

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application to Continue )  
The Monongahela Power Litigation )  
Termination Rider Initially Approved in ) Case No. 10-3104-EL-RDR  
Case No. 05-765-EL-UNC for Recovery of )  
Monongahela Power Regulatory Assets )  
Costs. )

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COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

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January 14, 2011

On Behalf of Industrial Energy Users-Ohio

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**COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

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On December 21, 2010, Columbus Southern Power Company ("CSP") filed an Application<sup>1</sup> with the Public Utilities Commission of Ohio ("Commission") to continue and alter the temporary litigation termination rider ("LTR") that was approved in *In the Matter of the Transfer of Monongahela Power Company's Certified Territory in Ohio to the Columbus Southern Power Company*, Case No. 05-765-EL-UNC, Opinion and Order (November 9, 2005) (hereinafter cited as "*Mon Power*"). CSP's Application should be denied: it is an untimely application for rehearing, it is an improper and incomplete application to increase distribution rates, factual issues remain regarding the value of the regulatory assets to be collected, and the Application proposes an inequitable manner of recovering the regulatory assets.

**I. BACKGROUND AND PROCEDURAL HISTORY**

On December 21, 2010, CSP filed an Application with the Commission to continue and alter the temporary LTR that was approved in *Mon Power*. In its Application, CSP suggests that the "most equitable manner of recovering the costs of

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<sup>1</sup> *In the Matter of the Application to Continue The Monongahela Power Litigation Termination Rider Initially Approved in Case No. 05-765-EL-UNC for Recovery of Monongahela Power Regulatory Assets Costs*, Case No.10-3104-EL-RDR, Application (December 21, 2010) (hereinafter referred to as "Application").

these regulatory assets is to extend the current Mon Power Litigation Termination Rider, at its current charge to CSP customers of .01229 ¢/kWh.” Application at 2. To understand CSP’s Application, the Commission must review its November 9, 2005, Opinion and Order in *Mon Power*.

On November 9, 2005, the Commission approved the transfer of Mon Power’s transmission and distribution assets to CSP. *Mon Power*, Opinion and Order (November 9, 2005). The Commission addressed several issues in the Opinion and Order that are germane to CSP’s Application. First, the Commission authorized CSP to create a temporary LTR. *Mon Power*, Opinion and Order at 18-20 (November 9, 2005). The Commission also authorized the transfer of certain regulatory assets to CSP’s books. *Id.* at 15. The Commission directed that the amortization of the regulatory assets be addressed in CSP’s next distribution rate case—as requested by CSP. *Id.* at 12. Finally, the Commission directed that the regulatory assets, which at that time totaled \$3.7 million, be audited to verify they were properly classified as transmission or distribution related regulatory assets.<sup>2</sup>

As CSP states in its Application, the Commission permitted CSP to create the LTR to recover \$10 million paid by CSP, as part of the purchase price, to Mon Power so that Mon Power would terminate pending state and federal litigation.<sup>3</sup>

But the Commission was explicit that the rider must be temporary:

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<sup>2</sup> The Commission stated: “We do not believe that the Companies’ methodology actually does properly remove any generation-related assets. Accordingly, we will direct the Companies to perform an audit to ensure that the regulatory assets being transferred relate to transmission and distribution assets only.... The Commission also believes this is a better alternative for CSP than to find that an asset did not receive proper accounting treatment during a later distribution rate case.” *Mon Power*, Opinion and Order at 15 (November 9, 2005).

<sup>3</sup> *Mon Power*, Opinion and Order at 19 (November 9, 2005); see also Application at 1.

The Commission finds that the Staff recommendation is well-taken. Accordingly, the Commission also finds that CSP's proposed tariff language for the **Monongahela Power Litigation Termination Rider should be modified to indicate that it is a "temporary" charge that will be applied only until the amount authorized by the Commission in this proceeding is collected.**<sup>4</sup>

The language in the LTR's tariff is also explicit: "[t]his temporary Rider shall remain in effect until the amounts authorized by the Commission in Case No. 05-765-EL-UNC have been collected."<sup>5</sup> CSP's Application states that the LTR will have collected the \$10 million authorized in *Mon Power* as of February 2011. Application at 1.

