

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 31, 2012

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In order to ensure that residential consumers of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OPC") (collectively, "AEP Ohio" or "Utility")<sup>1</sup> receive adequate service at reasonable rates, the Office of the Ohio Consumers' Counsel ("OCC") files this application for rehearing in response to the Finding and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding on August 1, 2012. OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

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<sup>1</sup> Effective at the end of 2011, OPC and CSP (both of which were operating companies of AEP Ohio) merged, with OPC becoming the successor in interest to CSP. See *In re: AEP Ohio ESP Cases*, Case No. 11-346-EL-SSO, et al., OPC Application for Rehearing (January 13, 2012) at 2. The Commission approved the merger on March 7, 2012, effective December 31, 2012. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376- EL-UNC, Entry (March 7, 2012).

The Order authorized AEP Ohio to collect from its customers fuel expenses, plus interest, that were deferred from the Utility's first Electric Security Plan ("ESP"). The collection will occur through a Phase-In Recovery Rider ("PIRR"). The Order was unjust, unreasonable and/or unlawful in the following respects:

1. The Commission's failure to reduce the deferral balance, that customers will pay, to account for the flow-through effects of the remand of the ESP 1 Order was unjust, unlawful and unreasonable.
2. The Commission failed to order the PIRR to be collected subject to refund to customers, as OCC had requested in comments, and did not set forth the reasons for why the PIRR should not be collected subject to refund. The Commission thus violated R.C. 4903.09, which requires the Commission to issue a written opinion setting forth the reasons prompting its decisions in all contested cases.
3. By declining to reduce the deferrals for accumulated deferred income taxes, the Commission permitted AEP Ohio to collect unreasonable carrying charges from customers, in violation of R.C. 4905.22 and R.C. 4928.02(A).
4. The Commission violated R.C. 4903.09 by allowing AEP Ohio to collect deferrals from CSP customers, even though the record showed only that AEP Ohio had over-collected on fuel charges from CSP customers, and thus had no deferrals to collect from CSP customers.
5. The Commission violated R.C. 4903.09 by failing to explain why it did not order interest to accrue on AEP Ohio's over-collection of fuel charges from CSP customers, at the same rate AEP Ohio charges customers for deferred fuel costs.

The grounds for this application for rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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/s/ Terry L. Etter

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## **TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
I. INTRODUCTION .....	1
II. STANDARD OF REVIEW .....	2
III. ARGUMENT .....	3
A. The Commission’s Failure to Reduce the Deferral Balance, That Customers Will Pay, to Account for the Flow-Through Effects of the Remand of the ESP 1 Order Was Unjust, Unlawful and Unreasonable. ....	3
B. The Commission Failed to Order the PIRR to Be Collected Subject to Refund to Customers, as OCC Had Requested in Comments, and Did Not Set Forth the Reasons Why the PIRR Should Not Be Collected Subject to Refund. The Commission Thus Violated R.C. 4903.09, Which Requires the Commission to Issue a Written Opinion Setting Forth the Reasons Prompting Its Decisions in All Contested Cases. ....	6
C. By Declining to Reduce the Deferrals for Accumulated Deferred Income Taxes, the Commission Permitted AEP Ohio to Collect Unreasonable Carrying Charges from Customers, in Violation of R.C. 4905.22 and R.C. 4928.02(A). ....	7
D. The Commission Violated R.C. 4903.09 by Allowing AEP Ohio to Collect Deferrals from CSP Customers, Even Though the Record Showed Only that AEP Ohio Had Over-Collected on Fuel Charges from CSP Customers, and Thus Had No Deferrals to Collect from CSP Customers...	9
E. The Commission Violated R.C. 4903.09 by Failing to Explain Why It Did Not Order Interest to Accrue on AEP Ohio’s Over-Collection of Fuel Charges from CSP Customers, at the Same Rate AEP Ohio Charges Customers for Deferred Fuel Costs.....	10
IV. CONCLUSION .....	10

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

On September 1, 2011, AEP Ohio filed an application to establish its PIRR to collect from customers the fuel costs deferred from its first ESP case. The PIRR was a subject broached in the hearing regarding the stipulation in the Utility's second ESP case.<sup>2</sup> After the PUCO rejected the stipulation,<sup>3</sup> the PUCO issued a procedural schedule in this proceeding setting deadlines for comments and reply comments on the Utility's PIRR plan.<sup>4</sup>

On August 1, 2012, the PUCO issued its Opinion and Order in the case, approving the PIRR application with some modifications. The Commission authorized

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<sup>2</sup> *In re: AEP Ohio ESP Cases*, Case No. 11-346-EL-SSO, et al. ("AEP ESP 2"), Stipulation and Recommendation (September 7, 2011).

