FILE

14

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of an 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**

COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S MEMORANDUM CONTRA INDUSTRIAL ENERGY USERS-OHIO'S JUNE 1, 2011, APPLICATION FOR REHEARING

Steven T. Nourse
(Counsel of Record)
Matthew J. Satterwhite
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2100
Facsimile: (614) 227-2270
dconway@porterwright.com

Counsel for Columbus Southern Power Company and Ohio Power Company

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of an 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**

COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S MEMORANDUM CONTRA INDUSTRIAL ENERGY USERS-OHIO'S JUNE 1, 2011, APPLICATION FOR REHEARING

Steven T. Nourse
(Counsel of Record)
Matthew J. Satterwhite
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2100
Facsimile: (614) 227-2270
dconway@porterwright.com

Counsel for Columbus Southern Power Company and Ohio Power Company

BACKGROUND

On May 4, 2011, the Commission issued an Entry directing Columbus Southern Power Company and Ohio Power Company (collectively "AEP-Ohio" or the "Companies") to submit revised tariffs that would, if accepted and approved for filing by the Commission, remove the increases to their Provider of Last Resort (POLR) charges and their 2001-2008 incremental environmental investment carrying cost charges approved as part of the Companies' ESPs. (Entry at ¶ 4 (May 4, 2011).) That Entry was issued on remand from, and in response to, the Ohio Supreme Court's April 19, 2011 decision in *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-1788 (Remand Decision).

On May 10, 2011, Industrial Energy Users-Ohio (IEU) filed a Motion requesting the Commission to take additional step beyond those outlined in the May 4 Entry in order to "fully reflect[]" the Court's Remand Decision in AEP Ohio's rates and accounts. On May 16, 2011, IEU filed an application for rehearing of that Entry, asserting two grounds for rehearing: The first ground in its May 16 application for rehearing simply reiterated the arguments that IEU had made in its May 10 Motion, contending that the Commission "failed to fully identify the flow-through effects on consumers' electric bills" of the Court's decision. In the May 16 application's second ground for rehearing, IEU urged the Commission to expand the Court's decision from a reversal of the Commission's ESP order establishing charges for 2001-2008 environmental investment carrying costs to also include a reversal of the Commission's completely separate ESP decision to allow the Companies to establish separate charges to recover carrying costs for 2009-2011 environmental investments. Accordingly, IEU's second

ground for rehearing requested the Commission to suspend the Companies' incremental environmental investment carry cost (EICC) riders for 2009.[1]

Subsequently, On May 25, 2011, this Commission issued a second Entry clarifying and modifying, its May 4 Entry. The May 25 Entry directed AEP-Ohio to file "tariff pages that reflect that the POLR riders and environmental carrying charges included in rates are being collected subject to refund as to be determined by the [Commission]." (May 25 Entry at p. 5.) The Commission also set forth a procedural schedule to afford the parties "an opportunity to present testimony and to offer additional evidence in regard to the POLR and environmental carrying charges remanded to the Commission." (Id. at ¶ 11.) Although the Commission did not explicitly rule on IEU's May 16 Application for Rehearing (or its May 10 Motion), the Commission did not expand this proceeding to consider the purported "flow-through effects" of the Ohio Supreme Court's Remand Decision or the current tariffs for AEP-Ohio's 2009-2011 EICC riders.

On June 1, 2011, IEU filed another Application for Rehearing, attacking the Commission's May 25 Entry and repeating the arguments that it advanced in its May 16 rehearing request (and its May 10 Motion). In particular, IEU contends in the first ground of its June 1 application for rehearing that the Commission should address deferred revenues; delta revenues (related to reasonable arrangements and Universal Service Fund (USF) charges); impacts upon AEP Ohio's pending ESP proceeding (Case Nos. 11-346-EL-SSO, et cet.); and jurisdictionalization of balance sheets and income statements for the purpose of future significantly excessive earnings test (SEET) evaluations. IEU incorporates by reference the

[1] The Companies' request to include in their EICC riders costs for their incremental 2010 environmental investments is pending in Case No. 11-1337-EL-RDR.

arguments it made in its May 10 Motion in support of the first ground of its June 1 rehearing request. (June 1 Application for Rehearing, at p. 6.) In the second ground of its June 1 rehearing request, IEU repeats its argument that the Commission should suspend the Companies' incremental environmental investment carry cost (EICC) riders for 2009-2011. (*Id.* at pp. 6-7.)