Through its Application, CSP is now proposing to extend the LTR to begin recovering \$4.1 million in regulatory assets, which is more than the amounts identified in *Mon Power*. *Id.*

In *Mon Power*, CSP proposed and the Commission agreed that any collection of the regulatory assets would be addressed in CSP's next distribution rate case. The Commission stated, "CSP proposes to recover these acquired regulatory assets and refund these acquired regulatory liabilities in its **next distribution rate case** filing (CSP Ex. 4, at 11)."<sup>6</sup> The November 9, 2005, Opinion and Order reinforces this conclusion several times.<sup>7</sup>

CSP did not file an application for rehearing of the *Mon Power* Opinion and Order. Instead, CSP waited over five years and filed this Application on December 21, 2010. The Application improperly requests that the Commission alter the LTR, a temporary rider. That request must be denied.

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<sup>4</sup> *Mon Power*, Opinion and Order at 20 (November 9, 2005) (emphasis added).

<sup>5</sup> Application at Exhibit B.

<sup>6</sup> *Mon Power*, Opinion and Order at 12 (November 9, 2005) (emphasis added).

<sup>7</sup> *Id.* at 12, 13, 14, 15.

## **II. COMMENTS**

### **A. CSP'S Application is an Untimely Application for Rehearing.**

CSP's Application is an untimely application for rehearing. The Commission previously determined that the LTR is a temporary rider and that any recovery of the regulatory assets would be addressed in CSP's next distribution rate case. *Mon Power*, Opinion and Order at 12, 13, 14, 15 (November 9, 2005).

Any party may file an application for rehearing within thirty days (30) after the issuance of a Commission order. Section 4903.10, Ohio Revised Code ("Revised Code"); Rule 4901-1-35, Ohio Administrative Code ("O.A.C."). A party cannot make a collateral attack on a final order after this time elapses. See *Greer v. Public Utilities Commission*, 172 Ohio St. 361, 362 (1961) (holding that the Commission has no power to hear an application for rehearing after the expiration of the thirty-day period); *In the Matter of the Authorization of Norfolk Southern Railway to Install an Active Grade Crossing Warning Device at the Marconi Boulevard Pedestrian Crossing in Franklin County*, Case No. 05-297-RR-FED, Entry on Rehearing at 2 (January 18, 2006); see also *In The Matter of the Commission's Investigation into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 4 (February 20, 2003) (holding "[t]he four assignments of error listed above are nothing more than a collateral attack on those prior decisions.").

CSP's Application is a collateral attack on the *Mon Power* Opinion and Order. The Commission explicitly stated that the LTR is a temporary rider that expires automatically upon collection of \$10 million. *Mon Power*, Opinion and Order at 20 (November 9, 2005). The tariff language in the LTR further reflects this reality. Finally,

the LTR is called the *litigation termination rider* for a reason—the rider was associated with the termination of litigation (not regulatory assets).

CSP's untimely application for rehearing contradicts the manner in which the Commission authorized recognition of the regulatory assets. It is disingenuous for CSP to argue otherwise because it was CSP's proposal to address the collection of the regulatory asset in its next distribution rate case. *Mon Power*, Opinion and Order at 12-15 (November 9, 2005).

CSP cannot save its untimely application for rehearing by styling it as an application. The Commission has seen through such tactics in the past. *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, Entry on Rehearing at 2 (November 7, 1996). In similar circumstances, the Commission stated "[a]lthough styled as 'comments', ETI's August 23, 1996 pleading actually constitutes an application for rehearing of the Commission's June 12, 1996 Order ...." *Id.* CSP's Application is no different.

