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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

REPLY TO MEMORANDUM CONTRA 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

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE"), and Industrial Energy Users-Ohio ("IEU," collectively with OCC and OPAE, "Moving Parties") reply to the memorandum contra ("Memo Contra") filed by Columbus Southern Power Company and Ohio Power Company (collectively, the "Companies" or "AEP Ohio") on August 24, 2011. The Companies' Memo Contra responded to a motion to strike jointly filed by the Moving Parties on August 17, 2011. The motion to strike applied to portions of the Companies' Reply Brief on Remand ("Reply Remand Brief") filed on August 12, 2011.

The portion of the Companies' Reply Remand Brief that is the subject of the motion to strike pertains to two statements. The first statement is the 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. Companies' Initial Merit Filing on Remand, at 19-20." The second statement is contained on page 25, along with accompanying footnote 6: "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 material found in the Companies' Reply Remand Brief that is complained of was not offered by the Companies at the hearing through either a request for administrative notice or through prefiled or live testimony. The material 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. Thus, the Moving Parties had no opportunity to challenge the correctness of these claims or provide evidence to demonstrate the unreasonableness of the conclusions the Companies attempt to draw from the information presented in their Reply Remand Brief.

As a result, such information should not be relied upon by the PUCO as a basis to make a decision regarding provider of last resort ("POLR") charges. To consider the material submitted in the Companies' Reply Remand Brief with the Moving Parties unable to rebut and respond to the material would be highly prejudicial to their cases. The Commission should grant the Moving Parties' Motion to Strike and should refrain from taking judicial notice of such material.

II. ARGUMENT

At this late date, when the record in this proceeding is closed, the Companies ask that the PUCO take administrative notice of "its promulgated decisions and ordered report that are the source of the data sought to be stricken."[1] Apparently, as of August 24, 2011, the request for administrative notice has now been expanded beyond the confines of what was originally asked to be noticed—the tariffs of DP&L and Duke, and the audit report footnote. Now the administrative notice sought appears to extend to the "promulgated decisions" of the PUCO related to the approved tariffs of Duke and DP&L which are alleged to contain "POLR" charges "in line" with AEP Ohio's POLR. The Companies claim 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."[2] The Companies' request for administrative notice appears to be a belated recognition that introducing new material as "evidence" in their Reply Remand Brief is inappropriate and needs some legal justification.

The Companies, however, have not shown any legal justification for allowing the material to be administratively noticed. Under Ohio Rule of Evidence 201,[3] administrative notice is confined to adjudicative facts that are not subject to reasonable dispute. The Court has emphasized that whether notice should be taken depends upon the facts presented,[4] and has declared that factors the Court deems significant include

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[1] Companies' Memorandum Contra at 2 (August 24, 2011).

[2] Id.

[3] 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.

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

"whether the complaining party had prior knowledge of, *and had an adequate opportunity to explain and rebut, the facts administratively noticed.*"[5]

The Companies' Memo Contra, nonetheless, ignores these factors. The Companies do not explain how the Moving Parties have been afforded an opportunity to explain and rebut the facts they seek to notice. Indeed, by waiting until the reply brief (and later for the PUCO Orders asked to be noticed as of August 24, 2011), after the record has been closed, the Companies seek to deny the Moving Parties this very opportunity. The Companies' unusual and inappropriate tactics should be rejected, and the Commission should, consistent with its own precedent and that of the Ohio Supreme Court, grant the Motion to Strike and deny the requests for administrative notice.

Doing so would be consistent with the Ohio Supreme Court's rulings on parties' undeniable right to confront assertions of fact which may become the basis for a decision on the matter. Indeed, the Ohio Supreme Court has recognized the importance of allowing parties an opportunity to explain and rebut facts administratively noticed.[6] In *Forest Hills Utility Company v. Public Utilities Commission*[7] the Court ruled that interested parties must have an opportunity to explain and rebut "evidence" that is to be the basis for a decision, holding that "[e]ven though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision on findings of 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*

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[5] *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).

