FILE

9

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 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**

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S MEMORANDUM CONTRA MOTION TO STRIKE FILED BY OHIO CONSUMERS' COUNSEL, OHIO PARTNERS FOR AFFORDABLE ENERGY AND INDUSTRIAL ENERGY USERS-OHIO

Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio") file this memorandum contra to the motion to strike filed by Ohio Consumers' Counsel ("OCC") Ohio Partners for Affordable Energy (OPAE) and the Industrial Energy Users-Ohio ("IEU") (collectively "Moving Parties") filed on August 17, 2011. The Moving Parties again reiterate the earlier confusion of the Commission's rulings and tariffs as extra record evidence and move to strike any reference to a comparison to other utilities as it did in its previous motions. The Moving Parties also seek to strike a reference to a footnote in a Commission ordered report in another case in the Commission's dockets as beyond the scope of the proceeding. The Commission

should deny the motion and if it desires, take administrative notice of its promulgated decisions and ordered report that are the source of the data sought to be stricken.

Specifically, the Moving Parties assert that AEP Ohio improperly included a comparison of its monthly POLR charge to other utilities' monthly charges for the POLR or default service obligation. The Moving Parties assert that this information should not be considered part of the record because it was not submitted as evidence during the course of the proceeding and not made available for cross-examination. The other information they seek to strike is from a Commission ordered audit report. The specific footnote deals with the acceptance of the Black Scholes model as an industry standard by an auditor that previously testified for OCC in the first phase of these proceedings before the remand challenging the Black Scholes model. The information is useful for the Commission's consideration in these cases and can be relied upon by the Commission unilaterally or after administrative notice if the Commission so chooses.

Industry Comparison of Charges

The Moving Parties first seek to strike a reference to a portion of AEP Ohio's reply brief that portrays the POLR charge of AEP Ohio in line with other Ohio electric distribution utilities. This matter is on the same subject matter as the previous motions to strike filed by the Moving Parties on August 10 and August 11, 2011. AEP Ohio will not restate all of the points in its memorandum contra filed on August 16, 2011, but rather incorporate all of the justification for the Commission's ability to use its own prior decisions and approved tariffs as it sees fit in its subsequent decisions overseeing the industry from that previous filing into this filing. (See August 16, 2011 AEP Ohio Memo Contra Motion to Strike).

As stated previously, the Commission has the authority to recognize its own decisions and the tariffs it approves. "It is settled that the published tariff, so long as in force, has the effect of a statute[.]" *Anthony Carlin Co. v. Nines* (1923), 107 Ohio St. 328, 333.[1] In essence, Moving Parties are objecting to a citation to a Commission issued document that has the standing of a statute. The Commission recognizes that it is "not an unusual or novel concept that the Commission, on its own motion, should take administrative notice of a public document, such as a tariff, that exists in its own records. Additionally, the tariff does not need to be explained by the Commission, but rather speaks for itself" *United Telephone Company of Ohio dba Embarq*, Case No. 07-760-TP-BLS (Entry on Rehearing dated February 13, 2008). In fact, the Commission has taken administrative notice of tariff provisions of other Ohio utilities for comparison purposes. *See In the Matter of the Complaint of Buckeye Linen Service, Complainant, v. Ohio Power Company*, Case No. 93-782-EL-CSS (Opinion & Order dated April 7, 1994) ("for purposes of comparison, the examiner took administrative notice of the tariffs of the following utility companies: Toledo Edison Company, Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, Columbus Southern Power Company, Dayton Power and Light Company, and Ohio Power Company").

---

[1] See also *Chesner v. Stewart Title Guar. Co.*, No. 1:06CV00476, 2009 U.S. Dist. LEXIS 22453, at *15 (N.D.Ohio Jan. 9, 2009) ("Ohio courts have held that the rate filings or tariffs,' once approved by the relevant overseer, 'have the force and effect of law.'") (quoting Barr v. Ohio Edison Co. (Feb. 25, 1995), 9th Dist. No. 16629); *Vorhees v. Jovingo*, 4th Dist. Nos. 04CA16, 04CA17 and 04CA18, 2005-Ohio-4948, ¶46 ("A tariff filed in accordance with the law has the force and effect of a statute."), appeal not allowed, 108 Ohio St.3d 1473, 2006-Ohio-665; *Carter v. American Teleph. & Telegraph. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) ("[A] tariff, required by law to be filed, is not a mere contract. It is the law.").

