

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO  
2010 DEC -3 PM 12: 22

In the Matter of the 2009 Annual Filing )  
of Columbus Southern Power Company )  
And Ohio Power Company Required by ) Case No. 10-1261-EL-UNC  
Rule 4901:1-35-10, Ohio Administrative )  
Code. )

PUCO

In the Matter of the Fuel Adjustment ) Case No. 09-872-EL-FAC  
Clauses for Columbus Southern Power )  
Company and Ohio Power Company. ) Case No. 09-783-EL-FAC

MEMORANDUM CONTRA OF  
COLUMBUS SOUTHERN POWER COMPANY  
AND OHIO POWER COMPANY TO MOTION FOR EXTENSION OF TIME AND STAY OF  
THE PROCEDURAL SCHEDULE OF OHIO PARTNERS FOR AFFORDABLE ENERGY

On November 30, 2010, Columbus Southern Power Company and Ohio Power Company (collectively "the Companies" or AEP Ohio"), the Staff of the Public Utilities Commission of Ohio (Staff), the Ohio Hospital Association, the Ohio Manufacturers' Association, The Kroger Company, and Ormet Primary Aluminum Corporation (collectively, the "Signatory Parties" or the "Stipulating Parties") filed a Stipulation and Recommendation (Stipulation) that would resolve the issues raised in these cases. As part of their Stipulation, the Signatory Parties jointly recommended a procedural schedule for consideration of the Stipulation: (a) written testimony in support of the Stipulation to be filed by December 1, 2010; (b) written testimony in opposition to the Stipulation to be filed by December 6, 2010; (c) evidentiary hearing regarding the Stipulation to be conducted on December 9, 2010; and (d) one set of briefs in support of or in opposition to the Stipulation to be filed by December 15, 2010.

On December 1, 2010, the Commission's Attorney Examiner issued an Entry establishing a procedural schedule for considering the Stipulation that coincides with the Stipulating Parties' recommendation.

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Also on December 1, the Office of the Consumers' Counsel, Ohio Energy Group, Appalachian Peace and Justice Network, Industrial Energy Users-Ohio, and Ohio Partners for Affordable Energy (Non-Signatory Parties) jointly filed a memorandum contra that opposes the Stipulating Parties' recommended procedural schedule along with a motion that requests an alternative procedural schedule and asks for expedited treatment of their requested procedural schedule. The Non-Signatory Parties also request that the time period for responding to their discovery requests be shortened to five days (from the ten-day time period that currently applies). On December 2, 2010, AEP Ohio filed a memorandum contra the Non-Signatory Parties' Motion for Procedural Schedule.

**OPAE cannot be heard to join two pleadings asking for the same relief**

On December 2, 2010, Ohio Partners for Affordable Energy (OPAE) filed a motion of its own – again asking for a delay in the established procedural schedule. Because OPAE already had joined in the Non-Signatory Parties Motion for Procedural Schedule, its duplicative request asking for the same relief should not even be heard or considered separately. The Commission should not permit OPAE more than “one bite at the apple” and should only consider and rule on OPAE's request once – and reject it as part of denying the Non-Signatory Parties' Motion. For the reasons stated in AEP Ohio's prior response to the Non-Signatory Parties' Motion, OPAE's request for delay also fails to state good cause for an extension. If the Commission does separately consider OPAE's redundant request, it should reject it for several additional reasons discussed below.

**OPAE did not invoke, let alone address or establish, the proper elements of a stay**

OPAE asks for a stay of the current schedule but fails to even address, let alone establish, any of the established grounds to seek a stay of a Commission determination. The Commission has noted that there is no controlling precedent in Ohio setting forth the conditions under which the Commission will stay one of its own orders.<sup>1</sup> However, the Commission has favored the four-factor test to determine the need for a stay offered in a dissenting opinion by Justice Douglas in *MCI Telecommunications Corp. v. Pub. Util. Comm.*<sup>2</sup> This test involves examining:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where lies the public interest.

