

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).<sup>1</sup> 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)<sup>2</sup> 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

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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.”<sup>3</sup> 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 4, 2011, the Commission directed AEP-Ohio to file proposed tariffs removing the POLR charges and environmental carrying cost charges from the rates by May 11, 2011.
- (4) On May 11, 2011, the Companies filed proposed revised tariffs, under protest, as corrected on May 13, 2011.
- (5) 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 entries of June 23, 2011, and June 30, 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.
- (6) On June 1, 2011, Industrial Energy Users-Ohio (IEU-Ohio) filed an application for rehearing of the May 25, 2011, entry. On June 22, 2011, the Commission issued an entry on rehearing denying IEU-Ohio’s application for rehearing. In its first ground for rehearing, IEU-Ohio had asserted that the May 25, 2011, entry unreasonably and unlawfully failed to identify fully the flow-through effects on consumers’ electric bills as necessary to comply with the Court’s remand. The Commission found that the remand proceedings established by

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<sup>3</sup> *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

the May 25, 2011, entry would afford IEU-Ohio the opportunity to offer testimony and present arguments on the subject of flow-through effects. The Commission further stated that the May 25, 2011, entry "does not preclude IEU-Ohio from asserting, during the remand proceedings established by the entry, that the Commission should consider any flow-through effects on customers' bills, as may be necessary to comply with the Court's remand."

In its second ground for rehearing, IEU-Ohio had argued that the May 25, 2011, entry unreasonably and unlawfully failed to suspend the Companies' Environmental Investment Carrying Cost Rider tariffs or direct the Companies to file tariffs that permit collection subject to refund. With respect to recovery of carrying costs on 2009, 2010, and 2011 incremental environmental investments, the Commission found that neither IEU-Ohio nor any other party appealed or sought rehearing on this issue consistent with the jurisdictional requirements of Sections 4903.10 and 4903.11, Revised Code. Accordingly, the Commission determined that approval of such recovery is a final and non-appealable order of the Commission, which is not subject to attack at this point in the proceedings.

- (7) On July 12, 2011, pursuant to Rule 4901-1-27(B)(7)(a) and (b), Ohio Administrative Code, AEP-Ohio filed a motion to strike portions of the testimony of IEU-Ohio witness Joseph G. Bowser and Ohio Consumers' Counsel (OCC) witnesses Daniel J. Duann and Mack A. Thompson, as filed on June 30, 2011. In its motion, AEP-Ohio contends that the identified portions of the testimony of these witnesses address issues that are not within the limited scope of the remand proceedings and are thus irrelevant. Specifically, AEP-Ohio argues that the testimony is prohibited as it pertains to the flow-through effects of the Court's remand on issues such as deferred revenues and delta revenues, which, according to the Companies, are issues that are beyond the scope of the remand. AEP-Ohio maintains that the Commission has no authority to venture beyond the scope of the remand. The Companies also argue that portions of IEU-Ohio witness Bowser's testimony related to recovery of carrying costs for 2009, 2010, and 2011 incremental environmental investments should be stricken as beyond the scope of the remand, irrelevant, and contrary to the Commission's entry on rehearing issued June 22, 2011. Finally,

AEP-Ohio asserts that the testimony regarding flow-through effects is prohibited because it is offered in support of what is essentially a refund request, which the Companies maintain is contrary to the prohibition on retroactive ratemaking as addressed by the Court in these and other cases. The specific testimony that AEP-Ohio seeks to strike is identified in Exhibit A of the Companies' motion.

- (8) On July 15, 2011, IEU-Ohio and OCC filed memoranda contra AEP-Ohio's motion to strike. In response to AEP-Ohio's arguments with respect to the issue of flow-through effects, IEU-Ohio contends that the Commission already indicated in its June 22, 2011, entry on rehearing that IEU-Ohio is not precluded from raising this issue and that the remand proceedings would afford IEU-Ohio the opportunity to present its testimony and arguments on the subject of flow-through effects. IEU-Ohio further argues that the Companies' position is inconsistent with their revised tariffs, which, according to IEU-Ohio, reflected a direct effect on recovery of deferred costs when the POLR and environmental carrying cost charges were removed. Additionally, IEU-Ohio asserts that, pursuant to the ESP Order, the deferral mechanism approved by the Commission is subject to the deferred revenues being legally recoverable and that the Commission may thus adjust the phase-in amounts. Finally, IEU-Ohio argues that the Court's decision in these cases and its prior precedent do not prevent the Commission from requiring the Companies to restate the deferred revenues or take into account the remand in addressing other related issues such as delta revenue recovery, as neither a credit nor refund for improperly collected revenues is being sought, given that the deferrals have not yet been collected.

With respect to recovery of carrying costs for 2009, 2010, and 2011 incremental environmental investments, IEU-Ohio contends that the ESP Order failed to identify any statutory basis for such costs. Pointing to the Court's decision with respect to carrying cost charges for 2001-2008 incremental environmental investments, IEU-Ohio argues that the Commission should likewise address the charges for 2009-2011.

OCC asserts that the Commission already determined in the June 22, 2011, entry on rehearing that it should consider any

flow-through effects necessary to comply with the Court's remand. OCC further contends that, where, as here, there is a mechanism built into the rates that permits future rate adjustments to be made, there is no violation against the prohibition against retroactive ratemaking. OCC maintains that prescribing a remedy, in the form of adjusting rates being collected subject to refund and prospectively adjusting phase-in deferrals, is a matter that the Commission should address to satisfy the obligations of the Court's remand. Noting that the scope of the remand is permissive in part, OCC argues that the Commission should exercise its discretion to allow the parties to litigate the flow-through effects of the remanded issues.

