BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation 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

APPLICATION FOR REHEARING ON REMAND BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

Nearly 1.4 million customers of AEP Ohio have paid hundreds of millions of dollars[1] in increased rates since April 2009 attributable to provider of last resort ("POLR") charges collected by AEP Ohio. These POLR charges are a component of current ESP rates and are embedded in the residual ESP deferrals which will be collected from 2012 through 2018.[2] The Public Utilities Commission of Ohio ("PUCO" or "Commission") in its October 3, 2011 Order on Remand failed to return to customers the unlawful POLR revenues collected from April 2009 through May 2011.

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[1] AEP Ohio's customers paid approximately $457 million in POLR charges over the three year term of the Companies first ESP. OCC Remand Ex. 2, Attachment DJD-D. From April 2009 to May 2011, customers paid approximately $368 million in POLR charges to AEP Ohio. OCC Remand Ex. 2, Attachment DJD-E. Rates being collected subject to refund amount to approximately $89 million. OCC Remand Ex. 2, Attachment DJD-D.

[2] The application for rehearing is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential electric customers of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP", and collectively with CSP, the "Companies" or "AEP Ohio"), and Ohio Partners for Affordable Energy ("OPAE," and collectively with OCC, "Consumer Parties"), an Ohio non-profit corporation with a stated purpose of advocating for affordable energy policies for low and moderate income Ohioans, apply for rehearing of the PUCO's Remand Order. This application is made in order to protect customers from paying unjust and unreasonable phase-in residual deferrals resulting from the Companies' electric security plan ("ESP").[3]

The Remand Order is unjust, unreasonable, and unlawful in certain respects. In particular, the Commission erred in the following respects:

1. The Commission erred when it failed to reduce the residual ESP phase-in deferrals by the unjustified POLR collections from April 2009 through May 2011. These deferrals violated R.C. 4928.143 in that the deferrals are a direct result of ESP rates that the Companies did not justify under R.C. 4928.143(B)(2).

2. The Commission erred when it failed to reduce the phase-in residual ESP deferrals to be collected from customers in 2012 through 2018 for the unjustified POLR collections from April 2009 through May 2011. This resulting phase-in plan is not just and reasonable and contains deferrals that are not related to "incurred costs" of the ESP, all in violation of R.C. 4928.144.

3. The Commission erred when it failed to reduce the residual ESP phase-in deferrals by the unjustified POLR collections from April 2009 through May 2011. Doing so violates the provisions of R.C. 4928.06 and the related policies of the state as enumerated in R.C. 4928.02(A) and (L).

4. The Commission erred when it did not reduce the residual ESP phase-in deferrals by the unjustified POLR collections from April 2009 through May 2011 and concluded it was precluded from doing so because it

[3]The application for rehearing is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

amounts to retroactive ratemaking. This was an error because there is a mechanism within the ESP rates that permits a prospective rate adjustment, and according to *Lucas County Com'rs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349, when there is such a mechanism, there is no retroactive ratemaking.

5. The Commission erred when it failed to order a return to customers of interest charges on customer supplied POLR charges for the POLR revenues collected from customers from April 2009 through May, 2011.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT
BY
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AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

I. INTRODUCTION

Nearly 1.4 million customers of AEP Ohio have paid hundreds of millions of dollars[4] in increased rates since April 2009, attributable to provider of last resort ("POLR") charges collected by AEP Ohio. These charges, though initially approved by the PUCO in its March 18, 2009 Opinion and Order, were subsequently determined by the Ohio Supreme Court to be unjustified.[5] The Supreme Court's Order reversed the PUCO and remanded these matters back to the PUCO. The Court opined that the

[4] AEP Ohio's customers paid approximately $457 million in POLR charges over the three year term of the Companies first ESP. OCC Remand Ex. 2, Attachment DJD-D. From April 2009 to May 2011, customers paid approximately $368 million in POLR charges to AEP Ohio. OCC Remand Ex. 2, Attachment DJD-E. Rates being collected subject to refund amount to approximately $89 million. OCC Remand Ex. 2, Attachment DJD-D.

[5] The Court, on April 19, 2011 issued a decision on the appeal by the Office of the Ohio Consumers' Counsel and the Industrial Energy Users – Ohio ("IEU")[5] from this Commission's March 18, 2009 Opinion and Order. *In re Application of Columbus Southern Power Company, et al.*, 2011 Ohio 1788.

