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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 Generating 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

MOTION AND MEMORANDUM IN SUPPORT FOR LEAVE TO FILE A MEMORANDUM CONTRA AND MEMORANDUM CONTRA THE MOTIONS OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY TO ESTABLISH A PROCEDURAL SCHEDULE, REJECT OR HOLD IN ABEYANCE TARIFFS FILED ON MAY 11, 2011 AND CONVERT RATES TO BEING COLLECTED SUBJECT TO REFUND

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May 18, 2011

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 Generating Assets.	)))))	Case No. 08-917-EL-SSO
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MOTION FOR LEAVE TO FILE A MEMORANDUM CONTRA

Pursuant to Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") moves the Public Utilities Commission of Ohio ("Commission") for an order permitting it to file a Memorandum Contra the Motions filed by Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively, the "Companies") on May 11, 2011. As the filing will not delay or hinder a decision by the Commission and the Memorandum Contra is filed within the time originally available for filing a memorandum contra, the Commission should grant IEU-Ohio's motion for leave to file the memorandum contra.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A MEMORANDUM CONTRA

On March 18, 2009, the Commission issued an Opinion and Order modifying and approving electric security plans ("ESP") for the Companies. On April 19, 2011, the Ohio Supreme Court ("Supreme Court") reversed and remanded the March 18, 2009 Opinion and Order, finding that the Opinion and Order contained three substantive errors. On May 4, 2011, the Supreme Court issued its mandate returning jurisdiction of the matters to the Commission. The Commission in response to the mandate directed CSP and OP "to file by May 11, 2011, proposed revised tariffs that would remove the POLR charges and environmental carrying cost charges associated with investments made 2001-2008, from the Companies' tariffs."[1]

On May 11, 2011, OP and CSP filed revised tariffs and two motions seeking either have the current tariffs remain in effect or to collect the current revenues from

[1] Entry at 2 (May 4, 2011).

provider of last resort ("POLR") charges and environmental carrying costs subject to refund. Because the Companies sought expedited treatment of their motions, IEU-Ohio filed a memorandum contra the request for expedited ruling, noting that immediate action was inappropriate. After IEU-Ohio filed its memorandum contra, counsel for the Companies sent an email[2] indicating that the Companies may seek to strike any further memorandum contra from IEU-Ohio because IEU-Ohio had exhausted its opportunity to file a memorandum contra provided by Commission rules.

Plainly, the first memorandum contra addressed the Companies' attempt to secure expedited relief and did not address the merits of their attempt to sidestep the procedural requirements established for the Companies in the May 4, 2011 Entry. Thus, the notion that IEU-Ohio is filing a memorandum contra "out of rule" is at best suspect, if not just wrong.

While not conceding that the Companies have any basis for objecting to the attached memorandum contra, and to prevent further delaying behavior on the part of the Companies, IEU-Ohio is seeking the Commission's leave to file the memorandum contra that is attached. As the filing will not delay or hinder a decision by the Commission and is submitted within the time originally available for filing a memorandum contra, the Commission should grant IEU-Ohio's motion.

[2] Attachment 1.

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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 Generating 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

MEMORANDUM CONTRA THE MOTIONS OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY TO ESTABLISH A PROCEDURAL SCHEDULE, REJECT OR HOLD IN ABEYANCE TARIFFS FILED ON MAY 11, 2011 AND CONVERT RATES TO BEING COLLECTED SUBJECT TO REFUND

On March 18, 2009, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order modifying and approving Electric Security Plans ("ESP") for Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively, "Companies"). On April 19, 2011, the Ohio Supreme Court ("Supreme Court") reversed and remanded the March 18, 2009 Opinion and Order, finding that the Opinion and Order contained three substantive errors.[3] On May 4, 2011, the Supreme Court issued its mandate returning jurisdiction of these cases to the Commission. In response to the Supreme Court's decision, the Commission, also on May 4, directed the Companies "to file by May 11, 2011, proposed revised tariffs that would remove the POLR charges and environmental carrying cost charges associated with investments

[3] The Supreme Court determined that the Commission engaged in retroactive ratemaking, approved a Provider of Last Resort ("POLR") charge that was not supported by the record, and approved recovery of revenues for carrying charges for certain incremental environmental investments that lacked a statutory basis under Section 4928.143(B)(2), Revised Code. *In re Application of Columbus Southern Power Co.*, Slip Op. No. 2011-Ohio-1788 (Apr. 19, 2011).

