

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of)
Columbus Southern Power Company for) Case No. 08-917-EL-SSO
Approval of its Electric Security Plan; an)
Amendment to its Corporate Separation)
Plan; and the Sale or Transfer of Certain)
Generation Assets.)

In the Matter of the Application of Ohio)
Power Company for Approval of its) Case No. 08-918-EL-SSO
Electric Security Plan; and an Amendment)
to its Corporate Separation Plan.)

**MOTION TO STAY NEGOTIATIONS BETWEEN THE
COMPANY AND THE PARTIES**

BY

**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO PARTNERS
FOR AFFORDABLE ENERGY, APPALACHIAN PEOPLE'S ACTION
COALITION, THE SIERRA CLUB OHIO CHAPTER, AND THE NATURAL
RESOURCES DEFENSE COUNCIL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Columbus Southern Power Company and Ohio Power Company ("Companies"), Ohio Partners for Affordable Energy, on behalf of providers of low-income weatherization services, Appalachian People's Action Coalition, the Sierra Club Ohio Chapter; and the Natural Resources Defense Counsel (together "Movants") pursuant to Ohio Adm. Code 4901-1-12, move to stay the negotiation process between the Companies and other parties regarding the Companies' electric security plan ("SSO") applications that were filed in the above-captioned cases on July 31, 2008. The stay is

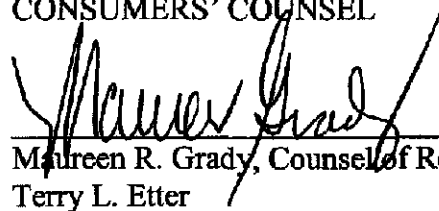
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requested until November 10, 2008--after the filing of testimony by the Staff and a week before the scheduled hearing of November 17, 2008.

In order to prevent irreparable harm to the Companies' residential customers and low-income customers, the Movants request that the Commission grant the Motion for Stay. While irreparable harm would inure to Movants and the clients they represent, no such harm would occur to the negotiating parties. The reasons for granting the Movants' Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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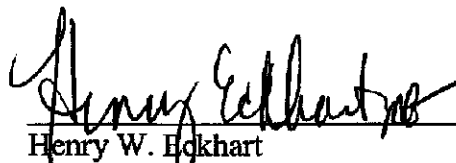
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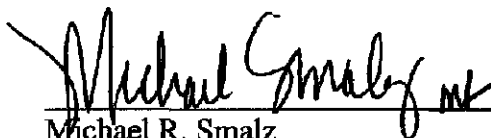
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MEMORANDUM IN SUPPORT

I. HISTORY OF THE CASE AND INTRODUCTION

These cases pending before the Commission are cases of first impression and of critical importance to customers in Ohio. The cases will establish the services electric customers will receive from the Companies and the rates customers must pay the Companies for three years beginning January 1, 2009. The Companies filed applications for approval of electric security plans ("ESPs") pursuant to R.C. 4928.143, along with other related applications on July 31, 2008.

On August 5, 2008, the Attorney Examiner issued an *Entry* establishing the procedural schedule, which is very short compared to other cases that have complex issues as well.¹ In addition the *Entry* requires that discovery responses be completed and sent to

¹ Entry (August 5, 2008) at 2-3.

the issuing parties within 10 days of electronic service.² On August 28, 2008, Movants filed a Motion for Continuance of the Hearing, Extensions of Time and Memorandum in Support. The Companies, on September 2, 2008, filed a Memorandum in Opposition. Movants filed their Reply on September 5, 2008. While the Attorney Examiner later extended the procedural schedule by 14 days, the Attorney Examiner did not extend the discovery deadline.³

Despite the fact that Movants are in the throes of analyzing the Companies applications, the Companies proposed that settlement negotiations should begin. This call for negotiations or a “dialogue” came despite requests by several parties that they be permitted a fair and reasonable opportunity to prepare for negotiations, through the normal (yet expedited) discovery process. The Companies, nonetheless, rejected such requests and formal negotiations have commenced at facilities provided by the Commission.

