

**BEFORE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company and)	
Ohio Power Company for Authority to)	Case No. 11-346-EL-SSO
Establish a Standard Service Offer)	Case No. 11-348-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,)	
in the Form of an Electric Security Plan.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

In the Matter of the Commission Review of)	
the Capacity Charges of Ohio Power Company)	Case No. 10-2929-EL-UNC
and Columbus Southern Power Company.)	

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA THE MOTION TO
CONSOLIDATE OF OHIO POWER COMPANY**

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I. INTRODUCTION

On September 11, 2012 Ohio Power Company (“AEP-Ohio”) filed an untimely motion to consolidate two of its pending proceedings: Case Nos. 11-346-EL-SSO, *et al.* (“*ESP II Case*”) and Case No. 10-2929-EL-UNC (“*Capacity Case*”).¹ The records in both proceedings are closed and the Public Utilities Commission of Ohio (“Commission”) has issued decisions in both proceedings. Procedurally, the two proceedings are ripe for a Commission decision addressing the merits of the applications for rehearing filed by various parties. As the law, Commission precedent,

¹ AEP-Ohio made the same request in its application for rehearing in the *ESP II Case*. *ESP II Case*, AEP-Ohio Application for Rehearing at 47-49 (Sept. 7, 2012).

and AEP-Ohio's own statements make clear, the timeframe to consolidate the proceedings has passed.

II. ARGUMENT

AEP-Ohio's motion improperly requests that the *ESP II Case* and the *Capacity Case* be consolidated. AEP-Ohio's request is untimely. An order on rehearing granting the consolidation would run afoul of the law and would cause additional confusion between the two separate and distinct records. As recently as July 24, 2012, AEP-Ohio agreed that such consolidation is improper.²

On July 20, 2012, the Office of the Ohio Consumers' Counsel ("OCC") and the Appalachian Peace and Justice Network ("APJN") filed a joint motion to take administrative notice of parts of the *Capacity Case* record in the *ESP II Case*. AEP-Ohio filed a memo contra stating:

[AEP-Ohio] does not support the motion filed by OCC/APJN because it is inappropriate, raises due process concerns, and fails to recognize that the present proceeding has already been submitted to the Commission for decision.

...

OCC/APJN's request for administrative notice at this point in the proceeding is awkward at best. The modified ESP proceeding is now submitted to the Commission for decision and the record is established. The Commission held public hearings, an evidentiary hearing, entertained two rounds of post hearing briefing and held an oral argument before all of the Commissioners. **The time for procedural maneuvers and argumentation is now complete and the record is in the hands of the Commission for determination.**³

² *ESP II Case*, AEP-Ohio's Memorandum Contra the Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network's Motion to Take Administrative Notice at 1-2 (July 24, 2012).

³ *Id.* (emphasis added).

Similarly, in AEP-Ohio's application for rehearing in the *Capacity Case*, AEP-Ohio stated:

Although this case and Case No. 11-346-EL-SSO address interrelated issues, the Commission may not assign an issue that must be decided in this proceeding to another proceeding with an independent case schedule and rehearing and appeal processes.⁴

While AEP-Ohio's application for rehearing indicates that it has changed its position and now thinks it is reasonable and lawful for the Commission to consolidate the *ESP II Case* and the *Capacity Case*, the law and the Commission's precedent hold otherwise.

Commission proceedings are to be conducted in the same manner as civil actions unless otherwise provided by law. Section 4903.22, Revised Code provides:

[e]xcept when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions. (emphasis added).

Civil Rule 42(A) governs consolidation and provides:

[w]hen actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. (emphasis added).

First, Civil Rule 42(A) clearly contemplates that cases may be consolidated to develop a joint record when the cases involve common questions of law or fact. However, because the cases were not consolidated before the individual records were developed, it would be unlawful and unreasonable to consolidate the *ESP II Case* and the *Capacity Case* now. The Commission has also held that it is inappropriate to

⁴ *Capacity Case*, AEP-Ohio Application for Rehearing at 6 (July 20, 2012).

consolidate cases after the close of the evidentiary record.⁵ In fact, in the *ESP II Case* the Commission denied OCC/APJN's motion to take administrative notice of parts of the record from the *Capacity Case*, finding "the timing of OCC/APJN's request [was] troublesome and problematic."⁶

Second, consolidating cases after the evidentiary records in the proceedings have closed would violate parties' due process rights. The parties in the *ESP II Case* and the *Capacity Case* are not the same. The witnesses in the *ESP II Case* and the *Capacity Case* are not the same. The issues in the *ESP II Case* and the *Capacity Case* are not the same. The Capacity Order⁷ states (wrongly) that the Commission's general supervisory authority and Chapter 4909, Revised Code, are controlling,⁸ while the ESP II Order must be valid, if it can be valid, based on Sections 4928.141 and 4928.143, Revised Code. Using the record in one proceeding to support decisions in another proceeding prevents parties from putting on evidence in the form of testimony and exhibits, cross-examining other witnesses on the issues, and addressing the issues on brief; these requirements are essential for due process.⁹

⁵ See *In the Matter of the Application of The Ohio Bell Telephone Company to Revise its Exchange and Network Services Tariff*, PUCO No. 1, to Establish Automatic Callback which is a New Advanced Custom Calling Service Feature, Case No. 93-343-TP-ATA, Entry at 2-3 (April 29, 2012) ["Upon review of Rule 42(A) and contrary to ODVN's definitive statement that such a motion would be granted in the court system, it is evident that, while consolidation of issues is permissible, it is not required as stated by ODVN. Final orders have been issued in the three cases which ODVN requested be consolidated with this case. In fact, two of the cases, 90-467 and 90-471, have already been appealed to the Ohio Supreme Court."].

⁶ *ESP II Case*, Opinion and Order at 12 (Aug. 8, 2012) (hereinafter, "ESP II Order").

⁷ As used herein, "Capacity Order" refers to the July 2, 2012 Opinion and Order issued by the Commission in the *Capacity Case*.

⁸ *Id.* at 12-13.

⁹ *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2006-Ohio-1386 at ¶ 53; see also *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 465 (1952); *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937).

Third, Section 4903.09, Revised Code, requires the Commission to base its orders upon the record in front of it.¹⁰

[I]n order to meet the requirements of R.C. 4903.09, * * * the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion. ... [A] legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.¹¹

Were the Commission to consolidate the cases at this point, its entries on rehearing modifying the ESP II Order or the Capacity Order would not be based on their individual records.

Consolidating the two proceedings at this point would violate Civil Rule 42(A) and will not aid the Commission in reaching its decisions on rehearing. Consolidation would also violate parties' due process rights. Further, each proceeding must be decided upon the separate and distinct records. Therefore, AEP-Ohio's motion to consolidate the *ESP II Case* with the *Capacity Case* is unlawful and unreasonable and must be denied.

III. CONCLUSION

For the reasons discussed above, the Commission must deny AEP-Ohio's motion to consolidate the *ESP II Case* with the *Capacity Case*.

¹⁰ See also *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 70-71; *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937); *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 92-93 (1999).

¹¹ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 30 (internal quotations omitted).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra the Motion to Consolidate of Ohio Power Company* was served upon the following parties of record this 17th day of September 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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