made 2001-2008, from the Companies' tariffs."[4] The May 4, 2011 Entry ("Entry") further directed the Companies to file an appropriate application if they intended to seek either a POLR charge or to recover revenues associated with the carrying costs of incremental environmental investments.[5]

The Companies, on May 6, 2011, filed an Application for Rehearing of the Entry. In the Application for Rehearing, the Companies alleged four assignments of error. In the first allegation, the Companies argued that the Commission has to carry out "an analysis of the issues" and follow an "established process" before it orders the Companies to file revised tariffs.[6] Second, the Companies alleged that the Commission's Entry does not comply with the terms of the Supreme Court's remand.[7] Third, they argued that the Commission failed to justify its decision in compliance with Section 4903.09, Revised Code.[8] Finally, the Companies alleged that the Commission violated the Companies' right to due process.[9] IEU-Ohio filed a memorandum contra the Application for Rehearing on May 16, 2011, urging the Commission to deny the Application.

On May 11, 2011, OP and CSP filed revised tariffs and two motions ("May 11 Motions") seeking either to have the current tariffs remain in effect or to collect the current revenues from POLR and environmental carrying costs subject to refund. In

[4] Entry at 2 (May 4, 2011).

[5] *Id.*

[6] Application for Rehearing at 7 (May 6, 2011).

[7] *Id.* at 2.

[8] *Id.*

[9] *Id.*

their memorandum supporting the motions, the Companies requested that the Commission set a procedural schedule to address the issues remanded by the Supreme Court and, in the meantime, reject their proposed revised tariffs or hold the revised tariffs in abeyance. That the revised POLR tariffs should be revised again goes without saying since the Companies admit that they did not comply with the Commission's order to remove completely the POLR charge.[10] (The revised tariffs addressing the revenue effects of removing carrying costs for 2001-2008 environmental investment, however, appear to comply with the Commission's order and should be accepted.) To appease the Companies by either rejecting the tariffs or holding them in abeyance while the Companies attempt to re-establish their claim to the revenues, a claim they still have not filed with the Commission as required by the Entry, would abet what can only be described as intentional and opportunistic behavior.[11]

Likewise, the Companies offer very little on the merits of their Motions that was not raised in their Application for Rehearing of the Entry. For example, they urge in the Motions that the Supreme Court's decision required the Commission to conduct some sort of hearing before it ordered the Companies to revise their tariffs.[12] In the Application for Rehearing, they similarly alleged that the Commission's decision to order revised tariffs violated a procedural requirement found in either Supreme Court

[10] Motion to Establish a Procedural Schedule for the Remand Proceeding and to Reject or Hold in Abeyance the Tariffs Filed on May 11, 2011, and Motion to Prospectively Convert the Affected Rates to Being Collected Subject to Refund, and Request for Expedited Ruling on Both Motions at 7-8 (May 11, 2011) ("May 11 Motions"). By separate filing, IEU-Ohio filed objections to the Companies' proposed revised tariffs. Objections by Industrial Energy Users-Ohio to May 11, 2011 Tariff Filing (May 18, 2011).

[11] The Companies have demonstrated in their filing that their failure to comply with the Commission's order to file conforming tariffs regarding the POLR charge was intentional. May 11 Motions at 8.

[12] *Id.* at 6 & 9.

precedent or by the terms of the Supreme Court's remand.[13] In the Motions, the Companies assert they were denied some right to hearing.[14] Similarly, in the Application for Rehearing, they allege error on the basis that they had a due process right to hearing before the Commission ordered them to file tariffs complying with the Supreme Court's decision.[15] Further, the relief the Companies seek in the Motions is largely the same that they requested in the Application for Rehearing, *i.e.*, that they be permitted to continue to recover revenues on the existing tariffs the Commission has ordered to be revised as a result of the Supreme Court's decision.[16]

As noted in IEU-Ohio's Memorandum Contra the Application for Rehearing, the Companies have not presented any proper basis for allowing them to continue to recover revenue on items not properly included in their ESPs. First, the Commission was not under any direction as a result of Supreme Court precedent[17] or the Supreme Court's remand in this case to allow the Companies to continue to collect revenues for the remanded items pending some sort of review process. Supreme Court precedent (if it applies) requires the Commission to take action consistent with the remand.[18] Furthermore, the Supreme Court's decision in this case states that the Commission may consider whether there are alternative bases to justify revenue recovery for POLR and

[13] Application for Rehearing at 2 (May 6, 2011).