Without the opportunity to analyze the Companies’ filings, the parties will not be sufficiently knowledgeable to engage in serious bargaining to negotiate a settlement on behalf of their clients. It is only fair, just, and reasonable that all parties be able to come to the negotiating table after having the opportunity to fully and adequately prepare.

The Movants file this motion for a stay of the negotiations between the Companies and other parties in this case because the negotiations are premature. If a stipulation is reached and presented to the Commission before the parties have had an adequate opportunity to prepare – including receiving responses to discovery - the non-signatory parties will be unjustly prejudiced in the prosecution of their case. All the parties should be

² Id at 3.

³ Entry (September 5, 2008).

afforded a reasonable opportunity to fully prepare in accordance with the schedule set forth by the Commission. But when a stipulation is signed, parties' rights to fully prepare can be affected. When a stipulation is docketed with the Commission the focus of the proceeding generally shifts from the reasonableness of the application to whether the stipulation satisfies statutory criteria and the three prong test. This procedure precludes non-signatory parties from presenting their case in chief, based on the filed application.

Moreover, if numerous parties resolve the case with the Companies before all the evidence is presented, the settling parties weaken the positions of non-settling parties by undermining the evidence and valid legal arguments made on the application. Typically, once the negotiating parties have reached a settlement, it is difficult for other parties to make substantial changes to a stipulation. The Commission – and the Supreme Court -- accord substantial weight to a stipulation, which makes it very difficult for non-signatory parties to present evidence to rebut the stipulation.

II. ARGUMENT

A. The Commission Has The Authority and an Obligation to Stay the Negotiations In this Case

The Commission has authority to stay the Companies' negotiations based upon its R.C. 4901.13 authority to govern proceedings, as previously recognized by the Supreme Court.⁴ Additionally, the Commission may order stays of negotiations under its general supervisory power as set forth in R.C. 4905.06 and under its jurisdiction as established under R.C. 4905.05. Finally, under R.C. 4903.082, the Commission has an obligation to stay the negotiations in this case because to allow them to continue would greatly prejudice

⁴ *Akron & Barberton v. Public Utilities Commission of Ohio*, 165 Ohio St. 316 (May 31, 1956).

the parties who have not had a reasonable opportunity to complete their review, including discovery, of this complex case.

B. The Application Does Not Conform to the Rules

None of the sets of rules establishing the requirements for a valid application under S.B. 221 have been finalized. Although the Commission issued a Finding and Order on the first set of rules⁵ relating to ESP and Market Based Rate applications on September 17, 2008, parties still have the opportunity to file an application for rehearing by October 17, 2008. The Commission must address the applications for rehearing filed before forwarding the rules to the Joint Committee on Agency Rule Review ("JCARR").

Reply Comments were filed on August 29, 2008, regarding the second set of rules, relating to electric service and safety standards that the utilities must meet.⁶ The Commission has not yet issued a Finding and Order and so it is possible that these rules will not be forwarded to JCARR before December.

Reply Comments are just being filed in the third set of rules relating to alternative technology and renewable resources.⁷ The Reply Comments were filed recently and are critical to the utilities' standard service offer plans. Therefore, it is not clear, and it will not be clear, whether a stipulation that comes out of the Companies' premature negotiations will meet the requirements of the rules that will be adopted. Hence, a stipulation, if adopted prior to the finalization of the rules, could fail to meet the third prong of the stipulation standard which requires the Commission to determine if the stipulation violates any

⁵ Case No. 08-777-EL-ORD.

⁶ Case No. 06-653-EL-ORD.

⁷ 08-888-EL-ORD.

regulatory principle or practice. Clearly the rules enacting S.B. 221 will set the regulatory principles or practices to be followed when determining whether the companies' SSO should be approved. So, without the rules being final, there can be no assessment under the third prong of the stipulation standard that the stipulation does or does not violate regulatory principles or practices.