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

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

opportunity to explain and rebut."[8] Although the Companies argue that the facts of *Forest Hills Utility Co.* are not comparable to the present cases,[9] *Forest Hills* nonetheless establishes the legal standard that is applicable to the pending motion to strike--a party must have a right to explain and rebut evidence that is subject to administrative notice. And the parties here were deprived of that right by the Companies' willful and deliberate disregard of this judicial tenet.

The PUCO on its own has embraced this judicial tenet and has confirmed that parties must be afforded the opportunity to explain and rebut evidence that is subject to administrative notice. It has refused to grant judicial notice when requested at the briefing stage, due to the lateness of the request.[10]

Although the Companies dismiss this precedent as involving information that is different than an independently approved Commission order concerning tariffs,[11] their claims should be disregarded. Whether a particular utility's tariffs relate to comparable charges at another utility cannot necessarily be discerned from the face of the tariffs. The filed tariffs do not explain the nature of the DP&L "rate stabilization" charge or the Duke "SRA-CD" and "SRA-SRT" charges.[12] Here the tariffs do not necessarily speak for themselves on the subject of the POLR charges, but need explanation in order to

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[8] Id. (emphasis added).

[9] Companies' Memo Contra at 5.

[10] See e.g. *In Re Columbus Southern Power Company*, Case No. 07-63-EL-UNC, Opinion and Order at 3 (October 3, 2007); *In re Perry and Beaver Valley Nuclear Power Stations*, Case Nos. 88-170-EL-AIR, et al., Rehearing Entry at 53 (March 28, 1989); *In re Unique Arrangement for Ormet*, Case No. 09-119-EL-AEC, Entry on Rehearing at 4, ¶(8); *In re Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Opinion and Order at 3 (April 10, 2006).

[11] Companies' Memo Contra at 5.

[12] The first time these so called "POLR" tariffs were identified was in response to OCC's and OPAE's Motion to Strike. Neither the Companies' briefs, nor their initial remand filing provided any citation to the specific tariffs referred to as Duke and DP&L's "POLR" charges.

determine whether the DP&L and Duke charges identified by AEP Ohio equate to similar POLR charges proposed by the Companies.

Similarly, a footnote attributed to an audit report in an unrelated proceeding is not self explanatory, let alone relevant to any issue before the PUCO on remand. While the Companies appear to offer the audit report material because it is "interesting" that Ms. Medine's "tune appeared to change" and the PUCO should weigh Ms. Medine's earlier espoused point of view[13] against this subsequent representation,[14] its arguments should fail. The audit report footnote in the Reply Remand Brief appears to refer to using the Black Scholes model to price coal options. It does not address whether Black Scholes is an appropriate modeling tool to evaluate the cost to the Companies of being ready to accept returning customers. These are two separate and distinct issues. The Commission should be concerned about whether the Black Scholes model should be used to evaluate POLR—not about what its auditor in a separate fuel case proceeding has to say about the Black Scholes formula and its use in pricing coal options.

The Companies focus on the Commission's ability to take administrative notice of its own decisions and tariffs, and its ability to weigh a witnesses' point of view against the witnesses' subsequent representations in a Commission ordered report.[15] The Companies, however, ignore the appropriate conditions under which administrative notice can be taken. Those appropriate conditions were not met here. The Moving Parties were not given the opportunity to explain and rebut the facts now being sought to be judicially noticed.

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[13] Ms. Medine opposed the use of Black Scholes as a method to value POLR.

[14] Companies' Memo Contra at 7.

[15] See Companies' Memo Contra at 7.

Additionally, AEP Ohio offers no explanation for its behavior. There is no excuse for presenting outside the record "facts" in a reply brief (and later seeking administrative notice of such facts and more in a Memo Contra), when these facts were available during the evidentiary proceeding and the party chose not to introduce or seek administrative notice of such facts. As urged in the Moving Parties' August 17, 2011 motion to strike, the Commission should, in keeping with precedent, deny the request for judicial notice, especially since the material subject to the notice was known at the time of the hearing.

