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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets. | ) ) ) ) ) ) | Case No. 08-917-EL-SSO |
| In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan. | ) ) ) ) ) ) | Case No. 08-918-EL-SSO |

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# MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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**May 16, 2011**

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S APPLICATION FOR REHEARING**
**BY**
**THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**
**AND**
**OHIO PARTNERS FOR AFFORDABLE ENERGY**

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## I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential electric customers of Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP," together with OP, the "Companies" or "AEP Ohio"), and Ohio Partners for Affordable Energy, an Ohio corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans and representing nonprofit commercial customers of AEP-Ohio, file this memorandum contra the Companies' Application for Rehearing of the May 4, 2011 Entry ("May 4 Entry") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in these proceedings. This pleading is filed to protect the Companies' customers from continuing to pay rates

under a PUCO order that the Supreme Court of Ohio reversed and remanded to the Commission for further consideration of the Companies' rates.

On April 19, 2011, the Ohio Supreme Court issued a ruling on the OCC and IEU-Ohio appeal from the PUCO's March 18, 2009 Opinion and Order ("2009 Order"). The Supreme Court reversed the PUCO's 2009 Order on three grounds – the approval of retroactive ratemaking, approving unsupported provider of last resort charges, and imposing carrying charges for environmental investments from 2001-2008.[1] The Court also remanded the 2009 Order to the Commission for further proceedings.[2]

With respect to the inclusion of certain carrying charges associated with environmental investments, the Court reversed the Commission's determination that R.C. 4928.143(B)(2) permits electric security plans to include items not listed in the statute. The Court directed that, "[o]n remand, the commission *may* determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges."[3] As to the provider of last resort charges approved, the Court found that there was no evidence supporting the Commission's finding that the POLR charge is based on cost and the PUCO's ruling therefore was an abuse of discretion. The Court ordered that on remand, "the commission *may* revisit this issue."[4] Alternatively, the Court also stated that "the

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[1] The three grounds where the Court found the Commission committed error were 1) with respect to unlawfully allowing a retroactive rate increase (OCC Prop. of Law 1, 2,and 3); 2) the inclusion of items in the electric security plan that are not specifically authorized by R..C. 4928.143(B)(2) (OCC Prop. of Law 6); and 3) in approving a provider of last resort charge (OCC Prop. of Law 5; IEU-Ohio Prop. of Law 3). The Court upheld the Commission on six other grounds raised by IEU-Ohio. In re: Application of Columbus Southern Power Co., Slip Op. No. 2011-Ohio-1788.

[2] In re: Application of Columbus Southern Power Co., Slip Op. No. 2011-Ohio-1788 at ¶29, 30, 35.

[3] Id. at ¶35 (Emphasis added).

[4] Id. at ¶30 (Emphasis added).

commission *may* consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs."

On April 26, 2011, the OCC and a coalition of customer parties[5] filed a pleading at the PUCO which requested the PUCO to, among other things, alter or amend the existing rates of the Companies or in the alternative stay the collection of rates from customers. The customer parties sought an expedited ruling on their motion.

On May 4, 2011 the Ohio Supreme Court issued a mandate to the Commission. Also on May 4, 2011, the Commission issued its May 4 Entry. In the May 4 Entry, the Commission noted the recent rulings of the Court and, "[p]ursuant to the Court's decision," directed AEP-Ohio to file revised tariffs by May 11, 2011 that would remove from the Companies' tariffs both environmental carrying cost charges associated with investments made from 2001 through 2008 and POLR charges.[6] The Commission also directed AEP-Ohio to make an appropriate filing if the Companies intend to seek a POLR charge, whether or not the Companies seek approval based upon costs. The Companies may also seek recovery of environmental carrying charges that were addressed by the Court's opinion, if they choose to reargue again.[7]

On May 6, 2011, the Companies filed an Application for Rehearing ("Application") regarding the May 4 Entry. This Memorandum Contra responds to the Companies' Application, and asks that the Commission reject the Application.

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[5] OCC, Ohio Energy Group, the Ohio Manufacturers' Association, the Ohio Hospital Association, and the Ohio Partners for Affordable Energy joined in filing the pleading.

[6] May 4 Entry at ¶4.

