

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 ON REHEARING

The Commission finds:

- (1) On March 18, 2009, the Commission issued its opinion and order in Columbus Southern Power Company's and Ohio Power Company's (OP) (jointly, AEP-Ohio or the Companies) electric security plan (ESP 1) cases (ESP 1 Order).¹ By entries on rehearing issued July 23, 2009, (First ESP 1 EOR) and November 4, 2009, the Commission affirmed and clarified certain issues raised in AEP-Ohio's ESP 1 Order. As ultimately modified and adopted by the Commission, AEP-Ohio's ESP 1 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) and approved a provider of last resort (POLR) charge for the term of ESP 1.²
- (2) The Commission's decision in AEP-Ohio's ESP 1 cases was appealed to the Ohio Supreme Court. The Ohio Supreme Court determined that Section 4928.143(B)(2), Revised Code, does not authorize the Commission to allow recovery of items not enumerated in the section. The Court remanded the case to the Commission for further proceedings in which "the Commission may determine whether any of the listed

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

² ESP 1 Order at 24-28, 38-40; First ESP 1 EOR at 10-13, 24-27.

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

- (3) By entry issued May 25, 2011, the Commission directed AEP-Ohio to file tariff pages that reflect that the POLR riders and environmental carrying charges included in rates are being collected subject to refund until the Commission specifically orders otherwise on remand. Additionally, the Commission adopted a procedural schedule for the remand proceedings in order to afford AEP-Ohio and intervenors the opportunity to present testimony and additional evidence in regard to the POLR and environmental carrying charges remanded to the Commission.
- (4) On October 3, 2011, the Commission issued its order on remand (Remand Order). The Commission concluded that, in accordance with the provisions of Section 4928.143(B)(2)(d), Revised Code, the Companies should be authorized to continue to recover the incremental capital carrying costs incurred after January 1, 2009, on environmental investments made from 2001-2008. As to the POLR charges, the Commission ruled that AEP-Ohio had not provided any evidence of its actual POLR costs, found that its unconstrained option model did not measure its POLR costs, and, therefore, directed AEP-Ohio to deduct the amount of the POLR charges reflected in the Companies’ rates and file revised tariffs consistent with the Remand Order.
- (5) On October 6, 2011, AEP-Ohio filed two sets of tariffs in response to the Remand Order. AEP-Ohio advocated that the first set of tariffs, which reflected a reduction of the POLR charges to the level in effect prior to the implementation of the

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

ESP 1 Order, were appropriate. The POLR charges reflected in this version were as established in Case No. 04-169-EL-UNC, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan* (RSP Case). In the alternative, in the event that the Commission intended that the POLR charges be eliminated in their entirety, AEP-Ohio offered a second set of tariffs, reflecting the elimination of all POLR charges, without conceding its right to request rehearing on the issue.

- (6) By finding and order issued October 26, 2011, the Commission found, without prejudging any issue that may be raised on rehearing in these matters, that the second set of tariffs eliminating all POLR charges from the Companies' rates should be approved to be effective with the first billing cycle of November 2011, subject to Commission review and subsequent adjustment, if appropriate (Tariff Approval Order).
- (7) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.
- (8) On November 2, 2011, applications for rehearing of the Remand Order were filed by AEP-Ohio, Industrial Energy Users-Ohio (IEU-Ohio), and jointly by the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) (jointly, OCC/OPAE). On November 10, 2011, AEP-Ohio filed a memorandum contra the applications for rehearing of IEU-Ohio and OCC/OPAE. On November 14, 2011, IEU-Ohio and OCC/OPAE filed memoranda contra AEP-Ohio's application for rehearing. In their applications for rehearing, the parties raise a number of assignments of error, alleging that the Remand Order is unreasonable and unlawful. In addition to its arguments pertaining to the Remand Order, AEP-Ohio raises further arguments and seeks rehearing with respect to the Tariff Approval Order.
- (9) By entry on rehearing issued November 22, 2011, the Commission granted the applications for rehearing to allow

further consideration of the matters specified in the applications.

- (10) The Commission has reviewed and considered all of the arguments on rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and should be denied.

