FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets.	)))))	**Case No. 08-917-EL-SSO**
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)))))	**Case No. 08-918-EL-SSO**

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S MEMORANDUM CONTRA INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING

On July 23, 2009 the Commission issued its Entry on Rehearing in this proceeding. On August 17, 2009 Industrial Energy Users-Ohio (IEU) filed its application for rehearing regarding a ruling the Commission made in its Entry on Rehearing and a ruling IEU asserts was not made. Columbus Southern Power Company (CSP) and Ohio Power Company (OP), collectively referred to as the Companies or "AEP Ohio," file this memorandum contra IEU's rehearing application pursuant to §4901-1-35 (B), Ohio Admin. Code.

The ruling made by the Commission which IEU challenges is that customers of the Companies served under reasonable arrangements "are prohibited from also participating in PJM [Demand Response Programs] DRP, unless and until the Commission decides otherwise in a subsequent proceeding. (Entry on Rehearing, p. 41)."

IEU argues that the Commission's decision is unreasonable because it was made in this proceeding while the Commission previously had said it would be considered in a separate proceeding. (Opinion and Order, p. 58).

The second issue raised by IEU concerns the motion it filed in this proceeding on April 20, 2009, asking that the Commission order the Companies to: 1. cease and desist from billing and collecting any rates and charges that may currently be on file with the Commission as a result of its March 18, 2009, order in this proceeding; 2. only bill and collect such rates and charges as may apply by the terms of the rate plan that was in effect on March 18, 2009; and 3. refund, with reasonable interest, any amounts collected in excess of the amount the Companies were authorized to bill and collect pursuant to the rates and charges that were in effect when the order was issued.

As discussed in more detail below, both of IEU's assignments of error are without merit and its rehearing requests should be denied.

I. The Commission's decision to prohibit further participation in the PJM Demand Response Programs is lawful and reasonable

In its entry on rehearing, the Commission held that "customers under reasonable arrangements with AEP-Ohio, including, but not limited to, EE/PDR, economic development arrangements, unique arrangements, and other special tariff schedules that offer service discounts from the applicable tariff rates, are prohibited from also participating in PJM DRP, unless and until the Commission decides otherwise in a subsequent proceeding." (Entry on Rehearing, p. 41) IEU challenges this holding by arguing (at page 5) that considering the entire set of PJM DRP issues later in a separate proceeding "is the reasonable course of action." In other words, if the decision were up

to IEU, it would defer all of the PJM DRP issues for future consideration in a subsequent case. The decision is not for IEU to make and the claim that the Commission cannot address *any* issues concerning retail PJM DRP participation until *all* issues are decided on that topic is without legal support. Rather, the interim relief afforded by the Commission on this subject was reasonable and supported by the abundance of record-based concerns about retail PJM DRP participation.

IEU argues (at pages 5-6) that "[i]f the Commission lacks sufficient information or evidence to make a decision on the global question of whether to prohibit participation in PJM DRPs, then it must also lack sufficient information or a reasonable basis to make a determination now on whether to prohibit PJM DRP participation by customers served under reasonable arrangements." IEU's logic is flawed. The Commission directly indicated (at page 40) that its reservation about deciding the larger issues in this case was because it specifically wanted more information "to consider the costs incurred by various customers to balance the interest of AEP-Ohio's customers participating in the PJM's DRP and the cost AEP-Ohio's other customers incur via the Companies' retail rates." It does not follow that, just because the Commission was not comfortable making a comprehensive and final decision on the larger issues presented, the Commission is precluded from deciding any subset of issues or partially preserving the *status quo* while it considered these larger questions.

Oddly, IEU argues (at pages 6-7) that the decision is "unreasonable" because the Commission has "complete and ongoing control over reasonable arrangements" under § 4905.31, Ohio Rev. Code. Neither IEU nor AEP Ohio has claimed that the Commission lacks jurisdiction to impose the temporary, partial restrictions on retail participation.