<sup>3</sup> *Id.*, Entry on Rehearing (February 23, 2012) at 12.

<sup>4</sup> Entry (March 14, 2012).

AEP Ohio to collect carrying charges on the deferral balance based on the weighted average cost of capital rate, but only until the collection period begins, at which time carrying charges will be calculated at the Utility's long-term cost of debt rate.<sup>5</sup> The Commission also ordered AEP Ohio to use annual compounding to calculate its deferred fuel balance on a going-forward basis.<sup>6</sup>

The Commission, however, declined to reduce the deferral balance to account for the flow-through effects of the remand of the ESP 1 Order or of the rejected ESP 2 stipulation,<sup>7</sup> declined to order the PIRR to be collected subject to refund and declined to require that carrying charges be calculated on a net-of-tax basis.<sup>8</sup> The Commission also allowed AEP Ohio to collect deferrals from CSP customers without record support,<sup>9</sup> and did not explain why OCC's request that CSP customers receive interest on the over-collection of fuel charges was not granted.

As discussed herein, the Commission's Order violates Ohio law. The Order therefore should be abrogated under R.C. 4903.10.

## **II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." OCC filed a motion to intervene in this

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<sup>5</sup> Order at 18.

<sup>6</sup> Id. at 19.

<sup>7</sup> Id. at 20.

<sup>8</sup> Id. at 19.

<sup>9</sup> See id. at 20.

proceeding on March 8, 2012, which was granted in the Order (at 6). OCC also filed comments and reply comments regarding AEP Ohio's application on April 2, 2012 and April 17, 2012, respectively.

R.C. 4903.10 requires that an application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." In addition, Ohio Adm. Code 4901-1-35(A) states: "An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing."

In considering an application for rehearing, R.C. 4903.10 provides that "the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear." The statute also provides: "If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed." As shown herein, the statutory standard for abrogating the Order is met here.

### **III. ARGUMENT**

#### **A. The Commission's Failure to Reduce the Deferral Balance, That Customers Will Pay, to Account for the Flow-Through Effects of the Remand of the ESP 1 Order Was Unjust, Unlawful and Unreasonable.**

In comments, OCC argued that the Commission cannot approve collection of the rider because it is based on ESP rates that were not established in compliance with R.C. 4928.143 and on a phase-in plan that is not just and reasonable under R.C. 4928.144.<sup>10</sup>

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<sup>10</sup> OCC Comments (April 2, 2012) at 6-7.



OCC also advocated that AEP Ohio had not met its burden of proving that the fuel costs were “prudently incurred” costs of fuel used to generate electricity supplied under the offer, as required by R.C. 4928.143(B)(2)(A).<sup>11</sup> OCC stated that, in order to protect consumers, the Commission should reduce the balance of unamortized deferrals (and carrying costs) to be collected from customers before collection begins.<sup>12</sup>

In the Order, the Commission refused to reduce the deferral balance to account for the flow-through effects of the remand of the ESP 1 Order<sup>13</sup> or of the rejected ESP 2 stipulation. The Commission cited to the reasons set forth in the Remand Order, in particular the view that adjusting the balance would be tantamount to unlawful retroactive ratemaking.<sup>14</sup>

The Commission’s decision, however, reveals a misunderstanding of the ratemaking rule and Ohio Supreme Court precedent. While the Commission in the Remand Order, and by extension the Order in this case, cited to *Lucas County*,<sup>15</sup> it misinterpreted the holdings of that case, and failed to recognize that retroactive ratemaking does not exist if a mechanism in the rates permits a prospective rate adjustment.

When a utility’s rates are reversed on appeal, the Commission as a matter of course implements revised rates minus the unlawful elements. This provides some degree of relief for customers, on a prospective basis, because the remaining rates no

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<sup>11</sup> Id. at 8-11.

<sup>12</sup> Id. at 6-7.

<sup>13</sup> *In the Matter of the Application of Columbus S. Power Co.*, Case No. 08-917-EL-SSO et al. (“ESP 1”), Order on Remand (October 3, 2011) (“Remand Order”).

<sup>14</sup> Order at 20.

<sup>15</sup> *Lucas County Com’rs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349.

longer contain the unlawful elements. Here, however, the PUCO again departed from its previous practice, to the detriment of customers. The ESP rates will continue in effect for customers, in the form of the deferred FAC rates that were approved as part of the phase-in plan. The deferrals allow the PUCO the opportunity to reduce the ESP rates to be collected through the PIRR. The PUCO should have removed the unlawful elements from rates that will prospectively be charged to customers. But it did not. The rates that were unsupported under the Court's holding, confirmed by the PUCO in its Remand Order, remain preserved for collection and unlawful as part of the phase-in deferrals that are to be collected from customers through the PIRR.

