

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company and)	
Ohio Power Company, Individually and, if)	Case No. 11-351-EL-AIR
Their Proposed Merger is Approved, as a)	Case No. 11-352-EL-AIR
Merged Company (collectively, AEP Ohio))	
for an Increase in Electric Distribution Rates.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	
Ohio Power Company, Individually and, if)	Case No. 11-353-EL-ATA
Their Proposed Merger is Approved, as a)	Case No. 11-354-EL-ATA
Merged Company (collectively AEP Ohio))	
for Tariff Approval.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	
Ohio Power Company, Individually and, if)	Case No. 11-356-EL-AAM
Their Proposed Merger is Approved, as a)	Case No. 11-358-EL-AAM
Merged Company (collectively AEP Ohio))	
for Approval to Change Accounting Methods.)	

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Residential consumers of Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”) (collectively, “AEP Ohio” or “Companies”) must receive adequate service at reasonable rates under Ohio law. As part of its advocacy in protecting such residential customer interests, the Office of the Ohio Consumers’ Counsel (“OCC”) files this application for rehearing of the December 15, 2011 Entry Nunc Pro Tunc. That Entry modified the December 14, 2011 Opinion and Order issued by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) in the above-captioned proceedings. OCC is authorized to file this application for rehearing under R.C. 4903.10

and Ohio Adm. Code 4901-1-35 (as well as under paragraph V(D) of the Stipulation dated November 23, 2011.

The PUCO's Entry Nunc Pro Tunc materially modified¹ the Stipulation and Recommendation ("Stipulation") filed in this case on November 23, 2011. The material modification is the Commission ordered that AEP Ohio's distribution rates be adjusted, *effective January 1, 2015*, to rates which are consistent with the rate design recommended in the Staff Reports. The stipulating parties, including the PUCO Staff, however had expressly agreed to continue the Companies' distribution rate design, however, and not adopt the principles of rate design recommended in the Staff Report. Under the Stipulation the "distribution rate design (the structure including design of blocks and the charges herein) for CSP and [OP] residential customers will remain the same as currently offered."² That current distribution rate design was attached as Attachment X to the Stipulation. Thus, the Commission's material modification--adjusting residential customers' rates on January 15, 2015, to implement the Staff Report rate design, that was not supported by any party, including the Staff--directly conflicts with the Stipulation and Recommendation.

The Entry Nunc Pro Tunc was unreasonable and unlawful in the following respects:

- A. The Commission erred in modifying the terms of the Stipulation by ordering "adjustments," to residential distribution rates effective January 1, 2015 without following the mandatory requirements of R.C. 4909.18. R.C. 4909.18 requires, *inter alia*, the utility to file an application to "modify, amend, change, increase or reduce any

¹ Under footnote 9 to the Stipulation and Recommendation, any signatory party has the right "in its sole discretion, to determine what constitutes a 'material' change for the purposes of that Party withdrawing from the Stipulation."

² See Stipulation and Recommendation at ¶E, page 10.

existing rate” and affords parties the opportunity to object to the proposal, before the proposal takes effect.

- B. The Commission erred in materially modifying the terms of the Stipulation and ordering the PUCO Staff’s rate design to be effective beginning January 1, 2015 (unless ordered otherwise), when there are no facts in the record to support such adjustments to residential distribution rates, in violation of R.C. 4903.09.
- C. The Commission erred by not adopting the Stipulation’s requirement that the existing rate design will be in effect after the expiration of decoupling and further erred by ordering instead that the PUCO Staff Report rate design be implemented on January 1, 2015. The Entry Nunc Pro Tunc was unreasonable under the PUCO’s standards for review of settlements, as it disregarded the carefully balanced compromise reached under the Stipulation, that as a package, benefited customers and the public interest.

The reasons in support of these grounds for this application for rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On November 23, 2011, a number of parties reached a Stipulation to resolve the above captioned cases. On December 14, 2011, the Commission issued an Opinion and Order adopting, but modifying the Stipulation. Those modifications included, *inter alia*, the requirement that AEP Ohio's residential distribution rates will be adjusted, *at some future point*, to bring them into consistency with the rate design recommended in the Staff Reports. Such a rate design was specifically rejected under section E of the Stipulation and Recommendation. Section E of the Stipulation declared instead that the distribution rate design will remain the same as currently offered.

