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

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S MEMORANDUM CONTRA OCC'S MOTION FOR REFUND

INTRODUCTION

In its June 28, 2006 Entry on Rehearing in this docket, the Commission imposed a limited refund obligation on Columbus Southern Power Company's and Ohio Power Company's (the Companies) recovery of Phase I charges associated with the construction and operation of an Integrated Gasification Combined Cycle (IGCC) generating facility. The order addressed the portion of Phase I charges that might be refunded, the circumstances that would trigger a refund and the time at which a refund might be trigged.

The Commission stated:

> Therefore, we find that if AEP-Ohio has not commenced a *continuous course of construction of the proposed facility* within five years of the date of 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.

It is clear from this language that the refund obligation associated with the Phase I recoveries was not for the total revenues recovered, and was not to be triggered until June

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28, 2011, if at all. Further, it was not to be triggered based on a Supreme Court of Ohio reversal (actually partial reversal) of the Commission's order authorizing the recovery of Phase I revenues.

Nonetheless, on September 17, 2008 the Ohio Consumer's Counsel (OCC) filed a motion in this docket asking the Commission to order the Companies to refund the entirety of their Phase I recoveries, and to do so now. OCC's motion is factually in error, ignores the refund language in the Commission's Entry on Rehearing and disregards Supreme Court of Ohio precedent. OCC's motion should be denied.

ARGUMENT

OCC's argument is based on a fundamental misunderstanding of the Supreme Court of Ohio's decision in the appeal from the Commission's IGCC order. In *Indus. Energy Users – Ohio v. Pub. Util. Comm.* 117 Ohio St. 3d 486, 2008-Ohio-990, the Court considered the various rationales presented by the Commission and the Companies in support of the Commission's order in the IGCC proceeding. While OCC repeatedly asserts that the Court reversed the Commission's order, the fact is that the Court affirmed the order in part and reversed the order in part.

While the Court did not rule on the argument that had been presented in the appeal that a total refund should be ordered, it did recognize that "the Commission has already issued a *conditional* refund order that remains in effect ...." (¶ 4, emphasis added). Further, the Court repeated its ruling from *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 2 0.0. 2d 85, 141 N.E. 2d 465, 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." (¶ 34).

Having stated this principle which has guided utility regulation in Ohio for half a century, the Court "decline[d] to deviate from *Keco* to create an exception based on these facts." (¶ 36).

OCC argues that the Commission itself made a portion of the Phase I surcharge recoveries refundable and, therefore, it now should order a total refund. First, as already noted, the rate authorization was conditional. If the conditions are triggered, any refund would be made in a manner consistent with the original Phase I surcharge authorization. That is different than the Commission revisiting an earlier decision and ordering a refund because it did not like the ultimate outcome of its prior order. Therefore, the Commission's conditional refund associated with its Phase I cost recovery authorization does not open the door to imposing refunds that run contrary to Ohio law, and OCC has not provided any authority to suggest otherwise.

OCC's motion essentially asks this Commission to convert its conditional refund, tied to events still three years in the future, and limited in amount, into an immediate refund of the full Phase I recoveries. Moreover, its basis for this request is the Court's "reversal" despite the fact that the Court itself has held since 1957 that its reversal of a Commission rate order does not permit, let alone compel restitution of the increased charges collected during the pendency of the appeal.

OCC argues that "the Commission should not be deterred by [*Keco* because the Court's opinion held that] the utility must collect the rates set by the commission, unless someone by affirmative action secures a stay of such order." (Motion, p. 5). Here, OCC argues, since the rates in question were subject to refund, the Commission can grant OCC's motion. OCC, however, glosses over the significant difference between the refund obligation imposed by the Commission and the refund OCC seeks by its motion. OCC contends that the Commission-approved Phase I cost recovery rider was approved "subject to the possibility of refunds, which made a refund consistent with, not contrary to, those tariffs." *(Id.)*. The point OCC fails to mention is that the only refund that would be consistent with the Commission-approved tariff is a refund that is consistent with the Commission's Entry on Rehearing.