[14] May 11 Motions at 8.

[15] Application for Rehearing at 2 (May 6, 2011).

[16] *Compare* May 11 Motions at 11 *to* Application for Rehearing at 18 (May 6, 2011).

[17] The Companies previously have cited *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n of Ohio*, 46 Ohio St.2d 105 (1976) ("*CEI Remand Case*"), for the proposition that the remand required additional "process," apparently meaning delay, before the Commission can order the tariffs to conform to the Supreme Court's decision. Application for Rehearing at 4-8 (May 6, 2011).

[18] *CEI Remand Case* at 116-17.

the carrying costs of environmental investments; it does not mandate that review.[19] Finally, the due process claim is nothing more than a variation on the Companies' initial argument that the Commission was required to conduct a hearing as a result of the remand. For the same reasons outlined in IEU-Ohio's Memorandum Contra the Application for Rehearing, therefore, the Companies have failed to advance an argument that supports their request for a procedural schedule and to continue to collect revenues under the existing illegal tariffs.[20]

To further justify their May 11 Motions, the Companies add three new arguments. First, they assert that there is some sort of market justification for the POLR charge because some customers "elect" to pay POLR charges.[21] Whether they elect to do so, or simply do not recognize they have choice, may be a battle for another day. What is not debatable is that they are being asked to pay a rate that has been found to be illegal, and the Commission was correct in directing the Companies to file tariffs to eliminate the POLR charges based on the March 19, 2009 Opinion and Order.

Second, the Companies provide an extended discussion to support continued recovery of revenues for the 2001-2008 incremental environmental carrying costs.[22] Once again, however, the Companies' argument ignores the obvious: the Supreme

[19] *In re Application of Columbus Southern Power Co.*, Slip Op. 2011-Ohio-1788 at ¶¶ 30 & 35 (Apr. 19, 2011).

[20] Industrial Energy Users-Ohio, Memorandum Contra the Application for Rehearing of Columbus Southern Power Co. and Ohio Power Co. (May 16, 2011).

[21] May 11 Motions at 8 (noting that 97% of customers have "elected" to pay POLR charges instead of choosing to leave AEP-Ohio generation service subject to a requirement of paying market rates if they return to AEP-Ohio). The Companies also assert that the POLR charges should return to the levels collected under the pre-2009 rates and be non-bypassable. That assertion is addressed in IEU-Ohio's objections to the proposed revised tariffs filed separately. *See* Objections by Industrial Energy Users-Ohio to May 11, 2011 Tariff Filings (May 18, 2011).

[22] May 11 Motions at 9-10.

Court has reversed that portion of the Commission's March 19, 2009 Opinion and Order supporting continued recovery. Moreover, the Commission has ordered,[23] and the Companies clearly understand,[24] that the Companies may file an appropriate application if they want the Commission to consider permitting future recovery of revenues for environmental investments. In the meantime, the Companies are not entitled to current revenue or overstated deferrals based on the March 18, 2009 Opinion and Order.

Third, the Companies offer that they may decide to withdraw their ESPs if the Commission continues to act on its "snap judgment" ordering the Companies to file revised tariffs.[25] To support this "argument," the Companies contend that the ESPs are a "package deal" that the Commission has found to be more favorable in the aggregate than the alternative available through a market rate offer.[26] Of course, the Companies' position has nothing to do with the rates that should be in place as a result of the Supreme Court's remand. Apart from the questionable suggestion that the Commission remains bound by a "deal" that the Supreme Court has found in part illegal,[27] the only point of this argument appears to be to threaten action that the Companies believe the Commission does not want to see happen. Thus, the Companies do not provide any principled reason for the Commission to grant the Companies' of the May 11 Motion that seeks authorization to collect revenues under the unrevised tariffs.

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[23] Entry at 2 (May 4, 2011).

[24]. May 11 Motions at 11.

[25] *Id* at 10.

[26] *Id.*

[27] Section 4928.143(C), Revised Code.

