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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 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'S
AND OHIO POWER COMPANY'S
APPLICATION FOR REHEARING

On March 18, 2009 the Commission issued its Opinion and Order in these cases (the "ESP Order") approving, among other things, a standard service offer for generation service offered by Columbus Southern Power and Ohio Power Company (collectively "AEP Ohio" or the "Companies") by means of an electric security plan, authorized by Ohio Rev. Code § 4928.143. By its subsequent entries on rehearing issued July 23, 2009 and November 4, 2009, the Commission confirmed and clarified certain issues in the ESP Order. On April 19, 2011, the Supreme Court of Ohio issued its decision regarding the thirteen alleged errors raised by the Ohio Consumers' Counsel ("OCC") and the Industrial Energy Users-Ohio ("IEU") in their appeal of the ESP Order. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 (hereinafter referred to as the Court's "Decision"). On May 4, 2011, the Court issued its mandate,

thereby passing jurisdiction back to the Commission in order to conduct a remand proceeding, as directed by the Decision.

The Decision remanded two provisions included in the ESP Order to the Commission for further consideration – the Provider of Last Resort ("POLR") charges and the environmental investment carrying charges. With respect to both charges the Court concluded that the then existing record and/or the Commission's proffered rationale did not adequately justify the approved charges or the amount of the approved charges. With respect to both charges, the Court left the door open for AEP Ohio to supplement the record to further support the charges and/or for the Commission to better explain the authority and rationale for the charges as approved in the ESP Order.

On October 3, 2011, the Commission issued its Order on Remand (the "Remand Order"). In the Remand Order, the Commission appropriately found that the environmental investment carrying charges previously approved in the ESP Order are expressly authorized by Ohio Rev. Code § 4928.143(B)(2)(d) because they allow recovery of "carrying costs" and have the effect of providing certainty to both AEP Ohio and its customers regarding retail electric service, specifically generation service. Remand Order at 14. The Commission, however, erroneously concluded that the increased POLR charges authorized as part of the ESP Order are not sufficiently supported by the record on remand. Remand Order at 33. Notwithstanding its conclusion (at 18) that Ohio Rev. Code §§ 4928.143(B)(1) & (B)(2)(d) provide express statutory authority for the recovery of POLR charges, the Remand Order finds: (at 24) that recovery of POLR charges by AEP Ohio at the level reflected in the existing rates was not justified based on actual costs; (at 28) that the unconstrained option model

presented by the AEP Ohio witnesses does not provide a reasonable measure of its POLR costs; and (at 31-32) that, contrary to its express holding in the ESP Order, the risk of customers migrating to a competitive retail electric service provider when market prices fall below AEP Ohio's approved standard service offer is merely a business risk and not a risk resulting from an electric distribution utility's POLR obligation. Accordingly, the Commission ordered AEP Ohio to file revised tariffs backing out the amount of the POLR charges authorized in ESP Order and to refund the POLR charges collected subject to refund since the first billing cycle in June 2011. Remand Order at 33, 37.

Because the Remand Order has an indirect impact on the issues being litigated in Case Nos. 11-346-EL-SSO et al., it had become apparent in the context of that active litigation that there was a dispute as to the effect of the Remand Order on AEP Ohio's POLR charge. Accordingly, AEP Ohio filed two alternative sets of tariffs. AEP Ohio maintained that the first set of tariffs, which reduced the POLR charges to the levels in effect prior to the implementation of the ESP Order, was the appropriate set of tariffs to be approved in light of the scope and findings in the Remand Order. Intervenors IEU, OCC and Ohio Partners for Affordable Energy ("OPAE") filed motions arguing that the alternative set of tariffs, which eliminates all POLR charges, should be approved. On October 26, 2011, the Commission issued a Finding and Order approving the alternative set of tariffs, eliminating the POLR charge in total for the balance of the ESP period (the "Tariff Approval Order").

Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code § 4901-1-35 (A), AEP Ohio seeks rehearing of both the Commission's October 3, 2011 Remand Order and

the Commission's October 26, 2011 Tariff Approval Order. The Commission's Orders are unlawful and unreasonable in the following respects:

I. The Remand Order's finding (at 24) that AEP Ohio "failed to present evidence of its actual POLR costs and has not justified recovery of POLR charges at the level reflected in its existing rates" is unlawful, unreasonable and against the manifest weight of the evidence.

II. The Remand Order's finding (at 28) that the option model fails to provide a reasonable measure of the Companies' POLR costs is unreasonable and against the manifest weight of the evidence, especially in light of the Commission's finding (at 22) that the Companies have POLR risks and that such risks may be recovered through a POLR charge.

III. The Remand Order exceeds the scope of the Commission's jurisdiction in finding that an EDU's POLR risk does not include migration risk and, in any case, the finding conflicts with Ohio Rev. Code §§ 4928.14 and 4928.141.

IV. The Remand Order and Tariff Approval Order exceed the scope of the Commission's jurisdiction in eliminating the full POLR charges.

V. The Remand Order and Tariff Approval Order are unreasonable and unlawful in ordering complete elimination of the POLR charges after finding in the Remand Order both with respect to POLR: (i) (at 22) that "the Companies have such risks and that the costs associated with such risks may be recovered through a POLR charge" and (ii) (at 24) that AEP

Ohio "has not justified recovery of POLR charges at the level reflected in its existing rates."