CSP should have filed an application for rehearing prior to the expiration of the thirty-day statutory period. Instead, CSP filed its application for rehearing more than five years after the Commission's November 9, 2005 Opinion and Order. Thus, the Commission has no jurisdiction to hear CSP's untimely application for rehearing. *Greer v. Public Utilities Commission*, 172 Ohio St. 361, 362 (1961).

**B. Recovery of the Regulatory Assets Should Be Addressed in a Distribution Rate Case.**

The recovery of the regulatory assets should only be addressed in a distribution rate case, consistent with the Commission's previous decision.<sup>8</sup> Additionally, CSP's Application raises new issues regarding the proper value of regulatory assets recorded on CSP's books. The value of the regulatory assets was previously identified by CSP as \$3.7 million. *Mon Power*, Opinion and Order at 12 (November 9, 2005). Now CSP is requesting approval to collect nearly \$4.1 million in regulatory assets. But CSP states that the regulatory assets "are not subject to carrying charges ...." Application at 1. If that is the case, it is not clear why there is a \$400,000 difference between the amount of regulatory assets previously identified to the Commission and the amount that CSP is requesting approval to collect in this Application. A distribution rate case is the venue to sort through the question of the proper valuation of any regulatory assets identified by CSP.

Additionally, CSP has failed to demonstrate that collection of transmission and distribution-related regulatory assets through a per-kWh rate is consistent with cost causation. A per kWh rate to collect the regulatory assets would shift most of the costs to higher volume industrial and commercial energy users. A distribution rate case is also the most appropriate venue to determine how the costs of the regulatory assets may be allocated among customers.

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<sup>8</sup> *Mon Power*, Opinion and Order at 12-15 (November 9, 2005).

**C. CSP's Application is an Application to Increase Distribution Rates.**

CSP's Application is an application to increase distribution rates. Section 4909.18, Revised Code. The Application does not satisfy the basic requirements of an application to increase rates; thus, it must be dismissed.

An application to increase rates requires the utility to file a written application and prove that the rate is just and reasonable during a hearing. Section 4909.18, Revised Code. The Ohio Revised Code describes an application to increase a rate as the following:

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission.<sup>9</sup>

An application to increase rates requires the utility to comply with the standard filing requirements outlined in Section 4909.18, Revised Code. And notice must be published in a newspaper in the utility's service territory. Section 4909.19, Revised Code. CSP has not complied with these requirements.

CSP's Application is an application to increase a rate. The LTR is a temporary rider that will expire in February 2011. CSP's Application seeks to continue that temporary rider and use it for a completely different purpose. Therefore, CSP's Application is an application to increase distribution rates.

CSP's Application to increase distribution rates fails to satisfy the statutory requirements of Sections 4909.18 and 4909.19, Revised Code. CSP has not

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<sup>9</sup> Section 4909.18, Revised Code (emphasis added).



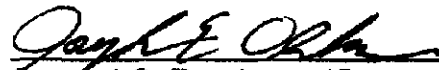
demonstrated that the Application is just and reasonable. Therefore, CSP's Application must be dismissed.

### III. CONCLUSION

CSP's Application must be dismissed. First, CSP's Application is an untimely application for rehearing for several reasons: The *Mon Power* Opinion and Order determined that the LTR was a temporary rider that would automatically expire upon collection of \$10 million, and the Opinion and Order determined that collection of the regulatory assets would be addressed in CSP's next distribution rate case. CSP could have filed an application for rehearing. It did not. Thus, CSP's Application—which challenges the above determinations—is an untimely application for rehearing.

Collection of the regulatory assets should be addressed in a distribution rate case. CSP requested—and the Commission granted—that the regulatory assets be addressed in CSP's next distribution rate case. Moreover, the Application is really an application to increase distribution rates, so a distribution rate case would provide the most logical setting. Finally, a distribution rate case is the most appropriate venue to determine how the costs of the regulatory assets may be allocated among customers.

Respectfully submitted,



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**On Behalf of Industrial Energy Users-Ohio**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Comments of Industrial Energy Users-Ohio* was served upon the parties of record this 14th day of January, 2011 via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.

  
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