[7] Id. at ¶5.

## II. ARGUMENT

### A. *Cleveland Electric Illuminating Company v. Public Util. Comm.*[8] Does Not Preclude the Commission from Exercising Its Discretion to Replace the Reversed 2009 Order, Pending Resolution of the Remand.

The Companies argue that the Commission should reverse its "two-step" rate change and instead conduct the remand proceeding prior to requiring any rates to be changed.[9] The Companies wrongly conclude that the process the PUCO has initiated to carry out the Court's mandate violates established Court precedent -- i.e. *Cleveland Electric Illuminating Co. v. Public Util. Comm.*[10] Such precedent, the Companies claim, requires the PUCO to issue an "appropriate" order that replaces the reversed 2009 Order.[11] The Companies argue that the rate schedule on file with PUCO must remain in effect until the PUCO executes the Court's mandate "by an appropriate order," and that the Commission's May 4 Entry is not an appropriate order.[12]

The Companies' analysis is flawed and represents an expansive and unfounded interpretation of *Cleveland Electric Illuminating Co. v. Public Util. Comm.* The opinion in that case does not preclude the PUCO from exercising its discretion to replace the reversed 2009 Order pending resolution of the mandate. The case provides support for the Commission taking prompt action on remand. The Court held that if it becomes

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[8] *Cleveland Electric Illuminating Co. v. Public Util. Comm.* (1976), 46 Ohio St.2d 105.

[9] Application at 4 (May 6, 2011).

[10] *Cleveland Electric Illuminating Co. v. Public Util. Comm.*, 46 Ohio St.2d 105.

[11] Application at 4 (May 6, 2011).

[12] Id.

apparent that there will be a long delay in establishing new rates,[13] as could be the case here, the Commission has authority to temporarily alter rates under its emergency powers as contained in R.C. 4909.16.[14]

Moreover, the facts of this case are distinguishable from the facts underlying *Cleveland Electric Illuminating Co.* In that case, the PUCO expressly ruled that rates were to be reinstated or changed *by operation of law*.[15] The Court ruled that such a finding was erroneous, and determined that the rate schedule subject to remand remains in effect until replaced by a further order of the Commission.

In this case, however, the PUCO did not expressly rule that rates were to be changed by operation of law. Rather, the Commission determined, in the exercise of its discretion, that rates must be changed. The rates thus remained in effect until they were replaced by further order of the Commission -- the May 4 Entry of the Commission. Hence, the PUCO did not rule that rates were changed by operation of law, but rather made the distinct determination to exercise its discretion to change rates pending what may be a lengthy remand proceeding.

In the May 4 Entry, the Commission decided to replace the existing rates with new rates which do not contain the POLR and carrying charges on environmental investments made from 2001 through 2008. This action did not go beyond the scope of

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[13] Given the fact that the remand issues are intertwined with issues contained in the Companies proposed ESP filing in Case Nos. 11-346-EL-SSO, et al., there could be a long delay in establishing new rates. If, for instance, the Companies are permitted to put on new evidence, intervenors should be afforded a full opportunity to conduct discovery and place counter evidence on the record. Such a proceeding would also necessarily require a full evidentiary hearing and briefing, which would contribute to a lengthy period of time before new rates are established.

[14] *Cleveland Electric Illuminating Co. v. Public Util. Comm.* (1976), 46 Ohio St.2d at 117.

[15] *In re Application of the Cleveland Electric Illuminating Company for Authority to Increase Rates,* Case No. 71-634-Y, Entry at ¶4 (June 16, 1975). (Attachment A)

the Court's mandate, but is action expressly permitted given the PUCO's emergency powers as noted by the Court in *Cleveland Electric Illuminating Company*. There the Court expressly found that "an appropriate order" that can replace existing rates reversed on appeal can be an order to temporarily alter rates under the PUCO's emergency powers.

The Commission's authority to exercise its powers under R.C. 4909.16 has been upheld as a constitutionally valid exercise of police power.[16] This exercise of this power falls under the discretion of Commission.[17] The Commission need not conduct a hearing prior to exercising this power since a hearing itself could cause substantial delay, causing the exact injury the statute seeks to avoid.[18] The Commission's May 4 Entry sets forth the temporary nature of the relief since the Entry provides the Companies the opportunity to file an application to seek new rates.[19]

### B. The Court's Opinion Did Not Preclude The PUCO From Eliminating Charges for POLR and Carrying Charges on Environmental Investment.

