

**FILE**

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**Case No. 08-918-EL-SSO**

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As a threshold matter, the factual premise of the OCC/OPAE and IEU positions is wrong to the extent they portray the POLR increase authorized in the ESP Order as being the total amount instead of the incremental increase authorized. AEP Ohio's existing rate plan prior to the *ESP Order* (i.e., the Rate Stabilization Plan) included a POLR charge and the increase authorized in the *ESP Order* went from approximately \$52 million annually to approximately \$152 million annually, not from zero to \$152 million; thus, the POLR increase at that time was approximately \$100 million, not \$152 million.<sup>1</sup>

The intervenors offer conflicting statements in this regard, further demonstrating the lack of clarity with respect to this dispute. On the one hand, IEU offers (at 6) that "there is no basis for stating that the increase in POLR charges had any connection to the pre-ESP charges in the RSPs." On the other hand, OCC/OPAE make the following statement regarding the relationship between the new and old POLR charges (internal citation omitted): "The Companies fail to consider that the total POLR charges approved by the Commission in the *First AEP Ohio ESP Case* were not unrelated to the 2008 'POLR' rates." Removing the double negative, this statement asserts that the ESP Order's increased POLR charge is related to the pre-ESP POLR charge.

OCC/OPAE further correctly acknowledge the incremental POLR increase by stating (at 5) that the POLR charge approved in the ESP Order "consisted of an add-on to the 2008 'POLR' rates." Obviously, saying the ESP Order's increased POLR charge is an add-on to the prior POLR charge acknowledges the reality of AEP Ohio's position that the incremental POLR charge is an add-on to the prior POLR charge. And backing out that increase means that the add-on is subtracted out – thus leaving the pre-ESP POLR

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<sup>1</sup> Due to the intervening changes in billing determinants applicable to the POLR charge implemented by the 2009 ESP Order, the current full and incremental POLR charge revenue amounts are different. But these numbers can be used for discussion of the issues.

charge. OCC's attachment of Exhibit DMR-5 from the testimony of AEP Ohio witness Roush only serves to bolster this point. As can be plainly seen from Exhibit DMR-5, the increased POLR charge proposed by AEP Ohio was merely an incremental increase to the existing revenue generated from the pre-ESP POLR charge.

OCC/OPAE describe the Remand Order as requiring the Companies "to back out the amount of POLR charges from rates that customers pay." OCC/OPAE Memorandum in Support at 2. Using different language than the Remand Order is necessary because the actual language used by the Commission does not support OCC/OPAE position. In assessing the evidence submitted by AEP Ohio in support of the POLR charge, the Commission's finding was that the Company "failed to present evidence of its actual costs and has not justified recovery of the POLR charges *at the level reflected in its existing rates.*" Remand Order at 24 (emphasis added). In the "Overall Conclusion on POLR Rider" section of the order, the Commission found that "AEP Ohio's *increased POLR charges authorized as a part of the ESP Order* are insufficiently supported by the record on remand." Remand Order at 33 (emphasis added). Most directly of all, the Commission found that "AEP Ohio *should back out the amount of the POLR charges authorized in the ESP Order* and file revised tariffs, consistent with this order on remand." *Id.*

AEP Ohio pointed out in its October 6 cover letter that the Commission's finding regarding "backing out" the authorized increase had to be read in the context of the litigated disputes being addressed. IEU mischaracterizes AEP Ohio's position in this regard as suggesting "that the Commission was agreeing to waive its authority to set the proper rates following the remand hearing." IEU Objections at 5. On the contrary, AEP

Ohio was simply pointing out that the Commission understood the jurisdictional debate between incremental versus full POLR charge and had indicated its intention to resolve it as part of the merit decision on remand – a position that AEP Ohio can support with documentation (as follows).

In response to the Commission’s original May 4, 2011 Entry that ordered AEP Ohio to “remove the POLR charges” from its tariffs, AEP Ohio filed an application for rehearing challenging the Commission’s legal authority and basis to eliminate the POLR charge. Indeed, in asking the Commission to instead either hold the tariffs in abeyance or prospectively convert them to being subject to refund, AEP Ohio offered to withdraw its application for rehearing in order to avoid the improper result of summarily eliminating the POLR charge. The Commission’s May 25 Entry stated as follows:

The Commission notes that there is significant disagreement among the parties *as to the level of POLR charges at issue pursuant to the Court’s remand*. ... Upon further consideration of the issues raised by the parties to these ESP remand proceedings, we find AEP Ohio’s motion to make the currently effective tariff rates, subject to refund, to be a reasonable request *until the Commission specifically orders otherwise on remand*.

May 25 Entry at 3-4 (emphasis added). On the basis of the May 25 Entry ordering that the tariffs be prospectively converted to being collected subject to refund, AEP Ohio fulfilled its commitment and withdrew its application for rehearing.

Because the incremental versus full POLR charge reversal was vigorously contested among the parties, the Commission affirmatively recognized the dispute, indicating that it would specifically resolve the dispute. In this context, the Remand Order’s key finding that AEP Ohio should “back out the amount of the POLR charges authorized in the ESP Order” has clear meaning. It makes little sense to conclude that “backing out” an amount from a charge should be interpreted to mean that the charge

should be eliminated. It also makes little sense to conclude that removing the “amount of the POLR charges authorized in the ESP Order” means elimination of the entire POLR charge.