The structure of the ESP rates specifically linked the rates charged in 2009-2011 to the phase-in deferrals that are to be collected through the PIRR. The phase-in deferrals were created as a residual value, flowing from the ESP 2009-2011 rates. The existence of phase-in deferrals creates a mechanism that permits the PUCO to make future rate adjustments to fully remedy the provider of last resort ("POLR") overcharges found by the Court.

In cases involving retroactive ratemaking claims, the Ohio Supreme Court has recognized that if a mechanism built into the rates allows for prospective rate adjustments, retroactive ratemaking does not exist.<sup>16</sup> In this proceeding, the structure of the ESP rates and their inherent linkage to the phase-in deferrals allow for prospective rate adjustments.

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<sup>16</sup> Id.

It was thus unlawful and unreasonable for the Commission to find that adjusting the deferrals to account for the flow through of unlawful POLR charges would constitute retroactive ratemaking. The Commission should abrogate the Order.

**B. The Commission Failed to Order the PIRR to Be Collected Subject to Refund to Customers, as OCC Had Requested in Comments, and Did Not Set Forth the Reasons Why the PIRR Should Not Be Collected Subject to Refund. The Commission Thus Violated R.C. 4903.09, Which Requires the Commission to Issue a Written Opinion Setting Forth the Reasons Prompting Its Decisions in All Contested Cases.**

In comments, OCC recommended that, in the event the Commission did not adjust the unamortized deferrals, the Commission should order the rider to be collected subject to refund, with interest accruing at AEP Ohio's long term cost of debt.<sup>17</sup> The Commission, however, did not address OCC's request that the rider only be collected subject to refund and thus did not explain why it did not grant OCC's suggestion.

R.C. 4903.09 requires that, in all contested cases, "the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Ohio Supreme Court has recognized that the Commission must comply with this statute for the Court to fulfill its responsibility to review the order being appealed.<sup>18</sup> In the Order, the Commission merely referred to its discussion in the Remand Order which rejected the proposal to adjust the deferral balance to flow through the unlawfully collected POLR rates.<sup>19</sup> OCC's proposal to collect the PIRR rates subject to refund, however, was not presented in the Remand proceeding, and thus was not addressed in the Remand Order.

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<sup>17</sup> OCC Comments at 11-15.

<sup>18</sup> See, e.g., *Allnet Communications v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209.

<sup>19</sup> Order at 20, citing Remand Order at 34-36.

By not explaining why it did not grant OCC's proposal to collect the PIRR rates subject to refund, the Commission violated R.C. 4903.09. Without sufficient detail, the Ohio Supreme Court will be unable to determine the Commission's reasoning for its decision. Thus, the purpose of R.C. 4903.09 will be thwarted and the review that OCC is entitled to, under R.C. 4903.09 and 4903.10, cannot occur. The Commission should therefore abrogate the Order. In addition, the Commission should reverse itself and allow collection of this rider, subject to refund.

**C. By Declining to Reduce the Deferrals for Accumulated Deferred Income Taxes, the Commission Permitted AEP Ohio to Collect Unreasonable Carrying Charges from Customers, in Violation of R.C. 4905.22 and R.C. 4928.02(A).**

In comments, OCC advocated that the carrying charges associated with the deferred fuel expenses should be calculated with a reduction for accumulated deferred income tax.<sup>20</sup> The deferred expenses create a deferred tax obligation that reduces a utility's current tax expense.<sup>21</sup> OCC argued that if the Utility is permitted to accrue carrying charges on the gross-of-tax amount, and collect that from customers, it will be over-collecting the actual carrying charges of these fuel deferral balances.<sup>22</sup>

In the Order, the Commission declined to adjust the deferrals for accumulated deferred income taxes. The Commission stated that it already considered and addressed the issue in the ESP 1 Order, where it found that the carrying charges on the deferrals should be calculated without an adjustment for accumulated taxes in order to ensure that AEP Ohio collects its actual fuel expenses, as required by R.C. 4928.144.<sup>23</sup> In the Order,

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<sup>20</sup> OCC Comments at 19.

<sup>21</sup> See *id.*

<sup>22</sup> *Id.*

<sup>23</sup> Order at 19.

the Commission also stated that arguments for calculating the carrying charges on a net of tax basis did not persuade the Commission that the approach in the ESP 1 Order<sup>24</sup> was inconsistent with prior Commission precedent or sound regulatory practice.<sup>25</sup>

R.C. 4905.22 states, in part, “[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission....” In addition, R.C. 4928.02(A) makes it state policy to ensure the availability of reasonably priced retail electric service to consumers.