The subject of refunds had been raised to the Commission by an intervenor in this case, in its objections to the Companies' tariff filing that was made to implement the Commission's Opinion and Order. (Objections of IEU-Ohio to Tariff Filing, p. 2, April 21, 2006). OCC did not file any objections to the Companies' tariff filing. Further, OCC did not seek rehearing of the Commission's June 28, 2006 Finding and Order accepting the tariff filing, even though that order contained the same conditional refund language that was set out in the Entry on Rehearing. (Finding and Order, p.2, June 28, 2006.).

The Companies' position regarding OCC's motion is supported by IEU's arguments presented to the Supreme Court of Ohio when it filed a Complaint for Writ of Prohibition attempting to preclude the Companies from collecting the Commission-approved Phase I surcharge.[1] In that proceeding, IEU, in reliance on *Keco*, argued that "a

[1] *State ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.* Case No. 06-1257, dismissed October 4, 2006.

successful appeal cannot cure the injury suffered by electric utility customers as a result of payment of unlawful rates. This Court has already decided that such unlawful collections are not refundable as a matter of law [citing *Keco*]." (IEU's Complaint for Writ of Prohibition, p. 27). In responding to the Companies' motion to dismiss its complaint, IEU once again relied on *Keco* when it argued that "[c]ustomers are not permitted to obtain refunds where the PUCO has illegally increased rates." (IEU's Memorandum in Opposition to Motion to Dismiss, p.11).

Adhering to *Keco* does not produce an unjust or unreasonable result in this case. The point OCC misses is that Phase I recovery was not dependent on the eventual construction and operation of the Companies' proposed IGCC facility. Instead, as the Commission correctly noted, Phase I cost recovery is linked to the investigation, analysis, evaluation and development of a realistic plan to address the Companies' Provider of Last Resort (POLR) obligation in a manner which considers concerns raised in this case by OCC and other parties. (Opinion and Order, p.21, April 10, 2006) Therefore, the Court's reversal of the Commission does not change the fact that the Phase I surcharges were related to the Companies' legitimate business activities related to their POLR obligation. Further, OCC did not avail itself of the remedy provided on appeal by §4903.16, Ohio Rev. Code. That statute provides for issuance of a stay of the Commission's order. OCC's argument to subvert *Keco* to remedy its own decision to not pursue a stay must be rejected.

Finally, OCC's reliance on the history of the Commission's orders in the *Zimmer* case is unpersuasive.[2] As OCC's recitation points out, the refund ultimately required of

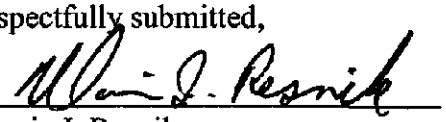
[2] *In the Matter of the Application of Columbus & Southern Ohio Electric Company*, Case No. 81-1058-EL-AIR.

the company in that case was consistent with the scope of the refund (related to the rate impact of including Zimmer plant-related Construction Work in Progress) and with the timing of the refund (after an opinion from the Supreme Court of Ohio affirming the Commission). The Commission did not accelerate the refund obligation, nor did it expand the scope of the amount of refund which had been specified.

Nonetheless, OCC relies on the *Zimmer* experience to urge the Commission to accelerate the refund obligation to the present, even though the condition of the refund has not been triggered, and to refund more than the amount specified by the Commission. OCC' s position gains no support from the *Zimmer* case.

For all these reasons stated above, OCC's motion should be denied.

Respectfully submitted,



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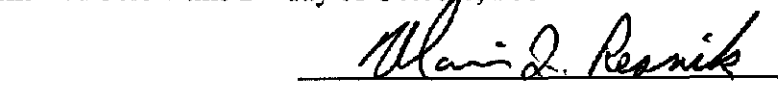
CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra OCC's Motion for Refund was served by U.S. Mail upon counsel identified below this 2nd day of October, 2008.



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