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In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

INDUSTRIAL ENERGY USERS-OHIO'S REPLY TO COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S MEMORANDUM CONTRA INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS

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Because the Application of Columbus Southern Power Company ("CSP") and Ohio Power Company's ("OPCo") (collectively, the "Companies") to establish a standard service offer ("SSO") in the form of an electric security plan[1] ("ESP") fails to comply with statutory or regulatory requirements, the Industrial Energy Users-Ohio ("IEU-Ohio") moved to dismiss the Application on May 10, 2011. In response, the Companies opposed the Motion by arguing that they have complied minimally with the statutory and regulatory requirements, did not comply but should be allowed to proceed anyway, and did not comply but the Public Utilities Commission of Ohio ("Commission") can figure out the right results after it conducts what is bound to be an extended hearing. The

[1] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Application (Jan. 27, 2011) (hereinafter "Application").

Commission already went down this path in Duke Energy Ohio's market rate offer ("MRO") case;[2] rather than force another hearing on an application that fails to comply with statutory requirements and Commission rules, the Commission should dismiss the Application and require the Companies to file applications for proper SSOs.

I. BACKGROUND

On January 27, 2011, the Companies filed their Application to establish an SSO. The Application provides for a uniform rate for an entity called AEP-Ohio. The Companies concede that the data provided to support the "application has been developed and presented as a single-company filing, given the proposed merger of CSP and OPCo (currently pending in Case No. 10-2376-EL-UNC) that is expected to close prior to 2012." Application at 1. In addition, the Application includes several riders and provisions for which the Companies have not provided values[3] (hereinafter "Placeholder Riders").

Based on the Application's deficiencies, IEU-Ohio filed a Motion to Dismiss on May 10, 2011. The Motion noted that the Application failed to comply with several statutory and regulatory requirements including compliance with requirements that require an electric distribution utility ("EDU") to file an application for EDU-specific

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[2] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order (February 23, 2011) (hereinafter "*Duke SSO*").

[3] The Placeholder Riders include the Generation Resource Rider, Alternative Energy Rider, Distribution Investment Rider, Pool Termination and Modification Provision[3] (not a rider, but a condition of the ESP), Generation NERC Compliance Cost Recovery Rider, and Facilities Closure Cost Recovery Rider. Moreover, the Provider of Last Resort ("POLR") charge cannot be determined until after the Commission approves the ESP, and the Companies only provide a very soft estimate for the Carbon Capture and Sequestration Rider.

revenue recovery and that the Application failed to provide information necessary for the Commission to carry out its statutory duty to evaluate the Application.

On May 25, 2011, the Companies filed a Memorandum Contra. Initially, the Companies argue in the alternative that their Application satisfied the statute or that the Commission has the legal discretion to ignore the statutory requirements. Then, the Companies argue that they need not comply with the Commission's filing requirements and provide EDU-specific data to support the Application. Finally, the Companies argue that the parties should go through the effort of a hearing to address in particular the Placeholder Riders, even though the Companies have failed to demonstrate in their Application what effect the riders may have on the Companies, customers, or the ESP price. In effect, then, OPCo and CSP are asking the Commission to repeat an exercise which has already ended badly in the *Duke SSO* case: parties are being asked to foot the bill for hearings on an Application that does not meet the statutory and regulatory requirements. Rather than go through that expensive and pointless exercise, the Commission should grant IEU-Ohio's Motion and dismiss the Application.

II. ARGUMENT

A. The Companies' Application Based on a Merged Entity Fails to Comply with the Statutory Requirements

As indicated in IEU-Ohio's Motion to Dismiss only an EDU can file an application for an SSO and the SSO must provide terms of service that relate to the EDU.[4] The Companies concede, as they must, that their Application was filed for something called AEP-Ohio, apparently a nickname for Ohio Power Company, the surviving entity if the

[4] Sections 4928.141 and 4928.143, Revised Code.

merger of CSP and OPCo is successful. To avoid the obvious problem that the Application is for an EDU that does not exist, the Companies present two arguments. First, they assert that the Application meets the requirements of Section 4928.143, Revised Code. Second, they argue in the alternative that the Commission can ignore the requirements by using its discretion to manage its own docket. Since neither of these responses is true, the Commission should reject the Companies' response.

The response to the Companies' first argument that they satisfied the statutory requirements is that it is inconsistent with their own Application. The Application is for something called AEP-Ohio. Nearly all of the supporting materials are likewise for something called AEP-Ohio.[5] As the Companies themselves point out, however, AEP-Ohio has no legal relationship to customers.[6] AEP-Ohio is not even the entity that will emerge from the merger if it is completed.[7] Moreover, in an argument especially telling for what it assumes, the Companies in the alternative argue that the Commission can use its discretion and ignore the fact that the Application is improperly filed. The Commission, however, is a creature of statute;[8] it cannot review an Application that does not seek an SSO for an EDU.