The Ohio Supreme Court has instructed the Commission to “respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.”<sup>26</sup> If the Commission chooses a different course in a later proceeding, it must explain why.<sup>27</sup>

As OCC pointed out in comments,<sup>28</sup> the Commission in the past has noted that the calculation of carrying charges on a net of tax basis is in accordance with “sound ratemaking theory” as well as Commission precedent.<sup>29</sup> But in the Order in this proceeding, the Commission changed course with a single sentence: “Intervenors and

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<sup>24</sup> ESP 1, Order (March 18, 2009).

<sup>25</sup> Order at 19.

<sup>26</sup> *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, 431, 71 O.O.2d 393, 330 N.E.2d 1.

<sup>27</sup> See, e.g., *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009 Ohio 6764, 921 N.E.2d 1038, ¶ 18.

<sup>28</sup> OCC Comments at 19.

<sup>29</sup> *In re FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, Opinion and Order (December 19, 2008) at 58, citing *Cleveland Electric Illuminating Co.*, Case No. 88-205-EL-AAM, Entry (February 17, 1988) (ordering carrying charges for Perry nuclear power plant to be net of taxes) and *In re Cleveland Electric Illuminating Co.*, Case No. 92-713-EL-AAM, Entry (December 17, 1992) (ordering carrying charges on deferred program costs to be on a net of tax basis).

Staff have not persuaded the Commission that our approach in the ESP 1 Order was inconsistent with prior Commission precedent or sound regulatory practice.”<sup>30</sup> This is not an adequate explanation.

By allowing the Utility to collect carrying charges on accumulated taxes, the Commission has departed from sound ratemaking theory and Commission precedent. The Order thus allows AEP Ohio to collect an unreasonable rate, in violation of R.C. 4905.22 and R.C. 4928.02(A). The Commission’s decision is thus unlawful, and the Commission should abrogate the Order.

**D. The Commission Violated R.C. 4903.09 by Allowing AEP Ohio to Collect Deferrals from CSP Customers, Even Though the Record Showed Only that AEP Ohio Had Over-Collected on Fuel Charges from CSP Customers, and Thus Had No Deferrals to Collect from CSP Customers.**

In its application, AEP Ohio stated that it had over-collected deferred fuel charges from CSP customers by \$3,896,041 as of December 31, 2011.<sup>31</sup> In the Order, however, the Commission stated that AEP Ohio’s reply comments indicate that both OP and CSP have deferral balances to be recovered through the PIRR.<sup>32</sup> The Commission, however, did not cite to the passage in the Utility’s reply comments that led to this conclusion. Nevertheless, the Commission ordered AEP Ohio to file, in final form, new tariffs for the CSP and OP rate zones, subject to Commission review.<sup>33</sup>

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<sup>30</sup> Order at 20.

<sup>31</sup> See Application, Exhibit A at page 1 of 7.

<sup>32</sup> Order at 20.

<sup>33</sup> Id.

A review of AEP Ohio's reply comments shows no reference to a deferral balance for CSP's customers. Thus, the Commission's decision has no basis in the record, in violation of R.C. 4903.09. The Commission's order, therefore, should be abrogated.

**E. The Commission Violated R.C. 4903.09 by Failing to Explain Why It Did Not Order Interest to Accrue on AEP Ohio's Over-Collection of Fuel Charges from CSP Customers, at the Same Rate AEP Ohio Charges Customers for Deferred Fuel Costs.**

In comments, OCC argued that the Commission should order AEP Ohio to refund to CSP customers the amount of deferred fuel charges the Utility over-collected from them, plus accrued interest calculated at the same interest rates that AEP Ohio has used to calculate carrying charges on the deferred fuel costs.<sup>34</sup> OCC noted that providing a refund, plus interest, to CSP customers who overpaid for fuel from 2009-2011 would be consistent with the Commission's directive in the Remand Order to return funds collected from customers, with interest (at a rate equal to the Utility's long term debt) within the next billing cycle following the order.<sup>35</sup>

The Commission's Order, however, did not address OCC's argument that the Commission should order AEP Ohio to refund the over-collection, plus accrued interest calculated at the same interest rates that will be allowed for AEP Ohio. As discussed in Section II.A, such an omission also violates R.C. 4903.09. The Commission's Order should therefore be abrogated.

#### **IV. CONCLUSION**

For the reasons stated herein, the Commission should grant OCC rehearing and abrogate the Order as requested by OCC.

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<sup>34</sup> OCC Comments at 19-20.

<sup>35</sup> Id. at 20.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served electronically to the persons listed below, on this 31<sup>st</sup> day of August 2012.

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