VI. The Tariff Approval Order is unlawful in that it circumvents the statutory/jurisdictional rehearing process, as required by Ohio Rev. Code § 4903.09, and fails to set forth the reasons prompting the Commission to reverse its conclusion in the Remand Order (at 33) that only the "increased POLR charges authorized as a part of the ESP Order are insufficiently supported by the record on remand," as required by Ohio Rev. Code § 4903.09.

A memorandum in support is attached and sets forth the specific grounds supporting the above-listed errors.

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

ARGUMENT

The Commission's Remand Order and Tariff Approval Order are unlawful because they exceed the scope of the Commission's jurisdiction in this limited remand proceeding, conflict with the statutes that impose the Provider of Last Resort ("POLR") obligation on all electric distribution utilities ("EDUs"), and are based on a misreading of Ohio Supreme Court precedent. The Orders are unreasonable in that they deny AEP Ohio recovery of any POLR charges, although continuing to recognize that the POLR obligation imposes real and unique risks on EDUs for which compensation is both necessary and fair. AEP Ohio asks that the Commission grant rehearing and restore the POLR charge in full as previously approved in the ESP Order. If such relief is denied, AEP Ohio requests that the Commission restore the POLR charge to the level in existence prior to the increase approved in the ESP Order.

I. The Remand Order's finding (at 24) that AEP Ohio "failed to present evidence of its actual POLR costs and has not justified recovery of POLR charges at the level reflected in its existing rates" is unlawful, unreasonable and against the manifest weight of the evidence.

The Remand Order concludes (at 24) that AEP Ohio "failed to present evidence of its actual POLR costs and has not justified recovery of POLR charges at the level reflected in its existing rates." This conclusion is predicated, in whole or part, on the Commission's belief (at 23) that it would have been reasonable for AEP Ohio "to undertake an *ex post* analysis of its POLR costs." This finding is plainly wrong and cannot be squared with the very nature of the POLR obligation as imposed and defined by law. There was no evidence in the record that it was possible for AEP Ohio to

conduct an *ex post* analysis of POLR costs and the thought that there could be such an analysis is inconsistent with the fact, previously recognized by the Commission in the ESP Order (at 38), that POLR risks are undertaken at the outset of the ESP period when the EDUs make their commitment to provide stable regulated SSO generation rates for the forward ESP period and thereby take on the risk of uncertainty as to what market prices will do. Because POLR risks exist as of Day 1 of the ESP period, the POLR charges must be set at the beginning of the period. As Companies witness Baker explained at the outset of these ESP cases:

> Trying to recover the costs of the Companies' POLR obligation retrospectively would fail, because it ignores the very nature of the POLR obligation. The value of the customers' right to switch under S. B. 221 comes from the option customers are given to switch suppliers, while still having the safety net of the ESP rate to come back to, if electricity prices move in a way that makes switching back to the Companies an economically attractive choice or if their supplier defaults. The value of that option exists at the beginning of the ESP term, independent of the actual outcomes. The Companies are committing now, based on current circumstances and uncertainties, to provide an SSO price for the full three-year period of the ESP.

(Cos. Ex. 2E at 14-15.)

The *ex ante* analysis of the POLR risk is important from the standpoint of the EDUs which are forced to undertake the POLR obligation and risk, but it is also important from the standpoint of the retail customers. As Companies witness Thomas testified:

> [I]f customers know the POLR cost up front, then they are able to plan accordingly by determining their switching options and savings. It enables customers to evaluate their option to continue to pay the POLR cost which enables them to return to SSO generation rates if they so choose and their option to waive paying POLR in exchange for returning to the Companies at market-based rates. On the other hand, if an after-the-fact approach were developed and used, customers would face unknown risks and would not know until afterward whether any decision to shop,

> and possible waive the waive the POLR charge, was going to provide a benefit. Thus, the purpose and effect of a stabilized SSO serving as a safety net for shopping would be diminished. In this regard, using an after-the-fact method to measure POLR costs (even assuming it is feasible or makes sense) could perversely operate to inhibit shopping and would limit customer options regarding waiver of the POLR charge.

(Cos. Remand Ex. 8 at 3.)

The Commission's related finding (at 23) that an *ex post* analysis "would have enabled the Commission to compare the projected results of the Companies' option model with their actual costs incurred to date, a comparison that would have been highly useful in ensuring that customers are not paying unwarranted POLR charges" also misses the mark. An *ex post* analysis of actual POLR costs may well differ from an *ex ante* analysis of expected costs, but it is the *ex ante* analysis that is significant from the standpoint of the current regulatory structure in Ohio. As Companies witness Dr. LaCasse explained:

> Before the fact, the expected cost is measured and reflected in rates so that customers receive an ESP price that is mostly fixed. After the fact, the cost would vary and reflecting this varying cost in rates would defeat the purpose of an ESP price, which is to provide customers a price that is mostly fixed. Instead of the Companies managing and hedging the shopping-related risk, these activities would be moved into a regulated framework where the costs would need to be reviewed for prudence. The creativity and effectiveness with which the Companies manage the risks could then be restricted. However, the expected cost exists regardless of how the EDU ultimately chooses to manage the risk.