Though IEU attempts to use this argument to support the notion that the issues should be deferred for subsequent determination in other proceedings on a case-by-case basis, there is no such requirement found in § 4905.31, Ohio Rev. Code. The presence of a second/alternative procedural forum for addressing such issues cannot be used as a barrier to using the first procedural forum where the issues were initially presented and argued. If anything, the fact that an additional statute allows the Commission to make changes to reasonable arrangements only serves to bolster the Commission's authority to do so here. Indeed, in disposing of IEU's rehearing request, the Commission may wish to cite its jurisdiction under § 4905.31, Ohio Rev. Code, as an additional basis for its decision.

Finally, IEU invokes § 4903.09, Ohio Rev. Code, claiming (at page 8) that the Commission's decision concerning PJM DRP participation was "out of the blue" and "without any citation to record evidence." Contrary to IEU's claims that the Commission did not explain the partial restriction at all, the Entry on Rehearing (at page 41) directly indicated that the Commission was implementing the partial restriction "[i]n further consideration of the need to balance the potential benefits to PJM DRP participants and the costs to AEP-Ohio ratepayers." The Commission's brief explanation is adequate to support the temporary, partial restriction for retail participation in the PJM DRPs, especially when considered in the context of the extensive consideration of these issues regarding the multitude of concerns addressed in the record about retail participation.

The Commission's Entry on Rehearing contained a thorough and extensive discussion of the PJM DRP issues and arguments (pages 36-41). In addition to numerous pages of testimony and cross examination about retail PJM DRP participation in this

case, AEP Ohio's merit briefs alone had more than thirty pages of arguments addressing this topic. During this second round of rehearing on the topic, AEP Ohio does not wish to again present cumulative arguments about the merits of its position; therefore, AEP Ohio incorporates by reference here all of its testimony and briefing materials in support of its position.

AEP Ohio would, however, like to briefly address the additional policy arguments supporting the Commission's temporary, partial restriction on retail PJM DRP participation that was adopted in the entry on rehearing. In prohibiting participation in the PJM DRPs by customers that already have obtained rate discounts, the Commission avoids a result that AEP Ohio believes would be "double dipping" for such customers to obtain additional financial benefits by managing their load through participation in the PJM DRPs. There are two primary reasons why this is true.

First, AEP and, by extension, AEP Ohio and its customers, incur a cost associated with a retail customer's participation in the PJM demand response programs. Specifically, AEP must continue to count the load of PJM demand response participants as firm under its Fixed Resource Requirements option and the cost of doing so will be reflected in AEP's retail rates – a cost that could be avoided if the customer had instead participated in an AEP Ohio demand response program. Necessarily, the dollars that do come into Ohio from Load Serving Entities (LSEs) on the East Coast only flow in that direction because those LSEs avoid capacity in the eastern part of PJM – which would need to be added by AEP since it must treat a retail PJM demand response customer as firm load. Again, a customer already receiving a discount indirectly financed by other

ratepayers should not be permitted to impose such additional costs on AEP Ohio and its customers.

Second, as a related matter, the PJM demand response programs provide direct competition for AEP Ohio's efforts to obtain a commitment from mercantile customers to dedicate their demand response capabilities and resources for the purpose of compliance with SB 221's peak demand reduction mandates. In other words, as more demand response resources are dedicated to the PJM programs, the less demand response resources will be available to the State of Ohio generally and for AEP Ohio specifically. That is why AEP Ohio maintains that the Commission was correct in providing that a customer already receiving a discount should, in exchange for receiving its service discount subsidy from other customers, make its demand response capabilities available for commitment to AEP Ohio in order to help reduce the peak demand reduction compliance costs borne by all customers. Having said that, AEP Ohio would also indicate that it intends to propose additional AEP Ohio demand response programs comparable to the PJM programs.

In sum, when understood in the context of the entire discussion in the Entry on Rehearing and the expansive record on this topic, this explanation given in the Entry on Rehearing is more than enough to pass muster under § 4903.09, Ohio Rev. Code, and sufficiently explains the basis for the decision. Of course, should the Commission wish to expand its explanation of the temporary, partial restriction in response to IEU's application for rehearing, that would further prevent IEU from pursuing the argument. In any case, this basis for rehearing should be rejected.

