

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company, Individually and, if) Case No. 11-351-EL-AIR
Their Proposed Merger is Approved, as a) Case No. 11-352-EL-AIR
Merged Company (collectively, AEP Ohio))
for an Increase in Electric Distribution)
Rates.)

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company, Individually and, if) Case No. 11-353-EL-ATA
Their Proposed Merger is Approved, as a) Case No. 11-354-EL-ATA
Merged Company (collectively, AEP Ohio))
for Tariff Approval.)

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company, Individually and, if) Case No. 11-356-EL-AAM
Their Proposed Merger is Approved, as a) Case No. 11-358-EL-AAM
Merged Company (collectively, AEP Ohio))
for Approval to Change Accounting)
Methods.)

ENTRY ON REHEARING

The Commission finds:

- (1) Columbus Southern Power Company (CSP) and Ohio Power Company (Ohio Power) (collectively, AEP-Ohio) are electric light companies as defined by Section 4905.03(A)(3), Revised Code, and public utilities as defined by Section 4905.02, Revised Code. Applicants are, therefore, subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.
- (2) On February 28, 2011, AEP-Ohio filed applications seeking an increase in electric distribution rates, for approval of tariff modifications, and for approval of changes to certain

accounting methods. Ohio Consumers' Counsel (OCC) was granted intervention in the proceedings.

- (3) By Opinion and Order issued December 14, 2011, the Commission approved the applications submitted by the parties and modified and adopted by the Commission pursuant to a Stipulation and Recommendation. Thereafter, on December 15, 2011, the Commission issued an entry *nunc pro tunc* specifying, for clarity, the implementation date of one modification of the Stipulation and providing that the new tariffs would become effective on a bills rendered basis rather than a services rendered basis.
- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.
- (5) On January 14, 2012, Ohio Power¹ filed an application for rehearing regarding the Commission's December 14, 2011, opinion and order. In its application for rehearing, Ohio Power argues that the opinion and order is unreasonable and unlawful because it removes the pilot nature of the program and requires a permanent rate design based on revenue decoupling and because it prematurely adds reporting requirements concerning the success of the program.
- (6) On January 17, 2012, OCC filed an application for rehearing regarding the Commission's December 15, 2011, entry *nunc pro tunc*. In its application for rehearing, OCC contends that the December 15, 2011, entry *nunc pro tunc* is unreasonable and unlawful because it modified the terms of the stipulation by ordering adjustments to residential distribution rates, materially modified the terms of the stipulation by implementing Staff's rate design, and failed

¹ On December 14, 2011, the Commission approved the merger of Ohio Power and CSP. *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 10-2376-EL-UNC, et al., Opinion and Order (December 14, 2011).

to adopt the Stipulation's requirement that the existing rate design be in effect after the expiration of decoupling.

- (7) In its application for rehearing, Ohio Power argues that the opinion and order is unreasonable and unlawful because it removes the pilot nature of the program and requires a permanent rate design based on revenue decoupling and because it prematurely adds reporting requirements concerning the success of the program. Ohio Power argues that the Commission should clarify that the extension of the rider extends the financial mechanism for future use but does not permanently lock AEP-Ohio into the pilot decoupling structure.

In our December 14, 2011, opinion and order, the Commission determined that, because the Stipulation provided for the pilot revenue decoupling program, it was necessary to take additional steps beyond the Stipulation to ensure an adequate record be established to review the pilot program upon conclusion of its three-year period. Consequently, the Commission established reporting requirements regarding how to measure the success of the pilot program and extended the throughput balancing rider past January 2015. With respect to the reporting requirements, the Commission believes that it is reasonable to determine, at the outset of the pilot program, how to properly measure whether the pilot program is successful in order to fairly evaluate the pilot program at its conclusion. Therefore, in the opinion and order, the Commission directed the signatory parties to file a detailed proposal regarding the type of data proposed to be obtained, how that data will be obtained, and metrics to evaluate the success of the pilot program. We find that these are reasonable reporting requirements necessary for the evaluation of the pilot program. Accordingly, rehearing on Ohio Power's second assignment of error should be denied.

Further, with respect to Ohio Power's first assignment of error, the Commission believes that, at the conclusion of the three-year pilot program period, there will be some period of time necessary to evaluate the pilot program and

to determine whether revenue decoupling should be extended permanently or whether some other mechanism should be implemented. However, the Commission is concerned with the potential unforeseen impacts of abruptly ending the throughput balancing rider while the evaluation of the pilot program is being undertaken. Therefore, the opinion and order provides that the throughput balancing rider should be extended temporarily until such evaluation can be completed, unless otherwise ordered by the Commission. It is not our intent, at this time, to establish the throughput balancing rider on a permanent basis.

The Commission finds that, in light of its concerns with the Stipulation enumerated in the opinion and order, the resulting modifications were not unreasonable or unlawful and, further, that the Commission acted within its authority. Consequently, the Commission finds that Ohio Power's application for rehearing lacks merit and should be denied.

