

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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**OHIO POWER COMPANY’S MEMORANDUM CONTRA OHIO ENERGY GROUP’S  
MOTION TO SUSPEND RATES**

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Ohio Power Company (AEP Ohio or Company) files this Memorandum Contra the motion filed by the Ohio Energy Group (OEG) on May 24, 2016. On May 23, 2016, AEP Ohio filed documentation to implement the Supreme Court of Ohio’s decision on appeal of these matters in Supreme Court case docket 2012-2008. In that decision, the Court reversed the Commission’s orders and remanded the cause to the Commission for reinstatement of the WACC (weighted average cost of capital) rate. *See In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶ 43.

OEG responded by filing a motion that asks the Commission to suspend the rates and order an investigation into whether AEP Ohio’s proposed tariff rates are unlawful. OEG’s position seeks to apply the Court’s decision in a way that only provides a fraction of the remedy envisioned by the Court. In support of this half-loaf approach, OEG claims that AEP Ohio’s proposed tariffs would constitute unlawful retroactive ratemaking; OEG’s legal position is

misguided. OEG further requests that the Commission open up an investigation to study the matter. OEG's litigious and inefficient request seeking an investigation regarding a simple mathematical exercise should be denied for the reasons outlined in this memorandum contra.

The Company's May 23 filing simply applies the Court's ruling to the deferral that was designed to be collected over multiple years with a true-up to ensure AEP Ohio receives the full amount of its authorized fuel costs and associated carrying costs. The manner in which the deferral was being collected was interrupted midstream, but the Court found that to be unreasonable:

Ohio Power has shown that the commission violated R.C.4928.143(C)(2)(a) when it modified the terms of its previously approved ESP. Therefore, we reverse the commission's orders on this issue and remand the cause to the commission for reinstatement of the WACC rate.

*In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶ 43. The manner of collection was corrected, but that did not change the planned outcome outlined in statute that the utility was entitled to full recovery plus associated carrying costs over time.

The nature of the mechanism involved in this case is a deferral designed to ensure the Company collects the full impact of the deferred costs by the end of 2018 with true-ups to account for any changes. Indeed, the statute governing creation and implementation of the PIRR, R.C. 4928.144, *requires* that the utility be permitted to recover the full amount not collected by virtue of the rate phase-in "plus carrying charges on that amount." The bottom line of the deferral is that the full amount is set for recovery and that the Commission provided itself multiple years, including still future years, to phase in the recovery until the final accounting and full collection by the Company.

OEG appears to argue that the processing of a rider recovering a long-term deferral over a number of years is somehow not open for reconciliation for full collection of the balance if the

deferral may change over time. As evidenced by the recent rulings of the Court (to be discussed below), when the Commission subsequently modifies the terms of a rider in a manner that is later determined by the Court to be in violation of the statute and orders, the rider remains subject to reconciliation on remand and can provide the basis for a remedy that fully implements the Court's reversal. OEG's argument based on a 1957 case alone is misguided and ignores the complexities of alternative ratemaking involved with R.C. Chapter 4928. While AEP Ohio agrees that *Keco* doctrine<sup>1</sup> (also known as the filed rate doctrine) remains in full force, OEG's over-simplified version of the doctrine is wrong and cannot be reconciled with contemporary case law from the Court.

The PIRR mechanism in this case involves the Commission phasing in a rate over a longer period of time by creating a regulatory asset for full recovery of the amount inclusive of carrying charges as outlined in R.C. 4928.144. That regulatory asset was ordered to be collected through 2018 and to be structured to allow the balance included in the regulatory asset to be fully recovered by 2018. The Court in the decision remanding this case for implementation of the WACC carrying cost charge was clear to indicate it was referring to the total amount of carrying costs, referred to in the record as \$130 million. In fact, the record before the Court's decision repeatedly referred to the estimated value of the change to be over \$130 million. *In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶¶ 2, 10, 26. Even the dissent that did not agree with the ruling made it perfectly clear that an additional \$130 million would be provided back to AEP Ohio under the decision. *Id.* ¶ 43 (Pfeifer, J., dissenting). The fact that the deferral period was set to allow AEP Ohio to recover the full impact of the Commission's utilization of the option to delay recovery of costs through R.C. 4928.144 left open the opportunity for the correct carrying cost level to be incorporated in the regulatory asset.

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<sup>1</sup> *Keco Industries, Inc. v. Cinci. & Suburban Bell Tel. Co.*, 166 Ohio St.254 (1957).

The Court's recent decision in AEP Ohio's ESP II decision further shows the remedy included in the Company's May 23, 2016 filing is not in violation of the filed rate doctrine. The Court applied a change resulting from its decision to overturn part of a Commission order on appeal prospectively to an existing deferral not yet fully collected. Specifically, the Court found:

As to the question of remedy, we note that AEP is currently collecting the deferred capacity costs with carrying charges through the RSR. *In re Application of Ohio Power Co. to Adopt a Final Implementation Plan for the Retail Stability Rider*, Pub. Util. Comm. No. 14-1186-EL-RDR, at 11-12 (Apr. 2, 2015). \*\*\*

Because AEP is entitled to recover only its actual capacity costs, we order the commission to adjust the balance of its deferred capacity costs to eliminate the overcompensation of capacity revenue recovered through the nondeferral part of the RSR during the ESP.

