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

MEMORANDUM CONTRA AEP OHIO'S APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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TABLE OF CONTENTS

PAGE

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 1.4 million residential electric customers of the Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP")(together "Companies" or "AEP Ohio"), and Ohio Partners for Affordable Energy, an Ohio non-profit corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans, file this memorandum contra the Companies' Application for Rehearing of the October 3, 2011 Opinion and Order ("Remand Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding. This Memorandum Contra is filed to prevent AEP Ohio from denying a return of $78 million to customers that the PUCO required in its Remand Order in these cases.

I. INTRODUCTION

On October 3, 2011, the PUCO issued an Opinion and Order ("Remand Order") in response to a recent Ohio Supreme Court decision[1] remanding issues back to the PUCO which were reversed on appeal to the Supreme Court. The PUCO's Remand Order permitted CSP and OP to retain environmental carrying charges collected subject to refund and continue its collection of incremental capital carrying charges that were incurred after January 1, 2009, on past environmental investments not previously reflected in rates.[2]

However, with respect to provider of last resort ("POLR") charges the PUCO found that AEP Ohio had not provided any evidence of its actual POLR costs; the unconstrained option model does not measure POLR costs; and migration risk is not properly part of a POLR charge.[3] Consequently, the Commission found that AEP-Ohio's increased POLR charges authorized as part of the original ESP Order[4] were not supported by the record on remand.[5] Accordingly, the PUCO ordered AEP to exclude the amount of POLR charges authorized in the ESP Order and file revised tariffs so that customers would not be charged for these amounts.[6]

In response to the Remand Order, AEP Ohio filed two sets of tariffs. AEP Ohio proposed that the Commission approve tariffs which allowed it to retain what it alleged to

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[1] *In re Columbus Southern Power Co.* (2011), 128 Ohio St.3d 512.

[2] Remand Order at 15.

[3] Remand Order at 33.

[4] *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 Nos. 08-917-EL-SSO et al., Opinion and Order (Mar. 18, 2009).

[5] Remand Order at 33.

[6] Id.

be pre-existing POLR revenues embedded in rates. Intervenors, Industrial Energy Users, OCC, and OPAE filed motions urging the Commission to adopt the alternative tariffs which eliminated all POLR charges completely. On October 26, 2011, the Commission issued a Finding and Order approving the alternative tariffs which completely eliminated all POLR charges being collected from AEP Ohio's customers.

AEP sought rehearing of both the Remand Order and the October 26, 2011 tariff order, citing six grounds for error. Intervenors filed Applications for Rehearing as well. For the reasons set forth below, AEP Ohio's Application for Rehearing should be denied.

II. ARGUMENT

A. The Commission Correctly Determined That The Companies Failed To Present Evidence Of Actual POLR Costs. Its Findings Are Lawful, Reasonable, And Supported By The Record. (Companies' Claim 1)

The Companies argue that in ruling that they failed to present evidence of actual POLR costs, the PUCO based its decision in part on its belief that it would have been reasonable for AEP Ohio to undertake an ex post analysis of its POLR costs.[7] According to the Companies, this is wrong and inconsistent with the nature of POLR.[8] The Companies insist that there is no evidence in the record that it was possible for AEP Ohio to conduct an ex post analysis of POLR.[9] Additionally, the Companies allege that an ex post analysis is inconsistent with the fact that POLR risks are undertaken at the beginning

[7] Application for Rehearing at 1 (Nov. 2, 2011).

[8] Id.

