BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generation Facility	)))))))	Case No. 05-376-EL-UNC

REPLY COMMENTS OF
OHIO POWER COMPANY

In accordance with the Attorney Examiner's August 11, 2014 Entry, Ohio Power Company ("AEP Ohio" or the "Company") submitted initial comments that described the issues that remain to be addressed in this proceeding, and the Company also updated its positions regarding those remaining issues. In summary, the issues and the Company's positions regarding them are:

(1) During Phase I of the IGCC project at Great Bend, Meigs County, Ohio, AEP Ohio reasonably incurred costs – and reasonably made expenditures – of $20.57 million.[1]

(2) Related to the first issue, AEP Ohio collected $24.24 million from the Phase I surcharges approved by the Commission, which is $3.67 million more than its actual and reasonably incurred Phase I expenditures for the Great Bend IGCC project. AEP Ohio collected

[1] AEP Ohio initially determined that it reasonably incurred costs and reasonably made expenditures of $21.074 million. (*See* AEP Ohio Statement at 3 (June 29, 2011).) As of August 31, 2014, the $21.074 million has been revised to $20.57 million, in part due to discussions with, and a review of Phase I expenditures by, Staff in 2012.

those amounts through a twelve-month bypassable generation surcharge that expired on July 2, 2007.

(3) Because AEP Ohio had not commenced a continuous course of construction of the proposed IGCC facility within five years of the date of the issuance of the Commission's June 28, 2006 Entry on Rehearing in this proceeding, AEP Ohio determined the portion of the Phase I charges collected that were for expenditures associated with items that may be utilized in projects at other sites. It has determined that none of the $20.57 million of actual and reasonably incurred expenditures were for items that may be utilized at other sites.

(4) AEP Ohio has determined that the difference between the amounts collected through the Phase I surcharges, $24.21 million, and the amounts reasonably incurred on Phase I activities is $3.67 million, together with interest, amounts to $4.7 million, and that that amount should be returned to customers.

A. Intervenors' Comments

Industrial Energy Users-Ohio (IEU) and the Office of the Ohio Consumers' Counsel (OCC) submitted joint initial comments, and Ohio Energy Group (OEG) and Ohio Partners for Affordable Energy (OPAE) each filed separate initial comments. A summary of the Intervenors' comments as well as AEP Ohio's reply to them are provided below.

1. Intervenor arguments that amounts collected through Phase I surcharges to pay for reasonably incurred costs of Phase I activities should be refunded are without basis.

All three sets of intervenor initial comments contend that AEP Ohio should be required to refund the entire $24.24 million that it collected from customers through the Phase I surcharges authorized by the Commission's prior orders, with interest. IEU/OCC argue that recovery of the costs of the IGCC facility, including Phase I costs, is not permissible under provisions of SB 3 or

SB 221 and, therefore, that Ohio law "does not permit AEP-Ohio to retain these dollars collected from customers." (IEU/OCC Jt. Comments at 13.) They further contend that "the Commission lacks jurisdiction to permit AEP-Ohio to retain any of the $24.24 million" (*id.* at 17), and that "AEP-Ohio should refund the entire $24.24 million, with interest, to customers because it was collected subject to refund with interest * * *." (*Id*. at 13.) OEG similarly takes the position that the Commission lacked authority to allow AEP Ohio to recover Phase I costs from customers under SB 3, and it contends that no provision of SB 221 would allow recovery, so a refund of all amounts collected is appropriate. (OEG Comments at 4.) OPAE also supports a refund of amounts recovered from customers related to Phase I activities. (OPAE Comments at 1.)

A primary flaw in the Intervenors' position is their contention that the entire amount collected by AEP Ohio during Phase I, including the $20.57 million prudently expended on Phase I activities, is subject to refund. It is not. As the Company pointed out in its Initial Comments, the Commission approved the Phase I generation surcharges, and, consequently, during the period when those Phase I rates were in effect, they were the lawful, Commission-approved rates. The Company was both authorized and required to charge those rates.