(Cos. Remand Ex. 3 at 13.)

In its ESP Order (at 38) the Commission showed that it fully understood that EDUs are exposed to unique POLR risks that give rise to costs and justify POLR charges. It also there agreed that the option model does provide a reasonable basis for estimating the Companies' POLR costs and charges. Its newly-disclosed preference for an *ex post* analysis of actual costs in this remand proceeding is an unwarranted about-face that is

entirely inconsistent with the record before it and the post–S.B. 221 regulatory landscape. The Remand Order's mere statement (at 23) that "it would have been reasonable for AEP Ohio to undertake an *ex post* analysis of its POLR costs" does not make it any more possible to actually do the analysis. The Company made every effort to develop such a direct measurement analysis and employed outside consultants to try and develop such an analysis. But given the nature of the POLR risk undertaken by the Companies, there were no direct receipts or accounting proof of the definite and material financial impact that POLR risk had on the Companies.

The Commission's decision (at 24) to equate a failure to provide evidence of actual costs to a conclusion that recovery of POLR charges at the level reflected in the existing rates is unjustified is also inconsistent with the fact, recognized by the Supreme Court, that POLR charges may be justified for reasons other than actual costs. Decision at ¶ 30. Indeed, Ohio Rev. Code § 4928.143(B)(2)(d) expressly authorizes the Commission to approve "[t]erms, conditions or charges relating to . . .standby . . . [or] default service . . . as would have the effect of stabilizing or providing certainty regarding retail electric service." The Commission refused to address this issue in its Remand Order (at 22, note 20), asserting that the argument was belatedly made and concluding that "the Companies offered no evidence to demonstrate that their POLR charges, if considered non-cost-based, are reasonable." The refusal to address this issue is arbitrary and unreasonable.

While it is true that AEP Ohio continued to assert in the remand proceedings that its POLR charges are cost-based, AEP Ohio did assert timely in its Initial Post-Hearing Brief on Remand (at 28) that "the existing POLR charge is *alternatively* justified because it has

the effect of providing stability and certainty regarding the price customers will pay for retail electric service." (Emphasis added.) It also addressed this issue in the Reply Brief on Remand (at 17-21). Each time AEP Ohio made this argument, it supported its alternative contention by citations to the record. See e.g. Cos. Ex. 2E at 14-15; Cos. Remand Ex. 4 at 9-10; Cos. Remand Ex. 8 at 3. Indeed the record is replete with evidence of the reasonableness and necessity of compensating AEP Ohio for the risks it is forced to assume as the POLR, even though the analysis of the risks must be made on an *ex ante* basis and may not realistically be based on actual costs "quantified and verified through the Companies' books, records, receipts, or other tangible documentation" (Remand Order at 23) on an *ex post* basis. The testimony of Companies witnesses Thomas, Dr. LaCasse and Dr. Makhija fully support the role and necessity of the POLR charge in stabilizing and providing certainty regarding retail electric service from the standpoint of both the Companies and retail customers.

II. The Remand Order's finding (at 28) that the option model fails to provide a reasonable measure of the Companies' POLR costs is unreasonable and against the manifest weight of the evidence, especially in light of the Commission's finding (at 22) that the Companies have POLR risks and that such risks may be recovered through a POLR charge.

The Commission errs as a matter of law in finding that the option model fails to provide a reasonable measure of the Companies' POLR cost because the Commission's finding is predicated, in whole or in part, on its erroneous assumption that the Ohio Supreme Court actually rejected the use of the model to measure AEP Ohio's POLR costs. It clearly did not. Quite to the contrary, the Court merely concluded that it could not determine based on the then existing record and the Commission's brief discussion of the POLR issue in the ESP Order (at 38) how the model could be found to be cost-based.

Decision at ¶ 27-29. The Court did not simply reverse the Commission's finding that the option model provided a reasonable means of measuring the POLR costs, it remanded the issue to the Commission so the Commission could revisit the POLR issue, going out of its way to clarify this point by stating "[t]o be clear, we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful, and the commission may consider on remand whether a non cost-based POLR charge is reasonable and lawful." *Id.* at 30. The Court also acknowledged that it would be appropriate on remand "to allow AEP to present evidence of its actual POLR costs." *Id.*

The Court, however, did not suggest or imply in its remand instruction, as the Commission seems to believe in its Remand Order (at 22), that the Commission had only "two avenues for consideration of AEP-Ohio's POLR charges on remand": approving a non-cost-based POLR charge or approving a POLR charge based on actual costs, quantified and verified through the Companies' books, records, receipts, or other tangible documentation. The Court also left open for consideration the evidentiary alternative of allowing AEP Ohio and the Commission to better explain for the Court why the option model provides a reasonable estimate of the Companies' *ex ante* POLR costs. Decision at 30. ("However, the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.") This is the evidentiary alternative AEP Ohio elected to present. In the original proceedings in these cases, AEP Ohio explained the rationale for using the option model to estimate the Companies' POLR costs through the testimony of Companies witness Baker. The Commission, given its experience in dealing with the POLR risk in prior proceedings, found this testimony sufficient to justify including the requested POLR charges in its ESP