II. IEU's April 20, 2009 motion and its reincarnation in its rehearing application misinterpret §4928.141, Ohio Rev. Code, and wrongly assert that the Companies were required to "accept" the modified ESP prior to new rates becoming effective.

The basis for IEU's April 20, 2009 motion was that because AEP Ohio had not "accepted" the March 18th order and was "withholding judgement on whether to withdraw and thereby terminate its ESP application" it should not be permitted to "currently [bill and collect] rates and charges pursuant to the Order."[1] (IEU April 20th motion, p. 4). IEU relied upon §4928.141, Ohio Rev. Code, for its position.

The Companies filed their memorandum contra IEU's motion on April 23, 2009, arguing that there is no statutory support for IEU's position.[2] §4928.141, Ohio Rev. Code, only speaks to the period of time "until a standard service offer is first authorized under section 4928.142 of 4928.143 of the Revised Code." As that language applies to the circumstances in this proceeding, the Commission's March 18, 2009 and March 30, 2009 orders had the effect of authorizing a modified ESP under §4928.143, Ohio Rev. Code.

There is no ambiguity surrounding the word "authorized." To authorize is to give official approval, as the Commission did with its March 18 and 30, 2009 orders.[3] The interpretation of this plain language suggested by IEU would change the statute to delete the "authorization" concept and insert an "acceptance" requirement.

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[1] There is no provision in §4928.143, Ohio Rev. Code, or elsewhere in Chapter 4928 or in the Commission's rules requiring an "acceptance" of a modified ESP if the utility does not terminate its application.

[2] As IEU has done with its April 20th motion and April 24, 2009 rely to the Companies' memorandum contra, the Companies incorporate their entire April 23, 2009 memorandum contra into this memorandum contra.

[3] Webster's New World Dictionary, College Edition, 1960

IEU also contends that the Commission did not rule on its April 20, 2009 motion in its Entry on Rehearing. Even though IEU's original rehearing application did not raise the issue which it raised in its prior motion and now raises for a second time, the Commission's Entry on Rehearing at least implicitly ruled on the issue. In its Entry on Rehearing the Commission further modified the ESP. It did not, however, direct any relief along the lines sought by IEU. It therefore is apparent that the Commission did not accept IEU's arguments from its April 20th motion or April 24th reply to the Companies' memorandum contra.[4]

An additional reason for denying IEU's current application for rehearing is that the Companies are charging the rates which the Commission authorized by its March 30, 2009, Entry approving the Companies' tariffs. Once those tariffs were filed and approved by the Commission, the Companies not only were authorized to charge those rates, they were required to charge those rates. (§4905.32, Ohio Rev. Code). If IEU thought that the Companies were not entitled to charge those rates because they had not "accepted" the Commission's modified ESP, its recourse was to seek rehearing of the Commission's March 30, 2009 Entry approving the tariffs. As IEU notes, the Companies' compliance tariffs filed on March 23, 2009 were accompanied by their transmittal letter which reserved their right under §4928.143(C)(2), Ohio Rev. Code, regarding withdrawal of their ESP application. (IEU August 17th Rehearing Application, p. 11). If IEU believed that the Companies could not reserve that right while implementing the rates authorized by the Commission, it should have sought rehearing of

[4] The Commission was well aware of IEU's arguments as well as attempts by other intervenors to reduce the rates authorized by the Commission. (See ¶7, p. 2 of its Entry on Rehearing).

the March 30, 2009 Entry approving the tariffs on that basis. IEU did not file for rehearing of that Entry and its attempt now to resurrect its earlier arguments must fail.[5]

IEU's argument regarding this issue must be rejected. There is nothing in Chapter 4928, Ohio Rev. Code, or in any portion of SB 221, that hints at, let alone supports an argument that a utility must forfeit the right either to seek rehearing of a Commission's ESP order or to implement the ESP rates authorized by the Commission. IEU asserts that the Companies "are taking the benefits of the Entry on Hearing." (*Id.*). The Companies are confident that IEU realizes that the Companies' rates were *reduced* by the Entry on Rehearing. That hardly can be characterized as a benefit for the Companies. IEU cannot seriously suggest that if the Companies intended to seek rehearing of a rate reduction they should have postponed implementing the rate reduction. Perhaps, IEU believes that implementing rate increases must be postponed if rehearing is sought, but rate decreases must be implemented even if rehearing is sought.