The Companies argue that there are many good reasons to deny the motion to strike and allege that the "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 a regulator."[16] The Companies cannot and do not cite to any portions of the four pleadings filed by the Moving Parties on this issue where the Moving Parties in fact questioned the ability of the PUCO. Such hyperbole should be summarily ignored. What Moving Parties question is why the Companies did not present the information, snuck in on their Reply Remand Brief, at the evidentiary hearing in this case.

In failing to present the information in a timely manner that would allow the intervenors to appropriately respond to it, the Companies disregard the procedural safeguards inherent in Commission practice and contained in Rule of Evidence 201. The Companies trample upon the basic and undeniable rights of the Moving Parties to confront "evidence" that may be relied upon by the PUCO. The policy requiring notice

[16] Id at 6.

and opportunity to be heard is particularly important in this case where millions of dollars are at risk for customers and where the information sought by AEP Ohio to be noticed is neither relevant nor indisputable.

The so-called POLR charges of other utilities over which AEP-Ohio seeks administrative notice were submitted to prove that AEP-Ohio's POLR charge is in the proper range for such a charge. Yet, the tariffs themselves are not self explanatory, and will confuse rather than assist the Commission.

For instance, the Companies refer to CSP's POLR being in line with other utilities' POLR charges and refer back to the Initial Merit Filing on Remand which lists the monthly POLR charges for DP&L and Duke. The charges characterized as DP&L "Monthly POLR" apparently relate to DP&L's "Rate Stabilization Charge." Under DP&L's tariffs, that charge is "intended to compensate DP&L for providing stabilized rates for customers *and* provider of last resort service."[17] Thus, the characterization of this approved and legally required charge as "POLR" is misleading. DP&L's Rate Stabilization Charge is explicitly a *combined* charge as stated in the tariff that does not separate out a POLR component.

Similarly, AEP Ohio's characterization of a Duke "POLR" is misleading as well. There is no explicit tariff that contains a charge labeled "POLR" for Duke[18] and the rate listed in the Companies' Initial Merit Filing, referenced in its Reply Remand Brief, does not correspond to any stand-alone charge in Duke's current electric service tariffs. While it appears that the Companies are alleging that Duke's "SRA-CD" and "SRA-SRT"

[17] Id., Attachment 1, reproducing DP&L's Electric Generation Services Tariffs, PUCO No. 17, Electric Generation Service Rate Stabilization Charge, Second Revised Sheet No. G25.

[18] Id., Attachment 2.

charges equate to POLR,[19] there is no evidence in the record that supports such a claim. Indeed when the issue was raised on cross-examination, the Companies had a clear opportunity to validate such a claim but did not. While the Companies try to argue that Duke's tariff "was a point of confusion in the transcript"[20] this merely confirms the reason the information cannot be dumped into the record via a brief. There is no clear tie in between the SRA-CD and SRA-SRT tariffs of Duke and the POLR charge being proposed by the Companies.

While the Companies claim that any distinctions between the POLR charges for itself and Duke and DP&L is "already understood by the Commission and can be relied upon"[21] they concede that the Commission will have to draw from information outside the record in the remand hearing (and apparently the tariffs themselves) to decide whether the tariffs demonstrate what the Companies claim. The suggestion that the Commission can expand the record by including materials outside the record and then use those outside the record materials to make findings of fact violates R.C. 4903.09 and flies in the face of good or legal administrative practice.

Additionally, the charges characterized as POLR charges for DP&L and Duke -- even if they were in some manner comparable to AEP Ohio's POLR risks and costs (a disputed matter) -- were provisions that formed part of an overall approach to rates in

[19] See Companies' Memo Contra at Attachment 2.

[20] Companies' Memo Contra at 6.