Incremental Carrying Cost for 2001-2008 Environmental Investment

- (11) IEU-Ohio raises four arguments in support of its position that the Remand Order was unjust and unreasonable with respect to the subject of the carrying costs on 2001-2008 environmental investments. In its first assignment of error, IEU-Ohio asserts that the Commission's finding that AEP-Ohio may recover environmental investment carrying costs pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that granting such recovery would have the effect of providing certainty regarding retail electric service. IEU-Ohio argues that AEP-Ohio provided no evidence on remand that the environmental carrying charges in question are "necessary to provide certainty in the provision of retail electric service" and that the evidence relied upon by the Commission fails to demonstrate how the requirements of Section 4928.143(B)(2)(d), Revised Code, are satisfied such that the charges are "necessary to make retail electric service probable." Finally, IEU-Ohio avers that the Commission's determination that customers benefit from the lower cost power received as a result of the environmental investments is inconsistent with the manner in which electric service is dispatched by PJM Interconnection, LLC, (PJM) based on the least cost set of offer prices. (IEU-Ohio App. at 5-8.)
- (12) As an initial matter, AEP-Ohio responds that IEU-Ohio has raised no new arguments for the Commission's consideration. Further, AEP-Ohio argues that IEU-Ohio's reading of the statute is unnatural, pointing out that a charge may have the effect of stabilizing or providing certainty regarding retail electric service, without being necessary to make the service certain or probable. The Companies also dispute IEU-Ohio's contention that there is no support in the record for the Commission's finding that the environmental carrying charges

have the effect of providing certainty to both the Companies and their customers. AEP-Ohio further notes that the Companies pass the benefit of lower cost power to customers through the fuel adjustment clause (FAC) and that the manner in which PJM dispatches resources does not negate this established practice. (Cos. Memo Contra at 11-13.)

- (13) The Commission thoroughly reviewed the record established in both the initial and remand proceedings and found evidence in the record offered by AEP-Ohio (Cos. Ex. 7 at 15-16; Cos. Ex. 7B at 6), which supports a finding that the Companies' environmental investment carrying charges have the effect of providing certainty to both the Companies and their customers regarding retail electric service.⁴ This evidence is part of the record; it makes no difference that it was offered by AEP-Ohio during the initial, rather than the remand, proceedings. Additionally, we explained in the Remand Order how the Companies' testimony satisfies the requirements of Section 4928.143(B)(2)(d), Revised Code (Remand Order at 13-14). Further, we find no merit in IEU-Ohio's argument that the environmental carrying charges must be necessary to make retail electric service "probable." Section 4928.143(B)(2)(d), Revised Code, requires only that the carrying charges "have the effect of stabilizing or providing certainty regarding retail electric service." Finally, we find no relevance in IEU-Ohio's argument regarding the dispatch of power by PJM, as AEP-Ohio, in actual practice, generally uses its own generating units to serve its customers and passes the benefit of the lower cost power to its customers through the FAC (Tr. XI at 58, 60; Cos. Ex. 7B at 6). Moreover, the presence of lower cost units in the PJM market will tend to lower current and future PJM energy market prices and contribute to stabilizing prices for the benefit of the Companies' customers. Therefore, IEU-Ohio's first assignment of error should be rejected.
- (14) IEU-Ohio next asserts that the Commission's finding that AEP-Ohio may recover the carrying costs on 2001-2008 environmental investments pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that their other

⁴ References to exhibits or transcripts from the remand proceedings will specifically be designated as such in this order. All other references refer to evidence from the original record compiled in 2008.

revenues do not provide adequate compensation. IEU-Ohio argues that, in not requiring AEP-Ohio to make such a showing, the Commission has violated, without explanation, its own policy regarding the legal basis for authorizing rate increases under Section 4928.143(B)(2), Revised Code. As evidence of this alleged Commission policy, IEU-Ohio points to the Commission's determination in the ESP 1 Order that AEP-Ohio's enhanced service reliability plan (ESRP) rider should be based on the Companies' prudently incurred costs subject to Commission review in the context of a distribution rate case. (IEU-Ohio App. at 8-9.)