C. Due Process Is Violated

The Commission is required by R.C. 4928.141 to conduct a hearing in this case. As such, the Commission is required to provide intervenors due process or, as the Commission has previously defined it, "a meaningful opportunity to be heard."⁸ Under R.C. 4903.082, this includes "ample rights of discovery." The Commission recently emphasized this in its review of Ohio Administrative Code 4901-1-16:

The statute [R.C.4903.082] places an obligation on the Commission to ensure ample rights of discovery whereas the rule [O.A.C. 4901-1-16(A)] expresses the Commission's intent that discovery be conducted promptly and expeditiously.⁹

In allowing the Companies to proceed with their premature negotiations the Commission is undermining the first prong of the Commission's stipulation test because such negotiations are interfering with discovery, which underlies the determination of whether parties are sufficiently knowledgeable:

The reasonableness test considers whether the settlement was a product of serious bargaining among capable, knowledgeable parties, whether the settlement benefits ratepayers and the

⁸ *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Gas Rates in Its Service Area; In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in Its Service Area; In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Change Depreciation Accrual Rates for Gas Distribution Facilities*, Case No. 92-1463-GA-AIR, et al, Opinion and Order at 38 (August 26, 1993).

⁹ *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 48 (December 6, 2006).

public interest, and whether the settlement package violates any important regulatory principle or practice.¹⁰

In *Ohio Consumers' Counsel v. PUC*, the OCC appealed a PUCO ruling that OCC could not conduct discovery in a stipulated case on whether there were "side agreements" between some of the signatory parties and the utility.¹¹ The Commission's decision to limit discovery violated the first prong of the stipulation test, the Court found.¹² The Court reiterated the importance of the Commission's discovery rule, noting its similarity to the Ohio civil rule 26(B), and the broad scope it creates for discovery:

The text of Ohio Adm.Code 4901-1-16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 1994 Ohio 324, 635 N.E.2d 331 ("The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding"). See *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479, 664 N.E.2d 532 ('Pursuant to Civ.R. 26(B)(1), a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter').¹³

The Court then connected the discovery provision to the first prong of the stipulation test noting that, by not allowing "broad discovery" of "all relevant matters" the commission compromised its ability to ensure that negotiations were a product of "serious

¹⁰ *Ohio Consumers' Counsel v. PUC* (2006), 111 Ohio St. 3d 300, 319.

¹¹ *Consumers' Counsel* at 320.

¹² *Id.* at 319.

¹³ *Id.* at 320.

bargaining.”¹⁴ Side agreements were deemed by the Court to be relevant to assessing whether the third prong of the stipulation test was met.¹⁵

For these and other reasons, the Commission should require the Companies to stay their negotiations and instead allow parties to prepare their case through discovery. In that manner, Movants and other parties will be in a position to have sufficient knowledge to engage in the type of serious bargaining envisioned under the stipulation test. The negotiations, thus, should be stayed until after discovery has been completed and the Staff has filed its testimony.

III. CONCLUSION

The Commission should grant the Movants’ motion to stay the negotiations because the premature negotiations are interfering with the parties’ rights to case preparation and ample discovery, which is already difficult due to the very unreasonably short time line. Without a stay of negotiations the Movants’ will not be sufficiently prepared and the Movants’ clients will suffer irreparable harm through the lack of due process. Because the rules regulating the Companies’ plans in this case have not yet been adopted, parties should not continue negotiating until it is clear how the Commission intends to enact the provisions of S.B. 221. Finally, not only will the Movants’ clients suffer irreparable harm from lack of due process, but any stipulation arising from premature settlement negotiations must fail to meet the three prong stipulation test because without sufficient discovery and adequate case preparation, the parties cannot be

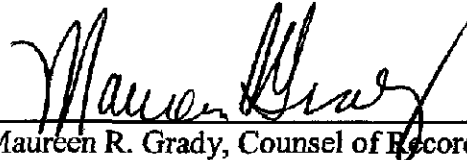
¹⁴ *Id.* at 321.

¹⁵ *Id.* at 321.

deemed to be sufficiently knowledgeable about the plan—the first prong of the stipulation standard.

Respectfully submitted,

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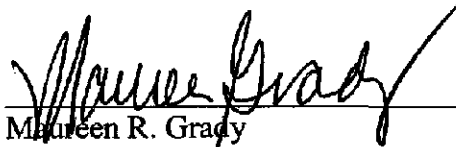
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Stay has been served upon the below-named persons via electronic transmittal, as well as by U.S. Mail, this 2nd day of October 2008.



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