OPAE's request should be denied due to its failure to address the basic justification for such an extraordinary relief. The Commission has fully considered the matters in these cases and even issued its procedural schedule. OPAE did not offer any rationale why it would be irreparably harmed as a result of the decision. A scheduling conflict certainly does not rise to the level of irreparable harm. OPAE provides no evidence of substantial harm to other parties. OPAE's basis for stay are based in its own issues with the stipulation and not based on a public interest argument. It is not clear that OPAE intended to invoke the full package associated with invoking a request for a stay, especially as it did not provide the traditional justification and

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<sup>1</sup> *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.*

<sup>2</sup> *MCI Telecommunications Corp. v. Pub. Util. Comm. (1987), 31 Ohio St.3d 604.*

should not attempt to do so now. Either way, the facts presented by OP&E to justify such an extraordinary remedy are not present. The Commission should deny this request.

**OP&E Cannot Rely on a Sudden Interest in the FAC Cases as a Reason for Delaying the Procedural Schedule Established for Consideration of the Stipulation**

OP&E never sought intervention in the FAC Cases (until yesterday) and one can only presume that OP&E did not have an interest in those proceedings independent of the Stipulation. OP&E maintains that it now needs to familiarize itself with the entire record in the FAC Cases in order to address the Stipulation, merely because the Stipulation resolves the FAC Cases. OP&E did not ask AEP Ohio for access to the confidential information but rather simply claims in its pleading that it lacks access to the information from the FAC Cases. Regardless of OP&E's status as an intervening party in the FAC Cases, AEP Ohio is willing under the present circumstances to provide access to the confidential information relating to the FAC aspects of the Stipulation that might be sought by OP&E, subject to OP&E signing a reasonable protective agreement.<sup>3</sup> Indeed, along with the filing of this pleading, AEP Ohio has already sent OP&E a protective agreement to sign for this purpose. In short, OP&E's access to data that relates to the FAC Cases is not a basis to support OP&E's late intervention or to delay the existing procedural schedule. Regardless, there is no need to re-litigate either the SEET Case or the FAC Cases as part of evaluating the Stipulation; the Stipulation hearing focuses on the three-part test for adoption of contested settlements.

**A Scheduling Conflict for One of OP&E's Attorneys Does Not Support a Month Delaying**

The only other basis for delay offered by OP&E is that one of its attorneys has a scheduling conflict. While OP&E's pleading recites in detail the important matters that need to be addressed by Mr. Rinebolt on the day that is also scheduled for the Stipulation hearing to

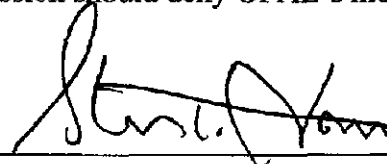
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<sup>3</sup> To date, no requests of AEP Ohio have been made by OP&E in this regard.

begin, the fact is that OP&A; has multiple attorneys working for the organization. In fact, the transcript record in the SEET hearing shows that Ms. Mooney was present for OP&A;, not Mr. Rinebolt, on all four hearing days. Hence, OP&A; has functioned thus far in these proceedings exclusively through participation of Ms. Mooney and Mr. Rinebolt's one-day scheduling conflict does not justify a month delay. In any case, if OP&A; believes that it is critical for Mr. Rinebolt to attend the Stipulation hearing, AEP Ohio would be amenable to delaying the start of the Stipulation hearing until December 10, provided the hearing is also completed that same day.

### CONCLUSION

For the foregoing reasons, the Commission should deny OP&A;'s motion.



Respectfully submitted,

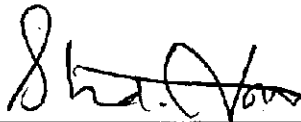
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**PROOF OF SERVICE**

I certify that Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra was served by U.S. Mail upon counsel for all parties of record identified below this 3<sup>rd</sup> day of December, 2010.



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