- (15) AEP-Ohio responds that the ESRP rider was proposed and approved pursuant to a different statutory provision, specifically, Section 4928.143(B)(2)(h), Revised Code. The Companies assert that the Commission's determination that Section 4928.143(B)(2)(h), Revised Code, requires a cost basis for approval of the recovery of distribution-related infrastructure improvements does not call into question the Commission's determination that Section 4928.143(B)(2)(d), Revised Code, contains no similar requirement. (Cos. Memo Contra at 13-14.)
- (16) Upon consideration of IEU-Ohio's second assignment of error, the Commission finds that IEU-Ohio has raised no new argument on rehearing that would warrant reconsideration of the Remand Order. IEU-Ohio cites no authority that would require AEP-Ohio to address adequacy of revenue, and we find no such requirement or Commission policy with respect to Section 4928.143(B)(2)(d), Revised Code. Further, the environmental investment carrying charges were not reflected in the Companies' existing rates prior to our approval in the ESP 1 Order (ESP 1 Order at 28; First ESP 1 EOR at 12-13). Thus, contrary to IEU-Ohio's claim, there was an economic basis upon which to authorize recovery of such costs. Accordingly, IEU-Ohio's second assignment of error is without merit and should be denied.
- (17) In its third assignment of error, IEU-Ohio argues that the Commission erred in finding that recovery of the environmental investment carrying charges is authorized pursuant to Section 4928.143(B)(1), Revised Code, as no party advanced this argument. Further, IEU-Ohio contends that the

Commission's determination is beyond the scope of the Court's remand and violates the law of the case doctrine. (IEU-Ohio App. at 9-13.)

- (18) AEP-Ohio asserts that IEU-Ohio cites no authority for the proposition that the Commission must confine its analysis of an issue to only those arguments advanced by the parties. The Companies further contend that IEU-Ohio misstates the law of the case doctrine. AEP-Ohio also notes that IEU-Ohio does not, and cannot, criticize the merits of the Commission's conclusion, in that the environmental investment carrying charges are properly recoverable pursuant to Section 4928.143(B)(1), Revised Code. (Cos. Memo Contra at 14-16.)
- (19) It is well within the Commission's discretion to cite and rely upon statutory authority even where such authority is not referenced by any party to the proceedings. The Court has stated that "nothing precludes the [C]ommission from passing upon the proper application or construction of a statute."⁵ Additionally, the Commission finds no merit in IEU-Ohio's assertion that the Remand Order violates the law of the case doctrine, which "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."⁶ Pursuant to the doctrine, "an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case," absent extraordinary circumstances.⁷ In its remand decision in the present cases, the Court reversed and remanded the issue of environmental investment carrying charges, stating that "[o]n remand, the [C]ommission may determine whether any of the listed categories of [Section 4928.143(B)(2), Revised Code] authorize recovery of environmental carrying charges."⁸ The Commission fully complied with this mandate and found that Section 4928.143(B)(2)(d), Revised Code, authorizes such recovery. Although the Court's decision addresses Section 4928.143(B)(2), Revised Code, which was the statutory provision in question on appeal, nothing in the decision

⁵ *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 248.

⁶ *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3.

⁷ *Id.* at 5.

⁸ *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 520.

precludes the Commission from considering other statutory provisions that may be relevant in resolving the remanded matter of the Companies' environmental carrying charges. The law of the case doctrine does not limit the Commission's authority to fully consider the issues remanded by the Court. IEU-Ohio's third assignment of error, therefore, should be denied.

- (20) In its fourth assignment of error, IEU-Ohio argues that the Commission unlawfully and unreasonably permitted collection of the environmental carrying charges during a period in which there was no legal authority to permit collection of those revenues. Specifically, IEU-Ohio asserts that the Companies were permitted to collect and retain such revenues without legal authorization from the point at which the charges became subject to refund to the point at which the Commission issued the Remand Order. IEU-Ohio claims that collection of the environmental carrying charges was not legally authorized until the Remand Order was issued on October 3, 2011. (IEU-Ohio App. at 13-15.)
- (21) AEP-Ohio submits that, notwithstanding the Court's remand decision, the rates and charges approved by the Commission in the ESP 1 Order remained the lawful rates and charges to be collected from customers until the Commission issued the Remand Order (Cos. Memo Contra at 5).
- (22) The Commission finds that IEU-Ohio's argument is contrary to precedent holding that "[w]hen this court reverses and remands an order of the Public Utilities Commission establishing a revised rate schedule for a public utility, the reversal does not reinstate the rates in effect before the [C]ommission's order or replace that rate schedule as a matter of law, but is a mandate to the [C]ommission to issue a new order, and the rate schedule filed with the [C]ommission remains in effect until the [C]ommission executes this court's mandate by an appropriate order."⁹ Thus, the environmental investment carrying charges approved for the Companies in the ESP 1 Order remained in effect during the course of the remand proceedings. Even though the remanded charges were made subject to refund pursuant to the May 25, 2011, entry, the