The Companies argue that the mandate left open a path for the PUCO to provide further basis and authority for its earlier decision, allowing the earlier decision to be reached again on remand.[20] Further the Companies argue that the Court directed the

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[16] *Inland Steel Development v. Public Util. Comm.* (1977), 49 Ohio St.2d 284.

[17] *Duff v. PUC* (1978), 56 Ohio St.2d 367.

[18] Id. at 377-378.

[19] *Seneca Hills Service Co. v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 410.

[20] Application at 10-13 (May 6, 2011).

PUCO to reconsider the basis for supporting the charges. AEP Ohio reasons that by ordering modified rates, the PUCO did not follow the Court's mandate.

A careful examination of the mandate, however, reveals that the Court recognized there was not just one path along which the PUCO could travel. Instead, the Commission is permitted to determine its own path. In issuing the mandate to the PUCO, the Court expressly permitted the PUCO to exercise discretion in carrying out the remand. This can be seen in the careful wording of the Court's opinion on the issues of environmental carrying charges and POLR. In the portion of the Court's opinion pertaining to environmental carrying charges, the Court directed that "[o]n remand, the commission *may* determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges."[21] As to the POLR charges approved, the Court stated that on remand, "the commission *may* revisit this issue."[22] Alternatively, the Court also stated that "the commission *may* consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs."

The deliberate use of the term "may" in both instances signals a permissive, not mandatory directive to the PUCO. Thus the PUCO may re-examine the carrying charge issue -- but the PUCO is not required to conduct such a re-examination. Similarly, the PUCO can revisit the issue of POLR, but need not and may determine that it is inappropriate to allow AEP Ohio to present evidence. Any one of these determinations

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[21] *In re: Application of Columbus Southern Power Co.*, Slip Op. No. 2011-Ohio-1788 at ¶35 (Emphasis added).

[22] Id. at ¶30 (Emphasis added).

fall within the scope of the Court's remand. Likewise, determining that rates should be adjusted pending remand is permissible, and not outside the scope of the Court's remand. The Commission did not go beyond the scope of the Court's mandate, but rather issued an appropriate entry that the Commission determined was necessary to initiate the remand process.[23]

### C. The PUCO Can Satisfy R.C. 4903.09 by Issuing an Entry on Rehearing That Details the Reasons Prompting its Decision.

The Companies argue that the Commission's May 4 Entry violates R.C. 4903.09 because it does not explain why the Commission decided to remove from AEP's tariffs the POLR and environmental increases. The Commission indicated in the Entry that it was acting pursuant to the decision of the Supreme Court. Entry at 2. The failure to set forth more detailed reasons prompting the PUCO's decisions is, at most, a technical defect that can be cured by the Commission in an entry on rehearing and does not void the May 4 Entry.[24] The PUCO can cure this alleged deficiency by explaining the reasons prompting its decision.[25]

### D. There Is No Statutory Right to a Hearing That Is A Pre-Requisite To Asserting A Due Process Claim.

The Companies argue that the May 4 Entry violates their due process rights by "summarily, and without explanation or basis," ordering the revenue associated with the POLR and environmental charges backed out of tariffs without affording the Companies

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[23] If AEP-Ohio believes the PUCO exceeded the bounds of the mandate, a writ of mandamus is the appropriate pleading to seek PUCO compliance with the Court's mandate. *State ex rel Smith v. O'Conner* (1995), 71 Ohio St.3d 660, 662.

[24] *Ohio Manufacturers' Assn. v. Public Util. Comm.* (1976), 45 Ohio St.2d 86.

[25] The Commission can find reasoning that supports its decision in the Court's opinion and in a pleading filed by the intervenors on April 26, 2011.

the opportunity to be heard.[26] This argument, along with the others offered by the Companies, must also fail.