The Commission properly has rejected IEU's argument that the Companies must forfeit either the right to pursue rehearing or the right to implement the ESP rates. The Commission now should deny IEU's application for rehearing on that issue.

CONCLUSION

For the foregoing reasons, IEU's application for rehearing should be denied.

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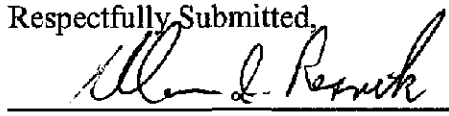
[5] IEU did seek rehearing of the March 18, 2009 Opinion and Order on April 16, 2009. In that pleading, IEU argued that the rates implemented by the Companies were higher than authorized in the Opinion and Order and the Companies' rates should be adjusted and refunds should be required. (IEU Application for Rehearing, pp. 40, 41). While the relief requested by IEU in that pleading was similar in structure to the relief now being sought (impose different, lower rates and order a refund) the basis for IEU's argument in its April 16th rehearing application had nothing to do with the arguments presented in its current rehearing application.

Respectfully Submitted,



Marvin I. Resnik
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Telephone: (614) 716-1608
Fax: (614) 716-2950
Email: miresnik@aep.com
stnourse@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 South High Street
Columbus, Ohio 42315
Fax: (614) 227-2100
dconway@porterwright.com

Counsel for Columbus Southern Power Company
and Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Industrial Energy Users-Ohio's Application for Rehearing was served by electronic mail upon the individuals listed below this 27th day of August 2009.

Marvin I. Resnik

sbaron@jkenn.com	ricks@ohanet.org
lkollen@jkenn.com	tobrien@bricker.com
charlieking@snavely-king.com	david.fein@constellation.com
mkurtz@bkllawfirm.com	cynthia.a.fonner@constellation.com
dboehm@bkllawfirm.com	mhpetricoff@vssp.com
grady@occ.state.oh.us	smhoward@vssp.com
etter@occ.state.oh.us	cgoodman@energymarketers.com
roberts@occ.state.oh.us	bsingh@integrysenergy.com
idzkowski@occ.state.oh.us	lbell33@aol.com
stnourse@aep.com	kschmidt@ohiomfg.com
dconway@porterwright.com	sdebroff@sasllp.com
jbentine@cwslaw.com	apetersen@sasllp.com
myurick@cwslaw.com	sromeo@sasllp.com
mwhite@cwslaw.com	bedwards@aldenlaw.net
khiggins@energystrat.com	sbloomfield@bricker.com
barthroyer@aol.com	todonnell@bricker.com
gary.a.jeffries@dom.com	cvince@sonnenschein.com
nmoser@theOEC.org	preed@sonnenschein.com
trent@theOEC.org	ehand@sonnenschein.com
henryeckhart@aol.com	erii@sonnenschein.com
nedford@fuse.net	tommy.temple@ormet.com
rstanfield@nrdc.org	agamarra@wrassoc.com
dsullivan@nrdc.org	steven.huhman@morganstanley.com
tammy.turkenton@puc.state.oh.us	dmancino@mwe.com
thomas.lindgren@puc.state.oh.us	glawrence@mwe.com
werner.margard@puc.state.oh.us	gwung@mwe.com
john.jones@puc.state.oh.us	stephen.chriss@wal-mart.com
sam@mwncmh.com	lgearhardt@ofbf.org
lmcalister@mwncmh.com	cmiller@szd.com
jclark@mwncmh.com	gdunn@szd.com
drinebolt@aol.com	aporter@szd.com
cmooney2@columbus.rr.com	