[5] The Companies make one concession to reality in that they acknowledge that alternative rates may be necessary if the merger is not completed. Otherwise, there is nothing in the Application that supports treating the entities as separate. In fact the Companies calculate the MRO v. ESP comparison as if only one entity existed. Testimony of Laura Thomas passim.

[6] http://www.aepohio.com/account/bills/rates/AEPOhioRatesTariffsOH.aspx_ (viewed May 31, 2011).

[7] *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, Application at 2 (October 18, 2010).

[8] *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St. 3d 535, 537 (1993).

Further, in setting up an argument in the alternative that admits what it seeks to deny, the Companies rely on two Supreme Court cases that do not support their argument either factually or legally.[9] In the first, *Toledo Coalition for Safe Energy v. Pub. Util. Comm*, 69 Ohio St. 2d 559 (1982), the Supreme Court determined that the Commission had discretionary power to deny a motion to intervene. As that power is authorized by statute,[10] the case does not address the opposite situation in which the Commission is required to address an application by an EDU. In the second, *Weiss v. Pub. Util. Comm*, 90 Ohio St. 3d 15 (2000), the Court determined that the Commission properly denied a complainant's request to file a class action complaint because Commission practice does not permit class actions. The Court held that the Commission had the right to deny a class action complaint pursuant to 4901.13, Revised Code, which states that the "public utilities commission may adopt and publish rules to govern its proceedings . . . ." If anything, then, *Weiss* supports a Commission order dismissing an application that fails to comply with statutory requirements and Commission rules.

The policy argument for exercising Commission discretion is further belied by the nature of the Application itself. The Application is in essence a multi-million dollar rate increase, but the full impact is hidden in an Application that withholds as much as it reveals about the proposed rates. Administrative convenience may be justified when there is the potential to advance a worthy cause or process; it cannot be used in this instance to hide or disguise the effects of an Application that plainly does not satisfy the basic requirements of the statutes.

[9] Memorandum Contra at 6.

[10] Section 4903.221, Revised Code.

In summary, the first basis for granting the Motion is tied to the basic requirements defining the parties that may seek an SSO. Sections 4928.141 and 4928.143, Revised Code, permit the Commission to approve an application for an SSO for only an EDU. In contrast, the Companies filed an Application for a merged entity that does not exist and may never exist, and its suggestion that the Commission has the authority to ignore the statutory requirements and its own rules flies in the face of reason and principled regulation. Thus, the Commission should dismiss the Application.

B. The Companies' Filing as a Merged Entity Violates the Statutory Condition that the Terms of the ESP be Specific to an EDU

Section 4928.143, Revised Code, requires that an EDU file an application for an SSO and provide terms and conditions that are specific to the EDU. As filed, the Application fails to provide EDU-specific terms. Thus, as a second ground for dismissal, the Motion argues that the Application fails to meet the statutory requirements of Section 4928.143, Revised Code.

Other than repeating the argument that the Companies each filed an Application, the Companies initially argue that the Commission granted them a waiver in regard to the Turning Point Project.[11] That the Companies highlight a waiver for the Turning Point Project merely emphasizes that the Application lacks the information that is necessary to evaluate its impact.

Ignoring the basic thrust of the second basis for the Motion to Dismiss, the Companies also offer that Placeholder Riders should be addressed in the context of a

[11] Memorandum Contra at 8.

hearing.[12] The problem with the argument is readily apparent: there is nothing to address. The Companies have presented the parties with riders for which they have not provided any estimate of what they will be seeking to recover. The recent problems with the Environmental Investment Carrying Cost Rider—a "placeholder" rider from the 2009 ESP—is sobering evidence of the danger of what is being requested here. It is as if the Companies are saying "trust us, this won't hurt." Then the reality hits when the Company seeks to recover millions of dollars of new revenues with minimal Commission oversight. The attempt of the Companies to justify their failure to comply with Commission rules, thus, leaves customers with nothing to address at hearing and a real expectation that the result will be expensive. More importantly, the Companies' attempt to hide the full impacts of their Application frustrates the Commission's statutory duty to determine if the proposed ESP is in the aggregate better than the alternative available under Section 4928.142, Revised Code. Such a result should not be permitted.

C. The Application Fails to Comply with the Commission's Rules and it is Impossible for the Commission to Compare the Application to an MRO

Finally, the Motion should be granted because the Application fails to comply with the Commission's filing requirements. In contrast to the Companies' rather odd assertion that the Commission can approve various provisions of an ESP "without knowledge of what the actual resulting rates will be,"[13] the Commission's rules contain a detailed list of filing requirements in Rule 4901:1-35-03, Ohio Administrative Code ("OAC"). Compliance with these rules ensures that the Commission can evaluate the

[12] Memorandum Contra at 9.

[13] Memorandum Contra at 10.

impact of the ESP on the Companies and its customers and carry out the statutory requirements contained in Section 4928.143(C), Revised Code.

In response, the Companies argue that the Commission should address IEU-Ohio's concerns in the context of the hearing,[14] that some riders cannot be determined with specificity or in the alternative are specific enough,[15] and that the *Duke SSO* decision does not require dismissal of an ESP Application that has all these problems.[16] Once again, the Companies' reasoning is without merit.