⁹ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1976), 46 Ohio St.2d 105, 105 (syllabus).

charges remained valid throughout the pendency of these proceedings to the point at which we executed the Court's mandate and issued the Remand Order, reaffirming the charges. For this reason, IEU-Ohio's fourth assignment of error should be denied.

POLR Rider

- (23) AEP-Ohio requests that the Commission grant rehearing and fully restore the POLR charges as approved in the ESP 1 Order or, alternatively, restore the charges to the level in place prior to the ESP 1 Order. AEP-Ohio raises six arguments in support of its position that the Remand Order and Tariff Approval Order are unjust and unreasonable with respect to the Companies' POLR charges. In its first assignment of error, AEP-Ohio argues that the Remand Order's finding that the Companies failed to present evidence of their actual POLR costs and did not justify recovery of their POLR charges at the level reflected in their existing rates is unlawful, unreasonable, and against the manifest weight of the evidence. AEP-Ohio states that the Commission's finding is predicated on the erroneous belief that it would have been reasonable for the Companies to have undertaken an *ex post* analysis of their POLR costs. AEP-Ohio claims that there is no evidence in the record that it was possible to conduct such an analysis. According to the Companies, the Commission's finding is also inconsistent with the Court's recognition that POLR charges may be justified for reasons other than actual costs. AEP-Ohio argues that the Commission unreasonably refused to address its alternative justification for non-cost-based POLR charges. (Cos. App. at 1-5.)
- (24) OCC/OPAE respond that the Commission correctly determined that AEP-Ohio failed to present evidence of its actual POLR costs or evidence demonstrating that the Companies' POLR charges, if non-cost-based, are reasonable (OCC/OPAE Memo Contra at 3-6). IEU-Ohio adds that AEP-Ohio's first assignment of error should be rejected as meritless, given the Commission's rejection of the unconstrained option model, and that there was nothing to prevent the Companies from determining their actual, after-the-fact POLR costs. IEU-Ohio also argues that the record does not support a conclusion that the unconstrained option model would be appropriate to

establish a non-cost-based POLR charge. (IEU-Ohio Memo Contra at 2-6.)

- (25) In the Remand Order, the Commission concluded that “AEP-Ohio has 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” (Remand Order at 24). We thoroughly reviewed and cited to ample evidence in the record in reaching this conclusion. We rejected AEP-Ohio’s theory that the value of the POLR optionality to customers is precisely equal to the Companies’ costs and found that the Companies’ modeled costs should not be equated with actual costs. We also addressed AEP-Ohio’s alternative justification for non-cost-based POLR charges. As another matter, we noted that it would have been reasonable for the Companies to carry out an *ex post* analysis of their actual POLR costs, given the Court’s concerns, and in light of the unique circumstances of these remand proceedings. (Remand Order at 22-23.) The Companies’ testimony suggests that it would in fact be possible to identify *after-the-fact* POLR costs, despite their concerns about the appropriateness of such an analysis, and does not directly refute the possibility (Cos. Remand Ex. 3 at 12-13; Remand Tr. II at 246-247). In any event, our conclusion that AEP-Ohio failed to present evidence of its actual costs was not predicated on the lack of an *ex post* analysis. Additionally, as we addressed in the Remand Order, the Companies did not demonstrate that their POLR charges, if considered non-cost-based, are reasonable, as required by the Court. Although AEP-Ohio points to evidence that purportedly establishes that the POLR charges are lawful pursuant to Section 4928.143(B)(2)(d), Revised Code, AEP-Ohio did not demonstrate how the charges derived from the option model are reasonable in concept or magnitude. For these reasons, AEP-Ohio’s first assignment of error has no merit and should be rejected.
- (26) In its second assignment of error, AEP-Ohio asserts that the Remand Order’s finding that the unconstrained option model fails to provide a reasonable measure of the Companies’ POLR costs is unreasonable and against the manifest weight of the evidence particularly given the Commission’s finding that the Companies have POLR risks and that the costs associated with such risks may be recovered through a POLR charge. AEP-