Commission *may* revisit the matters, but admonished the Commission (at least with respect to POLR) that the PUCO "should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."[6]

The PUCO permitted the Companies the opportunity to advance arguments to support the collection of these rate elements, and interested parties challenged the evidence put forth by the Companies.[7] Whether the unjustified charges that were and are being collected from customers will be returned to customers, in whole or in part, was one of the issues before the Commission on Remand. The Remand Order issued on October 3, 2011 recognized the lack of record support for AEP Ohio's POLR charges. Nonetheless the PUCO failed to remedy AEP Ohio's excessive charges to its customers in a manner consistent with its determination that such charges were not supported by the record and therefore were unjustified. The PUCO failed to reduce the phase-in deferrals to be collected from 2012 through 2018 by the unjustified POLR charges collected from customers for the period of April 2009 through May 2011.

The PUCO must act to prevent unjustified rate increases attributable to POLR that are to be imposed upon customers through the residual deferrals that will be the basis of ESP rates during 2012 through 2018. These residual deferrals (and the rates that will be created by them) must comply with the provisions of R.C. 4928.143 and 4928.144. They do not.

The Ohio Supreme Court has interpreted R.C. 4928.143 as limiting the provisions of an ESP to those that fit within one of the categories listed following subsection (B)(2).[8] And

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[6] Id. at ¶30.

[7] See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case Nos. 08-917-EL-AIR et al, Entry at 4 (May 25, 2011).

[8] *In re Application of Columbus Southern Power Company, et al.*, 2011 Ohio 1788 at ¶32.

under R.C. 4928.143(C)(1), the burden of proof "shall" rest with the electric distribution utility. The PUCO determined that the Companies failed to meet this burden when it ruled that "we thus find that AEP-Ohio's increased POLR charges authorized as part of the ESP Order are insufficiently supported by the record on remand."[9] Thus, the Commission must adjust the residual ESP deferrals for 2012 through 2018 which were based in part on POLR charges collected from customers beginning April 1, 2009. They simply do not comply with the statute.

But the statutory problems do not end there. Under R.C. 4928.144, the PUCO may authorize any "just and reasonable" phase-in of electric distribution utility rates or prices "established" under an ESP. Additionally, the statute requires that any phase-in approved must provide for the creation of regulatory assets by authorizing the deferral of "incurred costs" plus carrying charges. Here though, the Court and the Commission recognized the POLR portion of ESP rates was not just and reasonable, and thus the residual phased in deferrals (and the rates to be imposed) directly attributable to the ESP (including POLR) cannot be just and reasonable, notwithstanding the Commission's earlier approval of a phase-in of any "authorized increases." The ESP rates which included POLR were not lawfully "authorized increases" due to the lack of evidentiary support. Thus, the phase-in deferrals created that directly flow from unlawful ESP rates are themselves not just and not reasonable. Finally, as noted by the PUCO, the Companies failed to present evidence of the actual POLR "costs" incurred; thus there are no "incurred" POLR costs that can drive the level of deferred expenses to be collected under a phase-in attributable to R.C. 4928.144.

[9] Remand Order at 33.

The PUCO must therefore rectify the phase-in of the ESP rates on a going forward basis by adjusting the phase-in deferrals, thereby lowering the rates to be imposed by approximately $368 million.[10] Doing so is necessary to bring the plan in compliance with R.C. 4928.143 and 4928.144. Additionally, the PUCO must do so, under R.C. 4928.06, to "'ensure the policy specified in section 4928.02 of the Revised Code is effectuated.'"[11] That policy includes at least two provisions that are directly applicable here: R.C. 4928.02(A) and (L).

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[12]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[13] Furthermore, if the Commission grants a rehearing and determines that "the original

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[10] See OCC Remand Ex. 2, Attachment DJD-E.

[11] *In the Matter of the Application of Ohio Edison company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 13 (Nov. 25, 2008).

[12] R.C. 4903.10.

[13] Id.

order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***."[14]

Pursuant to R.C. 4903.221, OCC filed a motion to intervene on August 4, 2008. OPAE filed a motion to intervene on August 14, 2008. Both OCC and OPAE have been actively involved in this proceeding. Both meet the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, Consumer Parties respectfully request that the Commission hold a rehearing on the matters specified below.