The Ohio Supreme Court has repeatedly held that there are no constitutional due process rights to an "opportunity to be heard" -- via notice and a hearing-- in rate related matters if no statutory right to a hearing exists.[27] Generally, there is no statutory right to a hearing on matters remanded to the Commission. The Commission specifically indicated that the Entry was designed to comply with the decision of the Supreme Court. Entry at 2. AEP Ohio cannot, and did not, cite to a statute that requires such a hearing. Thus AEP Ohio's argument that its due process rights have been violated must fail.

## III. CONCLUSION

The Commission's May 4 Entry that required the Companies to revise their tariffs was an appropriate order. The May 4 Entry will protect the public from continuing to pay rates that the Commission, on remand, will be reexamining in light of the Supreme Court's directives. Absent such action, customers would be unprotected and would have to continue to pay as much as $22 million per month in charges the Supreme Court found to be unsubstantiated. Those payments may not be able to be refunded if the Commission ultimately decided against continuing the charges. The PUCO acted within its discretion to prevent further harm and unfairness to the customers. The Commission should uphold its May 4 Entry, and reject the Companies' Application for Rehearing.

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[26] Application for Rehearing at 16-17.

[27] *MCI Telecommunications Corp. v. Public Util. Comm.* (1988), 38 Ohio St.3d 266, 269, citing *MCI Telecommunications Corp. v. Public Util. Comm.* (1987), 32 Ohio St.3d 306.

Respectfully submitted,

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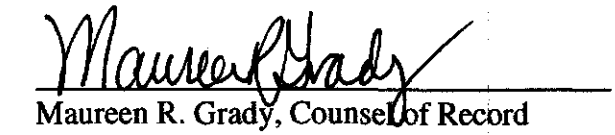
CONSUMERS' COUNSEL



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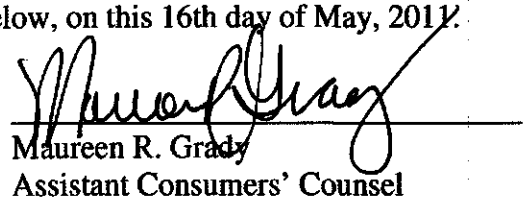
Counsel for Ohio Partners for Affordable Energy

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Columbus Southern Power Company and Ohio Power Company's Application for Rehearing was served electronically to the persons listed below, on this 16th day of May, 2011.



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Attachment A

File Copy [redacted] 1003

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|---|
| In the Matter of the Application of the Cleveland Electric Illuminating Company for authority to amend and increase its filed schedules fixing rates and charges for electric service. | ) | Case No. 71-634-Y |
| In the Matter of the Application of the Cleveland Electric Illuminating Company to refile its rates. | ) | Case No. 75-437-EL-ATA |

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ENTRY

The Commission, coming now to consider the above-entitled matters and being fully advised in the premises, finds:

(1) By its opinion of June 11, 1975, in its Case No. 74-276, the Supreme Court of Ohio reversed in part and affirmed in part the order of this Commission in its Case No. 71-634-Y, wherein the Commission granted a general rate increase to the Cleveland Electric Illuminating Company.

(2) The Cleveland Electric Illuminating Company thereafter filed an application with the Commission requesting authority to refile the rates presently in effect pursuant to Commission order in Case No. 71-634-Y, which the Commission granted by its entry of June 13, 1975 (Case No. 75-437-EL-ATA).

(3) Upon advise of counsel and upon consideration of the Supreme Court's decision in Slagle vs. Public Utilities Commission, 41 Ohio St. 2d 44 (1975), the Commission finds that its approval of the application in Case No. 75-437-EL-ATA was improper and that the entry approving the refiling of these schedules should be stricken from its Journal and held to be of no effect.

(4) Under Slagle, supra, the increased rates which have been charged and collected pursuant to the order appealed from may no longer be lawfully charged after the reversal by the Supreme Court and those rates in effect prior to the Commission's order [redacted]

It is, therefore,

ORDERED, That the above findings be observed. It is further,

ORDERED, That copies of this entry be served upon all parties of record in the above-captioned cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

C. LUTHER HECKMAN
Chairman

SALLY W. BLOOMFIELD

DAVID SWEET
Commissioners

Entered in the Journal
JUN 16 1975
A True Copy

Randall Applegate
Acting Secretary

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(over)