Order with only slight modification. Given the Court's misunderstanding of the POLR issue and unfamiliarity with the use of option models, AEP Ohio presented in the remand hearing substantial new testimony, including independent expert testimony, on how the model worked and why it is a reasonable means for estimating POLR costs. It made this new evidentiary record through the testimony of Companies witnesses Thomas, Dr. LaCasse and Dr. Makhija. See Cos. Remand Exs. 1, 3, 4, 5, and Ex. 8.). Companies witness Dr. LaCasse further confirmed the reasonableness of using the option model to estimate POLR costs by conducting an empirical Monte Carlo analysis and comparing the results. She concluded that the Monte Carlo analysis, suggested by IEU witness Lesser, "only serves to support the reasonableness of the results obtained from AEP Ohio's option valuation methodology." (Cos. Remand Ex. 8 at 7-8.)

The substantially expanded evidentiary record on remand is more than sufficient to address the concerns raised by the Ohio Supreme Court. Yet, the Commission summarily rejects all this evidence (at 29) on the grounds that the model is merely "predict[ing] costs that are readily measurable and verifiable through more reliable means." The Commission is wrong in assuming that POLR costs must be justified by actual out-of-pocket expenses. The manifest weight of the evidence showed that not to be the case. Moreover, the Commission's analysis (at 29) ignores that fact that the POLR risk exists as of Day 1 of the ESP period and the cost to be assigned to that risk must be "predicted" at that time in order to have a fixed SSO for generation service that provides the intended "safety net" for all customers and allows customers to evaluate their shopping options and savings.

There is no evidence in the record to support the Commission's sweeping assumption that alternatives (e.g. hedging, competitive bidding, or an after-the-fact recovery of incremental energy and capacity costs) were actually available to the Companies to manage the POLR risk. An additional flaw in this analysis was explained by Dr. LaCasse, as quoted above; the expected POLR cost exists at the outset of the ESP period regardless of how the EDU ultimately chooses to manage the risk. (Cos. Remand Ex. 3 at 13.)

In sum, the Commission erred in applying the Court's Decision and in eliminating the entire POLR charge after finding that POLR risks exist and POLR costs can be recovered. It was unreasonable and unlawful for the Commission to find (at 22) that "[w]e continue to believe that the Companies have [POLR] risks and that the costs associated with such risks may be recovered through a POLR charge" and, in the same breath, order that the entire POLR charge be eliminated. Because the Commission found that risks exist and costs can be recovered through a POLR charge, it clearly should not have completely eliminated the POLR charge based on a qualitative concern about the option model that estimates such POLR costs. The Commission should grant rehearing and establish an appropriate POLR charge greater than zero.

III. The Remand Order exceeds the scope of the Commission's jurisdiction in finding that an EDU's POLR risk does not include migration risk and, in any case, the finding conflicts with Ohio Rev. Code §§ 4928.14 and 4928.141.

The Remand Order's finding (at 31) that the Commission had the authority in this limited remand proceeding to reconsider the migration issue, and to then redefine the POLR risk to exclude the migration risk that it affirmatively recognized in the ESP Order, is clearly erroneous. The issue of whether the POLR obligation gives rise to a

migration risk was not before the Ohio Supreme Court in the appeal of the ESP Order. Neither IEU nor OCC raised that issue in their respective applications for rehearing of the ESP Order and, therefore, could not and did not assert that as error in the appeal. Thus, the Commission's prior determination of the migration issue remained the law of the case for purposes of this remand proceeding, and cannot be altered at this late stage. The law of the case doctrine "precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal." Hubbard ex rel Creed v. Sauline (1996), 74 Ohio St.3d 402, 404, 659 N.E.2d 781. The issue of whether the POLR obligation gives rise to a migration risk was definitively decided by the Commission in its ESP Order, and therefore was "available to be pursued" in the appeal. The only reason it was not pursued was that the Intervenors elected not to challenge this issue on rehearing, a precondition for pursuing it on appeal.

The Remand Order's conclusion (at 32) that the Ohio Supreme Court has defined the POLR risk as being limited to the obligation to accept returning customers is also erroneous. The Supreme Court did refer in these cases to the POLR obligation as an "obligation to stand ready to accept returning customers." Decision at ¶ 23 (citing Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39, fn. 5). But the Court's repetition, in an introductory paragraph in its summary of the Commission's POLR findings, of a short-hand reference to the POLR obligation contained in a footnote in a 2008 decision does not constitute a holding of the Ohio Supreme Court that the Commission erred in its conclusion that the POLR obligation gives rise to a migration risk. This is especially true because the Court had no need in the 2008 Constellation opinion to precisely define the components of the

POLR obligation and the 2008 Constellation decision was based on a record and Commission order that pre-dated S.B. 221.