III. APPLICABLE LAW

Electric security plans are part of the new statutory scheme that resulted from the Ohio General Assembly passing Amended Substitute Senate Bill No. 221 ("S.B. 221") on April 23, 2008. Among other things, S.B. 221 changed the rate structure for Ohio's electric utilities and established requirements for reliability of electric service and for the use of alternative energy resources by electric utilities. Governor Strickland signed S.B. 221 on May 1, 2008, and the legislation became effective on July 31, 2008.

S.B. 221, and the retained provisions of Chapter 4928 of the Revised Code provide a pervasive statutory scheme for the provision of electric service in Ohio. Under the statutory scheme there are specific state policies that by law[15] must be effectuated.[16] Those policies are enumerated under R.C. 4928.02, and include the policies of ensuring reasonably priced electric service[17], and protecting at-risk populations.[18] Other statutes,

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[14] *Id.*

[15] R.C. 4928.02.

[16] See R.C. 4928.06, which requires that the "PUCO shall ensure the policy specified in section 4928.02 of the Revised Code is effectuated."

[17] R.C. 4928.02(A).

[18] R.C. 4928.02(L).

such as R.C. 4928.143, prescribe the content of an electric security plan, and have been interpreted by the Ohio Supreme Court as restrictive.[19] That statute also directs that the burden of proof rests upon the electric utility.[20] Chapter 4928 also contains a statute which specifies the conditions under which a "just and reasonable" phase-in of electric rates may be authorized and provides for the deferral of "incurred costs" not collected, plus carrying charges. The statutory scheme imposed by S.B.221 was subject to its first review in a recent Ohio Supreme Court case flowing from the appeal of the PUCO's March 18, 2009 Opinion and Order issued in this proceeding. It is that appeal, which resulted in a reversal of significant parts of the PUCO's Opinion and Order that prompted the remand proceedings culminating in a Remand Order, which Consumer Parties now seek rehearing on.

IV. ARGUMENT:

A. The Commission Erred When It Failed To Reduce The Residual ESP Phase-In Deferrals By The Unjustified POLR Collections From April 2009 Through May 2011. These Deferrals Violated R.C. 4928.143 In That The Deferrals Are A Direct Result Of ESP Rates That The Companies Did Not Justify Under R.C. 4928.143(B)(2).

During the ESP period from April 2009 through May 2011, AEP Ohio collected approximately $368 million in POLR charges.[21] These charges, however, were not justified, as determined by the Supreme Court of Ohio. The Court ruled that there was not sufficient evidence to support POLR charges in the original evidentiary record

[19] *In re Application of Columbus Southern Power Company, et al.*, 2011 Ohio 1788 at ¶32.

[20] R.C. 4928.143(C)(1).

[21] OCC Remand Ex. 2 at 23 ($235.3 million for CSP; $132.4 million for OP).

developed before the PUCO. On Remand from the Court, the PUCO permitted the Companies a second chance to produce evidence to justify the POLR charges. Nonetheless after reviewing the "new" evidence, the PUCO came to the very same conclusion as the Court had previously--the POLR charges were not justified based on the evidence produced in the remand phase of these proceedings.[22]

The collection by AEP Ohio of unjustified POLR charges had a direct impact upon the setting of AEP's ESP rates –including those that have been collected already, and those that are to be collected over the next six years, under a PUCO ordered phase-in. The widespread effect of POLR on rates is the result of the way the PUCO set rates in its original March 18, 2009 Order. Under that Order, the ESP rates collected from customers for 2009-2011 were capped and a specific portion of the ESP charges--the fuel adjustment clause ("FAC") charges--were permitted to be deferred for later collection from customers.

The capping of the ESP rates, though, came at an expense to customers. The rate increases during 2009-2011 were limited to specified percentages[23], but the FAC expenses that were incurred above the capped rates were deferred for future collection from customers in 2012 through 2018. Additionally the Companies were authorized to earn carrying charges on the deferred expenses and authorized to collect those charges from customers during that same extended period.[24]

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[22] Remand Order at 40 (October 3, 2011).

[23] Rate increases based on total bill impacts were limited to 7% (CSP) and 8% (OP) in 2009; 6% (CSP) and 7% (OP) in 2010; and 6% (CSP) and 8% (OP) in 2011. See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case Nos. 08-917-EL-AIR et al, Opinion and Order at 22 (Mar. 18, 2009) (*ESP 1 Order*).

[24] *ESP I Order* at 22-23 (March 18, 2009).