The well-established filed rate doctrine and its corollary, the rule against retroactive ratemaking, prohibit Intervenors' refund argument. Those doctrines, codified in R.C. 4905.32, 4903.15 and 4903.16, are rooted in more than a century of United States Supreme Court precedent, *see Louisville & Nashville R. Co. v. Maxwell,* 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915), and reflect the General Assembly's intent to protect customers from discriminatory pricing and, most importantly, to ensure predictability and stability in rates for the benefit of both a utility and its customers by prohibiting retroactive ratemaking to compensate for prior over or under recoveries of costs. As the Ohio Supreme Court recognized in *Keco Industries, Inc. v.*

Cincinnati Suburban Bell Tel. Co., 166 Ohio St. 254, 2. O.O.2d 85, 141 N.E.2d 465 (1957), and as it has repeatedly affirmed since *Keco*, in order to balance the equities between a utility and customers and ensure rate stability, "a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped" and, "[l]ikewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates." 166 Ohio St. at 259.[2]

There were two, and only two, refund conditions established by the Commission's June 28, 2006 Entry on Rehearing, at Finding 40, and June 28, 2006 Finding and Order, at Finding 8, that approved the Phase I rates. First, amounts collected in excess of costs reasonably incurred on Phase I activities should be returned to customers. Second, in the event that a continuous course of construction had not commenced within five (5) years of the June 28, 2006 Entry on Rehearing, i.e., if the project did not proceed to Phases II and III, amounts expended on Phase I at the Great Bend site that could be transferred to other sites would be returned to AEP Ohio's customers.

AEP Ohio has determined that the amounts collected through the Phase I rates that exceeded the amounts it reasonably incurred on Phase I activities is $3.67 million. AEP Ohio also has determined that none of the $20.57 million of its reasonable expenditures on Phase I activities may be used at other sites. Consequently, none of the $20.57 million falls within the categories that the Commission's Entry on Rehearing and Finding and Order established as

[2] *See also In re Columbus S. Power,* 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 49; *In re Columbus S. Power,* 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 16; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21, *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco* * * *."); *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

subject to refund. Accordingly, Ohio's filed rate doctrine and prohibition against retroactive ratemaking compel the conclusion that the $20.57 million expended on Phase I activities are not subject to refund.

Beyond the policy reasons that underpin the filed rate doctrine and the related rule against retroactive ratemaking, and which support the reasonableness, in this case, of the conclusion that refunding any part of the $20.57 million reasonably expended on Phase I activities would be improper, there are other reasons, unique to this proceeding, that also compel the same conclusion. First, the Commission urged AEP Ohio to develop a plan to construct the Great Bend IGCC facility. Case No. 04-169-EL-UC, Opinion and Order, at 37-38 (Jan. 26, 2005). The Company responded to that directive with its Application in this case. It agreed to pursue the development of the IGCC facility, but only in the event of assurance of cost recovery. The Commission provided that cost-recovery assurance in its orders in this case, and the Company proceeded to expend its funds on Phase I activities on the basis of that assurance. Absent that assurance of cost recovery, AEP Ohio would have been able to protect itself from the prospect of disallowance of those expenditures – only by declining to make the expenditures in the first place. In addition, the Commission provided a valuable protection to customers by including in its Opinion and Order the requirement that the Company offset against the amount of generation rate increases that it could obtain through its RSP during 2006-2008 any IGCC-related revenues that it would recover through the Phase I generation surcharge rates. *Id.* at 20.

Second, Intervenors could have pursued the remedy that they now seek on remand if they had requested, at the front-end of the appellate process of this proceeding when they filed their notices of appeal, that the Ohio Supreme Court stay the Phase I surcharges in accordance with R.C. 4905.16. This they did not do. Moreover, the cost to the Intervenors of executing an

undertaking, i.e., posting a bond, to protect AEP Ohio against the harm that a stay might have inflicted on it pending that appeal likely would have been inconsequential to the Intervenors. That is because, in the event that the Court had issued a stay, AEP Ohio could have mitigated the cost of the stay by stopping work, and expenditures, on Phase I activities until the appeal was decided. Instead, Intervenors sat on their hands with regard to that relatively inexpensive remedy. They now seek to inflict substantial harm on AEP Ohio through their position on refunds at a point when AEP Ohio has already spent its funds on Phase I activities and is unable to protect itself from the risk of that harm by not making expenditures in the first place.