On December 15, 2011, the Commission modified its Opinion and Order by an Entry Nunc Pro Tunc. That Entry specifically addressed the Commission's distribution rate design modifications. It revised the Opinion and Order by *inter alia* specifying an "effective date" when the distribution rates of OP and CSP's residential customers would be automatically adjusted:

The first full paragraph on page 10 of the December 14, 2011, Opinion and Order, contains a sentence stating that "[s]econd, unless otherwise ordered by the Commission, AEP-Ohio's residential distribution rates will be adjusted, on a revenue neutral basis, to rates which are consistent with the rate design recommended by Staff in the Staff Reports and which will produce the annual revenue requirement agreed to in the Stipulation." This sentence on page 10 should be revised to include the effective date and should read as follows: "Second, unless otherwise ordered by the Commission, AEP-Ohio's residential distribution rates will be adjusted, effective January 1, 2015, on a revenue neutral basis, to rates which are consistent with the rate design recommended by Staff in the Staff Reports and which will produce the annual revenue requirement agreed to in the Stipulation."³

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of any order, "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." On December 15, 2011 the Entry Nunc Pro Tunc was issued, which revises the earlier December 14, 2011 Opinion and Order issued by the Commission.

³ Entry Nunc Pro Tunc at 2.

OCC filed a motion to intervene in this proceeding on February 4, 2011, which was granted in the March 23 Entry. OCC also filed testimony regarding both the Application and the Stipulation, and participated in the hearing on the Stipulation.

R.C. 4903.10 requires that an 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.” In addition, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 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.” The statute also provides: “If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard for modifying the Commission’s Entry Nunc Pro Tunc is met here.

III. ARGUMENT

On December 15, 2011, the Commission modified its Opinion and Order by an Entry Nunc Pro Tunc. That Entry specifically changed the implementation of the distribution rate design that was earlier ordered in the Opinion and Order. It was unreasonable and unlawful in the following respects.

- A. **The Commission erred in modifying the terms of the Stipulation by ordering “adjustments,” to residential distribution rates effective January 1, 2015 without following the mandatory requirements of R.C. 4909.18. R.C. 4909.18 requires, *inter alia*, the utility to file an application to “modify, amend, change, increase or reduce any existing rate” and affords parties the opportunity to object to the proposal, before the proposal takes effect.**

Whenever a public utility wishes, *inter alia*, to modify, amend, or change its rates, the utility must file an application with the Commission, pursuant to R.C. 4909.18 to accomplish the change. R.C. 4909.18 states:

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or *to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same,* shall file a written application with the public utilities commission.

Nonetheless, before the commission may permit the filing of schedules to accomplish rate modifications, amendments, or changes, parties are given the opportunity to argue that the application is unjust and unreasonable: “If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing * * *. After such hearing, the commission shall, where practicable issue an appropriate order within six months from the date the application was filed.” This statutory framework affords interested persons notice of proposed rate changes and an opportunity to be heard, even if the changes are “revenue neutral” and are not for an increase in rates.

The notice of and an opportunity to object to proposed rate changes is an opportunity that will be denied in these cases. This is because the Commission’s Entry Nunc Pro Tunc automatically approves a “revenue neutral” residential

distribution rate adjustment on January 1, 2015, with no application being filed by the Company, and no opportunity to object to the proposed changes. The Commission's Entry Nunc Pro Tunc orders a January 1, 2015 adjustment to the Companies' residential distribution rates in a manner that is inconsistent with R.C. 4909.18.

The Entry Nunc Pro Tunc states:

Second, unless otherwise ordered by the Commission, **AEP-Ohio's residential distribution rates will be adjusted, effective January 1, 2015**, on a revenue neutral basis, to rates which are consistent with the rate design recommended by Staff * * *.⁴

The Commission by its order is adjusting the Companies' residential distribution rates, effective January 1, 2015, without the filing of an application pursuant to R.C. 4909.18. And there is no opportunity for interested parties to object to the changes in rates and argue they are unjust and unreasonable. Therefore, the Commission's order is unlawful, and the OCC's Application for Rehearing should be granted.

The Commission lacks authority to disregard the legal requirements of R.C. 4909.18. There are no exceptions to these statutory requirements. The Commission is a creature of statute and lacks authority to deviate from the statutory requirements related to ratemaking. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1. If the Commission denies OCC's Application for Rehearing on this important issue, then the procedural safeguards required by statute will be side-stepped under the Entry Nunc Pro Tunc.

⁴ Entry Nunc Pro Tunc at 2. (Emphasis added).