IEU acknowledges the repetitive nature of its June 1 Application for Rehearing, stating that it was making the filing in order "to assure that it has protected" the positions it took in its May 10 Motion and has preserved the issues it raised in the May 16 Application for Rehearing. (June 1 Application for Rehearing, at pp. 4 and 6.) IEU's arguments remain meritless, and its June 1 rehearing request should be denied.

1. IEU's First Ground for Rehearing Should Be Denied.

a. Reducing AEP Ohio's Future Recovery of Deferred Fuel Costs to Offset AEP Ohio's POLR and Environmental Carrying Cost Charges Would Be Impermissible, Retroactive Ratemaking.

The fist issue that IEU raised in its May 10 Motion and in the first ground of its May 16 (and, thus, its June 1) rehearing request focuses on deferred revenues that the Commission authorized as part of AEP Ohio's ESP. AEP Ohio's ESP contains a Fuel Adjustment Clause (FAC) mechanism "to recover prudently incurred costs associated with fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs associated with carbon-based taxes and other carbon-related regulations" during the term of the ESP. (Opinion and Order at p. 14 (Mar. 18, 2009).) To prevent rate shock, the Commission ordered that AEP Ohio's new ESP rates be phased in over the three years of the ESP. Authorized increases were capped at 7% for CSP and 8% for OP in 2009, 6% for CSP and 7% for OP in 2010, and 6% for CSP and 8% for OP in 2011. (*Id.* at p. 22.) This was accomplished by "deferring a portion of AEP Ohio's annual incremental FAC costs" over the course of the ESP. (*Id.*, at p. 20.) "The amount of the incremental FAC expense that [is]

recovered from customers [is] limited so that total bill increases [will] not" exceed the caps. (*Id.*) The deferred FAC expenses will then be recovered over seven years after the term of the ESP "via an unavoidable surcharge," with carrying costs. (*Id.* at pp. 20, 22-23.) IEU calls this surcharge a "phase-in rider." (May 10 Motion, at p. 7.)

IEU's May 10 Motion makes no mention of the FAC mechanism in AEP Ohio's approved ESP. Instead, IEU describes the portion of AEP Ohio's annual incremental FAC costs that have been deferred between 2009 and 2011 as simply "a subset of the total revenue collection" authorized under AEP Ohio's ESP, and asserts that those "deferred revenues must be reduced by an amount equal to that portion of the revenues authorized by the Commission in its ESP order that the Supreme Court has determined are unlawful." (*Id.* at pp. 8-9.) In other words, IEU is ordering the Commission to reduce AEP Ohio's future approved recovery under the ESP to make up for what IEU says is the companies' "unjust enrichment" in the past. (*Id.* at p. 4.)

The relief IEU is requesting is directly contrary to the Ohio Supreme Court's opinion in this proceeding and its precedents for a half-century before that. As the Court held in its Remand Decision and in prior opinions, "the law does not allow refunds in appeals from commission orders." Remand Decision at ¶ 16; see also *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (holding, "[t]he General Assembly . . . prohibit[s] customers from obtaining refunds of excessive rates that may be reversed on appeal."). Indeed, the Supreme Court of Ohio explicitly held that a ratepayer may not obtain "[r]estitution based on the ground of unjust enrichment . . . to recover [an] increase in rates charged by a public utility under an order of the Public Utilities Commission, where such order is subsequently reversed by

the Supreme Court on the ground that it is unreasonable and unlawful." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 255-56, 141 N.E.2d 465.

IEU will undoubtedly argue that it is seeking to reduce AEP Ohio's recovery in the future, not to obtain a refund of rates already charged and collected. That argument elevates form over substance, and the Ohio Supreme Court has already held that it will not ignore substance. As noted above, the Commission in this proceeding increased AEP Ohio's recovery under the ESP between April and December 2009 to make up for AEP's inability to collect under the ESP's approved rates for the first three months of 2009. The Court held that this was "retroactive ratemaking," even though "the commission did not authorize AEP to rebill customers for usage from January through March[.]" Remand Decision at ¶ 10. Regardless of form, the Court held that the Commission's rate increase "reached the same financial result" as rebilling AEP Ohio's customers, *id.*, and thus was unlawful.

