

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of |) | Case No. 11-4920-EL-RDR |
| Columbus Southern Power Company for |) | |
| Approval of a Mechanism to Recover |) | |
| Deferred Fuel Costs Ordered Under |) | |
| Ohio Revised Code 4928.144. |) | |

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| In the Matter of the Application of Ohio |) | Case No. 11-4921-EL-RDR |
| Power for Approval of a Mechanism to |) | |
| Recover Deferred Fuel Costs Ordered |) | |
| Under Ohio Revised Code 4928.144. |) | |

**MEMORANDUM CONTRA MOTION TO STAY AEP OHIO'S COLLECTION
OF PHASE-IN RECOVERY RIDER RATES FROM CUSTOMERS BY
OHIO POWER COMPANY**

Introduction

On August 10, 2012, the Office of the Ohio Consumers' Counsel (OCC) filed a Motion to Stay Ohio Power Company's ("OPCo" or "Company") collection of the Phase-In Recovery Rider (PIRR). OCC cites to the August 1, 2012 Finding and Order in this case as the decision that the Commission failed to apply OCC's arguments leading to the collection of the PIRR. OCC's argument is misplaced, untimely and fails to satisfy the criteria for a stay of any proceeding.

OCC admits that it is appealing the very issues it asks the Commission to stay this Finding and Order in a completely different case before the Supreme Court of Ohio. As OCC indicates in its fourth footnote, that case is currently in Supreme Court of Ohio Case No. 2012-187. These arguments involve flow through issues argued by OCC that the Commission already denied and are not issues in the present case. Yet, it is exactly those issues that OCC raises as the reason to stay the Commission's Finding and Order in this

case. Despite the urgency claimed by OCC to seek an extraordinary remedy by the Commission, OCC has not filed for expedited treatment of its request and has yet to file an application for rehearing to seek changes in the Commission's ruling. The stay request is an untimely and otherwise inappropriate request.

The Commission should uphold its prior decisions and deny OCC's attempt to further undermine this and other orders of the Commission. The motion fails to satisfy the criteria for extraordinary actions, like a stay, and should be denied by the Court as an attempt to second guess the Commission's statutory authority to resolve utility matters.

OCC has not shown a strong likelihood of success on the merits

OCC attempts to take its appeal of another proceeding and claim that it is likely to succeed on the merits in this case on the off chance it is able to overturn a Commission decision in another case that seeks to overcome the *Keco* prohibition against retroactive ratemaking.¹ Indeed, the Supreme Court of Ohio already rejected OCC's argument as to the same underlying rate, AEP Ohio's prior POLR charge. *In re Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶¶ 16-21 (there is no right to a refund of rates collected unlawfully as the only remedy is stay of execution from the Supreme Court as part of an appeal). Under *Keco*, there is no retroactive remedy for rates that were charged pending rehearing and appeal and were subsequently determined to be unlawful. *Keco* addresses issues relating to a post-appeal remedy (or lack thereof) and does not restrict the Commission when initially establishing rates in a rate order. Despite this well-established policy in Ohio, OCC attempts to block the effectiveness of the Commission's rate order during rehearing and appeal.

¹ *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957).

The Commission determined the elements of the rate phase-in of its rate order in the original ESP proceedings and declined to make the adjustments sought by OCC and others in the remand proceedings of that case. (See the 08-917 *et al.* October 3, 2011 Remand Order at 34-36; December 14, 2012 Remand Entry on Rehearing at 17-18.) The case at hand is not a case determining the elements within the mechanism as OCC would have the Commission believe. The case at hand is merely carrying out the collection of the deferral defined in previous decisions.

The flow-through effects of asserted provider of last resort revenue on unrelated costs charged and deferred is not an issue in this proceeding. It is misguided for OCC to be seeking a stay based on decisions from other cases. OCC bases its request for a stay of the collection of the deferrals upon arguments from the appeal in Supreme Court Case No. 2012-187. Yet, OCC did not seek a Commission or Court stay of the October 2011 remand order that denied its flow through arguments it is now applying in this case. The Company is not suggesting that a stay is even appropriate in any of these proceedings based on OCC's arguments, but it is telling the OCC did not seek a stay in the actual case where the arguments are presented to the Commission and then later to the Supreme Court of Ohio when filing an appeal.

