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**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) Case No. 05-376-EL-UNC
Recover Costs Associated with the)
Construction and Ultimate Operation of)
an) Integrated Gasification Combined)
Cycle Electric Generating Facility.)

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**MOTION ON REMAND FROM THE SUPREME COURT FOR A REFUND OF
REVENUES THAT AEP COLLECTED FROM CUSTOMERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumer's Counsel ("OCC"), on behalf of residential customers, moves¹ the Public Utilities Commission of Ohio ("PUCO" or "Commission") to require the Columbus Southern Power Company ("CSP") and the Ohio Power Company ("OP") (collectively "AEP") to refund to customers all of the approximately \$23.7 million in revenues, with interest, that AEP collected pertaining to "the . . . expenditures for the design, construction, and operation of a 629-megawatt integrated gasification-combined-cycle ("IGCC") electric-generation facility"² Those revenues were collected on the authority of the Commission's April 10, 2006 Opinion and Order and June 28, 2006 Entry on Rehearing in these proceedings, the latter of which explicitly made the collection of those revenues subject to refund.³ The Supreme Court of Ohio reversed the Commission's decision, holding that the Commission lacked the authority to

¹ Ohio Adm. Code 4901-1-12.

² *Industrial Energy Users v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 487, 2008-Ohio-990, ¶ 7 ("IEU 2008").

³ *IEU 2008* at ¶¶ 8-9.

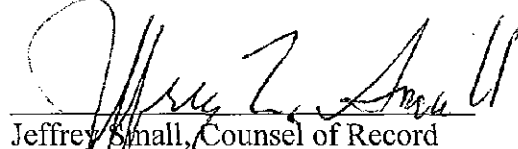
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grant AEP permission to collect those revenues.⁴ The Supreme Court having overturned the Commission's decision granting those revenues, it is appropriate now for the Commission to order their refund.

The reasons for granting OCC's Motion are further set forth in the attached memorandum.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Jeffrey Small", is written over a horizontal line.

Jeffrey Small, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
grady@occ.state.oh.us

⁴ *IEU 2008* at ¶ 37.

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⁵ Id. at ¶¶ 8-9 (emphasis added).

The Supreme Court reversed the Commission's grant of authority for AEP to impose the charges that resulted in AEP collecting \$23.7 million from its customers. The Court stated:

[W]e have previously stated that a concern for the future of the competitive market does not empower the commission to create remedies beyond the parameters of the law. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶ 38. The existing legislation sufficiently segregates generation of electricity from distribution, and in order to permit the commission to regulate generation services, additional legislative authority is necessary.

Accordingly, we reverse the commission's finding, which approved, as a distribution-ancillary service, AEP's application.⁶

The Court also rejected AEP's argument that collection of these costs was authorized under AEP's provider of last resort responsibility:

While the commission may allow recovery of an electric distribution utility's noncompetitive costs that are associated with its effort to secure competitive retail electric service in furtherance of its statutory POLR obligation, the commission's approval must be given in accordance with R.C. Chapters 4905 and 4909.

The evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility. To warrant its conclusions regarding AEP's POLR obligation, the commission may supplement the record with evidence to support its order and must verify that AEP has complied with the application requirements under R.C. 4909.18. Also, because AEP has not yet begun construction of the generation facility, compliance with the 75 percent used-and-useful standard should also be addressed.⁷

The Court remanded the case to the Commission, with instructions to make additional findings.⁸ The Commission has not yet made additional findings in the matter.

⁶ Id., ¶¶ 23-24.

⁷ Id., ¶¶ 31-32.

⁸ Id., ¶ 33.

In the appeal, appellants sought a refund for consumers of the \$23.7 million in IGCC plant research and development costs that had already been collected from those consumers. In *IEU 2008*, the Court declined to reach the matter of the refund “in view of [the Court’s] remand of this matter to the commission.”⁹

II. ARGUMENT: THE REVENUES IN QUESTION SHOULD BE REFUNDED.

The Commission specifically provided that the revenues collected by AEP for research and development were subject to refund. The Commission made the collection of revenues from the IGCC-related rider subject to refund:

[I]f AEP has not commenced a continuous course of construction of the proposed facility within five years of the issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest.¹⁰

In the subsequent appeal of the Commission’s orders, the Supreme Court did “not reach the matter of refund.”¹¹ The Commission, therefore, continues to have the responsibility to consider whether AEP may retain the revenues that were collected subject to refund and the timing of refunds. While the Commission originally contemplated five years as the timeline for the refund, the decision by the Court -- that the Commission’s allowance of collections was unlawful -- should result in an immediate refund to customers.

The Commission has previously made a rate increase subject to refund and ordered refunds after the Commission explored the reasonableness of rates in light of

⁹ Id. at ¶ 36. Justice Pfeiffer would have ordered the refund without remand. Id. at ¶38.

¹⁰ Entry on Rehearing at 17. AEP Ohio did not challenge, either through rehearing or on appeal, the Commission’s authority to order rates subject to refund.

¹¹ *IEU 2008* at ¶ 36.

events that occurred after the issuance of its orders. The Commission granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.¹² In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer.¹³ In an Entry on Rehearing, however, the Commission approved the utility's filed tariffs but expressly found the portion of the increase granted in the Opinion and Order attributable to Zimmer CWIP "should be made subject to refund, pending a rehearing on the CWIP issue."¹⁴

On rehearing, the Commission ordered that all of the Zimmer costs should be excluded from CWIP. The Commission ordered the Company to file tariffs reducing the total revenue requirements by approximately \$13 million.¹⁵ The Company appealed the case, but the Court subsequently affirmed the Commission's denial of a CWIP allowance.¹⁶ Refunds of the revenues attributable to Zimmer -- collected from customers,

¹² *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982).