Under the same logic, "restat[ing] and substantially lower[ing]" AEP Ohio's future recovery under the ESP in order to return "[c]onsumers' wealth" that IEU asserts was "unlawfully transferred to CSP and OP" (May 10 Motion at p. 9) would not be permitted. Even though IEU is not technically asking the Commission to refund money that the ratepayers have already paid, the relief that IEU is demanding would "reach[ ] the same financial result." IEU is insisting that the Commission must refund ratepayers' payments, in substance if not in form, and more than fifty years of Ohio Supreme Court precedent prohibits that remedy.

IEU complains that denying its requested relief would be contrary to "simple fairness." (*Id.*) But as the Supreme Court held in its ruling on appeal in this proceeding, "[a]ny apparent unfairness . . . remains a policy decision mandated by the larger legislative scheme." Remand Decision at ¶ 17. The statute allows a party appealing a Commission order to obtain a stay of

execution of the order so long as the appellant posts a bond "conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of[.]" Ohio Rev. Code § 4903.16. IEU did not seek a stay of the Commission's orders and entries approving AEP Ohio's ESP and did not post a bond. Having failed to exercise its rights under statute to stay the effect of AEP Ohio's ESP pending appeal, IEU should not be heard to complain now about "the injustice of the unlawfully authorized [rate] increases" (May 10 Motion at p. 10) under that ESP.

b. AEP Ohio's Recovery of Delta Revenue from Reasonable Arrangements and USF Charges Is and Will Be Appropriate.

The second issue that IEU raised in its May 10 Motion and in the first ground of its May 16 (and, thus, its June 1) rehearing request focuses on "delta revenue" recovery that the Commission has authorized as a result of AEP Ohio's reasonable arrangements with Ormet. IEU claims that "the amount of delta revenue eligible for collection as a result of the Ormet reasonable arrangement has been unlawfully overstated in the past and will be unlawfully overstated going forward until and unless the unlawfully authorized revenue is removed from the rates and charges in the otherwise applicable tariff schedule(s)." (May 10 Motion at p. 10.) IEU also claims that, in a similar fashion to its delta revenue example, "the unlawfully authorized revenue caused the otherwise applicable rate to be higher than the lawful rate and, in turn, increased the magnitude of the USF charges that have been paid and will continue to be paid until the unlawfully authorized revenue and all of its implications are stripped from all rates and charges (including riders)." (*Id.* at p. 11.)

To the extent that IEU is seeking to recover what it calls "overstated" revenue over the course of the 2008 ESP (*id.* at p. 10), these arguments regarding delta revenue and USF charges suffer from the same flaws that require rejection of IEU's argument regarding deferrals. The

delta revenue eligible for collection as a result of the reasonable arrangement with Ormet is the result of the difference between the lawfully approved filed rate that Ormet would have been charged, absent the reasonable arrangement, and the reasonable arrangement's lawfully approved filed rate. The delta revenue *already* collected has been based on the difference of two filed rates. The delta revenue collected *in the future* will likewise be the difference between the filed rates in effect in the future. Consequently, each rate that has been or will be charged is related to the delta revenue – the tariff rate that Ormet would have been charged, absent the reasonable arrangement; the rate charged to Ormet pursuant to the reasonable arrangement; and the rate charged to other customers to recover delta revenue – have been, are, and will be the approved filed rates. Similarly, all of the Companies' USF charges have been, are, or will be the approved filed rates.

Hence, contrary to IEU's claim, the amount of delta revenue eligible for collection as a result of the Ormet reasonable arrangement has not been "unlawfully overstated in the past" and will not be "unlawfully overstated going forward." Similarly, there has been no overstatement in the past, and there will be no overstatement in the future, of USF charges. AEP Ohio's delta revenue as a result of the Ormet reasonable arrangement and AEP Ohio's USF charges between April 2008 and April 2011 have been based on the Commission-approved rates in effect at the time. "[U]ntil such time as they were set aside by the Supreme Court, they were . . . the lawful rates and the *only* rates which could be collected by the utility." *Keco Industries*, 166 Ohio St. at 258.

Thus, any effort to claw back revenues already collected, either through delta revenue or USF charges, based on a theory that rates other than the approved filed rates should have been used in the past to determine delta revenue or USF charges would also clearly violate the

prohibition against retroactive ratemaking. *See In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-1788, at ¶ 16; *Lucas Cty. Commrs.*, 80 Ohio St.3d at 348; *Keco Industries, 166 Ohio St. at 255-56.*

c. IEU's Arguments Regarding SEET Jurisdictionalization Are Irrelevant to This Proceeding.