- (8) With respect to OCC's application for rehearing, the Commission will initially address the issue of the timeliness of OCC's application. Section 4903.10, Revised Code, provides, in pertinent part, that "[a]fter any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission."
- (9) However, OCC did not file its application for rehearing within 30 days of the Commission's December 14, 2011, opinion and order. Instead, OCC filed an application for rehearing with respect to the Commission's December 15, 2011, entry *nunc pro tunc*. Specifically, OCC argues that the December 15, 2011, entry *nunc pro tunc* modified the Stipulation so that AEP-Ohio's distribution rates would be adjusted, effective January 1, 2015, to rates which are consistent with the rate design recommended in the Staff Reports.

- (10) In our December 14, 2011, opinion and order, the Commission modified the substantive terms of the Stipulation, finding that:

The Stipulation provides that the existing residential rate design will continue without change. Therefore, the Commission finds that it is necessary to take additional steps, beyond the Stipulation, to ensure that an adequate record is established to review residential rate design at the conclusion of the three year pilot program. First, AEP-Ohio is directed to update its cost of service study, prior to the final year of the pilot program, and file the updated study in this proceeding. Interested parties will then be provided with an opportunity to comment upon the updated cost of service study. Second, unless otherwise ordered by the Commission, AEP-Ohio's residential distribution rates will be adjusted, on a revenue neutral basis, to rates which are consistent with the rate design recommended by Staff in the Staff Reports and which will provide the annual revenue requirement agreed to in the Stipulation. Finally, the throughput balancing adjustment rider will be extended past its proposed termination date in 2015 unless otherwise ordered by the Commission.

Thereafter, in its December 15, 2011, entry *nunc pro tunc*, the Commission corrected the fourth sentence in the above paragraph to read:

Second, unless otherwise ordered by the Commission, AEP-Ohio's residential distribution rates will be adjusted, *effective January 1, 2015*, on a revenue neutral basis, to rates which are consistent with the rate design recommended by Staff in the Staff Reports and which provide the annual

revenue requirement agreed to in the Stipulation. (Emphasis added.)

The Commission notes that change merely corrected the inadvertent omission of the specific effective date of the new rate design. It is clear from the context of the full paragraph in the original opinion and order that the additional steps ordered by the Commission, including the implementation of the new rate design, should occur “at the conclusion of the three year pilot program.” The entry *nunc pro tunc* simply stated explicitly that the “conclusion of the three year pilot program” would be January 1, 2015.

- (11) The Commission notes that App.R. 4(A) provides, in pertinent part, that “[a] party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed[.]” The Commission finds that Section 4903.10, Revised Code, and App.R. 4(A) are analogous for purpose of the proceeding discussion. In interpreting App.R. 4(A), the Supreme Court of Ohio has held that “[a] *nunc pro tunc* entry is the procedure used to correct clerical errors in a judgment entry, but the entry does not extend the time within which to file an appeal, as it relates back to the original judgment entry.” *Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 15, quoting *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, 907 N.E.2d 333, ¶ 15 (3d Dist.).

Additionally, the Supreme Court of Ohio and nearly every appellate district in Ohio have held that the only exceptions to this rule exist where the entry *nunc pro tunc* has created additional rights, denied an existing right, or the appeal stems from the entry *nunc pro tunc* instead of the original judgment entry. *Perfection Stove Co. v. Scherer*, 120 Ohio St. 445, 448-449, 166 N.E. 376 (1929); *State v. Crosby*, 12th Dist. Nos. CA2010-10-081, CA2011-02-013, 2011-Ohio-4907, ¶ 11; *Friedrich v. Honeywell*, 6th Dist. No. L-08-1300, 2009-Ohio-661, ¶ 10; *In re J.R.*, 8th Dist. No. 92957, 2009-Ohio-4883, ¶ 11; *Brush v. Hassertt*, 2d Dist. No. 21687, 2007-Ohio-2419, ¶ 10; *State v. Senz*, 9th Dist. No. 02CA0016, 2002-Ohio-6464, ¶ 19; *Endres Floral Co. v. Endres*, 5th Dist. No. 95AP120119, 1996 WL 488675 (June 24, 1996); *Griffin v. Mount Auburn*

Management Co., 1st Dist. No. C-860533, 1987 WL 18122 (Oct. 7, 1987); *State v. Taylor*, 3d Dist. No. 15-85-23, 1986 WL 12553 (Nov. 5, 1986).

- (12) The Commission finds that it is clear that the substance of OCC's assignments of error concern the merits of the modification of the Stipulation by the Commission in the December 14, 2011, opinion and order. OCC takes issue with the adoption of Staff's original proposed rate design upon completion of the three-year pilot program rather than the addition of the specific effective date contained in the December 15, 2011, entry *nunc pro tunc*. As discussed above, the Supreme Court of Ohio has held that an entry *nunc pro tunc* does not extend the time within which to file an appeal and that exceptions only exist where the entry *nunc pro tunc* has created additional rights, denied an existing right, or the appeal stems from the entry *nunc pro tunc* entry instead of the original judgment entry. See *Womack*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, at ¶ 15; *Perfection Stove Co.*, 120 Ohio St. at 448-449, 166 N.E. 376. Here, the Commission finds that the date clarification in the entry *nunc pro tunc* created no additional rights, denied no existing rights, and that OCC's application for rehearing stems from the original judgment entry, not the entry *nunc pro tunc*. Consequently, OCC's application for rehearing is untimely, as it was filed more than 30 days after the December 14, 2011, opinion and order and should be denied.
- (13) Nonetheless, the Commission finds that, even if OCC's application for rehearing was timely filed, it should be denied on its merits.