The Supreme Court of Ohio has previously stated its great concern over the wielding of power by administrative agencies in the absence of procedural integrity that satisfies due process requirements. Quoting *Ohio Bell Tel. Co. v. Pub. Util. Comm. Of Ohio* (1937), 301 U.S. 292, 304-305, the Ohio Supreme Court approvingly stated the great need in regulatory proceedings “* * * that the inexorable safeguard * * * of a fair and open hearing be maintained in its integrity. * * *. The right to such a hearing is one of the ‘rudiments of fair play’ * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement.” *State, ex rel., Ormet Corp. v. Industrial Commission of Ohio* (1990), 54 Ohio St.3d 102, 103. The required procedural integrity was absent when the Commission’s Entry Nunc Pro Tunc was issued. That Entry imposes an automatic adjustment to residential customers’ distribution rates, effective January 1, 2015, without assuring interested parties the procedural safeguards that are in place, and triggered by a utility application to adjust rates.

The Commission’s unilateral decision to adjust rates effective January 1, 2015, relieves AEP Ohio of filing an application, and side-steps the procedural safeguards that are in place in Ohio law. Moreover, it expressly contradicts the terms of the Stipulation. Under the Stipulation the distribution rate design “(including the design of blocks and the charges therein) for CSP and OPC residential customers will remain the same as currently offered.”⁵

Further, the Stipulation required that any “change” to distribution base rates “upon expiration of the rates agreed to in this stipulation shall occur only pursuant to an

⁵ Stipulation and Recommendation at IV.E), page 10.

application for establishing rates filed under R.C. 4909.18.”⁶ The rates agreed to in the Stipulation terminate on May 31, 2015.⁷ Clearly, these provisions of the stipulation make it clear that up through May 31, 2015 there were to be no changes in the rate design and that any changes post May 31, 2015, would require adhering to the statutory process of R.C. 4909.18. The Commission’s order is a doubly problematic for customers. It allows changes as soon as January 1, 2015 and permits the changes to be made without the process agreed to--process that is required under R.C. 4909.18. Therefore, the Commission has violated Ohio law and OCC’s Application for Rehearing should be granted.

B. The Commission erred in materially modifying the terms of the Stipulation and ordering the PUCO Staff’s rate design to be effective beginning January 1, 2015 (unless ordered otherwise), when there are no facts in the record to support such adjustments to residential distribution rates, in violation of R.C. 4903.09.

The Signatory Parties to the Stipulation agreed to a revenue decoupling mechanism for the residential and small commercial customers’ rate design, as a pilot. The Stipulation stated

The Signatory Parties agree to the creation of a decoupling pilot program (Pilot). To facilitate the Pilot, the Companies shall submit to the Commission compliance tariffs to establish the Pilot Throughput Balancing Adjustment Rider applicable to the Residential and GS-1 tariff rate schedules. The Pilot will be for the calendar years 2012, 2013 and 2014 and annual increases attributable to the Pilot shall be capped at 3% of the total annual distribution revenues for a customer class. There shall be no cap of annual rate decreases to customers attributable to the Pilot. The detailed description of the Pilot is shown in Attachment Y.⁸

⁶ Id at IV A) 2, page 6.

⁷ Id at page 5.

⁸ Stipulation at 10.

The Stipulation recommended the implementation of the decoupling mechanism as a pilot program for a three-year period – 2012 through 2014.

The rate design with the decoupling mechanism was recommended to the Commission as a pilot. As such, the Signatory Parties were not necessarily recommending such a mechanism for all time. It was recommended to the Commission over a discrete three-year period. The Parties recommended that once the pilot was complete, “the existing distribution rate design (the structure including design of blocks and the charges herein) for CSP and [OP] residential customers will remain the same as currently offered.”⁹ Furthermore, the Parties recommended that any rate changes after the pilot period be accomplished only through an application filed with the Commission, consistent with R.C. 4909.18.

But, the Commission, in its Entry Nunc Pro Tunc, however, has ordered an adjustment to the Companies’ residential distribution rates on January 1, 2015, without record support to demonstrate that such adjustments will result in just and reasonable rates as required by Ohio law.¹⁰ The Entry Nunc Pro Tunc states:

Second, unless otherwise ordered by the Commission, AEP-Ohio's residential distribution rates will be adjusted, effective January 1, 2015, on a revenue neutral basis, to rates which are **consistent with the rate design recommended by Staff in the Staff Reports and which will produce the annual revenue requirement agreed to in the Stipulation.**¹¹

Before adjusting the residential distribution rates and replacing them with another rate design on that date, there must be facts in evidence that warrant the establishment of

⁹ See Stipulation and Recommendation at ¶E, page 10.