Ohio states that the Commission's finding is predicated on the incorrect assumption that the Court rejected the model as a means to measure the Companies' POLR costs. (Cos. App. at 5-8.)

- (27) OCC/OPAE reply that the Commission correctly determined that AEP-Ohio's unconstrained option model fails to reasonably measure POLR costs and that the Companies failed to meet their burden of proof (OCC/OPAE Memo Contra at 6-7). IEU-Ohio likewise argues that the Commission should reject AEP-Ohio's second assignment of error, as the option model fails to provide the cost of POLR service (IEU-Ohio Memo Contra at 6-8).
- (28) The Court found that the unconstrained option model "does not reveal 'the cost to the Companies to be the POLR and carry the risks associated therewith.'"¹⁰ On remand, the Commission considered all of the evidence with respect to the unconstrained option model. We agreed with the Court that the model, which purportedly measures the value of the POLR optionality to customers, does not disclose AEP-Ohio's POLR costs, in light of our finding that the value of the POLR optionality provided to customers does not equal the Companies' costs. (Remand Order at 28-29.) There is thus no merit in AEP-Ohio's argument that we wrongly applied the Court's decision. Neither was it unreasonable or unlawful to eliminate the Companies' POLR charges. Although we indeed recognized that AEP-Ohio has POLR risks and that the costs associated with such risks may be recovered through a POLR charge (Remand Order at 22), the model fails to measure such costs. AEP-Ohio failed to support its proposed POLR charges and, without evidence in the record to establish an appropriate amount for recovery, the Commission did not err in eliminating the POLR charges. AEP-Ohio's second assignment of error should be denied.
- (29) AEP-Ohio next argues that the Remand Order exceeds the scope of the Commission's jurisdiction in finding that the POLR risk of an electric distribution utility (EDU) does not include migration risk and conflicts with Sections 4928.14 and 4928.141, Revised Code. According to the Companies,

¹⁰ *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 518 (quoting ESP 1 Order at 40).

migration risk was not properly an issue for the Commission's consideration in the remand proceedings. Additionally, AEP-Ohio contends that the Remand Order contains conflicting findings regarding migration risk. (Cos. App. at 8-13.)

- (30) According to OCC/OPAE, the Commission acted within its discretion in its conduct of the remand proceedings in allowing the scope of the proceedings to include definition of POLR risks. OCC/OPAE assert that the Court reversed the entire order authorizing the Companies' POLR charges. (OCC/OPAE Memo Contra at 8-10.) IEU-Ohio contends that the Commission correctly followed the Court's decision to conclude that POLR risk does not include migration risk or the related lost revenues (IEU-Ohio Memo Contra at 8-11).
- (31) The Commission disagrees with AEP-Ohio's argument that the Remand Order contains conflicting findings regarding migration risk. The first finding refers to the "'risks associated with customers switching to [competitive retail electric service] providers and returning to the electric utility's [standard service offer] rate'" and the Commission's continued belief 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, quoting ESP 1 Order at 40). This finding was not intended to specifically distinguish between migration risk and return risk or to imply that migration risk is a proper component of a POLR charge. In the second finding, however, we specified that "migration risk is more properly regarded as a business risk faced by all retail suppliers as a result of competition rather than a risk resulting from an EDU's POLR obligation" (Remand Order at 31-32). With respect to AEP-Ohio's remaining arguments on the subject of migration risk, the Companies have presented no new arguments for our consideration. Accordingly, the Companies' third assignment of error should be denied.
- (32) In its fourth assignment of error, AEP-Ohio asserts that the Remand Order and Tariff Approval Order exceed the scope of the Commission's jurisdiction in eliminating the POLR charges in full. The Companies argue that the Commission is precluded from eliminating that portion of the POLR charges that the Commission approved in the RSP Case prior to the ESP 1 Order as it was not open to challenge in these

proceedings or called into question by the Court's remand decision. (Cos. App. at 13-17.)