Another flaw in the Intervenors' positions is their view that the Court's decision somehow converted the Commission's July 28, 2006 Entry on Rehearing from an order that contained two specific and limited refund conditions into an order that also made all reasonable expenditures on Phase I activities subject to refund. The Court specifically addressed and rejected that variation of their position, at ¶¶ 34-36 of its decision. The Court recited its holding in *Keco*, 166 Ohio St. 254, at paragraph two of the syllabus:

> Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal.

Indus. Energy Users-Ohio v. Pub. Util. Comm., 117 Ohio St. 3d 486, 2008-Ohio-990, 885 N.E.2d 195, ¶ 34. The Court also acknowledged that the Commission had made the amounts collected pursuant to the Phase I generation surcharge rate subject to refund in certain circumstances, and that the matter was being remanded to the Commission. *Id.* at ¶ 35.

Therefore, the Court "decline[d] to deviate from *Keco* to create an exception based on these facts." *Id*. at ¶ 36.

For all of these reasons, Intervenors' arguments that *all* amounts collected to pay for reasonably incurred costs of Phase I activities should be refunded are without merit.

2. Intervenors' arguments that AEP Ohio must refund amounts expended on Phase I and already collected pursuant to the Phase I surcharge rates that the Commission previously authorized unless it first demonstrates that recovery of the costs of the IGCC facility meets the standard that the Court articulated in its decision are incorrect.

IEU/OCC and OEG also take the position that the Court's decision makes the reasonable expenditures on Phase I activities subject to refund unless the Company and Commission can establish a record basis for authorizing cost recovery for the entire Great Bend IGCC project pursuant to the provisions of SB 3, in the manner that the Court articulated in its decision. (IEU/OCC Jt. Comments at 13-15, 17; OEG Comments, at 3-4.) While this position potentially would have some relevance to the Company's recovery of Phase II and Phase III costs for the Great Bend IGCC project, it is not applicable to the refund of amounts already collected pursuant to the Commission-approved Phase I rates. In particular, this argument ignores the applicable law, described above and reiterated by the Court in its decision, that prohibits the refund of amounts collected pursuant to Commission-approved rates.

It also misapplies the Court's decision. The issue that the Court faced, in the first instance, was whether the Commission had the statutory authority under provisions of SB 3 to approve the recovery of the costs of the entire Great Bend IGCC project, and under what circumstances it could exercise that statutory authority. *Indus*. *Energy Users-Ohio,* 2008-Ohio-990, at ¶ 1-4. The Court articulated the permissible statutory basis under the law that existed at the time, which included the provisions of SB 3, that the Commission could rely upon to

authorize cost recovery for the entire project. However, the Court did not hold that the statutory standard for authorizing approval of cost recovery for the entire project was to be used as the standard for determining whether there should be a refund of amounts actually expended on Phase I activities. Rather, in connection with that issue, as explained above, it specifically cited to *Keco* as the governing legal standard for refunds of amounts collected pursuant to Commission approved rates during the pendency of appeals. *Id.* at ¶ 34. Moreover, it specifically declined to create an exception to that doctrine. *Id.* at ¶ 36.

In any event, if the standard that the Court articulated in its decision were applied to the amounts actually expended on Phase I and already collected through the Phase I rates, AEP Ohio disputes the Intervenors' contention that, under the circumstances that existed at the time the Phase I rates were approved, the IGCC project and the Phase I rates that the Commission authorized did not meet that standard. In other words, although it would be a largely hypothetical exercise, in light of the changed legal circumstances (the enactment of SB 221) and factual circumstances (among other things, the changed load growth and financial capability in the aftermath of the 2008-2009 recession and the cessation of efforts to develop the Great Bend IGCC project), the Company disagrees with the proposition that the Commission could not develop a record that meets the standard that the Court articulated under the circumstances that existed at the time the Commission approved and AEP Ohio collected the Phase I rates.[3]

[3] As set forth above, the Company's position is that the statutory standard under SB 3 that the Court established for approving rates that would recover the costs of an IGCC facility is not relevant to the issue of whether, or to what extent, the amounts collected in Phase I are subject to refund. However, it would not be possible, even in a hypothetical sense, to engage in such an exercise that presupposes that at the time the Commission approved the Phase I rates and the Court reviewed the Commission's decision to approve those Phase I rates, the Commission could have incorporated into its decision the subsequent changed regulatory and economic circumstances that led the Company to stop its efforts to develop the IGCC plant.