¹⁰ R.C. 4909.15.

¹¹ Entry Nunc Pro Tunc at 2. (Emphasis added).

a new rate design—even if it is one that was recommended by the Staff in the Staff Report (before the Staff yielded this recommendation by signing the settlement).¹² At the time of the Entry Nunc Pro Tunc there were no facts in evidence on the record documenting the benefits or detriments of the proposed rate design in the Staff Reports. Nor are there facts in the record which will enable adjustments to rates that are “consistent with the rate design recommended by the Staff.” And there is nothing to establish that such rate changes on January 1, 2015, will result in just and reasonable rates under R.C. 4909.18.

Ohio law requires the Commission to issue a written order based upon findings of fact. R.C. 4903.09 states:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

The Entry Nunc Pro Tunc, however, does not contain findings of fact that prompted the Commission’s decision to implement, on January 1, 2015, the principles of rate design put forth in the Staff Report. That is because there is nothing on the record to support the Staff’s original recommendation—which is now not even the Staff’s recommendation. Stated again, there is no signatory party, including the Staff, that supports such a rate design proposal for these cases.

¹² While the Staff Report is in evidence, there is no party that supports the rate design proposal in the Staff report, not even the PUCO Staff. The Staff, in signing on as a Signatory Party, agreed to forego its proposed rate design. The Company, whose proposal for rate design was adopted by the Staff, also agreed to forego its proposed rate design. The Companies’ testimony supporting the rate design proposal was specifically left out of the record, as was OCC’s testimony opposing such a rate design. This was all done in the context of reaching a carefully balanced settlement agreement.

Nor does the Entry Nunc Pro Tunc provide any factual findings, per R.C. 4903.09, that will enable the rate adjustments to be made that are consistent with the unsponsored rate design recommended in the Staff Report. The Staff Report does not show the level of customer charge and volumetric charge *at the agreed upon stipulated revenue requirement*. The Staff Report is based instead upon a revenue requirement that differs from the stipulated revenue requirement. Thus, one cannot simply take the customer charge and volumetric charge reported in the Staff Report and insert it into the Companies' stipulated rates. Hence no record exists to transform what are the Staff's principles of rate design--principles it willingly set aside in pursuit of a stipulation--into an actual customer charge and volumetric rate.

Even, if there was record support for a discrete customer charge and volumetric charge at the stipulated revenue requirement (which there is not), there is no evidence that would support a finding that making rate adjustments on January 1, 2015 is just and reasonable as required under R.C. 4909.18. The Entry Nunc Pro Tunc therefore is unlawful.

It should also be pointed out that in its December 14, 2011 Opinion and Order the Commission recognized the importance of having a record containing sufficient facts to evaluate the impact of the rate design proposal (decoupling) on customers. Indeed, with respect to the rate decoupling proposal, it took steps to address the sufficiency of the evidence, by ordering the Signatory Parties to provide a "detailed proposal regarding the type of data proposed to be obtained, how the data will be obtained and the metrics to evaluate the success of the pilot program." It nonetheless neglected to subject the Staff

Report rate design proposal to such rigor, but in the Entry Nunc Pro Tunc ordered it to automatically replace the decoupling mechanism on January 1, 2015.

The Staff's rate design principles, which Staff agreed to forego in signing on as a Signatory Party, would move customers toward a straight fixed variable rate ("SFV") design with a significantly increased customer charge and a decreased volumetric charge. The adoption of SFV has been controversial; although it has been instituted for gas rates, it has not been used for electric rates. Indeed, the Commission has opened a generic docket intended to investigate appropriate rate design for electric utilities¹³ and is considering both SFV and decoupling. The Commission mentions this 2010 Generic Docket in its Opinion and Order. The Commission stated:

The Commission also notes that we have opened a proceeding to investigate the appropriate rate design to properly align the interests of utilities and consumers in support of the state policy regarding energy efficiency. In Matter of Aligning Electric Distribution Utility Rate Structure with Ohio's Public Policies to Promote Competition, Energy Efficiency and Distributed Generation, Case No. 10-3126-EL-UNC.¹⁴

From a review of the Entry in the 2010 Generic Docket it appears that the Commission is interested in gathering facts: "to facilitate that review, the Commission establishes through this entry a process to gather additional facts, solicit presentations from diverse viewpoints and encourage public comment on questions of policy."¹⁵

However, in these cases, before any facts are in or cited by the Commission in its Entry Nunc Pro Tunc, the Commission has ordered that on January 15, 2015, the

¹³ In the Matter of Aligning Electric Distribution Utility Rate Structure With Ohio's Public Policies to Promote Competition, Energy Efficiency, and Distributed Generation, Case No. 10-1036-EL-UNC, Entry at 1 (December 29, 2010).