*In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, ¶¶ 39-40. The remedy ordered by the Court in that appeal simply cannot be squared with OEG's simplified view that the *Keco* doctrine prohibits adjusting the deferral balance in this case.

The Court's RSR ruling was that the continuing nature of the RSR (which is to be fully reconciled to reflect recovery of the deferral) presented the opportunity to remedy the unlawful transition revenue that related wholly to a period of time in the past when the non-deferral RSR revenue was recovered (2012-2015). Further, in the companion order concerning the capacity charge, the Court also reversed the energy credit issues to be litigated on remand – also related wholly to a period of time in the past (2012-2015). *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 2016-Ohio-1607, ¶ 57. These rulings were made in the face of concerns by AEP Ohio on brief that taking such action would violate Ohio's retroactive ratemaking prohibition. (AEP Ohio August 15, 2014 Memorandum Opposing Stay Request at 13-15.) Yet, the Court did not reverse, overrule, or even explicitly address the *Keco* doctrine in issuing its ruling.

Thus, it is manifestly evident from the Court's viewpoint that the *Keco* doctrine is consistent with a remand proceeding involving an active rider that can be reconciled to fully implement the Court's decision. And if it is acceptable in the RSR/Capacity remand to prospectively adjust historical rates that no longer apply (*i.e.*, the non-deferral component of the RSR and the energy credit component of the capacity charge) through the RSR, then it is equally acceptable to prospectively adjust the carrying charge through the ongoing PIRR for the entire period of error. If anything, it is more appropriate to do so here – where the Commission was found to have violated the Company's statutory right to consent to an ESP that had already run its course. Restoring the original deal is more compelling under those circumstances.

The Court's recent ruling is consistent with past rulings distinguishing the filed rate doctrine from allowable prospective changes based on issues from a prior period. The Commission faced a similar argument that it was allowing ordering a retroactive ratemaking in violation of the *Keco* doctrine in the facts appealed to the Court in the 1982 *River Case* case.<sup>2</sup> In that case the Commission determined that the process involving the gas cost recovery rate on a prospective basis involved adjusting for past supplier refunds. The Court held that this is distinct from a *Keco* issue because it did not involve a customer seeking restitution; it instead involved calculating gas costs that may be still be recovered prospectively.<sup>3</sup> That situation is akin to the facts before the Commission in this tariff update and as recently ordered by the Court in the Capacity decision.<sup>4</sup> Here the Commission is allowing an open prospective process to account for prior corrections to the regulatory asset so that the full amount is properly collected by the end of the term at the conclusion of 2018.

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<sup>2</sup> *River Gas v. Pub. Util. Comm.*, 1982, 69 Ohio St.2d 509; 433 N.E.2 568.

<sup>3</sup> *Id.* at 513-514; 571-572.

<sup>4</sup> *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, ¶¶ 39-40.

In the present case, by statute AEP Ohio is entitled to collect the full impact of the Commission's deferral under R.C. 4928.144, inclusive of carrying costs. The fact that the Court denied the Commission's midterm modification of those carrying costs in the deferral collection does not erase the fact that the collection process is still open. The amounts previously collected while the modification was under review did not apply to a specific service being provided in that window. The remaining period of PIRR collection can be adjusted to fully implement the Court's decision and correct the lower carrying charges created by the Commission's earlier decision.

OEG's request for an investigation is unfounded. OEG does not assert that there is any concern with the actual calculation performed by the Company. The Commission Staff is well equipped and routinely reviews perfunctory rate compliance filings to ensure accuracy for purposes of tariffs and can do so in this case. OEG's request for an investigation is solely based on its legal argument that the Commission should not be applying the Court's decision to the entirety of the regulatory asset. The Commission has the ability to interpret the law and does not need an investigation on factual issues to make that determination. Based on the Court's ruling remanding the case to the Commission to apply the WACC and the recent decision affirming the Commission's ability to reflect a Court's correction to a Commission order in a rider still subject to collection on the same matter, the Commission can find that there is not a filed rate doctrine concern in this case and process the tariff update filing accordingly. OEG's request for an investigation is without merit and should be denied.

## CONCLUSION

The purpose of the phase-in rider is to ensure the Company recovers the entire regulatory asset by 2018 with reconciliation to ensure that is achieved. The May 23, 2016 Company filing recognized the Court's ruling in the case remanding the issue to the Commission and the more recent Court ruling also providing for the ability to correct a Commission error by adjusting an open deferral recovery on the same subject matter.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Ohio Power Company's Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 27<sup>th</sup> day of May 2016, via electronic transmission.

/s/ Steven T. Nourse

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Summary: Memorandum -Ohio Power Company's Memorandum Contra Ohio Energy Group's Motion to Suspend Rates electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company