¹³ *Id.*, Opinion and Order at 8-14 (November 5, 1982).

¹⁴ *Id.*, Entry at 1 (November 17, 1982).

¹⁵ *Id.*, Order on Rehearing (March 16, 1983).

¹⁶ *Columbus & Southern Ohio Electric Co. v. Public Util. Comm.*, (1984) 10 Ohio St.3d 12.

subject to refund, since the issuance of the Entry on Rehearing -- were ordered by the Commission with interest.¹⁷

The Commission also made collection of the IGCC-related revenues subject to refund, with interest, in the above-captioned case, and should order refunds based upon the Court's determinations that rates were increased without legal authority. In doing so, the Commission should not be deterred by *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254 ("*Keco*"), a case discussed in *IEU 2008*.¹⁸ The Court in *Keco* stressed that "utility rates are solely a matter for consideration by the Public Utilities Commission and the Supreme Court," and that "[t]he utility must collect the rates set by the commission, unless someone by affirmative action secures a stay of such order."¹⁹ In contrast to circumstances in *Keco* where a lower court's decision regarding refunds was reversed, the *Commission* made the determination in this case that AEP's IGCC-related revenues should be subject to refund. The *Commission's process* for the determination of rates, therefore, is not in any way bypassed by the *Commission ordering* refunds. Here, the Commission-approved tariffs were approved subject to the possibility of refunds, which makes a refund consistent with, not contrary to, those tariffs.

Having made the revenues subject to refund, the Commission should now consider that an intervening, superseding event has occurred: The Supreme Court overruled the fundamental decision by the Commission that approved the collection of

¹⁷ *In the Matter of Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing at 3 (May 1, 1984).

¹⁸ *IEU 2008* at ¶34 and ¶36.

¹⁹ *Keco* at 257.

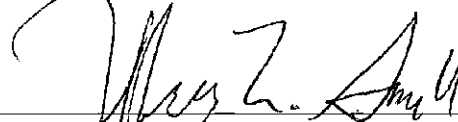
the IGCC-related revenues.²⁰ Under these circumstances, the Commission should refund the revenues that were subject to refund.

III. CONCLUSION

The Supreme Court remanded this case to the Commission in March 2008, more than six months ago. The Commission should now act, on remand to order refunds to consumers in the amount of approximately \$23.7 million that AEP was improperly permitted to collect, plus interest.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



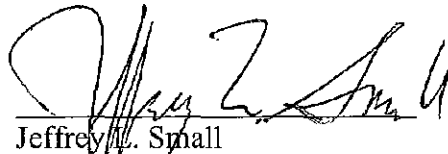
Jeffrey Small, Counsel of Record
Maureen R. Grady
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
614-466-8574 (Telephone)
614-466-9475 (Facsimile)
small@occ.state.oh.us
grady@occ.state.oh.us

²⁰ *IEU 2008*, ¶¶ 23-24, 32-33.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's
*Motion on Remand from the Supreme Court for a Refund of Revenues That AEP
Collected From Customers*, was served via electronic transmission this 17th day of
September 2008.


Jeffrey L. Small
Assistant Consumers' Counsel

SERVICE LIST

Marvin Resnik
Sandra Williams
American Electric Power Service Corp.
1 Riverside Plaza, 29th Fl.
Columbus, Ohio 43215
miresnik@aep.com

Thomas McNamee
Attorney General's Office
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
Thomas.McNamee@puc.state.oh.us

Daniel Conway
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
dconway@porterwright.com

Kathy Kolich
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308
kjkolich@firstenergycorp.com

Samuel Randazzso
Lisa McAlister
McNees, Wallace & Nurick
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
lmcalister@mwncmh.com

Michael Kurtz
David Boehm
Boehm, Kurtz & Lowery
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
mkurtz@bkllawfirm.com

Richard A. Kanoff
Calpine Corporation
Two Atlantic Ave., Third Floor
Boston, MA 02110
richardka@calpine.com

M Howard Petricoff
Vorys Sater Seymour & Pease
52 E Gay St.
PO Box 1008
Columbus, Ohio
mhpetricoff@vssp.com

Jessica Davis
Roetzel & Andress LPA
National City Center
155 E Broad Street, 12th Floor
Columbus, Ohio 43215
jdavis@ralaw.com

Dane Stinson
Bailey Cavalieri LLC
10 W. Broad St., Ste 2100
Columbus, Ohio 43215
dane.stinson@baileycavalieri.com

Thomas Lodge
Thompson Hine LLP
One Columbus
10 W. Broad St., Ste 700
Columbus, Ohio 43215
Tom.Lodge@ThompsonHine.com

John Bentine
Chester, Wilcox & Saxbe, LLP
65 East State Street, Ste. 1000
Columbus, Ohio 43215-4213
jbentine@cwslaw.com

Sally Bloomfield
Bricker & Ecker, LLP
100 South Third Street
Columbus, Ohio 43215
sbloomfield@bricker.com

David Rinebolt
Ohio Partners for Affordable Energy
337 S. Main St., 4th Fl., Ste. 5
PO Box 1793
Findlay, Ohio 45839-1793
drinebolt@aol.com

Michael Dortch
Baker & Hostetler LLP
Capital Square, Suite 2100
65 East State Street
Columbus, Ohio 43215
mdortch@kravitzllc.com