

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals	) ) ) )	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan	) ) ) ) ) )	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	) ) ) )	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders	) ) ) )	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders	) ) ) )	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company	) ) ) )	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	) ) ) ) )	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	) ) ) ) )	Case No. 11-4921-EL-RDR

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MEMORANDUM IN OPPOSITION TO MOTION OF INDUSTRIAL ENERGY  
USERS-OHIO

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## INTRODUCTION

On December 14, 2011, the Commission issued an Opinion and Order in these cases modifying and approving the September 7, 2011 Stipulation (Stipulation). As part of the Opinion and Order, the Commission (at 67) ordered AEP Ohio to file revised final tariffs by December 23, 2011. The Industrial Energy Users – Ohio (IEU) filed a motion on December 20 requesting, on an expedited basis, that the Commission issue an order (1) directing AEP Ohio to electronically serve parties with compliance tariffs along with any workpapers, and (2) providing that the rates effective January 1, 2012 be implemented subject to reconciliation once the Commission completes its final review. IEU's first request is unnecessary and the second claim is inappropriate; as such, the motion should be denied.

## ARGUMENT

### **1. IEU's request to be served with tariffs and to make workpapers available is superfluous**

Regarding the first request, AEP Ohio already plans to electronically file and serve the compliance tariffs (as it does other filings in these consolidated proceedings) prior to the established deadline and to make workpapers available to parties upon request – per the normal established process used in rate cases. IEU could have easily resolved this matter by initiating an informal communication with AEP Ohio, but it did not. In any case, based on AEP Ohio's explicitly-stated intention, there is no need for the Commission to issue an order in response to IEU's first request.

### **2. IEU's request to implement the new rates subject to reconciliation is misguided and should be denied**

IEU's second request is both procedurally and substantively inappropriate for a number of reasons and should be denied. Initially, IEU (at 6) criticizes the Commission for not

establishing any process requirements associated with the compliance tariffs beyond the deadline for filing the tariffs. Of course, what IEU fails to mention is that this is the normal process used in virtually all cases establishing rates: the Commission issues an order, the utility files compliance tariffs and the new rates go into effect pending rehearing and appeal. There is nothing unique about this case to justify departing from this process. On the contrary, as further discussed below, the Commission's order conforms to the established legal process and IEU's request improperly seeks to circumvent it.

**A. IEU's concerns about tariffs that do not apply the Opinion and Order are premature and speculative**

IEU (at 6) generically states in conclusory fashion that "there is a need to have any tariffs that may go into effect on January 1, 2012 implemented subject to reconciliation once the Commission completes its final review." The only reason offered (at 7) to explain its request is that AEP Ohio "may file proposed tariffs that do not comply with the Commission's Opinion and Order." IEU's stated concern is premature, wholly speculative, and lacks any basis whatsoever. Further, the Commission's Staff is normally responsible for reviewing tariffs and routinely works with utilities to understand and review such compliance filings. Indeed, AEP Ohio has been working with Staff to develop its compliance tariffs and does not anticipate any issues or concerns with the tariffs. Moreover, the Commission controlled the timing of its decision and unilaterally decided to establish a deadline of December 23 for the compliance tariff filing, knowing that it also ordered the new rates to be effective January 1, 2012. It is implied from these deadlines simultaneously established by the Opinion and Order that the Commission believes there is adequate time for the Commission to review the tariff filing. This remains particularly appropriate since Staff (as is typical) has been working with the Company. The

Commission should not pre-suppose without basis – as IEU does – that AEP Ohio will file tariffs that do not comply with the Commission’s order.

**B. IEU’s request is really a request for stay of execution but movant has not even alleged, let alone satisfied, the requirements for obtaining a stay**

The real basis for IEU’s request that the rates be implemented subject to reconciliation is revealed (at 7) by its assertion that “[w]hile a stay of execution is statutorily available, see 4903.16, Revised Code, it is not practically available to customers due to the bonding requirements.” IEU’s recognition of the stay requirements and simultaneous attempt to brush aside the integrated process for rehearing and appeal through implementing rates subject to reconciliation is inappropriate and should not be entertained. Without exception, R.C. 4903.16 requires an undertaking conditioned for the prompt payment of all damages caused by the delay in enforcement of the order complained of on appeal. R.C. 4903.16 reads:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days’ notice to the commission, allows such stay, in which event the *appellant shall execute an undertaking*, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, *conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of*, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

(emphasis added). The statutory prerequisite of an undertaking is not an option or suggestion.

