that Black Scholes should not be used in the ESP proceeding to price POLR.

The PUCO is required under R.C. 4903.09 to make its "findings of fact and written opinions" with regard to the record of the case. The hearing on remand provided the Companies with their opportunity to adduce evidence, such as through the "testimony and ... exhibits..." referenced in R.C. 4903.09. The Companies' Reply Brief is not an appropriate opportunity to present material to the PUCO as though it were evidence. The Companies provide no explanation of why this material was not presented in the course of this proceeding. Of course, no explanation could possibly justify the Companies' most unusual and inappropriate tactic. The material could have been introduced at the hearing and was not.

The PUCO, moreover, has recognized the confines of the record in its cases. For example, the PUCO recently granted a number of OCC's motions to strike non-record information that the Ohio American Water Company included in its post-hearing brief.[6] Another example is the PUCO's striking of non-record information in a utility company's brief in a complaint case against the Ohio American Water Company.[7] In the original phase of the AEP ESP proceeding, the Companies themselves moved to strike portions of OCC's brief that referred to evidence derived from another PUCO proceeding. There, the PUCO accepted OCC's withdrawal of a portion of its brief containing evidence derived from another PUCO proceeding.[8]

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[6] *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR, Opinion and Order at 9 (May 5, 2010).

[7] *In the Matter of the Complaint of Andrew Hehemann, et al. v. Ohio American Water Company*, Case No. 05-1275-WW-CSS, Order and Opinion at 4 (April 23, 2008).

[8] See *In re AEP Ohio's Electric Security Plan*, Case No. 08-917-EL-SSO, Opinion and Order at 7-8 (March 18, 2009).

Nor is it appropriate for the PUCO to take administrative notice[9] of a footnote the Companies attribute to OCC Witness Medine that pertains to a separate PUCO proceeding. First, administrative notice is, under Ohio Rule of Evidence 201,[10] confined to *adjudicative facts* that are not subject to reasonable dispute. The PUCO has in fact denied administrative notice of audit reports in separate PUCO proceedings based upon the fact that audit reports are subject to reasonable dispute. In a 1982 case, the PUCO refused to take judicial notice of a financial audit admitted in another PUCO proceeding for this very reason. Noting first that the document was submitted for different purposes altogether, the PUCO went on to proclaim "[w]e do not believe that it is proper to take administrative notice of the management audit whose findings and recommendations may be subject to reasonable dispute."[11] Here there is a great deal of dispute concerning use of the Black Scholes formula. Obviously one of the facts that the Companies were hoping to establish during the remand was that the Black-Scholes formula was appropriate to value the POLR obligation-- a fact the Supreme Court had already found was highly disputable.

Moreover, the reference that the Companies are seeking to use does not even address the fact that they are trying to establish. The Companies seek judicial notice of a footnote contained in an audit report filed in an unrelated matter—a fuel adjustment clause proceeding. There in the Management Performance and Financial Audit Report,

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[9] Administrative notice appears to be the Companies' alternative approach to getting the PUCO to consider the footnote.

[10] Although the PUCO is not stringently confined to the Rules of Evidence, Ohio Rule 201 is instructive as to general civil practice in Ohio. R.C. 4903.22 directs the Commission to generally follow these practices.

[11] *In the Matter of the Regulation of the electric Fuel Component contained within the Rate Schedules of the Ohio Edison Company and Related Matters*, Case No. 82-164-EL-EFC (Subfile A), Opinion and Order at 22 (August 3, 1983).

conducted by Energy Ventures Analysis ("EVA") (and Larken & Associates) the footnote attributed to Ms. Medine, an employee of EVA, opines "the standard industry tool to evaluate an option is the Black Scholes model." Taking the footnote in the context presented in the Audit Report, it is clear that the footnote refers to using a Black Scholes Model to evaluate a coal purchase option agreement, not value POLR. Thus, the footnote not only falls in the realm of a matter not generally subject to judicial notice,[12] but is not relevant to the question presented in this proceeding--whether the Black Scholes model is an appropriate tool to measure the "costs" of POLR.

Second, although the Ohio Supreme Court has recognized that there is neither an absolute right for, nor prohibition against, the PUCO taking administrative notice of *facts* outside the record in a case, the Court has resolved administrative notice issues on a case by case basis, depending on the facts presented.[13] The factors the Court "deem[s] significant include whether the complaining party had prior knowledge of, *and* had an adequate opportunity to explain and rebut, the facts administratively noticed."[14]

The importance of affording the complaining party the opportunity to rebut facts administratively noticed can not be downplayed. The Ohio Supreme Court in *Forest Hills Utility Company v. Public Utilities Commission*[15] held that the Commission erred when it took judicial notice of facts gathered from its own records to conduct its own analysis *after a hearing*. The utility company complained the Commission's analysis was not available at the time of the hearing, and thus it had no opportunity to be heard as

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[12] See e.g., *Taylor v. Charter Med Corp.*, 162 F.3d 827 (5th Cir. 1998); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2nd Cir. 1991).

[13] *Allen v. Public Util. Comm.* (1988), 40 Ohio St.3d 184, 185.

[14] *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1 18, citing *Allen v. Public Util. Comm.*, 40 Ohio St.3d at 186 (emphasis added).

[15] *Forest Hills Utility Co. v. Public Utilities Commission of Ohio* (1974), 39 Ohio St.2d 1, 3.

to the propriety of the Commission's taking of administrative notice. The court agreed: "Even though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision or findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, *with an opportunity to explain and rebut.*"[16] The Court further noted that the United States Supreme Court issued a holding supporting this proposition in *West Ohio Gas Co. v. Public Utilities Commission:*[17] "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."

By presenting the footnote from the Audit Report in the form of a Reply Brief, the Companies have intentionally limited the intervenors opportunity to explain and rebut the Companies' information. Indeed the PUCO has recognized that it is not appropriate to grant judicial notice when requested in a reply brief due to the lateness of such a request,[18] especially when the material is known at the time of the hearing[19] as was the material at issue here. Consequently, administrative notice is not appropriate at this stage in the proceeding, when the record has been closed.

The timing of the Companies' actions is highly prejudicial to the intervenors. The record closed on July 28, 2011 at the end of the rebuttal phase of the hearing when Hearing Examiner Parrot confirmed that "these cases shall be submitted to the

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[16] Id. (emphasis added).

[17] *West Ohio Gas Co. v. Pub. Util. Comm.* (1935), 294 U.S. 63, 69.

[18] *In re Columbus Southern Power Company*, Case No. 07-63-EL-UNC, Opinion and Order at 3 (October 3, 2007).

[19] *In re Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Opinion and Order at 3 (April 10, 2006).

Commission on the record subject to the filing of initial and reply briefs."[20] The Companies' efforts that ignore the confines of the closed record should be rejected.

The Commission should strike the portion of the Companies' Reply Brief identified in this Motion to Strike.

Respectfully submitted,

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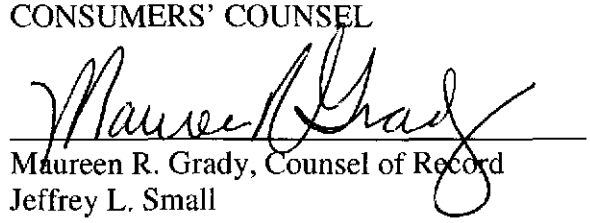

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[20] Remand Tr. V at 897.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served electronically to the persons listed below, on this 17th day of August 2011.

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