Even in that case the argument is without merit, as the Commission was clear in its orders in the remand proceeding that the arguments being applied from that case as a reason to stay this proceeding are nothing but attempts at retroactive ratemaking.² The

² Rather than restate all of the Company's arguments from the remand proceeding, the Company incorporates by reference all the justification for the Commission's order in that docket related to the flow through issues that the Commission relied upon in denying OCC and the Industrial Energy Users-Ohio arguments. See 08-917-El-SSO docket pleadings leading to the Remand Order and Remand Entry on Rehearing.

Commission was clear in its October 3, 2011 Opinion and Order (Remand Order) that it authorized AEP-Ohio to defer any FAC amount over the allowable total bill increase levels pursuant to R.C. 4928.144, and directed that any deferred FAC expense balance remaining at the end of 2011 is to be recovered via an unavoidable surcharge from 2012 to 2018. (Remand Order at 36.) The Commission found that it cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified. (Remand Order at 36; see also further justification in the December 14, 2011 Entry on Rehearing at 17-18.) As pointed out by the Commission, OCC is asking the Commission and now the Court to redefine the very nature of what is being collected in an attempt to work around the *Keco* prohibition against retroactive ratemaking and redefine the actions of the Commission in the original ESP proceeding to change the very nature of the expenses ordered collected and then how they are treated in the deferral. The Commission already considered the arguments of OCC and other parties raising similar arguments and denied them based upon the record in that case.

The arguments OCC seeks to stay the present order in this case are not involved in this proceeding and are without merit in the other appeal currently before the Court. OCC's strategy is to have the Commission facilitate OCC's efforts to undermine and reverse the Commission's decision through granting its stay request. There is no reason why the Commission should presume its decision is unlawful and grant a stay of execution. As such, the Commission should deny the request for a stay of its decision as requested by OCC.

OCC has not demonstrated irreparable harm absent a stay order

OCC asserts the irreparable harm in this case relates to the lack of an adequate remedy at law and restitution would be ‘impossible, difficult or incomplete.’ In support of its argument OCC cites to non-public utility appeals involving matters outside of the established R.C. Title 49 process governing public utility matters before the Commission and appealable directly to the Supreme Court of Ohio. To support a claim for irreparable harm, the OCC relies on the same case law offered by the OCC in its previous failed attempts to seek a stay of Commission orders before the Supreme Court of Ohio in Case Nos. 2009-1620 and 2009-2022. In those stay requests, OCC relied on the *Tilberry v. Body* (1986), 24 Ohio St. 3d 117, case and the *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158 cases that are again relied upon in this case.

Just as the Supreme Court did not grant stays in those proceedings, these cases do not support a stay in this case before the Commission. The *Tilberry v. Body* case dealt with the termination of a partnership leasehold. The Court stated “the sole issue presented for our determination is whether the trial court's judicial dissolution of the instant partnership is a final, appealable order pursuant to *R.C. 2505.02*.” *Tilberry* at 119. The Court was considering the case to determine if it qualified as a special proceeding with a right to an immediate appeal. The Court determined that disposition of the assets without first determining whether to follow the partnership agreement or the statute would result in irreparable harm and should be included in the recognition of the need for an appeal. The *Tilberry* case involved civil litigation and statutes governing the winding up of a partnership agreement and the individual interest each partner has when entering into the legal classification of a partnership. The Commission and its decisions are

governed by a different set of statutes that recognize the common occurrence of filed rates and their effectiveness once ordered until officially changed by the Supreme Court. The two legal classifications are simply not comparable.

Similarly, OCC's use of the Court's decision in *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158 is again misplaced. In *Sinnott*, the Court reviewed the finality of an order from an interlocutory appeal in a case involving an asbestos claim. The actual case dealt with the incurrence of unnecessary trial expenses serving as an injury when there was a question whether the plaintiffs satisfied a statutory prerequisite before trial. The facts before the Commission in this case do not involve a pretrial prerequisite that affects or determines the outcome of a case not yet adjudicated.