The Supreme Court has repeatedly reiterated the requirement to post a bond to secure a stay under 4903.16. *Office of Consumers' Counsel v. Public Util. Comm.* (1991), 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162; *City of Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 112, 163 N.E.2d 167, 172; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 258, 141 N.E.2d 465, 468.

The Supreme Court has only recently reiterated the unqualified requirement for posting a bond in order to obtain a stay, in rejecting an argument made by OCC:

OCC concedes that it failed to post bond, but asserts that it is "not financially capable of posting any bond other than a nominal amount," a circumstance that makes "a stay \* \* \* truly an illusory remedy at best unless the Court relieves OCC from filing a bond." To the degree that the bond requirement poses a barrier, however, it is one that must be cured by the General Assembly. Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation. *See, e.g., Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 359, 78 N.E.2d 890 ("the legislative branch of the state government may confer upon" the commission "very broad [powers]" for the "supervision, regulation and, in a large measure, control of the operation of public utilities"). And our "revisory jurisdiction" over agency proceedings is limited to that "conferred by law." Section 2(B)(2)(d), Article IV, Ohio Constitution.

*In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 517 (Ohio 2011). While IEU's motion explicitly recognizes (at 7) the statutory bond requirement as being relevant, it seeks to avoid the requirement because it is inconvenient and acts as a barrier to getting what it wants.

Concerning the substantive requirements for obtaining a stay of execution (beyond the financial undertaking requirement), parties before the Commission generally utilize the standard for establishing a stay that is set forth in *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604 (dissenting opinion of Justice Douglas):

When the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration -- if at all, and then only where certain standards are met. These standards should include consideration of [1] whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; [2] whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; [3] whether or not, if the stay is issued, substantial harm to other parties would result; and, [4] above all in these types of cases, where lies the interest of the public.

*MCI Telecommunications Corp. v. Public Utilities Comm.*, 31 Ohio St. 3d 604, 606 (Ohio 1987) (numbering supplied). IEU has not alleged, let alone demonstrated, that any of these factors are

satisfied in the present circumstance. IEU's overt attempt to short-circuit the integrated process for rehearing and appeal should not be entertained.

Under the seminal Ohio utility law decision in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), the Supreme Court has established, among other things, that: (1) any rates set by the Commission are lawful until such time as they are set aside by the Supreme Court; (2) a utility has no option but to collect the rates set by the Commission, unless a stay order is obtained; and (3) there is no automatic stay of any order and it is necessary for an aggrieved party to affirmatively obtain a stay and post a bond. The Commission has lawfully established the new rates for AEP Ohio through the December 14 Opinion and Order and IEU's remedy for challenging the decision is rehearing and appeal (where a stay of execution is available from the Court pursuant to R.C. 4903.16).

There is no reason why the Commission should consider its own decision issued just last week to now be unlawful or refrain from enforcing it. Yet, that is the underlying assumption made by IEU in seeking to hold up implementation of the Order. The Commission was tasked with adjudicating an order in response to AEP Ohio's application. That duty to reach a decision does not include providing for advance remedies to address the improbable event that AEP Ohio will file tariffs that do not comply with the decision or that the Supreme Court on appeal may disagree with the decision, especially when doing so involves a conclusion by the Commission that its own order may be unlawful without any supporting justification. IEU has not established a likelihood of success on the merits of any claim that the order is unlawful or unreasonable, let alone a strong likelihood of success. Consequently, the order should be implemented and follow the same process for rehearing and appeal that every other Commission decision is subjected to (while being implemented).

IEU also notes that it is considering a rehearing argument concerning the Opinion and Order's bills-rendered approach to implementing the new rates. Ordering rate increases effective on a bills-rendered basis is a widely used and established practice in various types of rate cases – including AEP Ohio's prior Electric Security Plan and its prior Rate Stabilization Plan. IEU's challenge of the bills-rendered approach, if there is one, can be made on rehearing (which is what IEU says it is currently contemplating in footnote 4). Regardless, it is currently a phantom challenge that was not set forth in its current motion. Consequently, it should not be considered and does not provide a reason for implementing the new rates subject to reconciliation.

