

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

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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**REPLY TO AEP'S MEMORANDUM CONTRA  
OCC'S MOTION FOR A REFUND  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On September 17, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential customers, moved ("Motion") the Public Utilities Commission of Ohio ("PUCO" or "Commission") to require the Columbus Southern Power Company and the Ohio Power Company (collectively "AEP" or "Company") to refund to customers all of the approximately \$23.7 million in revenues, with interest, that AEP collected pertaining to the expenditures on a 629-megawatt integrated gasification combined-cycle ("IGCC") electric-generation facility that AEP has not built.<sup>1</sup> 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.<sup>2</sup> Four parties to the Commission's proceedings, Industrial Energy Users-Ohio ("IEU"), FirstEnergy Solutions Corporation,

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<sup>1</sup> See, e.g., *Industrial Energy Users v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 487, 2008-Ohio-990, ¶ 7 ("IEU 2008").

<sup>2</sup> IEU 2008 at ¶¶ 8-9.

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the Office of the Ohio Consumers' Counsel ("OCC"), and Ohio Energy Group, appealed the Commission's decision.<sup>3</sup>

The decision of the Supreme Court of Ohio on March 13, 2008 considered three issues.

The issues presented to this court are [1] whether the commission properly designated an unregulated competitive generation service as a regulated distribution-ancillary service in order to exercise regulatory jurisdiction, [2] whether the commission properly determined that AEP's POLR obligation justifies a rate-based recovery to build and operate a generation facility, and [3] whether the commission properly denied the requested refund of \$24 million in generation-plant research-and-development costs that AEP has collected from its customers pursuant to the commission's order.<sup>4</sup>

The Court reversed the Commission's result on the first issue, holding that the PUCO lacked the required legislative authority.<sup>5</sup> On the second issue, the Court held that the "evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility," and remanded the matter to the Commission for further determinations consistent with distribution rate-setting statutes.<sup>6</sup> On the third issue -- the refund of \$24 million that was the subject of OCC's Motion -- the Court stated that it did "not reach the matter of refund" "[i]n view of . . . [the Court's] remand of this matter to the commission."<sup>7</sup> The Commission has not yet made additional findings on the issues remanded.

On October 2, 2008, AEP submitted its Memorandum Contra OCC's

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<sup>3</sup> Id. at ¶1.

<sup>4</sup> Id. at ¶11 (bracketed numbers inserted).

<sup>5</sup> Id. at ¶23-24.

<sup>6</sup> Id. at ¶32-33.

<sup>7</sup> Id. at ¶13.

Motion for Refund ("Memo Contra"). Seven months after the Supreme Court of Ohio remanded issues to the PUCO for further proceedings, AEP opposes moving forward with re-consideration of the amounts collected from customers consistent with the Court's decision in *IEU 2008*.

## **II. ARGUMENT: THE REVENUES IN QUESTION SHOULD BE REFUNDED TO CUSTOMERS.**

AEP's Memo Contra disregards the Supreme Court of Ohio's opinion, returning for support to the proceeding below. AEP states that "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."<sup>8</sup> After reversing the Commission's Order approving the Company's application based on the provision of distribution services, the Court stated:

*The evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility.*<sup>9</sup>

AEP's Memo Contra is based, therefore, on the false premise that the Court accepted its "POLR" explanation for collecting \$24 million from customers.

The other issue that remains with the PUCO -- i.e. besides the issue of whether any "POLR" obligation could justify increased charges on customers -- is that of the requested refund of \$24 million in generation-related research costs. On this matter, AEP is more frank: "[T]he Court did not rule on the argument that had been presented in the appeal that a total refund should be ordered. . . ."<sup>10</sup> The Commission specifically

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<sup>8</sup> Memo Contra at 5.

<sup>9</sup> *IEU 2008* at ¶32 (emphasis added).

