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 for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144.	)))))	Case No. 11-4921-EL-RDR

MOTION TO REJECT CERTAIN OF AEP OHIO'S PROPOSED RATES AND TARIFFS
OR, IN THE ALTERNATIVE,
MOTION TO STAY AEP OHIO'S COLLECTION OF PHASE-IN RECOVERY RIDER RATES FROM CUSTOMERS
OR
MOTION FOR AEP OHIO TO COLLECT PHASE-IN RECOVERY RIDER RATE SUBJECT TO REFUND
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
APPALACHIAN PEACE AND JUSTICE NETWORK

The Office of the Ohio Consumers' Counsel, on behalf of AEP Ohio's 1.2 million residential consumers, and the Appalachian Peace and Justice Network, a not for profit organization whose members include low-income customers in southeast Ohio (collectively, "Movants"), file this pleading in order to protect customers of CSP and OP (collectively, "AEP Ohio") from paying excessive rates for electric service and to preserve a remedy for the unjust collection of provider of last resort charges ("POLR"), consistent with the OCC/IEU appeal[1] of the Remand Order[2] to the Ohio Supreme Court.

Movants request that the Public Utilities Commission of Ohio ("PUCO" or "Commission") reject portions of the compliance filing that do not comply with the Commission Order to continue the rates and tariffs from their first Electric Security Plan ("ESP"), as discussed below. In particular, Movants object to the unauthorized implementation of a phase-in recovery rider ("PIRR"); the provisions of the rider that permit it to be collected at the weighted average cost of capital ("WACC"); and the provisions in the rider that fail to reduce the dollars to be collected by accumulated

[1] Supreme Court Case No. 12-0187.

[2] *In the Matter of the Application of Columbus S. Power Co*., Pub. Util. Comm. No. 08-917-EL-SSO, ("ESP 1 Remand Order") Opinion and Order (Oct. 3, 2011).

deferred income tax. The result is that the PIRR is being collected from customers although it has not been authorized and without the PUCO determining that the rates that make up the PIRR are reasonable and just, to the detriment of AEP Ohio's customers.

Alternatively, Movants request that if the PUCO does not reject AEP Ohio's proposed phase-in recovery rider as a portion of "continued" ESP 1 rates, the PUCO should act to protect consumers from paying the phase-in recovery rider rates. The rates sought to be collected through the phase-in recovery rider are a derivative of ESP 1 rates, having been created through deferral accounting that was authorized in conjunction with capped rates. However, the deferrals and the resulting PIRR rates are excessive and unjustified as a direct result of including unjustified POLR charges in the capped rates collected from customers from April 2009 through May 2011. These are the same unjustified POLR charges that the Ohio Supreme Court found to be unlawful,[3] and the PUCO in the Remand Order found to be unjustified.[4]

The PUCO has the authority and responsibility to take action to protect customers. It can do so simply by rejecting the provisions of the compliance tariffs which seek to implement the PIRR. It can also do so by exercising any one of the following powers it has over CSP and OP. The Commission can issue an order to stay collection of the PIRR rates; or it can order the PIRR rates be collected, subject to refund, pending outcome of the Supreme Court appeal.

[3] *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 519-520.

[4] *In the Matter of the Application of Columbus S. Power Co.*, Pub. Util. Comm. No. 08-917-EL-SSO, 2011 Ohio PUC LEXIS 1084.

Exercising any one of these options will prevent injury to the interests of the public and will prevent irreparable harm to customers.

The reasons for granting these motions are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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On Behalf of the Appalachian Peace and Justice Network

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A. The Commission's Rejection of the Stipulated ESP

On December 14, 2011, the PUCO issued an Opinion and Order[5] that modified and adopted a September 7, 2011 partial Stipulation and Recommendation in the above-captioned proceedings involving the AEP Ohio second ESP. That Stipulation was intended to resolve a number of AEP Ohio proceedings, including AEP Ohio's second ESP application.[6] The Stipulation was opposed by a number of parties, including OCC and APJN, IEU Ohio, and FirstEnergy Solutions. A number of parties applied for rehearing of the PUCO's Opinion and Order.

