

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) Case No. 08-917-EL-SSO
its Corporate Separation Plan; and the Sale or)
Transfer of Certain Generating Assets.)

In the Matter of the Application of Ohio)
Power Company for Approval of its Electric) Case No. 08-918-EL-SSO
Security Plan; and an Amendment to its)
Corporate Separation Plan.)

ENTRY

The attorney examiner finds:

- (1) On March 18, 2009, the Commission issued its opinion and order in Columbus Southern Power Company's and Ohio Power Company's (jointly, AEP-Ohio or the Companies) electric security plan (ESP) cases (ESP Order).¹ By entries on rehearing issued July 23, 2009 (First ESP EOR) and November 4, 2009, the Commission affirmed and clarified certain issues raised in AEP-Ohio's ESP Order. As ultimately modified and adopted by the Commission, AEP-Ohio's ESP directed, among other things, that AEP-Ohio be permitted to recover the incremental capital carrying costs that would be incurred after January 1, 2009, on past environmental investments (2001-2008)² and approved a provider of last resort (POLR) charge for the ESP period.
- (2) The Commission's decision in the AEP-Ohio ESP cases was appealed to the Ohio Supreme Court. The Ohio Supreme Court determined that Section 4928.143(B)(2), Revised Code, does not authorize the Commission to allow recovery of items not enumerated in the section. The Court remanded the case to the Commission for further proceedings in which "the Commission may determine whether any of the listed

1 *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009).

2 AEP-Ohio ESP Order at 24-28, 38-40; First ESP EOR at 10-13, 24-27.

categories set forth in Section 4928.143(B)(2), Revised Code, authorize recovery of environmental carrying charges.”³ In regards to the POLR charges, the Court concluded that the Commission’s decision that the POLR charge is cost-based was against the manifest weight of the evidence, an abuse of the Commission’s discretion and reversible error. While the Court specifically stated that “we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful,” the Court noted two other methods by which the Commission may establish the POLR charge: a non-cost-based POLR charge or evidence of AEP-Ohio’s actual POLR costs.

- (3) By entry issued May 25, 2011, the Commission 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, until the Commission specifically orders otherwise on remand. Additionally, the Commission adopted a procedural schedule, as modified by entry of June 23, 2011, for the remand proceedings in order to afford AEP-Ohio and intervenors the opportunity to present testimony and additional evidence in regard to the POLR and environmental carrying charges remanded to the Commission.
- (4) On June 15, 2011, the Ohio Consumers’ Counsel (OCC) filed a motion to compel discovery. In its motion, OCC explains that AEP-Ohio has not fully responded to OCC’s interrogatories no. 1, 2, and 3, and requests for production of documents no. 1, 2, 3, and 5, in its first set of discovery requests. OCC argues that the information that it seeks is relevant and that, pursuant to Rule 4901-1-16(B), Ohio Administrative Code (O.A.C.), OCC may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceedings. OCC states that it seeks the information in order to develop fully its case on behalf of residential customers concerning POLR and environmental carrying charges. OCC alleges that AEP-Ohio has not provided information that is responsive to OCC’s discovery requests. Specifically, OCC contends that AEP-Ohio has responded by directing OCC to answers to other parties that are not responsive to OCC’s requests and by stating that

³ *In re Application of Columbus Southern Power Company*, Slip Opinion No. 2011-Ohio-1788.

the information is not relevant or within the scope of these proceedings.

- (5) On June 22, 2011, AEP-Ohio filed a memorandum contra OCC's motion to compel discovery, addressing each contested interrogatory and request for production of documents. The Companies generally argue either that OCC's discovery requests are unduly burdensome and overbroad or that their responses to OCC's requests were adequate. OCC filed a reply to AEP-Ohio's memorandum contra on June 27, 2011.
- (6) In interrogatory no. 1, OCC requests that AEP-Ohio identify the persons who prepared or assisted in the preparation of the responses to the discovery requests. In its response, AEP-Ohio directed OCC to its response to Industrial Energy Users-Ohio's (IEU-Ohio) interrogatory no. 1 and also indicated that the Companies had listed a responsible witness where applicable. OCC argues that naming a responsible witness is not responsive, as the witness may not have participated in the preparation of the response and other individuals may have been involved. OCC asserts that there is no prohibition on discovery requests related to persons not designated by the Companies as witnesses in the proceedings.

In its memorandum contra, AEP-Ohio explains that, in its response to IEU-Ohio, which was served upon all parties, including OCC, the Companies identified the four witnesses sponsoring pre-filed testimony on behalf of AEP-Ohio. The Companies further state that, for each of OCC's discovery requests, they identified either a witness or counsel as the individual responsible for each response, including its preparation. AEP-Ohio argues that this method of response is appropriate and that OCC is not entitled to compel information through the discovery process regarding other utility employees who may have been involved in a supportive capacity in developing the discovery responses.