IEU also argues (at 2-3) that its “full POLR” interpretation is supported based on the conclusion on page 33 of the Remand Order which states regarding bypassability of the POLR charge that “Constellation’s arguments on this issue are moot, as customers will return to the Companies’ service at the standard service offer rate for the remainder of the term of this ESP.” Since the Remand Order did find (at 24) that AEP Ohio “has not justified recovery of POLR charges at the level reflected in its existing rates”, the associated provision adopted in the ESP Order to address the return risk regarding waiver of the POLR charge and returning at a market rate was also to be eliminated (and was eliminated in the Company’s proposed compliance tariffs). Because the waiver-and-return-at-market provision is being deleted, issues relating to customers returning at market rate was moot. As the Commission stated in its mootness finding, all shopping customers that return to the Companies’ service will pay the standard service offer rate during this ESP term (instead of a market rate). Thus, AEP Ohio’s proposed tariff already comports with this aspect of the Remand Order and it is not necessary to adopt “Version 2” of the tariff to achieve compliance. In any case, even under IEU’s interpretation of this mootness finding, this passage regarding bypassability is, at best, ambiguous and conflicting with the other language cited by AEP Ohio. Addressing such conflicting language is appropriate for rehearing, not for a compliance tariff.

In addition to the direct language used in the Remand Order itself, the ESP Statute that governs both the ESP Order and the Remand Order, R.C. 4928.143, also confirms

AEP Ohio's reading of the Remand Order. The ESP statute contemplates that the ESP plan is comprised of rate adjustments to the prior rate plan, not as a wholly new plan "from scratch" each time. The Commission has previously confirmed in the context of the SEET provisions in the ESP statute that the rate adjustments authorized under an approved ESP are the increased earnings. In other words, the total of the rate adjustments is the increase awarded under an ESP and caps the limit of being returned under the significantly excessive earnings test. The Commission has confirmed this reading of the SEET provision in its June 30, 2010 Finding and Order in Case No. 09-786-EL-UNC (*SEET Investigation*) at page 30, by concluding that the phrase "in the aggregate" in the SEET provision of the ESP statute refers to the total of any adjustments resulting from the ESP and not cumulative earnings. The Commission's decision in the SEET docket further clarified (at 30-31) as follows:

[T]he Commission finds that the amount of adjustments eligible for refund will be the value of the adjustments in the current year under review compared to the revenues which would have been collected had the rates from the electric utility's previous rate plan still been in place. For these reasons, we adopt the recommendation of the Staff as to the meaning of "in the aggregate."

In its August 25, 2010 Entry on Rehearing in the *SEET Investigation*, the Commission further clarified (at 5) that:

In considering the electric utilities' arguments regarding revenue information from the prior rate plan and deferrals, we find that it is well within the Commission's discretion to require the electric utilities to provide information on the revenues from the prior rate plan and deferrals under the ESP, as such is reasonably related to the Commission's determination of whether the utility's ESP results in significantly excessive earnings, and if so, the amount of return to customers.

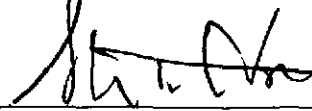
Hence, the Commission has interpreted the SEET provisions of the ESP as measuring the incremental earnings produced by the rate adjustments of the ESP as compared to the

prior rate plan's revenues. Indeed, as part of AEP Ohio's 2009 SEET case, the Company presented the earnings associated with the incremental POLR charge only (*i.e.*, excluding the pre-ESP POLR charge). *See* Direct Testimony of Thomas E. Mitchell (September 1, 2010) at 7. AEP Ohio's use of the incremental POLR as one of the rate adjustments that produced earnings under the ESP was not modified or adjusted in the Commission's decision in Case No. 10-1261-EL-UNC. This is the same context and understanding reflected in AEP Ohio's interpretation of the Remand Order.

### **CONCLUSION**

In sum, neither OCC/OPAE nor IEU set forth a persuasive argument as to why the language used by the Commission in the Remand Order supports their position. Rather, they set forth arguments as to why they believe the full POLR charge should have been eliminated (versus backing out the incremental increase). The rehearing process is the only appropriate phase for the Commission to reconsider its decision or entertain proposed modifications to the order. AEP Ohio submits that it would be inappropriate for the Commission to change its order in the compliance tariff phase of this proceeding – and such action would likely foster additional legal challenges to the decision. Accordingly, AEP Ohio respectfully opposes the OCC/OPAE motion to adopt version 2 of the compliance tariffs and IEU's objections.

Respectfully Submitted,



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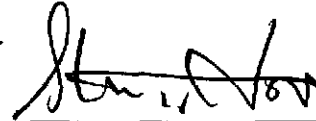
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## CERTIFICATE OF SERVICE

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 has been served upon the below-named counsel and Attorney Examiners via electronic mail this 19<sup>th</sup> day of October, 2011.



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