¹⁴ Opinion and Order at 9.

¹⁵ Id. at 1.

decoupling mechanism will be replaced by “the rate design recommended by Staff in the Staff Reports” -- a rate design that moves the Companies toward the SFV rate design. And it is a rate design that is not supported by any signatory party to this proceeding. Inasmuch as the Commission has no record support for its Entry Nunc Pro Tunc (or the Opinion and Order that the Entry Nunc Pro Tunc stands to change), the Entry Nunc Pro Tunc is therefore, unlawful.

- C. The Commission erred by not adopting the Stipulation’s requirement that the existing rate design will be in effect after the expiration of decoupling and further erred by ordering instead that the PUCO Staff Report rate design be implemented on January 1, 2015. The Entry Nunc Pro Tunc was unreasonable under the PUCO’s standards for review of settlements, as it disregarded the carefully balanced compromise reached under the Stipulation, that as a package, benefited customers and the public. .**

In the Entry Nunc Pro Tunc the Commission materially altered the Stipulation and Recommendation by ordering that the PUCO Staff Report rate design principles be implemented on January 1, 2015. That directly conflicts with two separate terms of the Stipulation. The first term of the stipulation that is modified by the Entry Nunc Pro Tunc is that the distribution rate design for CSP and OPC’s residential customers “will remain the same as currently offered.”¹⁶ The second term of the stipulation modified is that “[a]ny change to distribution base rates upon expiration of rates agreed to in this stipulation shall occur only pursuant to an application for establishing rates filed under R.C. 4909.18.”¹⁷ Rates agreed to under the stipulation expire not on January 1, 2015, but

¹⁶ Stipulation and Recommendation at IV E).

¹⁷ Id. at IV A) 2.

on May 31, 2015, when the increase in the distribution base revenue requirement of \$46.656 million terminates, along with the distribution investment rider.¹⁸

The changes made by the Commission upset the careful balance reached by the stipulating parties. OCC, for instance, filed objections and extensive testimony opposing the Staff Report rate design. OCC's objections, however, were withdrawn on the basis of the agreement reached.¹⁹ The PUCO Staff, which presented recommendations on rate design in the Staff Report, agreed to forego their recommendations on the basis of reaching a compromise. The Companies in turn, though proposing changes to their existing rate design in their Application, agreed to forego their rate design proposal. All these compromises were made in order to reach resolution of a myriad of issues in this case.

And now, the Commission seeks to upset the carefully crafted balance by changing the rate design specifically agreed to for residential customers of CSP and OPC. Settlement agreements, while not binding upon the Commission, are accorded substantial weight.²⁰ This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered. Here, the Stipulation resolved all issues presented in the proceeding, as well as issues presented in other proceedings²¹ And the Stipulation was unopposed by any party. Indeed, the PUCO's own Staff was a signatory party.

¹⁸ Id.; see also footnote 5.

¹⁹ Id. at IV L).

²⁰ See *Consumers Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123 at 125.

²¹ The Stipulation resolved an issue of double recovery presented by the stipulation in the Companies' ESP proceeding, Case No. 11-346-EL-SSO.

Yet, the PUCO failed to accord substantial weight to the carefully crafted Stipulation. It materially changed the Stipulation, when it should not have. The rate changes if permitted, will likely increase customer charges to residential customers, when no Signatory Party supports such an increase. The Commission's actions here were unreasonable and conflict with its own precedent that accords substantial weight to the terms of a settlement agreement. Rehearing should be granted, and the Commission should uphold the agreement that the Signatory Parties reached. Changes to the design of rates for residential customers should not be made on January 1, 2015. And any changes to rate design (which are not recommended) must only be made in accordance with R.C. 4909.18.

IV. CONCLUSION

To protect consumers, the Commission should grant OCC rehearing and modify the Entry Nunc Pro Tunc as recommended by OCC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 17th day of January 2012.

/s/ Maureen R. Grady _____
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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.