Prior to S.B. 221 the POLR obligation was described sometimes both by the Commission and by the Court using the "shop and return" short-hand language. See, e.g., Cos. Remand Ex. 4 at 11. This case, however, presented the Commission with the first opportunity to actually define the risks associated with the POLR obligation after the enactment of S.B. 221. The Commission took up this issue head-on, heard the Companies' explanation of the risks, listened to the Intervenors' arguments, considered the Staff's position and ruled in its ESP Order that the migration risk is a component, indeed the largest component, of the risk arising from the POLR obligation as restated in S.B. 221. The Commission, as in the past, initially referred to the short-hand "shop and return" description of the POLR risk, but then concluded very definitely and precisely that there are two component risks subsumed in that definition, one being the risk of migration:

> As the POLR, the Commission believes that the Companies do have some risks associated with customers switching to CRES providers and returning to the electric utility's SSO rate at the conclusion of CRES contracts or during times of rising price. . . . we do not agree that there is no risk or a very minimal risk as suggested by some. . . . [B]ased on the record before us, we conclude that the Companies' proposed ESP should be modified such that the POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith, including the migration risk.

ESP Order at 40. The Commission cannot lawfully reverse its prior final and non-appealable holding in this limited remand proceeding nor should it do so. Contrary to the Remand Order's finding (at 32), the migration risk is a risk directly resulting from an

EDU's POLR obligation; it is a unique risk different from the more common "ebb-and-flow" market risk shared by competitive retail electric service ("CRES") providers.

In passing S.B. 221, the Ohio legislature stepped back from the S.B. 3 state policy of having only market-based SSO rates going forward and required all EDUs to submit in their initial application under the revised law an ESP that would be tested by comparison to whether the ESP "is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code," which allows an EDU to submit a market rate offer ("MRO") to satisfy its requirement to provide a standard service offer, as required by Ohio Rev. Code § 4928.141. Ohio Rev. Code § 4928.143(C). In doing so, S.B. 221 significantly expanded the EDU's POLR obligation. Under S.B. 3 the EDU was permitted to meet its POLR obligations by providing consumers a "market based standard service offer" after the end of the initial five-year market development period. Ohio Rev. Code § 4928.14 (as in effect prior to S.B. 221). After S.B. 221, the EDU still retained the POLR obligation to "provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service," Ohio Rev. Code § 4928.141, but after the enactment of S.B. 221 EDUs no longer have the guarantee that its SSO will be "market-based" as previously guaranteed by Ohio Rev. Code § 4928.14(A) in S.B. 3. Rather, an EDU providing service through an ESP is required to offer service to all customers at rates, terms and conditions determined at the outset of the ESP to be more favorable in the aggregate than the estimated market rates for the term of the ESP, and must continue to offer the SSO rates

regardless of whether and by how much market rates fall or rise. This imposes on the EDU a new, very real migration risk, as the Commission properly recognized in its EDU Order.

In the post-S.B. 221 era, it is plainly wrong to suggest that the migration risk is merely a competitive risk shared by all providers in the market. It is a risk imposed uniquely upon electric distribution utilities as a matter of law by S.B. 221. No other provider is required by law to offer a firm supply of power to all customers. No other provider is required by law to offer service at a price and on such terms and conditions as are determined by the Commission to be more favorable in the aggregate than a market rate offer. No other provider is legally estopped from raising its retail price when market rates rise. CRES providers, unlike the EDUs, "are free to choose the customers they serve, the length of time they provide service, and the pricing and terms and conditions for such service." (Cos. Remand Ex. 4 (Thomas) at 4.) In short, EDUs and CRES providers are very different animals and the traditional marketplace risks that they share pale in comparison to the unique POLR risk imposed only on EDUs as a matter of law.

Finally in this regard, the Remand Order actually contains conflicting findings about the migration risk component of the POLR risk. The Remand Order found as follows:

> In the ESP Order, the Commission stated that it "believes that the Companies do have some risks associated with customers switching to CRES providers and returning to the electric utility's SSO rate at the conclusion of CRES contracts or during times of rising prices." We continue to believe that the Companies have such risks and that the costs associated with such risks may be recovered through a POLR charge.

Remand Order at 22 (internal citations omitted). This finding conflicts with the finding (at 31) that the migration risk is merely a business risk shared by all retail suppliers. This direct conflict is further evidence of the Commission's error, not only in revisiting matters that were final and non-appealable, but in wrongly characterizing the migration risk as being applicable to all retail suppliers. The finding on page 22 in this regard is correct and the finding on page 31 is unlawful and unreasonable.

Compensating the Companies for standing ready to offer all customers – those who have not switched to a CRES provider but have a right to do so at any time, those who have switched and retain the right to return at any time, as well as those who do return – a firm supply of generation service at the stable SSO rates is the necessary corollary of the price stability desired by the consumer advocates, encouraged by the business community and embraced as the *raison d'être* for S.B. 221. The Commission exceeded its jurisdiction and made an unlawful finding in reversing the 2009 ESP Order's finding that POLR risks include both migration and return risks.

IV. The Remand Order and Tariff Approval Order exceed the scope of the Commission's jurisdiction in eliminating the full POLR charges in the Remand Order.