Under the capped rates the fuel adjustment charges (that would be either collected or deferred) were residual values between the rate cap and the sum of all other non-FAC rates under the ESP. If the sum of all non-FAC rates (which included the POLR charge) was less than the yearly cap approved by the PUCO, then the ESP rates would collect a residual portion of the FAC. If the sum of all non-FAC rates (which included POLR charges) was greater than the cap approved by the PUCO, then the FAC rates (or a portion thereof) would be deferred for future collection from customers. Thus, if more FAC amounts were collected due to lower non-FAC rates being imposed, then the fuel expenses being deferred, as well as the carrying costs associated with the deferred fuel, would be less.[25]

But, because the Companies were permitted to collect non-FAC ESP rates that included unjustified POLR charges, the resulting FAC that was deferred and are yet to be collected from customers, have been directly overvalued by the amount of unjustified POLR collected from customers. In other words because the PUCO allowed the Companies to collect approximately $368 million in unjustified POLR increases during 2009 through 2011 as part of the capped ESP rates, the FAC deferred expenses, which were created as a result of the caps, are overstated by this same amount.

Recognizing the inherent connection between the capped rates and the FAC deferrals, OCC Witness Duann recommended that the value of the FAC deferrals be reduced to exclude the impact of collecting the entire POLR increases during 2009-2011.[26] Witness Duann testified to the mechanics of recalculating the fuel expense

[25] See OCC Remand Ex. 2 at 25.

[26] OCC Remand Ex. 2 at 26.

deferrals.[27] The result is that the deferred balance of fuel expense should be reduced by the unjustified POLR increases.

The Ohio Supreme Court has interpreted R.C. 4928.143 as limiting the provisions of an ESP to those that fit within one of the categories listed following subsection (B)(2).[28] While the Commission found a statutory basis for collecting POLR costs as part of the Companies' electric security plan,[29] it nonetheless concluded that the Companies had not presented evidence of their actual out of pocket POLR costs.[30] Thus, the Companies failed to meet their burden of proving, under R.C. 4928.143(C)(1), that POLR charges to customers were justified. Although the Commission cured part of the defective electric security plan rates when it ordered a return to customers of POLR charges collected subject to refund, it failed to bring the remaining ESP rates into compliance with R.C.4928.143. The remaining ESP rates in question are the residual deferrals that are to be charged to customers from 2012 through 2018.

These residual deferrals were created under the rate caps of 2009 through 2011. The residual deferrals will be transformed into phase-in rates, to be collected under the ESP plan from 2012 through 2018. These deferrals were created as a direct result of unjustified POLR induced ESP rates. They too, suffer from the same fatal flaw as the rates collected subject to refund. They cannot be permitted to be collected as part of an electric security plan since they are based on a residual calculation derived from ESP rates that were found to be unjustified under R.C. 4928.143(B). Because the Commission

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[27] OCC Remand Ex. 2 at 23-28.

[28] *In re Application of Columbus Southern Power Company, et al.*, 2011 Ohio 1788, ¶31-32.

[29] R.C. 4928.143(B)(1), 4928.143(B)(2)(d). See Remand Order at 18.

[30] Remand Order at 22.

did not act to reduce the phase-in deferrals, unlawful rates to collect the deferrals will be imposed upon customers from 2012 through 2018, absent a stay of the PUCO's Remand Order.

B. The Commission Erred When It Failed To Reduce The Phase-In Residual ESP Deferrals To Be Collected From Customers In 2012 Through 2018 For The Unjustified POLR Collections From April 2009 Through May 2011. This Resulting Phase-In Plan Is Not Just And Reasonable And Contains Deferrals That Are Not Related To "Incurred Costs" Of The ESP, All In Violation Of R.C. 4928.144.

Under R.C. 4928.144, the PUCO may authorize any "just and reasonable" phase-in of any electric distribution rate established under R.C. 4928.143, including carrying charges, as the Commission considers necessary to ensure rate or price stability. The statute further provides that if there is a phase-in, the Commission shall provide for the creation of regulatory assets by authorizing the deferral of "incurred costs" equal to the amount not collected, plus carrying charges. The PUCO in its original March 18, 2009 Order authorized the phase-in of ESP rates, and ordered the Companies to create deferrals for authorized increases above the caps.

Those ESP rates ordered in March 18, 2009, were, however, determined to be unlawful with respect to the POLR element. The phase-in of residual deferrals that are a consequence of the unlawful ESP rates cannot be a just and reasonable phase-in and thus the Commission cannot permit such phase-in deferrals to be collected from 2012 through 2018. It should have ordered the reduction of the phase-in ESP deferrals, taking out the impact of POLR charges collected from April 2009 through May 20011. It did not. The Commission erred.