A third "illustrative area" that IEU contends (in its May 10 Motion, its May 16 rehearing request, and, thus, in it June 1 application for rehearing) requires the Commission's attention on remand involves the operation of the significantly excessive earnings test (SEET). What IEU believes must be done with regard to the SEET in light of the Court's Remand Decision is not clear. All that IEU offers in that regard is the statement that "[i]f the Commission properly jurisdictionalizes the income statement and the balance sheet values that drive the SEET determination (as IEU has previously and unsuccessfully – to this point – argued is required by Ohio law), the SEET can provide the Commission with an opportunity to rectify, at least in part, the effect of unlawfully authorized and collected revenue." (May 10 Motion at p. 11.) This is simply a reiteration of IEU's position advanced in the Companies' SEET proceeding, Case No. 10-1261-EL-UNC, that reviewed the earnings for the Companies during 2009 and applied the SEET to them, and which IEU-is pursuing in an appeal to the Ohio Supreme Court, Case No. 2011- 0751.

The Commission declined to accept IEU's legal arguments in Case No. 10-1261-EL-UNC regarding "jurisdictionalization" of the Companies' balance sheets and income statements. There is no basis for concluding that the Court's Remand Decision supports IEU's unique, and incorrect, perspective on jurisdictionalizing balance sheets and income statements for purposes of the SEET under Ohio Rev. Code §4928.43.(F). The Remand Decision is irrelevant to IEU's position on the SEET. Moreover, the proper forum for IEU to advance the arguments regarding

the proper application of the SEET is not in this proceeding to implement the Court's Remand Decision.

d. IEU's Concerns Regarding The Companies' Pending ESP Application Are Premature and Best Addressed in the Proceeding for the 2011 ESP.

The fourth "illustrative area" that IEU asserts (in its May 10 Motion, its May 16 rehearing request, and, thus, in its June 1 application for rehearing) merits the Commission's attention on remand is "the relationship between the Companies' ESPs . . . and the plan filed in the 2011 ESP Application. IEU claims that the "foundation" for the pending 2011 ESP is excessive, as a result of the Court's Remand Decision. (May 10 Motion at pp. 11-12.) IEU's criticism is misguided and, in any event, is premature. It is misguided because the criticism is properly directed, if at all, at AEP Ohio's pending ESP Application, not the remand proceeding for the AEP Ohio's current ESP. It is premature because any possible impact, if any, on the pending ESP will not be possible to debate, let alone resolve, until the conclusion of the remand proceeding.

2. IEU-Ohio's Second Ground for Rehearing Should be Denied Because It Is Beyond the Scope of the Court's Remand Decision, Seeks to Bypass the Requirements for Seeking Rehearing and Appeal of Commission's Decision, and Is Meritless.

The Commission addressed and approved a provision for the Companies' ESPs through which they would recover carrying costs on their incremental environmental investments made during 2009, 2010, and 2011. (ESP Opinion and Order, at pp. 28-30.) That decision was made separate and apart from the decision to approve a provision to allow for the recovery of carrying costs for their 2001-2008 incremental environmental investments. (*Id.* at pp. 24-28.) Neither IEU nor any other party sought rehearing of the Commission's decision to approve recovery of carrying costs on 2009, 2010, and 2011 incremental environmental investments. Nor did IEU or

any other party raise on appeal to the Ohio Supreme Court any claim of an error in the Commission's decision to include a provision in the Companies' ESPs that would enable them to recover carrying costs for their 2009, 2010, and 2011 environmental investments.

Consequently, the Commission's decision to permit the Companies to recover their 2009, 2010, and 2011 incremental environmental investment carrying costs became final and non-appealable. Not surprisingly, the Court's Remand Decision does not address, let alone purport to reverse, the Commission's decision to approve that ESP provision and the charges established pursuant to that provision, which enable the Companies to recover those carrying costs. Rather, the Court's ruling in ¶ 35 of the Decision was explicitly issued in response to OCC Proposition of Law No. 6, which only challenged the non-fuel generation rate increase that was based on pre-ESP environmental investment carrying charges.