[9] Id at 1-2.

of an ESP.[10] An ex ante approach to POLR is the proper approach they argue, because it allows customers the ability to know the POLR costs up front so they can plan ahead.[11]

Additionally the Companies argue that POLR may be justified for reasons other than actual costs.[12] For instance they claim R.C 4928.143(B)(2)(d) justifies POLR since POLR allegedly would have the effect of stabilizing or providing certainty.[13] The Companies claim that testimony fully supports that POLR stabilizes and provides certainty from the standpoint of both the Companies and retail customers.[14] The Companies complain that the PUCO did not address this argument because it was "belatedly made"(on brief alone) and characterize the refusal to address the issue as arbitrary and unreasonable.[15]

The PUCO must make findings of fact based on the record before it. The record is created by evidence put forth by the parties to the record. In this proceeding, AEP Ohio had the burden of proving that the POLR charges previously approved by the PUCO, as part of an electric security plan, were supported by evidence.[16] The Supreme Court put AEP Ohio on notice that there were at least two ways the Commission could consider the POLR charge on remand: as either a non-cost based POLR charge or by way of evidence of AEP Ohio's actual POLR costs.[17] AEP Ohio chose the later approach

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[10] Id at 2-3.

[11] Id.

[12] Id at 4.

[13] Id.

[14] Id at 5.

[15] Id at 4.

[16] See R.C. 4928.143(C)(1), specifying that the burden of proof in the ESP proceeding rests upon the utility.

[17] *In re Application of Columbus Southern Power Co.* (2011), 128 Ohio St.3d 212, 219.

and attempted to argue that the costs of POLR were lost revenues measured on an ex ante basis through modeling. AEP's approach that modeled costs are equal to actual costs was thoroughly rejected. The Commission rightly determined that the costs of POLR must reflect "some definite and concrete component that is able to be quantified and verified through the Companies' books, records, receipts, or other tangible documentation."[18] This conclusion was the very same conclusion that OCC and others reached. It is a conclusion that is supported by evidence in the record.

The Companies complain that an ex post facto examination could not have been done. The Companies simply chose not to present such information because it would have shown that the costs of POLR are de minimus, and, if they exist at all, they are already recovered by means of the SSO[19] rates and the fuel adjustment clause.[20]

As for an ex ante approach being a "proper" approach, and being in line with setting the ESP rates in advance, an ex ante approach *at this time* and under the present circumstances was rejected. First, as the Commission recognized, in the third and final year of the ESP, and for purposes of the remand, an ex post analysis of the Companies' POLR charge would have been reasonable to undertake.[21] It would have addressed the Court's concern as to whether AEP Ohio would actually expend $500 million to bear the POLR risk. The Commission's ruling thus was limited to the circumstances presented.

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[18] Remand Order at 23.

[19] OCC Remand Ex. 1 at 12.

[20] Id at 12-14.

[21] Remand Order at 23.

Second, the rationale that an ex ante approach must be used because there is a need for certainty in pricing, is undermined by the current structure of the Companies' ESP. A major component of the ESP relates to the fuel adjustment charge. That charge is not set on an ex ante basis, but on an ex post basis. That charge is not known by customers ahead of time, and yet the Companies proposed the FAC as part of the electric security plan. If customers really needed certainty in pricing, the FAC would either not be part of the ESP or would need to be fixed, ex ante. But the FAC, set on an ex post basis, is a major component of the ESP and this inconsistency shows the weakness of the Companies' arguments.

With respect to the argument that there is a non-cost basis for POLR under R.C.4928.143(b)(2)(d), the Commission correctly notes that the Companies offered no evidence to demonstrate that their POLR charges, if non-cost based, are reasonable.[22] Lack of evidence prevents the Commission from further considering the argument. And that lack of evidence was due to the Companies' failure to raise this issue, despite the plentiful opportunities that were present.

B. The Commission Correctly Determined That The Option Model Fails To Reasonably Measure POLR. Its Finding Was Lawful, Reasonable, And Supported By The Record. (Companies' Claim 2)

The Companies allege that the Commission erred in finding that the option model fails to measure POLR especially since the PUCO found the Companies have POLR risks and such risks can be recovered from POLR.[23] They claim that the PUCO's holding is predicated on the erroneous assumption that the Supreme Court of Ohio rejected the use

[22] Id at footnote 20.

