

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV
2009 OCT -9 PM 5:14

PUCO

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

**INDUSTRIAL ENERGY USERS-OHIO'S REPLY
TO AEP-OHIO'S MEMORANDUM CONTRA IEU-OHIO'S
MOTION FOR REFUND OR TO SHOW CAUSE**

Samuel C. Randazzo, Trial Attorney
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcAlister@mwncmh.com
jclark@mwncmh.com

October 9, 2009

Attorneys for Industrial Energy Users-Ohio

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician _____ Date Processed 10-9-09

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

**INDUSTRIAL ENERGY USERS-OHIO'S REPLY
TO AEP-OHIO'S MEMORANDUM CONTRA IEU-OHIO'S
MOTION FOR REFUND OR TO SHOW CAUSE**

I. Introduction and Background

On March 18, 2005, Columbus Southern Power Company ("CSP") and Ohio Power Company ["OP"] (collectively "AEP-Ohio") filed an Application seeking approval of mechanisms to provide it with cost recovery assurances for a hypothetical integrated gasification combined cycle ("IGCC") plant that AEP-Ohio indicated it may construct in Meigs County, Ohio. On April 10, 2006, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order that, among other things, authorized AEP-Ohio to recover certain costs associated with the hypothetical IGCC generating plant and treated the costs as being associated with ancillary service necessary to provide retail distribution service to Ohio customers (hereinafter "April 10, 2006 Order"). AEP-Ohio described the costs as being preconstruction costs including engineering and scoping study costs. April 10, 2006 Order at 11.

On June 28, 2006, the Commission issued an Entry on Rehearing that conditioned its approval of AEP-Ohio's Application by requiring that all Phase I costs would be subject to subsequent audits and 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.”¹

Industrial Energy Users-Ohio (“IEU-Ohio”), among others, appealed the Commission's decision to the Supreme Court of Ohio. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486 (2008). On March 13, 2008, the Court affirmed, in part, reversed, in part, and remanded the Commission's Order. The Ohio Supreme Court held that while there may be merit to the Commission's regulation of the design, construction and operation of the hypothetical IGCC plant, the “evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility.” *Id.* at 493. Accordingly, the Court remanded the case to the Commission to “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.” *Id.* Additionally, the Court directed the Commission to address compliance with the “75 percent used-and-useful standard” because AEP-Ohio had not yet begun construction of the hypothetical IGCC plant. *Id.* Finally, the Court declined to rule on IEU-Ohio's request for a refund of costs already collected from AEP-Ohio's customers because of its remand to the Commission for further development of the record and because the conditional refund provision added in the Commission's Entry on Rehearing remained in effect. *Id.* at 494.

¹ *Entry on Rehearing* at 16, 17.

On September 17, 2008, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion on Remand requesting that the Commission order AEP-Ohio to refund to customers, with interest, the revenue collected for the design, construction, and operation of the IGCC electric generation facility.

On January 8, 2009, the Attorney Examiner issued an Entry directing AEP-Ohio to provide a detailed statement outlining the status of the construction of the IGCC facility, including whether AEP-Ohio is engaged in a continuous course of construction of the IGCC facility. Specifically, the Entry stated:

To provide the Commission with additional information, and to further develop the record in this matter, the Attorney Examiner believes it is imperative that AEP-Ohio provide a detailed statement outlining the status of the construction of the IGCC facility, including whether AEP-Ohio is engaged in a continuous course of construction on the IGCC facility.

January 8, 2009 Entry at 3.

On February 6, 2009, AEP-Ohio filed a two page response that states that AEP-Ohio has not commenced construction of the IGCC facility but changes in the economy, load growth and the law may result in AEP-Ohio commencing construction by June 2011. Columbus Southern Power Company's and Ohio Power Company's Response to the Attorney Examiner's January 8, 2009 Entry (February 6, 2009). On September 1, 2009, an AEP-Ohio affiliate filed an integrated resource plan ("IRP")² at the Virginia State Corporation Commission ("SCC") that identifies that neither AEP-Ohio nor any affiliate has any plans that include initiation of construction of any IGCC plant prior to June 28, 2011. Based on these reports, on September 18, 2009, IEU-Ohio filed

² *In re: Appalachian Power Company's Integrated Resource Plan filing pursuant to Virginia Code Section 56-598 et seq.*, Case No. PUE-2009-97 (September 1, 2009) (available online at <http://docket.scc.virginia.gov/vaproduct/main.asp>) (last viewed on September 17, 2009) (hereinafter "Virginia IRP").

a Motion requesting that the Commission direct AEP-Ohio to refund IGCC revenues collected or show cause why the revenues should not be immediately refunded ("Motion").

On October 1, 2009, AEP-Ohio filed a Memorandum Contra IEU-Ohio's Motion ("Memo Contra"). AEP-Ohio simply states that integrated resource planning is subject to change and an IRP is not a commitment to a specific course of action. AEP-Ohio Memo Contra at 3. AEP-Ohio concludes that there is no reason to change the timeline. AEP-Ohio also adds that if no IGCC facility is built anywhere, Ohio customers are not entitled to any refund. However, AEP-Ohio quickly adds that "there is no need to engage in that debate at this time." *Id.* at 4.

II. Reply

AEP-Ohio would have the Commission avoid the issues that the Court directed it to address on remand on the basis that AEP-Ohio may start some continuous course of construction of a hypothetical IGCC plant prior to June 2011 despite all indications otherwise. For the first time, AEP-Ohio alternatively argues that regardless of whether it constructs anything, Ohio customers may not be entitled to a refund. AEP-Ohio's arguments are contrary to the directives of the Court, Ohio law and common sense.