If IEU's unsubstantiated theory is accepted, the same concept would apply in any Commission case involving utility rates. More important than its breadth, IEU's implied blanket presumption of irreparable harm flies in the face of the *Keco* decision and its progeny. As referenced above, *Keco* holds that Commission rate orders are effective pending rehearing and appeal and there is no automatic stay of approved rates pending appeal – regardless of whether those rates are ultimately held to be unlawful. *Keco*, 166 Ohio St. at 258-259. If every Commission order that increased a rate were considered as the basis for irreparable harm and every rate order were stayed pending rehearing and appeal, there would be no need for the *Keco* doctrine and there would be a stay issued in every such case. That is an absurd result and belies the reality that issuance of a stay order is a highly unusual and extraordinary remedy. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (DC Cir. 1985). Neither the Commission nor the Court has found it necessary or appropriate to issue stay orders on anything more than an extraordinary basis (as referenced above, any request for a stay before the Supreme Court of Ohio would involve additional requirements under Section 4903.16, Ohio Rev. Code, such as a financial undertaking, which are essentially bypassed where the Commission entertains a stay).

Ohio law simply does not consider the outcome that IEU describes as being harm at all, let alone irreparable harm. As the Supreme Court of Ohio has held under similar circumstances, “there is no statute which requires that, during the pendency of an appeal from the order of the commission granting an increased rate, the utility must impound the increase collected or post bond to insure reimbursement to its consumers in the event the rate should ultimately be lowered.” *City of Columbus* (1959), 170 Ohio St. 105, 110, 163 N.E.2d 167, 171. It is a function of the integrated regulatory scheme in Title 49 of the Revised Code that Commission-approved rates are effective during rehearing and appeal and that statutory design does not constitute irreparable harm. Consequently, granting the relief requested by IEU would cause irreparable harm to AEP Ohio and would not serve the public interest in departing from the General Assembly’s statutory design for rate case procedures.

Outside of the context of successfully obtaining a stay of execution, it is well established that R.C. 4903.15 provides by default that orders of the Commission are “\* \* \* effective immediately upon entry thereof upon the journal of the public utilities commission.” Pursuant to this provision, the December 14, 2011 Opinion and Order became effective when it was entered upon the journal. Similarly, even where there has been an appeal and the Court reverses a Commission order, the rate originally approved by the Commission remains in place until the Commission conducts the remand proceeding and approves a new rate. In *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 1976, 46 Ohio St. 2d 105, 117; 346 N.E.2d 778, 786 (“*CEP*”), the Court held:

\*\*\*this court's reversal and remand of an order of the commission does not change or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order.



(Emphasis added.) In short, absent invoking the extraordinary remedy of issuing a stay of execution, the rates approved by the Commission should remain in effect without recourse should the outcome change on rehearing or appeal – until such time as the Commission prospectively approves new rates (either on rehearing or on remand from the Court). That is bedrock utility law in Ohio and IEU seeks to capriciously overturn it without basis or support.

**C. IEU’s reliance on the recent remand proceeding in Case Nos. 08-917-EL-SSO is misplaced**

IEU offers the recent remand proceeding conducted in Case Nos. 08-917-EL-SSO et al. as an example showing that the Commission “can (and recently has) ordered the collection of rates and charges subject to refund.” The remand proceeding, however, was a highly unique context, since the Commission was implementing a Supreme Court reversal of the Commission’s relevant findings in AEP Ohio’s initial ESP proceeding. More importantly, AEP Ohio specifically requested (for specific reasons applicable only to that case) that the rates be kept in place and converted to being collected subject to refund.

In agreeing to the subject-to-refund outcome in the remand proceeding as part of its May 11, 2011 Motion to Reject Tariffs in Case Nos. 08-917-EL-SSO et al., AEP Ohio indicated (at 13) that converting the rates to being collected subject to refund was the “least-preferred alternative” that was “disfavored but acceptable alternative” to the other options being discussed under the specific circumstances of that case. More specifically, AEP Ohio stated that: “AEP Ohio does not believe the Commission has authority to unilaterally implement rates subject to refund. \*\*\* In any case, AEP Ohio reserves its right to challenge any Commission-ordered implementation of rates subject to refund in a future case.” Due to the unique circumstances involved in the remand proceeding – the fact that AEP Ohio consented to converting the rates subject to refund in that case (while questioning the Commission’s authority to unilaterally

implement such a remedy and reserving the right to challenge it in any future case) – the Commission cannot rely on that case as a precedent for implementing tentative rates in the current case when no such circumstances exist and the Company objects.

## **CONCLUSION**

For the foregoing reasons, the AEP Ohio requests that the Commission deny IEU's Tariff Motion.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Memorandum in Opposition was served by electronic mail upon the individuals listed below this 21<sup>st</sup> day of December, 2011.

/s/ Steven T. Nourse  
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Summary: Memorandum In Opposition to Motion of Industrial Energy Users-Ohio  
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Southern Power Company