[23] Application for Rehearing at 5-6.

of the model to measure POLR.[24] Rather, according to the Companies, the Supreme Court left open the alternative of allowing AEP to provide a reasonable estimate of the Companies' ex ante POLR costs.[25] Further, the Companies claim that PUCO is wrong in assuming that POLR costs must be out of pocket expenses.[26] Costs must be predicted at the start of the ESP and so ex ante costs must be used, which by their nature are not out of pocket costs.[27] Finally, the Companies allege that there is no evidence to suggest that alternatives were actually available for the Companies to manage POLR risks. Because the Commission found that POLR risks exist and that risks may be recovered through a POLR charge, the Companies believe it to be inconsistent with eliminating the entire POLR charge.[28]

While the Commission did find that POLR risks exist,[29] they properly rejected the Companies' calculation of those risks. They found that the Companies did not bear their burden of proof. Contrary to AEP Ohio's assertion, such a finding is not inconsistent with the finding that POLR risks are present. While POLR risks may be present, they must be shown to have some basis for collection from customers. The Companies failed to present an adequate basis and in doing so failed to meet their burden of proof.

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[24] Id. at 5.

[25] Id.

[26] Id. at 6.

[27] Id at 7.

[28] Id. at 8.

[29] Remand Order at 22.

C. The Commission Acted Within Its Discretion In Its Conduct Of The Remand Proceeding Where It Allowed The Scope Of The Remand To Include Defining POLR Risks. (Companies' Claim 3)

According to the Companies the PUCO exceeded its jurisdiction in concluding that an electric distribution utility's POLR risk does not include migration risk.[30] The Companies cite to the "law of the case" doctrine and claim that intervenors in their appeal did not raise the issue of whether POLR should include the risk of customers leaving.[31] Hence, they claim the prior ruling of the PUCO, where it determined migration risk was a part of POLR, remained the law of the case.

Additionally, the Companies argue that the PUCO's conclusion that Ohio Supreme Court defined the POLR risk as excluding migration is erroneous. Rather, the Companies characterize the Supreme Court reference in the *Constellation*[32] case as a "short hand reference" to the POLR obligation contained in a footnote in a 2008 decision, and not a "holding of the Court." Finally, the Companies attempt to distinguish the POLR obligation of the Companies from competitive retail electric supplier obligations.[33] The Commission's holding whereby it defines migration risk as a competitive risk shared by all providers is "plainly wrong," say the Companies.[34]

The Companies' revisionist history to preclude the PUCO from defining POLR to exclude migration risk should be rejected. When the Court's specific POLR remand language is scrutinized, it can be seen that the Court reversed the entire order authorizing

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[30] Application for rehearing at 8-13.

[31] Application for Rehearing at 9.

[32] *Constellation NewEnergy, Inc. v. Pub. Util. Comm*., 104 Ohio St.3d 530, ¶39.

[33] Application for Rehearing at 11-12.

[34] Id. at 12.

POLR: "Ruling on an issue without record support is an abuse of discretion and reversible error. Therefore, we reverse the provisions of the order authorizing the POLR charge."[35]

The Court was not selective about what POLR findings were being reversed; rather it ordered the Commission to start with a blank slate on POLR by reversing all the provisions of the order authorizing POLR. Included in the provisions of the order authorizing POLR were Commission findings as to where the "costs" of POLR come from. The Commission erroneously determined the Companies have some "risks" associated with customers switching to CRES providers and further determined that the POLR rider should be "based on the 'cost' to the Companies to be the POLR and carry the risks associated therewith, including the migration risk."[36] The Court, however, found that there was no evidence suggesting that the POLR charge is related to any costs that AEP Ohio will incur, despite the Commission's repeated references to the "cost" of POLR.[37] The Court also questioned the relationship between the risks of POLR and the costs.[38]

Following the Court's remand, the PUCO directed AEP Ohio, by Entry,[39] to make an appropriate filing if it determined to seek a non-cost based POLR charge or a POLR charge based on costs or seek to collect environmental charges. AEP Ohio responded by

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[35] *In re Application of Columbus Southern Power Company, et al*., 2011 Ohio 1788, ¶29 (citation omitted).

