

FILE

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) 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
IEU'S MOTION FOR A REFUND
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. STATEMENT OF THE CASE ON REMAND

On September 18, 2009, the Industrial Energy Users - Ohio ("IEU") submitted a Motion for Refund or to Show Cause ("IEU Motion") to the Public Utilities Commission of Ohio ("PUCO" or "Commission"). IEU asks the PUCO 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.¹ 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.² AEP

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

² IEU 2008 at ¶¶ 8-9.

filed its Memorandum Contra IEU's Motion for Refund or to Show Cause ("Memo Contra IEU") on October 1, 2009, and IEU filed its Reply to AEP's Memo Contra IEU ("IEU Reply") on October 9, 2009.

In response to an Entry dated January 8, 2009, AEP submitted a status report on the Company's IGCC project. AEP's two-page report stated that it had "not commenced construction" and that "there still exist real statutory barriers to [its] construction. . . ."³

A year earlier than the IEU Motion, on September 17, 2008, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential customers, submitted a Motion for Refund or to Show Cause ("OCC Motion") to the PUCO. On October 2, 2008, AEP submitted its Memorandum Contra OCC's Motion for Refund, and the OCC submitted its Reply on October 8, 2008. AEP stated 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."⁴ 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.*⁵

AEP's argument was based, therefore, on the false premise that the Court accepted its "POLR" explanation for collecting \$24 million from customers. The OCC Motion remains pending.

³ AEP Response to Attorney Examiner's January 8, 2009 Entry at 1-2 (February 6, 2009).

⁴ AEP Memo Contra OCC at 5 (October 2, 2008).

⁵ IEU 2008 at ¶32 (emphasis added).

The OCC was one of four parties (including IEU) to the Commission's proceedings that appealed the Commission's decision.⁶ In its decision on March 13, 2008, the Supreme Court of Ohio 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-plan research-and-development costs that AEP had collected from its customers pursuant to the commission's order.⁷

The Court reversed the Commission's result on the first issue, holding that the PUCO lacked the required legislative authority.⁸ 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.⁹ 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."¹⁰ The Commission has not yet made additional findings on the issues remanded.

⁶ The other appellants were FirstEnergy Solutions and the Ohio Energy Group. Id. at ¶1.

⁷ Id. at ¶11 (bracketed numbers inserted).

⁸ Id. at ¶23-24.

⁹ Id. at ¶32-33.

¹⁰ Id. at ¶13.

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

AEP's Memo Contra IEU responds to IEU's arguments that were based upon an integrated resource plan ("Virginia IRP")¹¹ filed by an AEP affiliate to the Virginia State Corporate Commission ("SCC"). IEU argues that the Virginia IRP shows that the AEP-affiliated companies do not have plans to build a major generating station anytime soon, and therefore the prospect for AEP to begin a continuous course of construction by 2011 is dim.¹² AEP's Memo Contra IEU argues that its plans may change at a later date.¹³ The Virginia IRP, however, deals specifically with AEP's plans for an IGCC project, stating:

The 2008 IRP for AEP-East recommended an earlier build profile than the current 2009 IRP. The most noticeable differences between the two plans are the *elimination of the 2017 IGCC unit* due to a combination of the addition of the Cook Unit [nuclear] Upate and additional demand response¹⁴

The Virginia IRP, therefore, goes beyond a statement that new baseload generating units will not be constructed by AEP anytime soon¹⁵ and eliminates any unit that could be relied upon by AEP to retain the \$24 million collected from customers. The Supreme Court of Ohio's decision in *IEU 2008* calls for action by the PUCO on remand, and the Virginia IRP confirms that the \$24 million in collections from customers will not contribute to any IGCC project by AEP in Ohio.

¹¹ See IEU Motion, footnote 1, citing *In re AEP IRP Filing in Virginia*, Case No. PUE-2009-97 (September 1, 2009), available at: <http://docket.scc.virginia.gov/vaprod/main.esp>

¹² IEU Reply at 3-4.

¹³ AEP Memo Contra IEU at 3.