3. IEU/OCC's position that the interest rate that should be used in connection with refunds should be the Company's Weighted Average Cost of Capital rate that it proposed for recovering the capital costs of capital investments of the IGCC project during Phase II and Phase III should be rejected. The appropriate interest rate for refunds is the customer deposit rates in effect during the period that the AEP Ohio has held the funds in excess of amounts expended on Phase I activities.

IEU/OCC also contend that the Commission should apply a weighted average cost of capital (WACC) rate, which the Company requested earlier in this proceeding for recovering the costs of capital investments during Phases II and III of the IGCC project, to any refund of Phase I surcharges to customers. (IEU/OCC Jt. Comments at 15-16.) Their argument is without merit for several reasons.

As an initial matter, there is simply no basis for Intervenors to receive interest at a WACC rate – and, tellingly, IEU/OCC have not cited one. There is no precedent for such a rate, no record to justify such a rate, and, indeed, the very nature of customer utility payments makes a WACC rate for refunds of amounts previously collected from them inappropriate. A WACC rate is calculated based upon a company's cost of equity and debt. A company investing in a capital-intensive project, like AEP Ohio would have invested in Phases II and III of the IGCC project had they gone forward, incurs significant costs (here, expected to be in the multiple millions of dollars), which it would have to finance and carry until those costs were recovered. Retail customers, by contrast, incur no such capital costs in making their monthly utility payments. As such, the application of a WACC rate to any refund of those payments is inappropriate.

IEU/OCC consistently and vigorously oppose the application of a WACC rate as a carrying charge for the Company's capital investments and regulatory assets in every proceeding in which the Company seeks that carrying charge, including, most recently, the Company's ESP III proceeding. *See, e.g.* Case No. 13-2385-EL-SSO. It is evident here that their change in

position, requesting a WACC rate, is simply self-serving. It is further inappropriate for the Commission to order AEP Ohio to make any refund of Phase I surcharges to customers that incorporates a WACC rate because AEP Ohio never sought to collect – or collected – any carrying charge for Phase I costs, let alone carry charges at a WACC rate. Thus, customers have not paid the charges that IEU/OCC now seek.

The appropriate interest rate that should apply to any refund of Phase I surcharges to customers is the customer deposit rate. This rate is appropriate here to compensate customers for the time value of the money they spent that will be refunded, and the application of that rate to any refund of Phase I surcharges is consistent with prior Commission precedent. Accordingly, for each of these reasons, the Commission should disregard IEU/OCC's unfounded request to apply a WACC interest rate to amounts refunded in this case.

4. AEP Ohio agrees with IEU/OCC's position that amounts refunded to customers should be returned to all customers, through a non-bypassable credit.

IEU/OCC posit that the Commission should direct any refund of amounts collected through the Phase I surcharges to be refunded to all customers, both shopping and non-shopping, because there was virtually no shopping in AEP Ohio's service area at the time the Phase I surcharges were collected. (IEU/OCC Jt. Comments at 16.) The Company agrees that the difference between the amounts collected through the Phase I surcharges and the amounts reasonably incurred on Phase I activities, plus interest, which equals $4.7 million, should be returned to customers through a non-bypassable credit.

5. IEU/OCC's position that AEP Ohio's ability to retain amounts reasonably expended on Phase I activities is contingent upon the completion of an audit referred to in the Commission's Entry on Rehearing is also incorrect. A utility's expenditures are presumed to be prudent.