[36] *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, Opinion and Order at 40 (March 18, 2009).

[37] *In re Application of Columbus Southern Power Company, et al*., 2011 Ohio 1788, ¶25.

[38] Id. at ¶27.

[39] *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, Entry at ¶5 (May 4, 2011).

filing, on May 20, 2011, an "Initial Merit Filing on Remand." There, the Companies indicated they would present testimony that "further supports and explains the existence and magnitude of the POLR risks that it bears."[40] On June 6, 2011, the Companies filed their witnesses' testimony, including the direct testimony of Laura Thomas.[41] There Ms. Thomas addresses, among other things, the existence of POLR risks and includes in her testimony a definition of POLR that encompasses both switching and returning by customers. Remarkably, Ms. Thomas makes no reference to the PUCO Order that defined POLR.

Ms. Thomas' testimony was intended as a follow up to the Court's remand. Her testimony opened the door to testimony on the definition of POLR. Intervenors, including OCC and Industrial Energy Users, then rebutted Ms. Thomas' testimony by properly defining POLR to include the risks of customers' returning only, minus migration.[42] The Companies did not move to strike these statements in either IEU's or OCC's testimony. The Companies cannot be heard now to complain about the scope of remand when their own filings, which allegedly address the Court's reversal, confirm that the entire POLR definition is in play.

[40] AEP Ohio Initial Merit Filing on Remand at 6 (May 20, 2011).

[41] Companies' Remand Ex. 4.

[42] See OCC Remand Ex. 1 at 8-12; IEU Remand Ex. 1 at 12-13.

D. The Commission Acted Within Its Discretion When It Ordered The Elimination Of The Entire POLR Charge From The Tariffs. (Companies' Claim 4)

The Companies argue that when the Commission ordered the elimination of the entire POLR charge, it exceeded the scope of its jurisdiction.[43] The Companies maintain that a portion of the current POLR charge is attributable to a pre-approved POLR that was in place prior to the ESP order.[44] That portion of existing POLR charge approved in the rate stabilization plan cases was never open to challenge in this proceeding.[45]

The Companies' arguments should fail. The Commission was well within its jurisdiction when it ordered the removal of the entire POLR charge. The Companies fail to consider that the total POLR charges approved by the Commission in the March 18, 2009 ESP I Order were not unrelated to the 2008 "POLR" rates. A review of the record establishes that the total POLR charges sought (and eventually approved by the PUCO) consisted of an add-on to the 2008 "POLR" rates. Specifically, Exhibit DMR-5 shows the derivation of the revenue requirement requested for POLR as starting with the 2008 "POLR" charge and building upon that charge to achieve a proposed total revenue requirement for the POLR charge. Thus, leaving in the 2008 "POLR" charges for customers does not entirely remove the PUCO-approved POLR charges from the ESP rates that (as approved) included 2008 "POLR" costs.

It is also clear that in the ESP I Order the Commission granted the Companies' unavoidable POLR riders (meaning the charges under the riders cannot be avoided by customers even if they switch providers for their generation service). This result would

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[43] Application for Rehearing at 13-17.

[44] Id. at 13.