Once again it is apparent that the Companies are seeking through the May 11 Motions to delay action that would positively affect customers. The Companies may lawfully charge and collect at levels only as permitted by Section 4928.143, Revised Code. The Supreme Court has determined that revenue effects for POLR and environmental carrying costs are not properly included in the current ESPs. Nonetheless, the Companies seek through these motions authority to leave the current tariffs in place. This attempt to "slow-walk" their way to compliance simply should not be tolerated in light of the Supreme Court's remand and the Commission's May 4, 2011 Entry.

Moreover, the Commission should not deny customers the benefits of their legal remedy. In March and May 2009, customers unsuccessfully sought relief from revenue collections they argued were beyond those available the Companies.[28] When the issue was presented to the Supreme Court through a complaint seeking a writ of prohibition, both the Companies and the Commission argued that the customers had an adequate remedy at law through an appeal of the Commission's Opinion and Order.[29] The Supreme Court agreed.[30] The customers have now successfully prosecuted that appeal. Once that appellate process indicated that the revenue recovery is too high, however, the Companies have sought through the May 11 Motions to prevent at least temporarily the relief ordered by the Commission in its Entry. The Commission can and

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[28] Motion for Stay of the Retroactive Collection of AEP's New rates from Customers or, in the Alternative, Motion to Make Rates Subject to Refund and Memorandum in Support, Mar. 25, 2009; *State, ex rel. Office of the Ohio Consumers' Counsel, et al., v. Public Util. Comm'n, et al.*, Case No. 09-710, Complaint (Apr. 17, 2009) ("*Prohibition Complaint*").

[29] *Prohibition Complaint*, Motion to Dismiss of Respondents Columbus Southern Power Co. and Ohio Power Co. at 29-30 (Attachment 2); *id.*, Motion to Dismiss Submitted on Behalf of Respondents, Alan Schriber, et al., at 8-9 (Attachment 3).

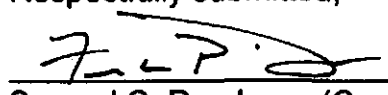
[30] Prohibition Complaint, Entry (June 17, 2009) (Attachment 4).

should avoid that result by requiring the Companies to comply with the Entry if the "adequate remedy at law" is to have any meaning.

Because the Companies have no legal basis to ask that proper revised tariffs be disapproved or "held in abeyance," the Commission should not find acceptable the Companies' alternative request to allow them to continue collection subject to refund.

For the reasons stated above, the Commission should deny the Companies' May 11 Motions (which are premised on little more than another attempt at a "rehearing" of the May 4, 2011 Entry), accept proposed revised tariffs that comply with the Commission's May 4, 2011 Entry, and order the Companies to properly revise and file those proposed tariffs that are not in compliance.

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 *MOTION AND MEMORANDUM IN SUPPORT FOR LEAVE TO FILE A MEMORANDUM CONTRA*, and *MEMORANDUM CONTRA THE MOTIONS OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY TO ESTABLISH A PROCEDURAL SCHEDULE, REJECT OR HOLD IN ABEYANCE TARIFFS FILED ON MAY 11, 2011 AND CONVERT RATES TO BEING COLLECTED SUBJECT TO REFUND* was served upon the following parties of record this 18th day of May 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.

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ATTORNEY EXAMINER

Attachment 1

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Subject: Re: Industrial Energy Users-Ohio's Memorandum Contra Columbus Southern Power Company's and Ohio Power Company's Request for Expedited Ruling (Case No. 08-917-EL-SSO,et al)

Joe:

The last sentence of IEU's May 12 memo contra seems to suggest that IEU plans to file a second memo contra within the normal 7-day response time that would apply here. AEP Ohio notes that Rule 12 only allows each party to file one memorandum in opposition and the rule does not permit a party to file multiple responses ("any party may file a memorandum contra within seven days after the service of the motion"). Rule 12(C) for expedited motions creates a curtailed process where no reply memoranda are permitted and would clearly not allow multiple responses to the same motion. While the apparent purpose of IEU's May 12 memo contra was to clarify how Rule 12(C) works for the Commission, it was IEU's choice to use its one-time opportunity to respond for that narrow purpose. A second memo contra by IEU is not permitted and would warrant a motion to strike.