As an additional or alternative argument, IEU/OCC contend that AEP Ohio should not be permitted to retain the $20.57 million of reasonably incurred Phase I expenditures until Staff completes the audit that the Commission ordered in its June 28, 2006 Entry on Rehearing. (IEU/OCC Jt. Comments at 17.) Their position is without merit, as it contradicts the well-established presumption that a utility's expenditures are prudent and improperly attempts to shift the burden to AEP Ohio to justify the prudency of its expenditures.

For nearly thirty years, the Commission has assessed the prudence of utility decisions under the following guidelines:

> (1) There should exist a presumption that the decisions of utilities are prudent.
> (2) The standard of reasonableness under the circumstances should be used.
> (3) Hindsight should not be used in determining prudence, although consideration of the outcome may legitimately be used to overcome the presumption of prudence.
> (4) Prudence should be determined in a retrospective, factual inquiry.

In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Syracuse Home Utilities Company, Inc. and Related Matters, Case No. 86-12-GA-GCR ("*Syracuse*"), Opinion and Order at 10 (Dec. 30, 1986). *See also Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999), citing *Cincinnati v. Pub. Util. Comm.*, 67 Ohio St. 3d 523, 530, 620 N.E.2d 826 (1993) (stating that a prudent decision is "[o]ne which reflects what a reasonable person would have done in light of conditions and circumstances which were known or reasonably should have been known at the time the

decision was made"). It is up to a party challenging the prudence of an expenditure to rebut the presumption of prudence through evidence sufficient to overcome it. *Syracuse*, Opinion and Order at 10.

The Commission reiterated and affirmed its adherence to the above standards as recently as last month. *See In the Matter of the Application of The Dayton Power and Light Company to Establish a Fuel Rider*, Case No. 12-2881-EL-FAC, Opinion and Order at 6 (Aug. 20, 2014). Contrary to IEU/OCC's argument, the Commission continues to follow its well-established precedent and should presume AEP Ohio's Phase I expenditures to be prudent unless another parties proves otherwise through evidence sufficient to overcome that presumption. Additionally, AEP Ohio does not object to an audit of Phase I expenditures, and in fact has already provided significant information and access to documentation supporting the reasonableness of those expenditures to Staff in connection with its review of them.

B. Procedural Schedule

The parties' initial comments provide divergent views regarding the purpose and scope of the issues that remain to be addressed in this proceeding. Accordingly, AEP Ohio recommends that two additional steps be added to the procedural schedule. Specifically, the Company suggests that an intermediate scheduling entry be issued, after the Commission and its Attorney Examiner have had the opportunity to review the parties' initial comments, that determines whether further adjudicatory proceedings are necessary at all and, if so, what issues the Commission believes the parties should address in their evidentiary presentations. Such a step is commonly utilized in cases, such as this one, in which a comment cycle is conducted in an effort to identify and refine the issues to be addressed. Such a step might also improve the focus and efficiency of the parties' evidentiary presentations.

In addition, should the Commission determine that further adjudicatory proceedings are necessary, AEP Ohio also requests that it be granted the opportunity to submit supplemental direct testimony two weeks after Intervenors' and Staff's testimony is filed. Because the issues that will be addressed in this phase of the proceeding are not raised at the Company's initiative, it will be difficult, if not impossible, for the Company to anticipate and address in its direct testimony all issues that other parties might address in their testimony. AEP Ohio, therefore, should be permitted as part of its direct case to have an opportunity to present supplemental direct testimony addressing issues raised by other parties through their testimony, as part of the Company's direct case. This added procedural step should benefit all parties for the additional reason that it should reduce the amount of rebuttal testimony that otherwise might be necessitated.

If the approach of an intermediate entry is adopted, the Company also recommends that the date for submitting its initial direct testimony and the date for filing Intervenor and Staff testimony be extended by approximately six weeks from the date that entry is issued. The dates for the prehearing conference and the hearing would then be extended by approximately eight weeks from their currently scheduled dates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Comments Ohio Power Company was served upon the following counsel of record by e-mail this September 19, 2014:

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Summary: Comments Reply Comments of Ohio Power Company electronically filed by Ms. Christen M. Blend on behalf of Ohio Power Company