This remand proceeding was a limited proceeding necessitated by the Supreme Court's express direction to revisit certain issues raised as part of the appeal of the ESP Order. Issues outside the scope of appeal and the narrow remand did not suddenly become "up for grabs." As noted previously, issues previously decided by the Commission in this proceeding and not appealed, or decided in a prior proceeding and not reversed on appeal, remain final and are not subject to challenge. Hubbard ex rel

Creed v. Sauline; Office of the Consumers' Counsel v. Pub. Util. Comm. (1985), 16 Ohio St. 3d 9, 10-11, 475 N.E.2d 782.

The Commission acknowledged and followed this finality of decision rule in its June 22, 2011 Entry on Rehearing in this case. In that Entry on Rehearing (at ¶ 12), the Commission rejects IEU's argument that the Commission should suspend that portion of the Companies' Environmental Investment Carrying Cost Rider that provides for the recovery of 2009 – 2011 incremental environmental carrying cost charges, in light of the Supreme Court's remand direction that the Commission revisit the statutory authority for including in the ESP the current carrying costs for AEP Ohio's 2001-2008 environmental investments. The Commission concludes (at ¶ 12, p.6):

> Sections 4903.10 and 4903.11, Revised Code, set forth the jurisdictional requirements for seeking rehearing and appealing a Commission order. As neither IEU-Ohio nor any other party appealed the Commission's decision with respect to recovery of carrying costs on incremental environmental investments for 2009, 2010, and 2011, or even sought rehearing on this issue, our approval of such recovery is a final and non-appealable order of the Commission and is not subject to attack at this point in the proceedings.

This same rule of law precludes the Commission from eliminating from the ESP Order, on remand, that portion of the current POLR charges that was approved by the Commission, and in place, prior to the ESP Order.

As is clear from the original application filed in these cases, the request before the Commission was for an *increase* in the existing POLR charge, which was authorized by the Commission in the Companies' 2005 Rate Stabilization Case, PUCO Case No. 04-169-EL-UNC. See Cos. Ex. 1 (Roush) at DMR-5. The application to increase the POLR charges beyond the level previously authorized in the Rate Stabilization Order fully comports with Ohio Rev. Code § 4928.143, which calls for the ESP plan to be

comprised of rate "adjustments" to the prior rate plan. Under § 4928.143, an ESP is not a wholly new plan that wipes outs or supersedes charges, terms or conditions previously approved by the Commission. The Commission recently confirmed this reading of the statute in its June 30, 2010 Finding and Order in Case No. 09-786-EL-UNC (SEET Investigation), by noting (at 30) that the SEET analysis applies to the "value of the adjustments in the current year under review compared to the revenues which would have been collected had the rates from the electric utility's previous rate plan still been in place."

The original POLR charges approved in the Rate Stabilization Case were challenged by OCC through rehearing and appeal. See Consumer Counsel v. Pub. Util. Comm., Sup. Ct. Case No. 2005-767 (OCC Notice of Appeal, attached as Exhibit A to AEP Ohio's May 23, 2011 Combined Reply to IEU's Objections and Memo in Opposition to OCC/OPAE's Motion to Reject Tariffs). Although the Supreme Court vacated the original Rate Stabilization Order on other grounds, the Commission on remand reaffirmed the POLR charge as approved in the Rate Stabilization Plan. Case No. 04-169- EL-UNC, Entry (August 9, 2006). Throughout the duration of these cases, up until the time new tariffs were filed in accordance with the ESP Order, AEP Ohio continued to collect the POLR charge as authorized by the 2005 Rate Stabilization Order. Thus, that portion of the existing POLR charge that was approved in the Rate Stabilization Plan cases was never open to challenge in this proceeding. Office of the Consumers' Counsel v. Pub. Util. Comm. (1985), 16 Ohio St. 3d at 10-11; June 22, 2011 Entry of Rehearing at ¶ 12. Consistent with the finality of decision rule, only that portion of the POLR increased by the ESP Order was before the Ohio Supreme Court for review and only that

portion of the POLR increased in the ESP Order was open for reconsideration in this remand proceeding. The Remand Order and Tariff Approval Order are unlawful to the extent that they order the elimination of that portion of the POLR charge in existence prior to the issuance of the ESP Order.

The Commission's decision to back out the full amount of the POLR charges is also inconsistent with the reason for the Court's remand of the POLR charge. The Court remanded the POLR charges to the Commission because it could not see how the record supported the conclusion that the option model resulted in a cost-based charge. Decision at 27. The option model, however, was advanced only to justify the *increase* in the POLR charges sought in these cases. The POLR charges, in effect, at the commencement of these cases were not based on option modeling. The original POLR charges approved in the Rate Stabilization Case reflected actual costs associated with the Companies membership in the regional transmission organization and carrying charges related to environmental capital investments. Rate Stabilization Order at 27-29. Because AEP Ohio's pre-ESP POLR charges were not derived from, nor did they depend upon, option modeling, nothing in the Supreme Court's Decision calls the original POLR charges into question for purposes of the remand.

In the Remand Order at 33, the Commission concludes:

> [W]e thus find the AEP-Ohio's increased POLR charges authorized as a part of the ESP Order are insufficiently supported by the record on remand. Accordingly, the Commission finds that AEP-Ohio should back out the amount of the POLR charges authorized in the ESP Order and file revised tariffs, consistent with this order on remand.