Thanks,
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05/12/2011 05:57 PM

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Subject Industrial Energy Users-Ohio's Memorandum Contra Columbus Southern Power Company's and Ohio Power Company's Request for Expedited Ruling (Case No. 08-917-EL-SSO,et al)

Attached is a copy of Industrial Energy Users-Ohio's Memorandum Contra Columbus Southern Power Company's and Ohio Power Company's Request for Expedited Ruling which was filed this afternoon in the above-captioned matter. Hard copies have either been hand delivered or sent via ordinary mail.

Please do not hesitate to contact us if you have any questions about this matter.

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contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another party any matter(s) addressed herein.

[attachment "20110512173931484.pdf" deleted by Steven T Nourse/AEPIN]

Attachment 2

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, ex. Rel. Office of the Ohio Consumers' Counsel, Ohio Manufacturer's Association, The Kroger Co., and Ohio Hospital Association,	:	**Complaint for Writ of Prohibition Case No. 09-710**
Relators,	:	
v.	:	
The Public Utilities Commission of Ohio Alan R. Schriber, Chairman, Ronda Hartman Fergus, Commissioner, Valerie A. Lemmie, Commissioner, Paul A. Centolella, Commissioner, Cheryl L. Roberto, Commissioner; and	:	
Columbus Southern Power Company and Ohio Power Company,	:	
Respondents.	:	

MOTION TO DISMISS OF RESPONDENTS, COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

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On Behalf of Respondents, Columbus Southern Power Company and Ohio Power Company

application as filed, but instead modified the application. A number of complex and interrelated factors go into a Commission decision. If the Court were to entertain Relators' invitation to modify the rates approved by the Commission, it would need to perform an original analysis of AEP Ohio's application to weigh all the record evidence and the elements of the application in order to determine if the changing of one part of the Order requires further changes to a different part of the Order. Such an approach would clearly violate the normal standard of review applicable to Commission orders. *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15, 17-18, 2000-Ohio-5, 734 N.E.2d 775, 778 (due deference should be given to statutory interpretations by an agency that has accumulated substantial and to which the General Assembly has delegated enforcement responsibility).

More specifically, the Court would have to establish an entirely new Standard Service Offer rate if it grants the requested writ. Paragraph 82 of the Complaint states:

> If the Writ of Prohibition is granted, [the Court] would stay the underlying retroactive portion of the Orders which permitted the Companies to charge and collect unlawful increased rates. If the writ stopped the charging and collecting of the retroactive rates, the Companies would still be permitted to charge customers increased rates – nine months of rate increases in the nine month remaining period of 2009.

Thus, Relators ask the Court to "trim back" the portion of the approved rate increase that is claimed to be retroactive and leave in place the remaining portion of the rate. What Relators ignore is that there is no basis in the record before the Court to perform such a calculation – even if it were appropriate for the Court to directly set rates (which it is not). It is simply impossible for the Court to adjust the rate to exclude only the portion claimed to be retroactive.

Only through a reversal and remand with instructions to the Commission could the rate be so modified by the Commission. But a remand proceeding is inappropriate in a Writ of Prohibition action that seeks the exercise of this Court's original and direct jurisdiction over a legal jurisdictional dispute. As a practical matter, it makes little sense to conclude that a body patently and unambiguously lacks jurisdiction over a determination and then remand the same matter to that body. And S.Ct. Prac. R. X, Section 5 indicates that the Court disposes of original actions by either dismissing the case or issuing a alternative or peremptory writ. This major flaw in the relief sought again confirms that, in filing this Writ of Prohibition, Relators have chosen the wrong procedural vehicle within which to pursue their grievance.

The setting of rates involves consideration of numerous issues and an understanding of the intricacies of the industry as applied to the recent statutory changes. The Court should not accept any argument claiming the establishment of a new rate as a result of granting this writ is a simple mathmatical equation. In the context of being asked to directly set rates for water service provided by contract within a municipal corporation, this Court has raised important questions as to the appropriateness of striking down rates as unlawful:

> [T]hen what is the result? New rates would have to be determined. This poses yet another dilemma: Who sets the new rates? The court itself is not in a position to decide an appropriate rate. "* * * [A] court may not engage in rate-making since this is a legislative function." 12 McQuillin, Municipal Corporations (3 Ed. Rev. 1986) 616, Section 35.37a. Even if a court were to undertake to set the rates for these parties, it has not been explained how that is to be accomplished.