As stated above, OCC's application for rehearing first argues that the Commission erred in modifying the terms of the Stipulation by ordering "adjustments" to residential distribution rates effective January 1, 2015, without following the mandatory requirements of Section 4909.18, Revised Code. Specifically, OCC contends that the Commission's order contravenes Section 4909.18, Revised Code, because it adjusts AEP-Ohio's residential distribution rates without record support to demonstrate

that such adjustments will result in just and reasonable rates. Additionally, OCC argues that the Commission erred in materially modifying the terms of the Stipulation and ordering Staff's proposed rate design to become effective January 1, 2015, unless ordered otherwise. Finally, OCC argues that the Commission's adoption of the rate design set forth in the Staff Reports was unreasonable under the Commission's standards for review of settlements because it disregarded the carefully balanced compromise reached under the Stipulation.

- (14) It is well-established that the Commission is not bound by a stipulation. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). Consequently, the Commission may, and often does, modify the terms of a stipulation. See *Columbus Southern Power Co.*, Case No. 10-2376-EL-UNC, et al., Opinion and Order (December 14, 2011); *Northeast Ohio Natural Gas Corp.*, Case No. 10-209-GA-GCR, et al., Opinion and Order (October 26, 2011); *Ohio Power Co.*, Case No. 09-1873-EL-ACP, et al., Finding and Order (June 1, 2011).

Although the Stipulation provided that Ohio Power's existing rate design should be continued, the Commission noted in the opinion and order that Staff had originally recommended a rate design which included a customer charge designed to reflect distribution costs which are fixed and do not vary as a result of usage. Further, the Commission noted that, on four previous occasions, the Commission had determined that a straight fixed variable rate design was more appropriate for residential customers than a throughput balancing adjustment rider. Therefore, because the rate design originally proposed by Staff better reflected cost causation principles by collecting distribution costs which do not vary according to usage through a fixed customer charge, the Commission modified the Stipulation to provide for the implementation of the rate design proposed by Staff in the Staff Report. In doing so, the Commission acted pursuant to the ratemaking process set forth in Section 4909.18, Revised Code, and pursuant to the Commission's broad discretion with respect to rate design.

Ohio Consumers' Counsel v. Pub. Util. Comm., 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261, ¶ 20. Nonetheless, the Commission believed that it was appropriate to delay the implementation of the new rate design to allow the pilot revenue decoupling program to proceed as proposed by the parties. Consequently, the Commission directed that, upon conclusion of the three-year pilot program, the rate design originally recommended by Staff in the Staff Reports should be implemented on a revenue neutral basis. Opinion and Order at 10. In addition, in order to ensure that no customer was prejudiced by the delay in the implementation of the new rate design, the Commission directed AEP-Ohio to file an updated cost of service study prior to the final year of the pilot program for interested parties' review and comment. Thus, we find that OCC's claims that the Commission erred in modifying the Stipulation lack merit.

Moreover, the Commission finds that the Staff Reports submitted in the proceeding provided ample record support for the rate design ordered by the Commission. Staff Report, CSP, at 36-45; Staff Report, Ohio Power, at 35-45. Accordingly, the Commission finds that rehearing on OCC's first three assignments of error should be denied.

- (15) Finally, with respect to OCC's claims that the Commission disregarded the carefully balanced compromise reached under the Stipulation, it is well-established that the Commission is not bound by a stipulation and may modify the terms of a stipulation. *Consumers' Counsel*, 64 Ohio St.3d at 125, 392 N.E.2d 1370, citing *Akron*, 55 Ohio St.2d at 157, 378 N.E.2d 480. In fact, the Stipulation provides that, if the Commission does not adopt the Stipulation without material modification, any signatory party may file for rehearing and, if the Commission denies rehearing, may terminate and withdraw from the Stipulation within 30 days of the Commission's ruling on rehearing. Consequently, to the extent that OCC contends the Commission has disturbed the compromises reached under the Stipulation, its remedy is to terminate and withdraw from the Stipulation. Accordingly, rehearing on OCC's fourth assignment of error should be denied.

It is, therefore,

ORDERED, That the application for rehearing filed by Ohio Power be denied.
It is, further,

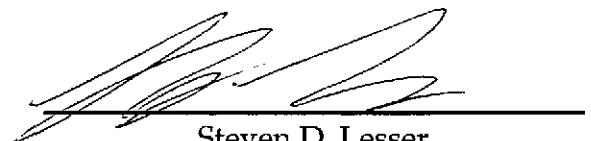
ORDERED, That the application for rehearing filed by OCC be denied. It is,
further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of
record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser


Andre T. Porter


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MLW/sc

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Barcy F. McNeal

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Secretary