IEU's effort now, through the second ground of its June 1 application for rehearing of the May 25 Entry (and its May 10 application for rehearing of the May 4 Entry), to attack that aspect of the Commission's final order approving the Companies' ESPs must be rejected. It is an effort to bypass the rehearing statute, Ohio Rev. Code §4903.10, and the statute governing the filing of appeals of the Commission's final orders, Ohio Rev. Code § 4903.11. Not surprisingly, IEU's request is outside the scope of the Court's Remand Decision, which is limited to a reconsideration, on remand, of the statutory basis for recovery of the carrying costs for 2001-2008 environmental investments:

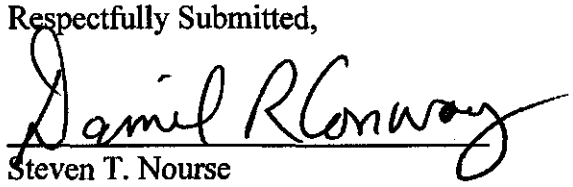
> In its sixth proposition of law, OCC argues that R.C. 4928.143(B)(2) does not permit AEP to recover certain carrying costs associated with environmental investments. That section states, "The [electric security] plan may provide for or include, without limitation, any of the following," and then lists nine categories of cost recovery. OCC argues that this section permits plans to include *only listed* items; the commission and AEP argue that (B)(2) permits *unlisted* items. We agree with OCC. . . .

> For the foregoing reasons, we reverse the commission's legal determination that R.C. 4928.143(B)(2) permits ESPs to include unlisted items. On remand, the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges.

Remand Decision at ¶¶ 31, 35. IEU's request to suspend the Companies' tariff riders that allow them to recover their carrying costs for 2009 incremental environmental investments must be denied.

For the foregoing reasons, Columbus Southern Power Company and Ohio Power Company respectfully request that the Commission deny IEU's June 1, 2011, Application for Rehearing.

Respectfully Submitted,



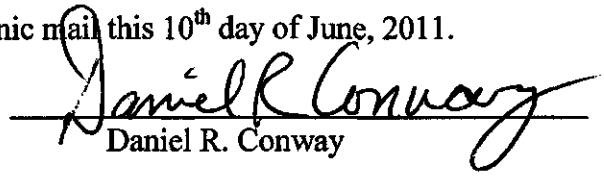
Steven T. Nourse
Matthew J. Satterwhite
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2100
Facsimile: (614) 227-2270
dconway@porterwright.com

Counsel for Columbus Southern Power Company and Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Industrial Energy Users-Ohio's June 1, 2011, Application for Rehearing has been served upon the below-named counsel and Attorney Examiners via electronic mail this 10th day of June, 2011.



Daniel R. Conway

sbaron@jkenn.com	ricks@ohanet.org
lkollen@jkenn.com	tobrien@bricker.com
charlieking@snavely-king.com	david.fein@constellation.com
mkurtz@bkllawfirm.com	cynthia.a.fonner@constellation.com
dboehm@bkllawfirm.com	mhpetricoff@vssp.com
grady@occ.state.oh.us	smhoward@vssp.com
etter@occ.state.oh.us	cgoodman@energymarketers.com
roberts@occ.state.oh.us	bsingh@integrysenergy.com
idzkowski@occ.state.oh.us	lbell33@aol.com
dconway@porterwright.com	kschmidt@ohiomfg.com
jbentine@cwslaw.com	sdebroff@sasllp.com
myurick@cwslaw.com	apetersen@sasllp.com
khiggins@energystrat.com	sromeo@sasllp.com
barthroyer@aol.com	bedwards@aldenlaw.net
gary.a.jeffries@dom.com	sbloomfield@bricker.com
nmoser@theOEC.org	todonnell@bricker.com
trent@theOEC.org	cvince@sonnenschein.com
henryeckhart@aol.com	preed@sonnenschein.com
nedford@fuse.net	ehand@sonnenschein.com
rstanfield@nrdc.org	erii@sonnenschein.com
dsullivan@nrdc.org	tommy.temple@ormet.com
tammy.turkenton@puc.state.oh.us	agamarra@wrassoc.com
thomas.lindgren@puc.state.oh.us	steven.huhman@morganstanley.com
werner.margard@puc.state.oh.us	dmancino@mwe.com
john.jones@puc.state.oh.us	glawrence@mwe.com
sam@mwncmh.com	gwung@mwe.com
lmcalister@mwncmh.com	stephen.chriss@wal-mart.com
jclark@mwncmh.com	lgearhardt@ofbf.org
drinebolt@aol.com	cmiller@szd.com
cmooney2@columbus.rr.com	gdunn@szd.com
sarah.parrot@puc.state.oh.us	greta.see@puc.state.oh.us
jlang@calfee.com	lmcbride@calfee.com
talexander@calfee.com	