[21] Companies' Memo Contra at 4.

filed stipulations[22] that were later approved by PUCO orders.[23] By the very terms of the approved stipulations, they were submitted only for specific proceedings and not intended for use in any other proceeding (except for enforcement purposes).[24] Thus, using the stipulated tariff rates as precedent for purposes of this proceeding is inappropriate. The Companies, not surprisingly, do not address this part of the Moving Parties' arguments. Such silence can only be construed as recognition that there is no response that can be put forth to explain away AEP Ohio's inappropriate use of stipulations.

By attempting to slide "facts" regarding the Duke and DP&L rates in through their Reply Remand Brief, the Companies would have the Commission accept as "true" assertions that were questionable at best, wrong at worst, and certainly a violation of proper management of the case record. As the Commission is well aware, each case presents a unique record -- with facts, experts, and legal arguments. A case-by-case determination is appropriate in a rate-setting that fits the circumstances of the utility under consideration. Issues in this case regarding the POLR charge should be determined based upon facts within the record in this case, as required under R.C. 4903.09. Material pertaining to values for various charges located in the tariffs of other electric distribution utilities should not be relied upon, especially under circumstances where those values were established by stipulations. The Commission should grant the motion to strike the non-record material presented by AEP Ohio in its Reply Remand Brief, and ignore the

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[22] *In re DP&L ESP Proposal*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation at ¶3, ¶35 (February 24, 2009); *In re Duke ESP Proposal*, Case No. 08-920-EL-SSO, Stipulation and Recommendation at 2 (October 27, 2008).

[23] *In re DP&L ESP Proposal*, Case No. 08-1094-EL-SSO, Opinion and Order (June 24, 2009); *In re Duke ESP Proposal*, Case No. 08-920-EL-SSO, Opinion and Order (December 17, 2008).

[24] *In re DP&L ESP Proposal*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation at ¶35 (February 24, 2009); *In re Duke ESP Proposal*, Case No. 08-920-EL-SSO, Stipulation and Recommendation at 2 (October 27, 2008).

Companies' material. The Companies' belated request for administrative notice of the material should likewise be rejected.

III. CONCLUSION

The record closed on July 28, 2011, at the end of the rebuttal phase of the hearing. Hearing Examiner Parrot confirmed that "these cases shall be submitted to the Commission on the record subject to the filing of initial and reply briefs."[25] The portion of the Companies' Reply Remand Brief that is subject to the motion to strike ignores the confines of the closed record and should not be considered in the Commission's deliberations. The Commission should strike the portion of the Companies' Reply Remand Brief identified in the motion to strike. Additionally, the PUCO should decline to take administrative notice of the materials mentioned.

Respectfully submitted,

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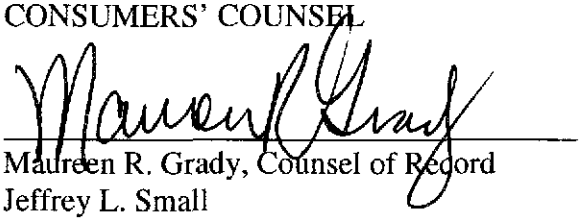

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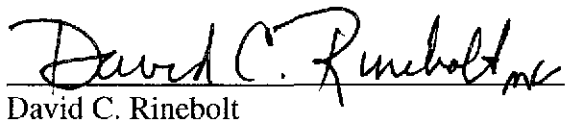
[25] Remand Tr. V at 897.



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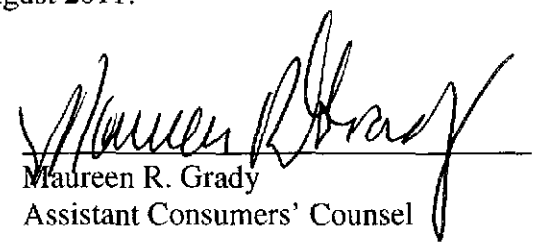
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served electronically to the persons listed below, on this 29th day of August 2011.



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