First, the Rules specifically require that the Companies provide information that is specific to the EDU. The Companies' filing on a combined basis fails to comply with the Commission's rules and frustrates the Commission's ability to determine the impact of the ESP on the EDUs and their customers. Moreover, the purpose of requiring detailed cost estimates is so that the Commission can ultimately evaluate whether the ESP is more favorable in the aggregate than the outcome that will otherwise occur under an MRO. The Commission cannot perform this analysis because the Companies' Application includes several Placeholder Riders that cannot be accounted for in the comparison to the MRO. Additionally, customers are left in the dark because the riders either have no values or the values can only be guessed at once the Companies provide their own blackbox calculation (*i.e.*, the POLR charge).

The weakness of the Companies' argument is demonstrated particularly well in the two attempts to justify the Placeholder Riders and the POLR. In one instance, the

[14] Memorandum Contra at 10.

[15] Memorandum Contra at 11.

[16] Memorandum Contra at 12.

Companies point to the Fuel Adjustment Clause ("FAC") to demonstrate that some riders do not have a fixed value.[17] But the Application includes an estimate for the FAC and it is included in the comparison to the MRO alternative. The difference between the FAC and such unknowns as the Generation NERC Rider, the Alternative Energy Rider (which ironically should be available since some element of it is apparently included in the FAC), the Facilities Closure Cost Recovery Rider, and several more ticking bombs suggests why the Commission rules are careful to require the Companies to provide cost information as part of the Application. Moreover, it is apparent that the Companies understood that failure to provide cost information was likely to be a sensitive problem when they sought a waiver for the Turning Point portion of the Application. That they still filed several other riders with no supporting information highlights the seriousness of the deficiency.

The problems with the Application are further demonstrated by the Companies' response in the Memorandum Contra to the concerns raised about the POLR charge. The Companies' Application notes that it is only providing a methodology for a non-cost based rider, not a final level of the charge. As the Companies acknowledge, some new level of rate will emerge based on any modifications the Commission may order after the hearing and a decision is rendered.[18] The blackbox of Black-Scholes is thus complete: If the Commission were to approve the Companies' methodology, the Companies will provide their calculation of the final POLR charge only after the Application is approved with whatever changes the Commission may feel are necessary. The same problem is evident with the Application's Placeholder Riders. In

[17] Memorandum Contra at 11.

[18] *Id.* at 11.

either instance, the Commission will have no opportunity to determine if the late-filed POLR or revenue claim for a Placeholder Rider disturbs the determination that the ESP as modified is better than the alternative under an MRO. Thus, the Commission will not be able to determine if the ESP, in the aggregate, is better than the alternative under Section 4928.142, Revised Code. In the context of utility regulation, a worse administrative model would be hard to find. It is certainly not one that is authorized by the Commission's rules.

Given the many failures of the Application to comply with the statutory and regulatory requirements, the Commission should follow its prior decision in the *Duke SSO* case and dismiss the Application. In response, the Companies urge that the *Duke SSO* does not apply because Duke Energy Ohio's application was dismissed only for failure to satisfy the statutory requirements.[19] In fact, the Commission dismissed the application because Duke failed to comply with the statutory requirements and provide information required by the Commission's rules. The Commission specifically stated:

> It is required that Duke provide the information dictated by the statute and delineated in the Commission's rules, in order for the Commission to determine if the application satisfies the statutory requirements. Duke readily concedes that it did not provide certain information because it was outside of its two-year proposal. Accordingly, the Commission can not find that Duke satisfied the requirements set forth in Rules 4901:1-35-03 and 4901:1-35-11, O.A.C.[20]

Thus, the direction of the *Duke SSO* case is clear: failure to comply with the Commission's administrative requirements is ground for dismissal.

[19] Memorandum Contra at 12.

[20] *Duke SSO*, Case No. 10-2586-EL-SSO, Opinion and Order at 49 (February 23, 2011) (emphasis added).

What the Commission should not do is delay action on the Motion. In the *Duke* SSO case, the Commission dismissed the Application only after the parties fully litigated the Application and incurred the time and expense inherent in a fully litigated case. In this instance, the Companies, like Duke Energy Ohio, have attempted to avoid basic statutory and regulatory requirements. The solution is equally obvious: the Application should be dismissed before more time and money is wasted.

III. CONCLUSION

For the reasons outlined in its Motion and Memorandum in Support and this Reply, IEU-Ohio urges the Commission to dismiss the Application.

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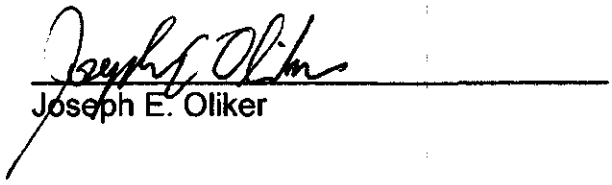
Certificate of Service

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Reply to Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Industrial Energy Users-Ohio's Motion to Dismiss,* was served upon the following parties of record this 1st day of June 2011, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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