- (9) On July 18, 2011, AEP-Ohio filed a reply in response to the memoranda contra of IEU-Ohio and OCC. As an initial matter, the Companies contend that OCC mischaracterizes the June 22, 2011, entry on rehearing in claiming that the Commission has already determined that it should consider flow-through effects.

In response to IEU-Ohio, AEP-Ohio asserts that the Commission declined, in the June 22, 2011, entry on rehearing, to rule on arguments regarding its obligation to consider flow-through effects and instead indicated that it would consider those arguments in the remand proceedings established by the May 25, 2011, entry. Noting that IEU-Ohio has now had the opportunity to file its testimony and advance its arguments, the Companies argue that the Commission should determine at this point whether to consider further IEU-Ohio's arguments. Specifically, AEP-Ohio reiterates its position that a reduction of deferred revenues is not necessary to comply with the Court's remand and would in fact be contrary to the Court's decision in these and other cases. In response to OCC's argument that the scope of the remand is permissive in part, the Companies dispute that the Commission's discretion extends to issues other than the evidentiary and legal basis for the POLR charges and carrying cost charges on 2001-2008 incremental environmental investments. AEP-Ohio contends that finding a prospective remedy for past payments is not within the scope of the remand.

Additionally, AEP-Ohio argues that granting IEU-Ohio's and OCC's requested remedy of adjusting deferred revenues would be contrary to the Court's decision in these cases. AEP-Ohio asserts that IEU-Ohio and OCC seek restitution, which the Companies maintain is a remedy that cannot be obtained. Further, the Companies argue that nothing in the ESP Order established a mechanism through which deferred costs may be reconsidered. AEP-Ohio contends that withholding revenues that the Commission previously authorized and deferred constitutes retroactive ratemaking. According to AEP-Ohio, the fact that the remedy sought by IEU-Ohio and OCC is to adjust prospectively deferred amounts that have not yet been charged does not alter the unlawful nature of the remedy.

With respect to IEU-Ohio's arguments regarding recovery of carrying costs for 2009, 2010, and 2011 incremental environmental investments, AEP-Ohio maintains that the Commission already determined that it would not consider the issue in these cases, given that the issue was not appealed and thus cannot be an issue on remand.

- (10) Upon review of the pleadings, the attorney examiner finds that AEP-Ohio's motion to strike should be granted, in part, and denied, in part. With respect to testimony regarding recovery of carrying costs for 2009, 2010, and 2011 incremental environmental investments, the motion should be granted. Accordingly, the following portions of IEU-Ohio witness Bowser's testimony should be stricken: page 6 at lines 5 through 12; page 11 at lines 5 through 23; and page 12 at lines 1 through 5.

As noted in the June 22, 2011, entry on rehearing, the Commission approved, in the ESP Order, AEP-Ohio's recovery of carrying costs on incremental environmental investments for the ESP period (2009-2011), with such recovery to occur through annual proceedings.<sup>4</sup> Additionally, the Commission approved, in another section of the ESP Order, the Companies' recovery of carrying costs incurred after January 1, 2009, on past environmental investments for the period of 2001-2008.<sup>5</sup>

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<sup>4</sup> AEP-Ohio ESP Order at 28-30.

<sup>5</sup> AEP-Ohio ESP Order at 24-28.

The latter decision was appealed to the Ohio Supreme Court by OCC; however, the Commission's approval of the Companies' recovery of carrying costs for 2009, 2010, and 2011 incremental environmental investments was not an issue that was appealed by any party or was even the subject of an application for rehearing of IEU-Ohio, OCC, or any other party. Given that no party sought rehearing or appealed this issue pursuant to the jurisdictional requirements of Sections 4903.10 and 4903.11, Revised Code, the Commission's approval of recovery of carrying costs on 2009-2011 incremental environmental investments is a final and non-appealable order that is not open to attack at this stage in the proceedings. IEU-Ohio witness Bowser's testimony on this subject is irrelevant and contrary to the June 22, 2011, entry on rehearing and, therefore, should be stricken.

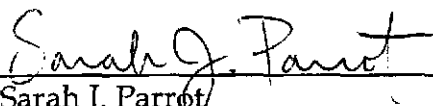
With respect to the parties' arguments regarding the flow-through effects of the Court's remand, the attorney examiner notes that the Commission stated, in the June 22, 2011, entry on rehearing, in response to IEU-Ohio's concerns regarding flow-through effects, that "[t]he remand proceedings established in the May 25, 2011, entry will afford IEU-Ohio the opportunity to offer testimony and present its arguments, as well as to respond to any arguments advanced by the Companies, which the Commission will then consider at that time." As the Commission specifically determined that the remand proceedings are a means to afford IEU-Ohio the opportunity to offer testimony and present arguments related to the flow-through effects of the remand, the attorney examiner finds that IEU-Ohio and OCC should be permitted to raise their arguments for the Commission's consideration on the merits following the remand hearing. Therefore, except as discussed above with respect to testimony regarding carrying costs on 2009-2011 incremental environmental investments, AEP-Ohio's motion to strike should be denied.

It is, therefore,

ORDERED, That AEP-Ohio's motion to strike portions of the testimony of IEU-Ohio witness Bowser and OCC witnesses Duann and Thompson 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.

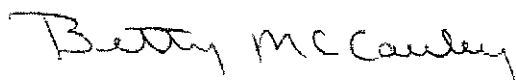
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Sarah J. Parrot  
Attorney Examiner

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Entered in the Journal

**JUL 19 2011**

  
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Betty McCauley  
Secretary