Fairway Manor, Inc. v. Bd. of Comm'rs (1998), 36 Ohio St. 3d 85, 89, 521 N.E.2d 818, 823. Not only would it be inappropriate for the Court to directly invalidate a portion of

Attachment 3

ORIGINAL

IN THE
SUPREME COURT OF OHIO

State ex rel. Office of the Ohio Consumers' Counsel, *et al.*,	:	Case No. 09-0710
	:	Original Action in Prohibition
Relators	:	
v.	:	
Alan R. Schriber, *et al.*,	:	
Respondents	:	

FILED
MAY 07 2009
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION TO DISMISS
SUBMITTED ON BEHALF OF RESPONDENTS, ALAN R. SCHRIBER, *ET AL.*

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tially be challenged through a prohibition action. The Court has previously considered the consequences of opening such a door. In denying a writ of prohibition sought on grounds that the trial court had misconstrued a contract, the Court observed that "[i]f we were to adopt [relator's] argument, every potentially erroneous trial court construction of a contract would be subject to review by extraordinary writ rather than by appeal following final judgment." *State ex rel. Jackson v. Miller*, 83 Ohio St. 3d 541, 543, 700 N.E.2d 1273, 1275 (1998). In another case, the Court rejected an argument that prohibition was appropriate where the underlying action was clearly barred by the statute of limitations. The Court noted that accepting this argument would lead it "down a slippery slope." *State ex rel. Jones,* 84 Ohio St. 3d at 78, 701 N.E.2d at 1009. In the present case, the Court should likewise decline to expand the scope of prohibition.

Additionally, Relators' request that the Court correct the results of the Commission's actions would involve the Court directly in setting rates. This is a function that the Court has recognized is beyond its authority. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 116-117, 346 N.E.2d 778, 785-786 (1976) (holding that only a Commission order can change a utility's rate schedule).

The Commission has jurisdiction to hear and decide issues presented in the AEP companies' ESP application. Therefore, Relators have not satisfied the second requirement for the issuance of a writ of prohibition.

The final requirement is that the Relators must have no other adequate remedy if the writ is denied. This they cannot show.

It is well established that prohibition is not a substitute for appeal. *State ex rel. Nalls v. Russo*, 96 Ohio St. 3d 410, 414, 775 N.E.2d 522, 526 (2002). Relators may raise the errors they allege through an appeal. The General Assembly has established a comprehensive scheme for the review of Commission orders. The first step is the rehearing process. R.C. 4903.10 provides that "[a]fter any order has been made by the public utilities commission, any party . . . in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding." Ohio Rev. Code Ann. § 4903.10 (West 2009), Appendix at 1. Under this statute, the Commission may modify or abrogate its original order. Relators have availed themselves of this procedure by filing applications for rehearing of the Commission's March 18, 2009 order. As of the date of filing of this motion, those applications (as well as those filed by other parties) remain pending before the Commission.

Under the exhaustion of remedies doctrine, courts will generally permit the administrative process to run its course before granting judicial relief. The Court has noted the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Jones v. Chagrin Falls*, 77 Ohio St. 3d 456, 462, 674 N.E.2d 1388, 1392 (1997), quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). As explained in another decision, "[t]he purpose of the doctrine of exhaustion of administrative remedies is to prevent premature interference with the administrative processes." *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St. 3d 287, 290, 762

Attachment 4

The Supreme Court of Ohio

State of Ohio ex rel. Office of the Ohio Consumers' Counsel, Ohio Manufacturers' Association, The Kroger Co., and Ohio Hospital Association

v.

Alan R. Schriber, Chairman, Ronda Hartman Fergus, Commissioner, Valerie A. Lemmie, Commissioner, Paul A. Centolella, Commissioner, and Cheryl L. Roberto, Commissioner

Case No. 2009-0710

IN PROHIBITION

ENTRY

This cause originated in this Court on the filing of a complaint for a writ of prohibition. Upon consideration of the motion to dismiss of Columbus Southern Power Company, Ohio Power Company, and the commissioners of the Public Utilities Commission,

The motion to dismiss is granted because the complaint does not state a claim justiciable in prohibition. The issues raised by the complaint may be resolved on appeal, and thus relators have an adequate remedy at law. *State ex rel. Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1962), 173 Ohio St. 450, 452, 183 N.E.2d 782. Accordingly, this cause is dismissed.

THOMAS J. MOYER
Chief Justice

ADC
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