- (33) In response, OCC/OPAE contend that the Commission acted within its discretion when it ordered the elimination of the entire POLR charges from the Companies' tariffs. OCC/OPAE note that the Commission approved POLR charges in the ESP 1 Order that were based on pre-ESP 1 rates plus an additional amount. (OCC/OPAE Memo Contra at 11-12.) IEU-Ohio points out that the POLR charges approved in the ESP 1 Order, which are based on the unconstrained option model, have no continuing relationship with any amount authorized for collection in the RSP Case. According to IEU-Ohio, once the Commission rejected the option model, there was no basis for authorizing any POLR charges. (IEU-Ohio Memo Contra at 11-13.)
- (34) The Commission notes that AEP-Ohio originally proposed POLR charges that would collect a revenue requirement of \$108.2 million for CSP and \$60.9 million for OP (ESP 1 Order at 38). Specifically, the Companies adjusted the POLR charges authorized in the RSP Case such that the proposed new level of costs, which were based on the option model, would be recovered (Cos. Ex. 1 at 12, Ex. DMR-5; Cos. Ex. 2-A at 31). In the ESP 1 Order, we approved 90 percent of the proposed charges, finding that "the POLR rider shall be established to collect a POLR revenue requirement of \$97.4 million for CSP and \$54.8 million for OP" (ESP 1 Order at 40). The Court subsequently reversed the provisions of the ESP 1 Order that authorized the Companies' POLR charges.¹¹ As the ESP 1 Order specifically addressed the full amount of the proposed revenue requirements, not just the increased amount, and authorized 90 percent of the proposed charges, we find no error in having eliminated the charges in their entirety. AEP-Ohio's fourth assignment of error is thus denied.
- (35) AEP-Ohio next claims that the Remand Order and Tariff Approval Order are unreasonable and unlawful in ordering the elimination of the POLR charges in full given the Commission's findings in the Remand Order that "the Companies have such risks and that the costs associated with such risks may be

¹¹ *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512, 519.

recovered through a POLR charge" (Remand Order at 22) and that AEP-Ohio "has not justified recovery of POLR charges at the level reflected in its existing rates" (Remand Order at 24). AEP-Ohio maintains that it is unreasonable based on the record to conclude that the Companies should receive no compensation for the unique POLR risks that the law imposes. (Cos. App. at 17-19.)

- (36) OCC/OPAE respond that the Commission's elimination of AEP-Ohio's POLR charges was not unreasonable or unlawful because the Companies failed to meet their burden of proving their out-of-pocket POLR costs (OCC/OPAE Memo Contra at 13). IEU-Ohio adds that AEP-Ohio essentially seeks to continue to collect POLR charges at the level authorized in the RSP Case based on no record support and a claim that it is entitled to some level of compensation in light of the Commission's finding that the Companies have POLR risks (IEU-Ohio Memo Contra at 13-15).
- (37) As discussed above, the Companies did not justify their proposed POLR charges, which were derived from a model that does not measure POLR costs. In the absence of evidence as to the appropriate amount for recovery, the Commission did not err in fully eliminating the POLR charges. AEP-Ohio's fifth assignment of error should be denied.
- (38) In its sixth assignment of error, AEP-Ohio argues that the Tariff Approval Order is unlawful in that it circumvents the jurisdictional rehearing process and fails to set forth the reasons prompting the Commission to reverse its conclusion in the Remand Order that only the "increased POLR charges authorized as a part of the ESP Order are insufficiently supported by the record on remand" (Remand Order at 33). AEP-Ohio asserts that it has consistently advocated that the scope of the remand proceedings is jurisdictionally limited to the amount of the POLR increase authorized in the ESP 1 Order, although other parties contend that the POLR charges should be eliminated in their entirety. The Companies claim that the Commission resolved this dispute in their favor in the Remand Order but reversed course, without explanation, in the Tariff Approval Order. (Cos. App. at 19-22.)