Public utility law is a unique area of law with a direct appeal to the Supreme Court of Ohio. With that unique area of law comes some process that must be respected. The Court in *Keco* made clear that a utility must collect the rates approved by the Commission and those rates are subject to a general statutory plan of regulation and collection is presumed lawful until such time as they are set aside as being unlawful or unreasonable by the Supreme Court. *Keco* at 257-259. The Commission should not disturb that rationale and find that there is irreparable harm to a situation just because a presumptive valid Commission approved rate is being charged and collected. OCC did not even feel the need to file its request for an expedited review process and has yet to file a rehearing application seeking to have the Commission reconsider its decision. OCC's actions do not back up the alleged gravity of the words filed. That is because it presents the same old argument on irreparable harm that strikes at the very structure of the General Assembly's process presuming that rates approved are valid until found

otherwise. The request for a stay falls short of the established standard for granting a stay and should be denied.

OCC has not demonstrated that its request to deviate from the presumption of the validity of Commission orders is in the public interest or does not cause substantial harm to other parties

Commission orders are presumed valid and disagreement with the outcome of the arguments presented, especially arguments from a different case entirely, is not a valid reason for a stay. The General Assembly has provided a direct appeal of issues from the Commission to the Supreme Court of Ohio, providing a more direct review of decisions and greater ability to reach final orders. This is based upon the statewide implication of Commission decisions and the number of citizens impacted by those decisions. The motion for a stay provides no reason why the Commission should consider its own decision recently issued to now be unlawful other than its individual disagreement. This is especially true where, as here, the Commission has already rejected OCC's underlying premise on multiple occasions. (Finding and Order at 20; Remand Order at 34-36.) Moreover, as referenced above, the Supreme Court has already proactively rejected OCC's attempt to recapture POLR revenue collections. *In re Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶¶ 16-21 Yet, that is the underlying assumption made by OCC in the request for stay. The duty to reach a decision does not include providing for advance remedies to address the improbable event that the Supreme Court on appeal may disagree, especially when doing so involves a conclusion by the Commission that its own order may be unlawful.

Disagreement with the outcome of a case is not an appropriate basis for the grant of a stay before the Commission and is not in the public interest. There is a provision for seeking a stay before the Court on appeal under R.C. 4906.16, but that too faces a high standard beyond disagreement with the Commission. The concern that rates may be overturned on appeal is not an adequate argument. If this were a valid argument for a stay then the laws prescribed by the General Assembly and the presumption that Commission orders are valid unless overturned by the Supreme Court would be without meaning. Otherwise each and every rate order of the Commission would be stayed by the Commission. The Court already determined that there is no automatic stay of any order, but there is a statutory process with a bond requirement that is available to any person aggrieved by an order. *Keco* at 258. Yet that is the standard OCC proposes and would be a standard applicable to every rate order. Such an approach would undermine the special responsibilities and discretion granted to the Commission by the General Assembly as recognized by the Supreme Court of Ohio. Undermining the purpose of the Revised Code is not in the public interest.

No special circumstances exist in this case for the Commission to doubt its order at this stage that would cause it to declare a stay of its own order. The General Assembly authorized a deferral of collection of cost and rates under R.C. 4928.144, but OCC now seeks to delay that collection even more. The Commission deferred the final collection of rates related to deferred costs dating back to 2009, and it is time for the Commission to carry out its approved order and not allow a party to further delay collection based on attempts to undermine or overturn Commission decisions. There is no reason for the Commission to deviate from the public interest and the procedures enacted by the

General Assembly. Finally in this regard, if the Commission does grant a stay and does not commence collection of the deferred fuel balance, it should provide for continues application of a WACC carrying charge during any period of delay in collection, in accordance wit the rationale discussed on page 18 of the Finding and Order.

Conclusion

For all of the reasons presented above and the reasons already found by the Commission in other incorporated decisions, Ohio Power Company respectfully requests that the Commission deny OCC's request for the extraordinary action of granting a stay of the Finding and Order and allow the order to remain in effect and the review and appeal process enumerated in the Ohio Revised Code by the General Assembly to continue uninterrupted.

Respectfully Submitted,

//ss// Matthew J. Satterwhite
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion has been served, via electronic service, to the counsel identified below this 17th day of August 2012.

/s/ Matthew J. Satterwhite

Matthew J. Satterwhite

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Summary: Memorandum Contra Motion to Stay electronically filed by Mr. Matthew J Satterwhite on behalf of American Electric Power Service Corporation