Rule 4901-1-19(A), O.A.C., provides, in pertinent part, that "if the party served is a corporation . . . it shall designate one or more of its officers, agents, or employees to answer the interrogatories, who shall furnish such information as is available to the party." The attorney examiner finds that

AEP-Ohio appears to have complied with this rule. Although AEP-Ohio did not actually list the individual witnesses in its response to OCC, the Companies identified either a witness or counsel as the individual responsible for each discovery response in each response itself. AEP-Ohio has explained that such witness or counsel is responsible both for the response and for its preparation. Therefore, the attorney examiner finds that the Companies have sufficiently responded to OCC's request. Accordingly, OCC's motion to compel a response to interrogatory no. 1 should be denied.

- (7) In interrogatory no. 2, OCC asks that AEP-Ohio identify, for each of its witnesses, (a) the facts that provide the basis for each opinion on which the witness will testify; (b) the background and qualifications of the witness; (c) documents supplied to, reviewed by, relied on, or prepared by the witness in connection with his or her testimony; (d) the agency or court, case name, and case number for all other proceedings in which the witness testified on the same or a similar subject in the past ten years; and (e) the name and title of all persons who assisted in the preparation of the witness's testimony and the nature of that assistance. In its response, AEP-Ohio referred OCC to the pre-filed testimony that the Companies filed on June 6, 2011. OCC argues that the information sought in subparts (c), (d), and (e) cannot be found within the testimony.

With respect to subpart (c), AEP-Ohio argues that each witness's work papers were provided and subject to OCC's review and examination at each witness's deposition. Regarding subpart (d), the Companies note that their counsel advised OCC, in the course of attempting to resolve the matter, that there is no similar proceeding. Regardless, AEP-Ohio contends that most of its witnesses provided references in their pre-filed testimony to other instances in which they had testified. The Companies also argue that OCC could have inquired, during the deposition of each witness, as to other proceedings in which the witnesses had testified. Concerning subpart (e), AEP-Ohio asserts that each witness is responsible for the preparation of his or her own testimony and that its response is sufficient for the reasons mentioned in connection with interrogatory no. 1.

Upon review of the parties' arguments, the attorney examiner agrees with OCC that the information sought in subparts (c), (d), and (e) cannot be found within the pre-filed testimony of AEP-Ohio's witnesses. With respect to subpart (c), the attorney examiner finds that the information sought by OCC is relevant to these proceedings and, to the extent that there are responsive documents other than the work papers that have already been provided, OCC's motion to compel should be granted. AEP-Ohio should identify and provide such documents to OCC by July 7, 2011. Regarding subpart (d), the attorney examiner finds that the information sought by OCC is likewise relevant and that AEP-Ohio should formally respond to OCC's request by July 7, 2011. If AEP-Ohio's witnesses have not testified on the same or a similar subject in the prior ten years, then AEP-Ohio should so state in its response. Similarly, concerning subpart (e), the Companies should formally respond to OCC's request by July 7, 2011. If the witness is the responsible party for the preparation of his or her testimony, AEP-Ohio should indicate that fact in its response.

- (8) In interrogatory no. 3, OCC asks that AEP-Ohio identify communications, including documents, that it has had regarding the remand proceedings with the Commission or any parties or non-parties to the proceedings. In its response, AEP-Ohio objected to the request on numerous grounds, including that it is irrelevant, overbroad and unduly burdensome, and may seek information that is privileged. OCC argues that it seeks to test the consistency between AEP-Ohio's pre-filed testimony and prior statements on the subject matter of these cases. OCC asserts that its request seeks relevant information and is not unduly burdensome, given that it is limited to communications regarding the remand proceedings. OCC also notes that it has executed a protective agreement, thus eliminating any objection based on the confidential nature of the information.

In its memorandum contra, AEP-Ohio argues that the scope of the request is overbroad and unduly burdensome in that it essentially seeks a log of every communication between every employee and agent of the Companies and their affiliates and any other individual. AEP-Ohio argues that the time and expense of compiling such a log would be substantial and

require a review of privileged communications. AEP-Ohio also indicates that its counsel informed OCC that counsel was unaware of any responsive documented communication, after undertaking a good faith search involving a few employees that would be the ones likely to engage in such communications.

The attorney examiner finds that the information sought by OCC is relevant to the subject matter of these proceedings. Although AEP-Ohio argues that OCC's request is overbroad and unduly burdensome, the Companies' counsel has nevertheless indicated that a good faith search has revealed no responsive documented communications. As AEP-Ohio itself notes, the remand proceedings are narrow in scope, being limited to just two issues, and OCC's request appropriately seeks only communications pertaining to the remand proceedings. Additionally, if AEP-Ohio finds OCC's request unduly burdensome, the proper course of action was to file a motion for protective order pursuant to Rule 4901-1-24(A), O.A.C. Finally, the attorney examiner notes that, to the extent that responsive communications are privileged, AEP-Ohio should provide a privilege log, as requested by OCC. Accordingly, OCC's motion to compel a response to interrogatory no. 3 should be granted and AEP-Ohio is directed to provide the information to OCC by July 7, 2011.