- (39) In reply, OCC/OPAE argue that the Tariff Approval Order is lawful, noting that the Commission routinely approves tariffs prior to the resolution of applications for rehearing. OCC/OPAE also assert that the Remand Order was not dispositive of the issue of whether the Companies' POLR charges should be eliminated in full or in part. (OCC/OPAE Memo Contra at 13-14.) IEU-Ohio agrees with OCC/OPAE that the Tariff Approval Order is a valid order. According to IEU-Ohio, in the Remand Order, the Commission concluded that the Companies' POLR charges cannot be authorized and directed them to file tariffs removing the POLR charges. Accordingly, IEU-Ohio claims that the Tariff Approval Order cannot properly be described as an "unexplained reversal." (IEU-Ohio Memo Contra at 15-17.)
- (40) Upon consideration of AEP-Ohio's sixth assignment of error, the Commission finds it necessary to clarify the intent of the Remand Order, as the parties differ considerably in their understanding of whether the Companies' POLR charges were expected to be eliminated in full or in part. Although AEP-Ohio quotes several portions of the Remand Order that purportedly support its argument that the Commission intended to eliminate the POLR charges only in part, it was our intent in the Remand Order to direct the Companies to eliminate the POLR charges in their entirety, consistent with our finding that the Companies failed to provide any evidence of their actual POLR costs and that the unconstrained option model does not measure POLR costs. The portions of the Remand Order cited by AEP-Ohio were meant to convey that the full amount of the POLR charges authorized in the ESP 1 Order, and not just the amount of the increase over the prior POLR charges authorized in the RSP Case, should be pulled out of the revised tariffs. As discussed above, the ESP 1 Order addressed the full amount of the Companies' proposed POLR revenue requirements, not just the increased amount, and authorized 90 percent of their proposed charges. Accordingly, we find no merit in AEP-Ohio's argument that the Commission reversed course in the Tariff Approval Order and circumvented the rehearing process. AEP-Ohio's sixth assignment of error should be denied.

Flow-Through Effects of Remand

- (41) IEU-Ohio's fifth, sixth, seventh, and eighth assignments of error pertain to the Commission's treatment in the Remand Order of the flow-through effects of the Court's remand. In its fifth assignment of error, IEU-Ohio argues that the Commission unlawfully and unreasonably failed to order an adjustment of OP's phase-in deferral balance caused by the ESP 1 rate caps on the theory that the proposed adjustment would be tantamount to retroactive ratemaking. IEU-Ohio next submits that the Commission unlawfully and unreasonably failed to order an adjustment of OP's phase-in deferral balance based on a finding that the past rates have already been collected from customers, which is not supported in the record. In its seventh assignment of error, IEU-Ohio argues that the Commission unlawfully and unreasonably extended the prohibition on retroactive ratemaking to prevent an adjustment of phase-in deferral balances that have not been collected from customers and were subject to further adjustment by the ESP 1 Order, which established the basis for the deferral balances. Finally, IEU-Ohio contends that the Commission unlawfully and unreasonably failed to address the flow-through effects of the Court's remand on deferral balances; recovery of delta and Universal Service Fund revenues; earnings of the Companies pursuant to the significantly excessive earnings test of Section 4928.143(F), Revised Code; and the Companies' pending ESP application in Case No. 11-346-EL-SSO, *et al.* (IEU-Ohio App. at 15-25.)
- (42) Similarly, OCC/OPAE argue that the Commission erred when it failed to reduce the phase-in deferrals by the amount of the unjustified POLR charges collected from April 2009 through May 2011 (*i.e.*, from the beginning of the ESP 1 term through the point at which the charges became subject to refund). Specifically, in their first assignment of error, OCC/OPAE assert that the deferrals violate Section 4928.143, Revised Code, in that the deferrals are a direct result of rates that the Companies did not justify under Section 4928.143(B)(2), Revised Code (OCC/OPAE App. at 6-10). In their second assignment of error, OCC/OPAE claim that the phase-in is not just and reasonable and includes deferrals that are not related to the incurred costs of ESP 1, in violation of Section 4928.144, Revised Code (OCC/OPAE App. at 10-11). Next, OCC/OPAE

contend that, in failing to reduce the amount of the deferrals, the Commission violated Section 4928.06, Revised Code, and the state policies found in Section 4928.02(A) and (L), Revised Code (OCC/OPAE App. at 11-12). In their fourth assignment of error, OCC/OPAE dispute the Commission's conclusion that an adjustment to the deferrals would constitute retroactive ratemaking. OCC/OPAE maintain that, where there is a rate mechanism that provides for a prospective adjustment, there is no retroactive ratemaking. (OCC/OPAE App. at 12-14.)