Moreover, under the phase-in statute, the regulatory assets created must be a result of the deferral of "incurred costs" equal to the amount not collected. Here the PUCO specifically found that the Companies failed to present evidence of the actual out of pocket POLR costs that they incurred.[31] Because the deferrals to be phased in were the result of a residual rate calculation of ESP rates, which included POLR charges that were unrelated to POLR costs incurred, the deferrals created under the phase-in cannot be said to relate entirely to "incurred costs." Thus, deferrals created for the phase-in fail to meet the statute, and the phase-in residual deferrals should have been reduced accordingly to exclude the impact of the POLR costs—costs the Commission determined were not incurred by the Companies. The PUCO's failure to reduce the deferrals was unjust and unreasonable and violated R.C. 4928.144.

C. The Commission Erred When It Failed To Reduce The Residual ESP Phase-In Deferrals By The Unjustified POLR Collections From April 2009 Through May 2011. Doing So Violates The Provisions Of R.C. 4928.06 And The Related Policies Of The State As Enumerated In R.C. 4928.02(A) And (L).

Under R.C. 4928.06, the Public Utilities Commission "shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."[32] R.C. 4928.02 of the Revised Code establishes the policies of the State as they relate to the provision of electric services. One important policy is to ensure the availability to consumers of "adequate, reliable, safe, efficient, nondiscriminatory, and *reasonably priced retail electric service.*"[33] Another equally important state policy is contained in subsection (L)

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[31] Id.

[32] See for example, *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305, 314 where the Court ruled that portions of the rate plan approved violated R.C. 4928.02.

[33] R.C. 4928.02(A) (emphasis added).

of that statute. Subsection L of R.C. 4928.02 states the policy that at-risk populations [i.e low income customers] be protected.

These policies were not complied with by the Commission when it determined not to reduce the FAC deferral balance. Had the Commission reduced the deferral balance to eliminate the flow through effects of the unjustified POLR increases, the phase-in increases to be collected from customers would have been drastically reduced. And the Commission would have complied with these state policies. It did not and as a result it failed to fulfill its duties under R.C. 4928.02. The Commission erred in this respect.

D. The Commission Erred When It Did Not Reduce The Residual ESP Phase-In Deferrals By The Unjustified POLR Collections From April 2009 Through May 2011 And Concluded It Was Precluded From Doing So Because It Amounts To Retroactive Ratemaking. This Was An Error Because There Is A Mechanism Within The ESP Rates That Permits A Prospective Rate Adjustment, And According To *Lucas County Com'rs. V. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349, When There Is Such A Mechanism, There Is No Retroactive Ratemaking.

Not surprisingly, the Companies argued that the POLR charges paid from April 2009 through May 2011 cannot be returned to customers because doing would amount to retroactive ratemaking.[34] The Commission agreed in the Remand Order.[35]

But such arguments reveal a misunderstanding of the ratemaking rule and Ohio Supreme Court precedent. While the Remand Order cites to *Lucas County,* it

[34] AEP Ohio Brief at 56-58 (August 5, 2011).

[35] Remand Order at 35-36 (October 3, 2011).

misinterprets the holdings of this case, and fails to recognize that retroactive ratemaking does not exist if a mechanism exits in the rates that permits a prospective rate adjustment.

When a utility's rates are reversed on appeal, the Commission as a matter of course implements revised rates minus the unlawful elements. This provides some degree of relief for customers, on a prospective basis, because the remaining rates no longer contain the unlawful elements. Here however, the PUCO departed from its practice to the detriment of customers. The ESP rates will continue in effect for customers, in the form of the deferred FAC rates that were approved as part of a phase-in plan. The deferrals allow the PUCO the opportunity to adjust the ESP rates to be collected from 2012 through 2018. The PUCO should have removed the unlawful elements from rates that will prospectively be charged to customers. But it did not.

The rates that were unlawful under the Court's holding , confirmed by the PUCO in its Remand Order, remain preserved for collection and still unlawful as part of the phase-in deferrals that are to be collected from customers during 2012 through 2018. The structure of the ESP rates specifically linked the rates charged in 2009-2011 to the phase-in deferrals that are scheduled to be collected from 2012 through 2018. The phase-in deferrals were created as a residual value, flowing from the ESP 2009-2011 rates. The existence of phase-in deferrals creates a mechanism that permits the PUCO to make future rate adjustments to fully remedy the POLR overcharges.