It is expected that the Moving Parties will reply to the responses incorporated by AEP Ohio in this memorandum in the same manner done in the joint reply filed August 18, 2011. (See August 18, 2011 Reply at 6). Moving Parties dismiss the position that a tariff is akin to a statute by arguing that the argument is a red herring. The above cited authority of the Commission stating that it treats its approved tariffs as statutes and that it takes notice itself of its tariffs because they speak for themselves is not a red herring. The Commission is free to refer to statutes, Court decisions, and its own prior decisions (including approved tariffs) as part of its overall oversight regulating the industry. Moving Parties' request to prevent the Commission from relying on its previous decisions is the red herring. The approved tariffs are appropriate for the Commission to rely on to compare to the other utilities. Any distinctions raised by Moving Parties between the treatment of the default service or provider of last resort charges between the different utilities is already understood by the Commission and can be relied upon with the Commission's discretion.

Interestingly enough the Moving Parties restate the precedential support of the Ohio American Water Company case (see footnote 6 on page 3 discussing Case No. 09-391-WS-AIR) as support for striking the use of Commission approved tariffs from other companies when that case denied a motion to strike FirstEnergy tariffs used by the Commission in the order. The Moving Parties do not seem to share the Commission's view of its approved tariffs and decisions as valid decisions to rely upon akin to a statute. The Commission interpretation is correct, decisions and approved tariffs are appropriate to rely upon at any stage in a proceeding including a Commission order.

Also in the August 18, 2011 filing, Moving Parties cite to the *Forest Hills Utility Company v. Pub. Util. Commission* Supreme Court of Ohio case to argue that the Commission cannot take judicial notice of facts gathered from its own records to conduct its own analysis after a hearing." (See Reply Memo August 18, 2011 at 5). The case cited by the Moving Parties is not applicable to these facts. In *Forest Hills*, the Court found that the Commission developed a new analysis based on annual reports not in the record to develop a new result in the case. The Commission provided an entirely new analysis that was not presented at hearing to reach an entirely different result. That is not the case with the comparative tariffs and orders in this case. AEP Ohio is not asking the Commission to change the charge approved or generate a new calculation as a result of this information. Here AEP Ohio simply cited to Commission approved documents as a means of reference to show the reasonableness of the costs and charges described throughout the hearing. The facts of the *Forest Hills* case simply are not comparable to the present cases and the simple reference to Commission approved tariffs.

The other citations in the August 18, 2011 Reply Memo are also likely to be used to reply to AEP Ohio's memorandum contra. Footnote 11 concerning the *Ormet* case also involves facts beyond the facts in these cases. (See Reply Memo August 18, 2011, footnote 11 at page 4) The reference to the 09-119-EL-AEC *Ormet* case involves press releases and company issued statements to be relied upon as evidence in the case. The same argument can be made concerning the nature of the information in the *Perry and Beaver Valley* case in footnote 10. (See Reply Memo August 18, 2011, footnote 10 at page 4). Clearly the information relied upon by the Moving Parties is different than an independently approved Commission order concerning tariffs.

The Moving Parties also cite to other cases to support its arguments, but those do not prevent the Commission from considering its approved tariffs. The Columbus Southern Power Company case cited in footnote 9 also includes arguments by OCC that the Commission is allowed to take notice at any time in the proceeding. (See *Re Columbus Southern Power Company*, Case No. 07-63-EL-UN, Opinion and Order at 5). While the Commission did not find the materials sought for notice deserved recognition in that case the Commission did end its discussion stating, "[t]he Commission notes that Commission proceedings are not stringently confined to the Rules of Evidence. *See Greater Cleveland Welfare Rights Organization, Inc. v. Public Utilities Comm' of Ohio*, 2 Ohio St.3d 62, at 68 (1982)." (*Id.*)

There are many good reasons for the Commission to deny Moving Parties' motion to strike the reference to other utilities' default or provider of last resort charges. First and foremost they are valid Commission orders that can be relied upon as law in any matter. Second, as stated in the August 16, 2011 Memorandum Contra the motion to strike the question of Duke's tariff was a point of confusion in the transcript. But most importantly is the fact that Moving Parties inappropriately question the very ability of the Commission to oversee the utility industry as a whole and take its previous decisions into account when carrying out its duty as regulator. Moving Parties motion to strike should be denied.

FAC Audit Report: Black Scholes Model Support

Moving Parties also seek to strike a portion of AEP Ohio's Reply Brief dealing with a former OCC witness' support of the Black Scholes model as filed in the audit report she was required by the Commission to file in the 10-286-EL-FAC et. al, cases

dealing with AEP Ohio's fuel audit (FAC Audit Report). Specifically, Moving Parties argue that it is improper to take notice of prior management audit findings and recommendations because they may be subject to reasonable dispute. (Motion to Strike at 4).