While AEP Ohio seeks rehearing on the issue of whether the record does indeed sufficiently support the increased POLR charges authorized in the ESP Order, the

Commission must at the minimum grant rehearing and reinstate at least that portion of the POLR charges that pre-dated the ESP Order.

V. The Remand Order and Tariff Approval Order are unreasonable and unlawful in ordering complete elimination of the full POLR charges after finding in the Remand Order both with respect to POLR: (i) (at 22) that "the Companies have such risks and that the costs associated with such risks may be recovered through a POLR charge" and (ii) (at 24) that AEP Ohio "has not justified recovery of POLR charges at the level reflected in its existing rates."

There is no doubt based on the record in this proceeding, and the Commission's continuous approval of POLR charges for all EDUs since the inception of the S.B. 221 regulatory structure, that the law imposes on EDUs unique risks associated with the POLR obligation. There is likewise no doubt from the record in this proceeding, and the Commission's prior approval of POLR charges, that the EDUs should be compensated for the POLR risks they are required to bear. In fact, the Commission affirmatively finds in the Remand Order (at 22) that "the Companies have such risks and that the costs associated with such risks may be recovered through a POLR charge." The Commission did not find that it would be wholly unjustified to compensate AEP Ohio for its POLR risks, it found (at 24) only that AEP Ohio "has not justified recovery of POLR charges at the level request in the existing rates." In light of these findings, it is completely unreasonable for the Commission to now conclude that AEP Ohio should receive zero compensation for the POLR risks the law requires it to bear.

Ohio Rev. Code § 4928.143(B)(1) requires the Commission to include in an ESP "provisions relating to the supply and pricing of electric generation service." Ohio Rev. Code § 2928.143(B)(2)(d) permits the Commission to include in an ESP such charges, terms and conditions as will "have the effect of stabilizing or providing certainty

regarding retail electric service." The Commission previously acknowledged that these statutory mandates impose upon it an obligation to assure that *any* ESP plan it approves adequately protects the interests of the EDUs, who continue to be subject to unique risks as a matter of law that their competitors do not share, as well as the interests of retail customers. In its ESP Order at 72 the Commission states: "The Commission believes that it is essential that the plan we approve be one that provides rate stability for the Companies, provides future revenue certainty for the Companies, and affords rate predictability for the customers." This obligation existed at the beginning of the ESP period and is equally significant for purposes of this remand proceeding even though the end of the ESP period is near. Indeed it is even more significant now that the Commission discharge its responsibility to provide for rate stability and revenue certainty for AEP Ohio, as well as rate predictability for its customers, because, while AEP Ohio had at the beginning of the ESP period the option under Ohio Rev. Code §4928.143(C)(2)(a) to withdraw its ESP application if it did not accept the Commission's modifications to its proposed ESP, there is no equivalent option at this late date.

The record in this case clearly establishes that the POLR obligation imposes unique risks on AEP Ohio – risks the Commission acknowledges in the Remand Order (at 22). Companies witnesses Dr. LaCasse and Dr. Makhija, for example, both testified to the unique burdens and risks the POLR obligation imposes on AEP Ohio in terms of limiting its ability to optimally manage its generation on a forward basis, exposing it to lost revenues due to both the loss of customers when market prices fall and the return of customers when market prices increase, and increasing its liability and lowering its equity value. (Cos. Remand Ex. 3 at 5-7; Cos. Remand Ex. 1 at 3-4.) While the Intervenors

attacked the level of the POLR increase sought by the Companies, they had to concede that the POLR obligation does give rise to unique risks. See Companies Initial Post Hearing Brief on Remand at 34-35; (see also Tr. v. III at 427-429 (cross examination of Constellation witness Fein).) Given the state of the record, the Commission's decision to completely eliminate the POLR charge is unreasonable and an abdication of the Commission's responsibility under Ohio Rev. Code § 4928.143(B) to provide some modicum of rate stability and revenue certainty for the Companies as well as rate predictability for retail customers.

VI. The Tariff Approval Order is unlawful in that it circumvents the statutory/jurisdictional rehearing process, as required by Ohio Rev. Code § 4903.09, and fails to set forth the reasons prompting the Commission to reverse its conclusion in the Remand Order (at 33) that only the "increased POLR charges authorized as a part of the ESP Order are insufficiently supported by the record on remand," as required by Ohio Rev. Code § 4903.09.

The Supreme Court of Ohio has held that the rehearing process is mandatory and jurisdictional:

> We have previously stated that both R.C. 4903.10 and 4903.11 are jurisdictional. *Consumers' Counsel* cases, *supra.* Therefore, because R.C. 4903.10 links all the parties through notice requirements and because an order issued after a rehearing may modify or even abrogate previously issued orders, we construe it to establish the rehearing process as an integrated whole, with each application for rehearing potentially affecting the position of other parties to the proceedings. R.C. 4903.11 must be construed accordingly.