- (9) In request for production of documents no. 1, OCC requests copies of all documents identified in response to its first set of interrogatories, specifically interrogatories no. 2(c), 3, and 5. In its response, AEP-Ohio directed OCC to its responses to those interrogatories. In its motion to compel, OCC argues that AEP-Ohio failed to provide documents identified in response to interrogatories no. 2(c) and 3.

With respect to documents related to interrogatory no. 2(c), AEP-Ohio replies that work papers were provided for each witness. Regarding documents related to interrogatory no. 3, the Companies argue that the request is properly objectionable for the reasons already mentioned in connection with that interrogatory.

Concerning documents related to interrogatory no. 2(c), as discussed above, the attorney examiner finds that AEP-Ohio should provide any responsive documents, with the exception of the work papers that have already been provided, by July 7, 2011. Additionally, for the reasons noted above with respect to interrogatory no. 3, AEP-Ohio should provide any responsive documents related to that interrogatory to OCC by July 7, 2011.

- (10) In request for production of documents no. 2, OCC requests copies of all formal and informal requests submitted to AEP-Ohio from the Commission and all responses provided to the Commission in the remand proceedings. In its response, AEP-Ohio directed OCC to its response to IEU-Ohio's request for production of documents no. 2. In its motion to compel, OCC argues that AEP-Ohio failed to provide any documents.

In its memorandum contra, AEP-Ohio explains that, in its response to IEU-Ohio, which was served upon OCC, the Companies indicated that there had been no data requests from Staff, as of the date of their response, and that intervenors would be copied on any responses to formal discovery requests. AEP-Ohio notes that OCC did not question this particular response during its attempts to resolve its discovery issues with the Companies. AEP-Ohio concludes that there does not appear to be a dispute, as the Companies have agreed to provide the requested copies.

The attorney examiner notes that AEP-Ohio has agreed to provide OCC with copies of any responses to formal discovery requests and thus there does not appear to be a dispute among the parties on that point. However, to the extent that there are informal discovery requests from Staff or responses thereto from AEP-Ohio, the Companies should provide copies of the responsive documents to OCC by July 7, 2011.

- (11) In request for production of documents no. 3, OCC requests copies of all discovery served on AEP-Ohio by other parties and all responses to that discovery in the remand proceedings. In its response, AEP-Ohio again directed OCC to its response to IEU-Ohio's request for production of documents no. 2. In its motion to compel, OCC argues that AEP-Ohio failed to provide any documents.

AEP-Ohio replies again that, in its response to IEU-Ohio, which was served upon OCC, the Companies indicated that intervenors would be copied on any responses to formal discovery requests. AEP-Ohio reports that there appears to be no dispute, as OCC did not debate this particular response in its efforts to resolve its discovery issues with AEP-Ohio. AEP-Ohio further states that it has served copies of its responses to IEU-Ohio's discovery requests on OCC and that it intends to do the same with respect to responses to other intervenors' discovery requests.

Upon review of the parties' arguments, the attorney examiner finds that there does not appear to be a dispute with respect to request for production of documents no. 3, as AEP-Ohio has agreed to provide copies of the requested documents to OCC. Accordingly, OCC's motion to compel a response to request for production of documents no. 3 should be denied.

- (12) In request for production of documents no. 5, OCC requests copies of all communications between the Commission and AEP-Ohio that are related to these proceedings. In its response, AEP-Ohio objected to the request on numerous grounds, including that it is irrelevant, overbroad and unduly burdensome, and may seek information that is privileged. In its motion to compel, OCC argues that AEP-Ohio failed to provide any documents.

In its memorandum contra, AEP-Ohio responds that this request is a slightly but not materially narrowed version of interrogatory no. 3. AEP-Ohio argues, therefore, that the request is properly objectionable for the reasons already enumerated in connection with that interrogatory. AEP-Ohio also notes that OCC did not attempt to resolve the matter informally with the Companies.

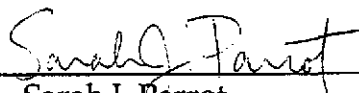
For the reasons addressed above with respect to interrogatory no. 3, the attorney examiner finds that OCC's motion to compel a response to request for production of documents no. 5 should be granted. AEP-Ohio should provide any responsive documents to OCC by July 7, 2011.

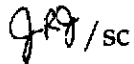
It is, therefore,

ORDERED, That OCC's motion to compel discovery be granted, in part, and denied, in part, as set forth in this entry. It is, further,

ORDERED, That a copy of this entry be served upon all persons of record in these cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Sarah J. Parrot
Attorney Examiner

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Entered in the Journal
JUN 30 2011



Betty McCauley
Secretary