[45] Id. at 15-16.

allow the Companies to have an annual collection of "a POLR revenue requirement of $97.4 million for CSP and $54.8 million for OP," meaning customers would pay the Companies a total POLR of $152.2 million.[46]

The Companies' July 28, 2009 tariff filings and supporting work papers show that the POLR charge in rates is based on a POLR revenue requirement for CSP of $97,384,098. That revenue requirement, consistent with Schedule DMR-5, consists of a component for 2008 POLR "current rates" of $14,007, plus a non-FAC increase of $83,376,997.[47] Similarly, the Companies' July 28, 2009 tariff filings and supporting workpapers show that the POLR charge in rates is based on a POLR revenue requirement for OP of $54,801,769. That revenue requirement, consistent with Schedule DMR-5, consists of a component for 2008 POLR of $38,091,727 plus a non-FAC increase of $16,710,042.[48] Thus, the total POLR for AEP Ohio ($152,185,867) consists of a 2008 POLR component that amounts to $52,098,828. It is that piece of POLR that should be removed, consistent with the Commission's Order on Remand, so that Ohio customers do not pay it.

[46] ESP I Order at 38 (Mar. 18, 2009).

[47] Tariff Filing, Case Nos. 08-917-EL-SSO, et al, (July 28, 2009) at [60]. (“Summary of Requested Rate Increase.

[48] Tariff Filing, Case Nos. 08-917-EL-SSO, et al, (July 28, 2009) at [71].

E. The Commission's Elimination Of POLR, Despite Finding The Companies Had POLR Risks, Was Not Unreasonable And Unlawful Because The Companies Failed To Meet Their Burden Of Proving What The Out Of Pocket Costs Of POLR Were. (Companies' Claim 5)

The Companies argue that the Commission found that Companies have risks and costs associated with risks for being the POLR.[49] They allege that in light of such findings, "it is completely unreasonable for the Commission to now conclude that AEP Ohio should receive zero compensation for the POLR risks the law requires it to bear."[50]

While the Commission did find that POLR risks exist,[51] it properly rejected the Companies' calculation of those risks. The Commission found that the Companies did not bear their burden of proof. Such a finding certainly is not inconsistent with the finding that POLR risks are present. While POLR risks may be present, they must be shown to have some basis for collection from customers. The Companies failed to present an adequate basis and in doing so failed to meet their burden of proof.

F. The Commission's Order Approving The Tariffs Implementing The Remand Order Was Lawful. (Companies' Claim 6)

The Companies claim that the tariff approval order is unlawful because it circumvents the jurisdictional rehearing process and fails to set forth reasons prompting its decision. The Companies complain that the tariff order changes the effect of the Remand order, prejudging the issues on rehearing. Additionally, the Companies claim that the POLR tariff issue--full POLR out or maintaining pre-existing POLR-- was

[49] Application for Rehearing at 17.

[50] Id.

[51] Remand Order at 22.

resolved in the Remand Order,[52] and that in the Tariff Order the PUCO reversed itself, with no explanation, violating R.C. 4903.09.

There has been no circumvention of the jurisdictional rehearing process here, despite the Companies' claims otherwise. The tariffs approved by the PUCO in this proceeding are no different than tariffs approved in any other proceeding. Tariff approval prior to the resolution of rehearing requests is the normal sequence of events. If the Companies wanted to allow tariffs to remain unchanged pending rehearing, then they had options available to them, including the option of moving for a stay of Commission approval. They failed to take such action and cannot now be heard to complain that their rights on rehearing have somehow been compromised.

The Remand Order was not dispositive of the tariff issue. Contrary to the Companies' allegation the Commission did not resolve the POLR tariff issue on Remand. So there was no reversal from the Remand Order as the Companies claim.

III. CONCLUSION

The Commission should reject the Companies' Application for Rehearing. Instead the Commission should affirm its order that assures that customers are given back at least $78 million of the unlawful POLR collections. Indeed, to make customers whole, the entire unlawful POLR collections from April 2009 through May 2011 should be returned, as Customer Parties argued in their Application for Rehearing. Only then will the Commission completely undo the unlawful effects of its earlier ESP I order.

[52] Citing to the Remand Order at 24, 33.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Columbus Southern Power Company and Ohio Power Company's Application for Rehearing was served electronically to the persons listed below, on this14th day of November 2011.

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Summary: Memorandum Memorandum Contra AEP Ohio's Application for Rehearing by the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.