Senior Citizens Coalition v. Public Utilities Comm. (1988), 40 Ohio St. 3d 329, 333, 533. Ohio Rev. Code § 4903.10 requires an application for rehearing to be filed and ruled upon before the Commission can modify one of its orders. While the Tariff Approval Order purports to require elimination of the full POLR charge "without prejudging any issue which may be raised on rehearing in these matters," the Tariff Approval Order

actually does prejudge rehearing issues by virtue of changing the plain effect Remand Order as written. The Tariff Approval Order, thus, unlawfully circumvents the mandatory, jurisdictional rehearing process. Adding insult to injury, the Commission did so without explanation.

Ohio Rev. Code § 4903.09 requires the Commission to issue written opinions in contested proceedings, "setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." By providing written decisions that explain what the Commission has determined and, just as importantly, why the Commission made a particular determination, the Commission enables those affected by its decisions to understand them. In addition, this requirement also enables the Ohio Supreme Court to properly discharge its duties on appeal to review the Commission's decision-making. MCI Corp. 14 V. Pub. Util. Comm. (1988), 38 Ohio St.3d 266, 270, 527 N.E.2d 777. Thus, the Commission's explanation of the reasons for its decision is required not only for the Court's review but, perhaps more importantly, in order to assure the affected parties that their factual allegations and legal arguments have been fully considered.

The issue of scope of the Court's remand of the POLR charge was one of the primary issues contested from the beginning of this remand proceeding. AEP Ohio consistently advocated that the scope of the remand proceeding is jurisdictionally limited to whether to retain the incremental POLR increase authorized in the 2009 ESP Order or to "back out" the increase authorized in the ESP Order. See AEP Ohio Motion to Reject (May 11, 2011) at 7-8; AEP Application for Rehearing (May 6, 2011) at 8. Other parties contested AEP Ohio's position on this issue and argued that the full amount of the POLR charge, including that portion that pre-dated the ESP Order should be eliminated. See

e.g., IEU Objections (May 18, 2011); OCC/OPAE Opposition (May 19, 2011). The Commission acknowledged the importance of this contested issue in its May 25, 2011 Entry, stating at 3-4:

> The Commission notes that there is significant disagreement among the parties as to the level of POLR charges at issue pursuant to the Court's remand. . . . Upon further consideration of the issues raised by the parties to these ESP remand proceedings, we find AEP-Ohio's motion to make the currently effective tariff rates, subject to refund, to be a reasonable request until the Commission specifically orders otherwise on remand.

The Commission affirmatively resolved this dispute – i.e. ordered otherwise – in the Remand Order by adopting AEP Ohio's position. In assessing the record evidence in support of the POLR charges, the Remand Order states (at 24) that the Companies "failed to present evidence of its actual costs and has not justified recovery of the POLR charges *at the level reflected in its existing rates*." (Emphasis added.) The "Overall Conclusion" in the Remand Order (at 33) was that "*AEP Ohio's increased POLR charges authorized as part of the ESP Order* are insufficiently supported by the record on remand." (Emphasis added.) Most directly of all, the Remand Order directs (at 33) that "*AEP Ohio should back out the amount of the POLR authorized in the ESP Order* and file revised tariffs, consistent with this order on remand."

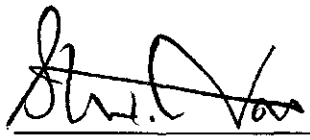
The Commission, however, inexplicably reverses itself in the Tariff Approval Order. The sum and substance of its reversal on this key contested issue is a single sentence (at p.3, ¶ 7), stating: "The Commission finds, at this time, without prejudging any issue which may be raised on rehearing in these matters, that the alternate tariffs eliminating all POLR charges from the rates should be approved to be effective with the first billing cycle of November 2011." The Commission offers no explanation of its rationale. It does not respond to AEP Ohio's position. It does not support its decision

with any evidence. AEP Ohio firmly believes that, whatever the reasoning that underlies the about-face in the Tariff Approval Order, it is fundamentally flawed for the reasons discussed in Sections IV and V of this memorandum. The compounding error, though, is that no one, not the Companies, not other interested parties, nor the Court can review that reasoning because it is not contained in the Entry. Moreover, it cannot reasonably be maintained that the Commission's about face was done without prejudging any issue on rehearing, since the "incremental versus full POLR" disagreement is among the primary issues being debated throughout this remand proceeding (including on rehearing) and the Tariff Approval Order's unexplained reversal exacerbates the impact and prejudice visited upon AEP Ohio. Reversing a decision outside, and in advance of, the rehearing process necessarily prejudges the decision on rehearing and doing so without explanation not only runs afoul of the statutory/jurisdictional rehearing process but also violates Ohio Rev. Code § 4903.09. Accordingly, the Tariff Approval Order violates both Ohio Rev. Code § 4903.09 and § 4903.10.

CONCLUSION

For the foregoing reasons, the Commission should reconsider both the Remand Order and the Tariff Approval Order as being unreasonable and unlawful and should restore the POLR charges approved in the ESP Order. If such relief is denied, AEP Ohio requests that the Commission restore that portion of the POLR charge in existence prior to the issuance of the ESP Order.

Respectfully Submitted,



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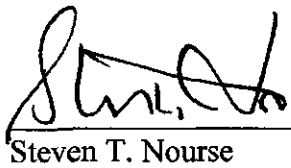
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing has been served upon the below-named counsel and Attorney Examiners via electronic mail this 2nd day of November, 2011.



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