The Commission has a duty to comply with the directives from the Court, which include supplementing the record with evidence that supports the order permitting AEP-Ohio to recover the costs associated with the research and development of the proposed IGCC facility, verifying that AEP has complied with R.C. 4909.18 and addressing compliance with the "75 percent used-and-useful standard" because AEP-Ohio had not yet begun construction of the hypothetical IGCC plant. AEP-Ohio

bears the burden of proof and production of evidence to support the Commission's conclusions that the Court found otherwise lacked sufficient evidence to sustain. The Commission requested that AEP-Ohio provide it with additional information to further develop the record including a detailed statement outlining the status of the construction of the IGCC facility. AEP-Ohio responded (twice now) that there is no continuous course of construction. Without more information, of which there appears to be none, the Commission must comply with the Court's order and issue an order on remand. Without a supplement to the record, the order on remand should either direct AEP-Ohio to refund, with interest, the revenue it billed and collected or direct AEP-Ohio to forthwith show cause why such revenue and interest should not be promptly refunded to the customers from which it was collected.

It is worth noting that if AEP-Ohio is ordered to refund the IGCC revenues, it is not foreclosed from seeking to recover the costs at a point in time when conditions become more favorable for AEP-Ohio to actually construct an IGCC plant. As AEP-Ohio's response recognized, "in enacting SB 221 the General Assembly addressed the need for advanced energy resources such as IGCC technology...." Columbus Southern Power Company's and Ohio Power Company's Response to the Attorney Examiner's January 8, 2009 Entry at 1-2 (February 6, 2009). In other words, subsequent to the Court's remand, Amended Substitute Senate Bill 221 ("SB 221") became effective and specifically includes mechanisms for recovery of IGCC facilities that were not in Ohio law when AEP-Ohio made its initial IGCC application. Specifically, Sections 4928.143(B)(2)(b) and (c), Revised Code, state:

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

Thus, should AEP-Ohio be able to meet the requirements set forth in Section 4928.143(B), Revised Code, it may apply to the Commission to recover the costs associated with an IGCC plant should the need arise.

III. Conclusion

For the reasons stated herein, IEU-Ohio respectfully requests that the Commission either direct AEP-Ohio to refund, with interest, the revenue it billed and collected or direct AEP-Ohio to forthwith show cause why such revenue and interest should not be promptly refunded to the customers from which it was collected. Anything other than the action requested by IEU-Ohio herein results in an unlawful, unjust and unreasonable failure to comply with the Ohio Supreme Court's mandate issued in *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486 (2008).

Respectfully submitted,



Samuel C. Randazzo, Trial Attorney

Lisa G. McAlister

Joseph M. Clark

MCNEES WALLACE & NURICK LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

lmcAlister@mwncmh.com

jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Reply to AEP-Ohio's Memorandum Contra IEU-Ohio's Motion for Refund or to Show Cause* was served upon the following parties of record this 9th day of October, 2009, via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



Lisa G. McAlister

Marvin I. Resnik
Sandra K. Williams
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Daniel R. Conway
Porter Wright Morris and Arthur LLP
41 South High Street
Columbus, OH 43215-6194

**ON BEHALF OF COLUMBUS SOUTHERN POWER
COMPANY AND OHIO POWER COMPANY**

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

ON BEHALF OF THE OHIO ENERGY GROUP

Kathy Kolich
Senior Attorney
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP.

Jeffrey L. Small
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

ON BEHALF OF OHIO CONSUMERS' COUNSEL

Richard A. Kanoff
Senior Counsel
Calpine Corporation
Two Atlantic Avenue, Third Avenue
Boston, MA 02110

ON BEHALF OF CALPINE CORPORATION

Thomas E. Lodge
Thompson Hine LLP
10 West Broad Street, Suite 700
Columbus, OH 43215-3435

ON BEHALF OF LIMA ENERGY COMPANY

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213

**ON BEHALF OF AMERICAN MUNICIPAL POWER-
OHIO**

CERTIFICATE OF SERVICE

Thomas L. Rosenberg
Jessica L. Davis
Roetzel & Andress, LPA
National City Center
155 East Broad St., 12th Floor
Columbus, OH 43215

**ON BEHALF OF INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL #970, UNITED
ASSOCIATION OF JOURNEYMEN AND APPRENTICES
OF THE PLUMBING AND PIPE FITTING INDUSTRY OF
THE UNITED STATES AND CANADA LOCAL #168
AND PARKERSBURG-MARIETTA BUILDING AND
CONSTRUCTION TRADES COUNCIL AFL-CIO &
ON BEHALF OF IRONWORKERS LOCAL #787**

William A. Adams
Dane Stinson
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215

ON BEHALF OF DIRECT ENERGY SERVICES, LLC

M. Howard Petricoff
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

**ON BEHALF OF BAARD GENERATION LLC &
ON BEHALF OF CONSTELLATION GENERATION
GROUP, LLC, CONSTELLATION ENERGY
COMMODITIES GROUP, INC., AND CONSTELLATION
NEWENERGY, INC.**

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay OH 45839-1793

**ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE
ENERGY**

Michael D. Dortch
Kravitz Brown & Dortch LLC
145 E. Rich St.
Columbus, OH 43215

**ON BEHALF OF GE ENERGY (USA) LLC AND
BECHTEL POWER CORPORATION**

Thomas McNamee
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215

**ON BEHALF OF THE PUBLIC UTILITIES COMMISSION
OF OHIO**

Christine Pirik
Greta See
Attorney Examiners
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

ATTORNEY EXAMINER