<sup>10</sup> Memo Contra at 2.

provided that the revenues collected by AEP for research and development were subject to refund.<sup>11</sup> The Court did not take the issue up “[i]n view of . . . [the Court’s] remand of this matter to the commission.”<sup>12</sup> The Commission, therefore, continues to have the responsibility to consider whether AEP may retain the revenues that were collected (subject to refund) or must return the revenues to customers.

AEP addresses the importance of *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254 (“*Keco*”) by mangling OCC statements and citing arguments that OCC never supported.<sup>13</sup> AEP’s account of OCC’s argument that appears at the top of page 4 in the Memo Contra combines parts of two OCC sentences, including a quote from *Keco*, without correctly showing that the construction of OCC’s sentences was altered or that quoted material was contained in OCC’s original text.<sup>14</sup> The importance of OCC’s argument (i.e. the misquoted argument) was that, in contrast to circumstances in the instant proceeding, *Keco* reversed a lower court’s decision and

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<sup>11</sup> Entry on Rehearing at 17 (June 28, 2006).

<sup>12</sup> *IEU 2008* at ¶36.

<sup>13</sup> AEP finds support from arguments made by IEU-Ohio in its Writ of Prohibition at the Supreme Court of Ohio. Memo Contra at 4-5. OCC was not involved in IEU-Ohio’s original action before the Court. IEU-Ohio argued, however, in briefing the later, successful appeal that *Keco* does not apply to the instant circumstances. S.Ct. Case No. 06-1594, IEU Merit Brief at 36-38 (November 13, 2006) (“It is IEU-Ohio’s position that the *Keco* principle does not apply based on the facts, law, and circumstances before the Court in this appeal.” *Id.* at 36).

<sup>14</sup> OCC wrote on page 5 of its Motion (underlining the portion repeated by AEP):

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*.<sup>18</sup> 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.”<sup>19</sup> 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.

AEP’s inaccurate rendition of OCC’s argument inserts the word “because” in brackets which mischaracterizes OCC’s argument, and fails to show that citations were omitted or that a quote from *Keco* was contained in the repeated text. AEP’s version is as follows:

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).

blocked an action in the courts for restitution. As OCC argued in its Motion, OCC requested that the *Commission* (not a court in an action for restitution) determine that revenues made subject to refund by the *Commission* should actually be refunded.<sup>15</sup>

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 the IGCC-related revenues.<sup>16</sup> The Commission should not force AEP's customers to wait until 2011, as is AEP's preference, for a resolution of whether customers who paid \$24 million will see that money returned.<sup>17</sup> The Commission should promptly refund the revenues to customers.

### III. CONCLUSION

The Supreme Court remanded this case to the Commission in March 2008. The Commission should act now, on remand, to order AEP to make refunds (including interest) for the \$24 million that AEP collected from consumers.

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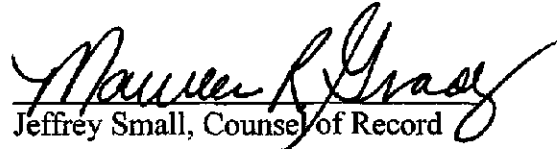
<sup>15</sup> *Keco* and the instant case are distinguishable, among other reasons, because the instant case involves the Court's opinion that did "*not* reach the matter of refund." *IEU 2008* at ¶36 (emphasis added).

<sup>16</sup> *IEU 2008*, ¶¶ 23-24, 32-33.

<sup>17</sup> Memo Contra at 1-2 ("not to be triggered until June 28, 2011").

Respectfully submitted,

Janine L. Migden-Ostrander  
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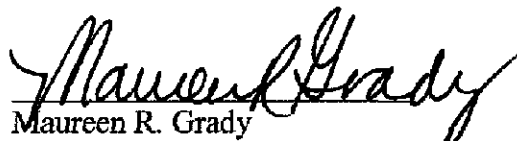
A handwritten signature in cursive script, reading "Maureen R. Grady". The signature is written in black ink and is positioned above the printed name and title.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Reply to AEP's Memorandum Contra* was served on the persons stated below via First Class U.S. Mail, postage prepaid, this 8<sup>th</sup> day of October, 2008.

  
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