¹⁴ Virginia IRP, Section 13.2 ("Comparison to 2008 IRP") at 112 (emphasis added).

¹⁵ See, e.g., IEU Motion at 7.

The Commission specifically provided that the revenues collected by AEP for research and development were subject to refund.¹⁶ The Court did not take the issue up “[i]n view of . . . [the Court’s] remand of this matter to the commission.”¹⁷ 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. 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.¹⁸ AEP states that the “Commission understood the uncertainty of the planning process when it provided the five-year window for commencing construction . . . ,”¹⁹ but a normal planning process surely does not include the Supreme Court of Ohio’s reversal of the Order underlying the collection of the “Phase I” charges. The Commission should not force AEP’s customers to wait until 2011, as is AEP’s preference,²⁰ for a resolution of whether customers who paid \$24 million will see that money returned.

AEP also argues that its removal of all plans to construct an IGCC generating station favors the Company’s retention of the \$24 million that was collected from

¹⁶ Entry on Rehearing at 17 (June 28, 2006).

¹⁷ *IEU 2008* at ¶36.

¹⁸ *IEU 2008*, ¶¶ 23-24, 32-33. “The commission may change or modify earlier orders as long as it justifies any changes.” *Ohio Consumers’ Counsel v. Public Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276 at ¶14.

¹⁹ AEP Memo Contra IEU Motion at 3.

²⁰ See, e.g., AEP Memo Contra IEU at 3 (“no reason to modify the time frame”).

customers.²¹ Even in the event that the PUCO applies its original conditions upon AEP's retention of the \$24 million (which is not required), those conditions do not support the Company's argument. The Commission made the collection of revenues from the IGCC-related rider subject to refund, as follows:

[I]f AEP has not commenced a continuous course of construction of the proposed facility within five years of the 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.²²

Even under these original conditions, AEP's total abandonment of its plans for an IGCC generating unit in Ohio would not mean that the Company is entitled to retain the \$24 million it collected from customers.

The Commission originally made collections subject to refund in connection with "projects at other sites,"²³ not projects "built by AEP Ohio or any of its affiliates"²⁴ as claimed by the Company. The Commission's Order repeats AEP's claim that "the proposed IGCC plant will advance the commercialization of IGCC technology," which did not depend upon AEP's ownership of the IGCC units.²⁵ For example, the record in the case before the Commission reveals that "Phase I" moneys were spent on services provided by AEP's vendors, as detailed by the testimony of AEP Witness Jasper that

²¹ Memo Contra IEU at 4 ("no refunds to customers would be forthcoming").

²² Entry on Rehearing at 17 (June 28, 2006).

²³ Id.

²⁴ AEP Memo Contra IEU at 4.

²⁵ Order at 19 (April 10, 2006).

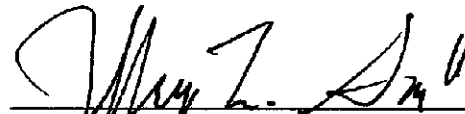
mentions General Electric and Bechtel.²⁶ These same, benefiting (i.e. from the AEP work) vendors have been engaged in construction of Duke Energy Indiana's IGCC generating unit located in Indiana.²⁷ Under all circumstances, therefore, the Commission should promptly refund the revenues in question to customers.

III. CONCLUSION

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

Respectfully submitted,

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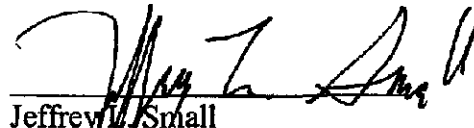
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²⁶ Supplemental Testimony of William M. Jasper at 1 ("GE/Bechtel") and WMJ Exhibit 4 ("\$23,739 "in 000s of Dollars") (August 3, 2005).

²⁷ *In re Duke Energy IGCC Generating Plant in Indiana*, IURC Cause No. 43114, Order at 6 (November 20, 2004) (e.g., "Agreement with GE/Bechtel in February, 2006").

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Reply to AEP's Memo Contra IEU Motion* was served on the persons stated below via First Class U.S. Mail, postage prepaid, this 13th day of October 2009.


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