- (43) In a similar vein, OCC/OPAE argue in their fifth assignment of error that the Commission should have ordered the Companies to compensate customers for POLR charges collected from April 2009 through May 2011 in the form of interest at a rate of 10.93 percent (OCC/OPAE App. at 14-15).
- (44) AEP-Ohio argues that the Commission properly rejected the flow-through arguments of IEU-Ohio and OCC/OPAE because revenues collected under tariffs approved by the Commission are lawfully collected, notwithstanding the fact that the Ohio Supreme Court subsequently reverses and remands the Commission's order approving the tariffs (Cos. Memo Contra at 3-6). Additionally, the Companies contend that the deferrals were properly approved in the Commission's ESP 1 Order and cannot now be collaterally attacked in the remand proceedings (Cos. Memo Contra at 6-7). AEP-Ohio also asserts that a reduction in the deferrals would constitute retroactive ratemaking (Cos. Memo Contra at 7-11). Finally, the Companies claim that, if the Commission were to order an adjustment to the deferrals, it would undermine state policy, contrary to the argument of OCC/OPAE (Cos. Memo Contra at 11).
- (45) The Commission affirms its decision to decline to order an adjustment to the FAC deferral balance as any such adjustment would constitute unlawful retroactive ratemaking. As we thoroughly discussed in the Remand Order, IEU-Ohio and OCC/OPAE seek what would essentially amount to a refund or credit of the Companies' unjustified charges, which is not a permissible remedy pursuant to Court precedent. We find that many of the arguments raised by IEU-Ohio and OCC/OPAE with regard to the flow-through effects of the Court's remand

were already raised by the parties and have been fully addressed (Remand Order at 34-36).

- (46) In its sixth assignment of error, IEU-Ohio challenges the Commission's finding that "[c]onsistent with the Court's precedent, we cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified" (Remand Order at 36). Specifically, IEU-Ohio disputes that the rates have already been collected from customers, noting that the deferrals created as a result of the ESP 1 Order are for amounts that have not yet been collected from customers. We note, however, that the past rates to which we were referring are not the deferrals but rather the rates associated with the unjustified POLR charges that have in fact already been collected from customers. Therefore, we find no merit in IEU-Ohio's contention that the Remand Order is premised on an incorrect factual assertion, and IEU-Ohio's sixth assignment of error should be denied.
- (47) Given our finding that an adjustment to the FAC deferral balance would constitute unlawful retroactive ratemaking, the Commission finds no merit in OCC/OPAE's arguments that the Remand Order violates Sections 4928.02, 4928.06, 4928.143, and 4928.144, Revised Code. Further, with respect to OCC/OPAE's contention that the phase-in includes deferrals that are not related to the incurred costs of ESP 1, we note that the deferred costs in question are FAC, not POLR, costs. Accordingly, OCC/OPAE's first, second, and third assignments of error should be denied.
- (48) For the reasons provided in response to the parties' other arguments related to flow-through effects (Remand Order at 35-36), OCC/OPAE's fifth assignment of error regarding interest on the unjustified POLR charges for the period of April 2009 through May 2011 is without merit and should be denied.
- (49) In sum, we find that IEU-Ohio's fifth, sixth, seventh, and eighth assignments of error, as well as the five assignments of error raised by OCC/OPAE, should be denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by AEP-Ohio, IEU-Ohio, and OCC/OPAE on November 2, 2011, be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO




Todd A. Snitchler, Chairman



Paul A. Centolella

Steven D. Lesser

Andre T. Porter

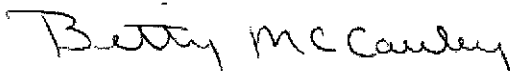


Cheryl L. Roberto

SJP/GNS/sc

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Betty McCauley
Secretary