The Ohio Supreme Court has recognized, when faced with retroactive ratemaking claims, that if there is a mechanism built into the rates that allow for prospective rate

adjustments, retroactive ratemaking does not exist.[36] Applying that reasoning in these cases leads to the conclusion that there is no retroactive ratemaking because of the structure of the ESP rates and their inherent linkage to the phase-in deferrals.

E. The Commission Erred When It Failed To Order A Return To Customers Of Interest Charges On Customer Supplied POLR Charges For The POLR Revenues Collected From Customers From April 2009 Through May, 2011.

From April 1, 2009 through May 2011, the Companies collected POLR revenues from customers. These collections, however, were determined by the Ohio Supreme Court to be unjustified because they were not supported by the record developed before the PUCO. The PUCO then, in its Remand Order, reached the same conclusion. Consumer Parties argued that the unjustified POLR collections affected the residual phase-in rates to be collected from 2012 through 2018. Consumer Parties and the Industrial Energy Users-Ohio argued that the Commission should reduce the phase-in rates to flow through the impact of its decision.[37]

The Commission, nonetheless, rejected the "flow through" arguments of the intervenors. These arguments, as presented above, were that the PUCO should reduce the deferral balance associated with the phase-in ESP rates on a prospective basis. Had such arguments been accepted, the phase-in deferrals would have been adjusted downward and customers' rates on a going forward basis would not reflect the residual impact of unjustified POLR collections made from April 2009 through May 2011.

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[36] Lucas County Com'rs. v. Pub. Util. Comm. (1997), 80 Ohio St.3d 344, 348-349.

[37] See OCC Remand Ex. 1 at 6, 38; OCC Remand Ex. 2 at 5-6; 23-28; IEU-Ohio Remand Ex. 3 at 9-11.

The Commission should have ordered the Companies to compensate customers for the use of customers' funds (POLR collections) for the 2009-2011 period. In other words, because customers were deprived of their funds because of the unlawful POLR charges and the Companies enjoyed the interest-free use of customer-supplied funds during that period, the Commission should have ordered the Companies to return the funds as well as provide customers with the interest that they would have been earned on the customer funds. The interest rate pertaining to those funds should have been calculated consistent with OCC's Witness Duann's recommendation that a 10.93% interest rate is an appropriate rate to apply to refunds.[38] This was the rate developed during the initial phase of the case for calculating the carrying cost to the Companies on the phase-in FAC deferral balance.

V. CONCLUSION

At issue here for 1.4 million customers is the Companies' future collection of unlawful charges related to residual ESP rates which included unjustified amounts of POLR. The POLR charges were charges the Ohio Supreme Court determined were not justified on the basis of the record before them. And these are the same charges the PUCO also ruled were not justified in the Remand Order.

While the Commission remedied the unjust POLR charges collected from May through December 2011, it failed to remedy the flow through effect of the unlawful POLR charges imposed from April 2009 through May 2011 to be collected from customers commencing in 2012. From April 2009 through May 2011, the Companies' customers paid residual ESP rates that are formed in part by the unjust POLR charges.

[38] OCC Remand Ex. 2 at 29 (citing DJD-F).

Unfortunately, and in violation of the law, under the Remand Order, customers will be forced to continue to pay residual ESP phase-in rates from 2012 through 2018 that reflect the impact of the unjustified POLR charges.

Consumer Parties seek rehearing on this matter and request the PUCO to grant rehearing and reverse its rulings that it cannot fully remedy the unjust collection of POLR charges from the Companies' customers. Doing so would comply with the provisions of the law and ensure that the state policies enacted to protect Ohioans are effectuated. Otherwise, the imposition of the residual phase-in ESP rates will be in violation of numerous Ohio statutes. And customers will suffer harm.

Respectfully submitted,

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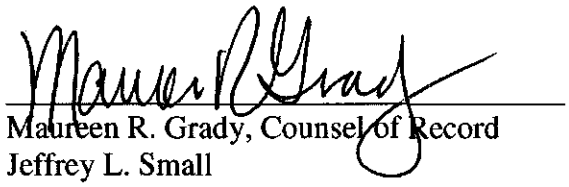

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Rehearing on Remand was served upon the following via electronic transmission this 2nd day of November, 2011.

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