The Moving Parties miss the point of the inclusion of the citation in the Reply Brief. OCC in its initial brief cite to Ms. Medine to undermine the credibility of the Black Scholes model. AEP Ohio thought it interesting that her tune appeared to change in a report done at the order of the Commission after the prior statement was made. Specifically stating it was an industry standard. Throughout this proceeding the Commission has been presented with testimony and cross-examination questioning the appropriateness of using the model, the inputs into the model, and the fact that it is based on a European option and not an American option; all of these argument presented to attempt to undermine the usage of this award winning model. As the Moving Parties admit in the motion to strike, there is not an absolute right, nor an absolute prohibition against administrative notice and it is a case by case determination. (Motion to Strike at 5). In this case the notice is not being sought to adopt the extensive findings or recommendations from a lengthy previous management or audit report. Instead it is very focused on providing the Commission with a viewpoint on the application of a model currently under attack in these proceedings as a fringe option; and a point of view from the very same witness relied upon by OCC as recently as its initial brief in the remand proceeding. The Commission has the ability in this circumstance to weigh the witness' point of view against subsequent representations in a Commission ordered report. The fact that the quote did not apply to provider of last resort costs but instead to the

evaluation of coal purchase option agreements does not erase the fact that this model, criticized in this record, has value and is applied as a standard by AEP Ohio in other efforts.

Conclusion

The Commission is in the best position to determine the meaning of its own decisions and apply its decisions and report as it sees fit. The circumstances surrounding the approval charges for other utilities are known by the Commission and can be weighed as the Commission sees fit in its role as regulator. The consideration of the very model at the center of the debate in subsequent proceedings by witnesses previously attacking its value is also a matter appropriate for the Commission to consider. AEP Ohio respectfully requests the Commission to deny the motion to strike the information derived from Commission orders, approved tariffs, and Commission ordered reports and to the extent necessary take administrative notice for purposes of doing a comparison as the Commission sees fit.

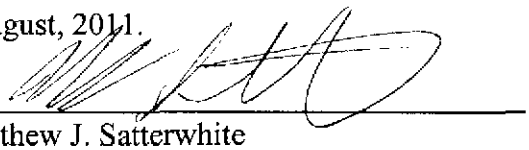
Respectfully Submitted,

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Counsel for Columbus Southern Power Company and Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Motion to Strike has been served upon the below-named counsel and Attorney Examiners via electronic mail this 24th day of August, 2011.



Matthew J. Satterwhite

sbaron@jkenn.com
lkollen@jkenn.com
charlieking@snavely-king.com
mkurtz@bkllawfirm.com
dboehm@bkllawfirm.com
grady@occ.state.oh.us
etter@occ.state.oh.us
roberts@occ.state.oh.us
idzkowski@occ.state.oh.us
dconway@porterwright.com
jbentine@cwslaw.com
myurick@cwslaw.com
khiggins@energystrat.com
barthroyer@aol.com
gary.a.jeffries@dom.com
nmoser@theOEC.org
trent@theOEC.org
henryeckhart@aol.com
nedford@fuse.net
rstanfield@nrdc.org
dsullivan@nrdc.org
tammy.turkenton@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com
drinebolt@aol.com
cmooney2@columbus.rr.com
sarah.parrot@puc.state.oh.us
ricks@ohanet.org
tobrien@bricker.com
david.fein@constellation.com
cynthia.a.fonner@constellation.com
mhpetricoff@vssp.com
smhoward@vssp.com
cgoodman@energymarketers.com
bsingh@integrysenergy.com
lbell33@aol.com
kschmidt@ohiomfg.com
sdebroff@sasllp.com
apetersen@sasllp.com
sromeo@sasllp.com
bedwards@aldenlaw.net
sbloomfield@bricker.com
todonnell@bricker.com
cvince@sonnenschein.com
preed@sonnenschein.com
ehand@sonnenschein.com
erii@sonnenschein.com
tommy.temple@ormet.com
agamarra@wrassoc.com
steven.huhman@morganstanley.com
dmancino@mwe.com
glawrence@mwe.com
gwung@mwe.com
stephen.chriss@wal-mart.com
lgearhardt@ofbf.org
cmiller@szd.com
gdunn@szd.com
greta.see@puc.state.oh.us