

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company to Adjust Their) Case No. 10-154-EL-RDR
Economic Development Cost Recovery)
Rider Pursuant to Rule 4901:1-38-08(A)(5),)
Ohio Administrative Code.)

ENTRY ON REHEARING

The Commission finds:

- (1) On February 8, 2010, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, AEP-Ohio or the Companies) filed an application to adjust their economic development cost recovery rider (EDR) rates. In accordance with the Commission's decision in AEP-Ohio's electric security plan (ESP) cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, the EDR rate for each company was initially set at 0.00 percent.¹ AEP-Ohio's EDR rates were subsequently revised to 10.52701 percent for CSP and 8.33091 percent for OP, pursuant to the Commission's order issued in In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates, Case No. 09-1095-EL-RDR, Finding and Order (January 7, 2010) (09-1095).
- (2) Paragraphs (A)(5) and (C) of Rule 4901:1-38-08, Ohio Administrative Code (O.A.C.), require that the electric utilities' EDR rates be updated and reconciled semiannually and permit any affected person to file a motion to intervene and comments to the application within 20 days of the date that the application is filed. In 09-1095, the Commission directed AEP-Ohio to file its application to adjust its EDR

¹ *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, and In the Matter of the Application of Ohio Power Company for Approval of an Electric Security Plan; and an Amendment to its Corporate Separation Plan, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009) and Entry on Rehearing (July 23, 2009) (ESP cases).*

rates in such a way as to allow the Commission sufficient time to review the filing and perform due diligence in order to facilitate implementation of the EDR rates with the first billing cycles of April and October.²

- (3) In accordance with the aforementioned Commission directives and Rule 4901:1-38-08(A)(5), O.A.C., on February 8, 2010, AEP-Ohio filed an application in this case to reduce CSP's EDR rate by 0.00246 percent to 10.52455 percent, and to increase OP's EDR rate by 0.03602 percent to 8.36693 percent. According to AEP-Ohio, the proposed adjustments to the EDR rates, which utilized the same methodology approved by the Commission in 09-1095, reflect a reduction in recovery due to an over-estimation of recoverable delta revenues for CSP of \$8,017, and recovery of an under-estimation of recoverable delta revenues for OP of \$113,504 for the period from September 2009 to December 2009, based on the actual delta revenues associated with the Companies' unique arrangement with Ormet Primary Aluminum Corporation and CSP's reasonable arrangement with Eramet Marietta, Inc. As a part of its application, AEP-Ohio provided the projected bill impacts of the proposed EDR rider adjustments on CSP and OP customers, by customer class.
- (4) On March 1, 2010, the Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene and comments. The Commission subsequently granted IEU-Ohio's intervention on March 24, 2010. In its comments, IEU-Ohio raised four distinct issues, to which AEP-Ohio responded to on March 8, 2010.
- (5) On March 24, 2010, the Commission issued a Finding and Order (March 24 Order) approving AEP-Ohio's application. In the March 24 Order, the Commission addressed, with specificity, the four issues IEU-Ohio raised in its March 1, 2010 comments, denying each of IEU-Ohio's arguments.
- (6) On April 23, 2010, IEU-Ohio filed an application for rehearing, asserting the following assignments of error:
 - (a) The March 24 Order is unlawful and unreasonable inasmuch as the Commission has no subject matter jurisdiction over the EDR application. The

² 09-1095 at 11-12.

Commission lost jurisdiction over AEP-Ohio's ESP and all proceedings stemming from the ESP, including this proceeding, when the Commission failed to issue an order within 150 days of the filing of AEP-Ohio's ESP application.

1. The Commission's failure to dismiss AEP-Ohio's EDR application violates Sections 4928.143 and 4928.141, Revised Code.
 2. Basic tenets of statutory construction require the Commission to dismiss the EDR application and grant IEU-Ohio's requested relief in this case.
 3. The Commission's determination that IEU-Ohio improperly attempts to relitigate the 150-day subject matter jurisdiction issue is unlawful and unreasonable.
- (b) The March 24 Order is unlawful and unreasonable inasmuch as the Commission continues to permit AEP-Ohio to take the benefits of the higher rates contained in the ESP, including the EDR, while AEP-Ohio simultaneously challenges the ESP orders and reserves the right to withdraw and terminate its ESP.
- (c) The March 24 Order is unlawful and unreasonable inasmuch as it continues the illegal exception for the EDR from the maximum percentage increases permitted in the ESP.
- (d) The March 24 Order is unlawful and unreasonable inasmuch as it fails to ensure the carrying cost rate for the EDR is the lowest cost rate.
- (7) The Commission addressed each of IEU-Ohio's assignments of error in its March 24 Order. Therefore, the Commission finds that IEU-Ohio has raised no new arguments to support its application for rehearing, and, thus, the application for rehearing should be denied. However, the Commission will provide further explanation as to why IEU-Ohio's first ground for rehearing is without merit.

The Commission did not lose jurisdiction over the ESP application after 150 days. The 150-day period specified in Section 4928.143(C)(1), Revised Code, does not limit the Commission's jurisdiction. The general rule is that "a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Hardy v. Delaware Cty. Bd. Of Revision*, 106 Ohio St. 3d 359, 363, 835 N.E.2d 348, 353 (2005), quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 66 N.E.2d 531, ¶ 3 of the syllabus (1946). As the Court has explained:

Statutes which relate to the manner or time in which power or jurisdiction vested in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, may be construed to be directory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated.

Schick v. Cincinnati, 116 Ohio St. 16, 155 N.E. 555, ¶ 1 of the syllabus (1927).

The Court has repeatedly held that a tribunal does not lose jurisdiction for failing to act within a prescribed time absent an express intent to restrict jurisdiction for untimeliness. *See, e.g. In re Davis*, 84 Ohio St. 3d 520, 705 N.E.2d 1219 (1999); *State v. Bellman*, 86 Ohio St. 3d 208, 714 N.E.2d 381 (1999). There is no such expression of intent in Section 4928.143(C)(1), Revised Code, or elsewhere in S.B. 221. The statute expresses no purpose for the requirement that an application be approved within 150 days. Absent a discernable purpose in the text of the statute, the time for performance is viewed as directory, not mandatory, *State ex rel. Smith v. Barnell*, 109 Ohio St. 246, 142 N.E.2d 611 (1924). The Commission, thus, retained jurisdiction to act on the ESP application.

It is, therefore,

ORDERED, That IEU-Ohio's application for rehearing be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in this proceeding.

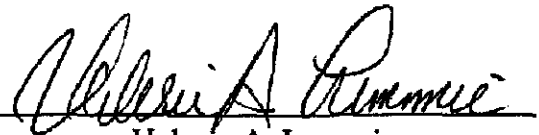
THE PUBLIC UTILITIES COMMISSION OF OHIO



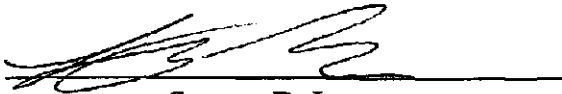
Alan R. Schriber, Chairman



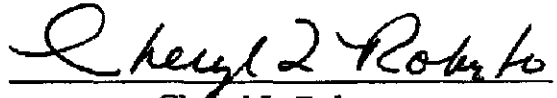
Paul A. Centolella



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Renee J. Jenkins
Secretary