On February 23, 2012, the Commission issued an Entry on Rehearing that revoked the Stipulation.[7] The Commission determined that, upon consideration of the arguments presented on rehearing, the Stipulation "does not benefit ratepayers and the public interest and thus, does not satisfy our three-part test for the consideration of stipulations."[8] The Commission then found that the application modified by the Stipulation must be disapproved.[9]

After citing to the specific provisions of R.C. 4928.143(C)(2)(b) that it considers as controlling, the Commission directed AEP Ohio to file, no later than February 28, 2012,

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[5] *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order (Dec. 14, 2011) ("ESP 2").

[6] Stipulation and Recommendation (Sept. 7, 2011).

[7] ESP 2, Entry on Rehearing (Feb. 23, 2012).

[8] Id. at ¶10.

[9] Id. at ¶20.

new proposed tariffs. The PUCO noted that the new tariffs are to "continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP 1, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case."[10]

On February 28, 2012, AEP Ohio filed a "compliance filing" to implement the "continued" ESP I rates and tariffs. AEP Ohio indicated that it could incorporate the necessary rate changes into its billing system after receiving the PUCO's approval of the compliance tariffs. [11]

Notably, AEP Ohio in its compliance tariffs seeks to implement the PIRR "as approved in the ESP I" with the new PIRR rates being collected from all customer classes. The "new" PIRR rates are designed to collect from customers the regulatory asset balance created under ESP 1 rates over the remaining 82 months of the amortization period.[12]

B. The PIRR Tie-In to the OCC/IEU Ohio Appeal

On April 19, 2011, the Ohio Supreme Court issued a ruling on the OCC and IEU appeal[13] from this Commission's March 18, 2009 Opinion and Order in AEP Ohio ESP 1

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[10] Id.

ESP 2, Compliance Filing Enclosure Letter at 1 (Feb. 28, 2012).

[12] Id. at 2.

[13] *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512.

proceeding.[14] The Supreme Court reversed the PUCO on three grounds -- retroactive ratemaking, provider of last resort charges, and carrying charges on environmental investment.[15] Two of these issues -- POLR charges and carrying charges on environmental investment -- were remanded to the PUCO.[16]

The Commission subsequently conducted an evidentiary hearing which commenced on July 15, 2011, and concluded with rebuttal testimony on July 28, 2011. On October 3, 2011, the PUCO issued Remand Order in the ESP 1 case. The PUCO concluded that although given the full opportunity to present evidence, the utility failed to provide any evidence of its actual POLR costs.[17] The Commission directed AEP Ohio to refund the POLR charges collected subject to refund since the first billing cycle in June 2011. Specifically AEP Ohio was ordered to apply that amount to any deferrals in the fuel adjustment accounts on each of the utility companies' books as to the date of the Order, with the remaining balance to be credited to customers beginning with the first billing cycle in November 2011.[18]

With respect to the $367 million (plus carrying charges) of POLR charges collected from April 2009 through May 2011, however, the Commission declined to apply that POLR revenue to offset the deferrals in the fuel adjustment accounts as requested by OCC and IEU-Ohio. Such a proposed adjustment "would be tantamount to unlawful retroactive ratemaking" it concluded.[19] The Commission noted that it "cannot

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[14] *In the Matter of the Application of the Columbus Southern Power Co.*, Case No. 08-917-EL-SSO et al.

[15] Id.

[16] Id. at ¶30.

[17] Remand Order at 18-24.

[18] Id at 38.

[19] Id. at 36.

order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified."[20]

Among others, OCC and Ohio Partners for Affordable Energy ("OPAE") (jointly), IEU-Ohio, and AEP Ohio applied for rehearing. By its Entry on Rehearing, dated December 14, 2011, the Commission denied both OCC/OPAE's Application for Rehearing, as well as IEU Ohio's. On February 1, 2012, IEU Ohio filed a Notice of Appeal. The Supreme Court docketed the appeal as Case No. 12-187. On February 10, 2012, OCC file a Notice of Appeal.

The unlawful charges that the appeals seek to remedy are a derivative of the ESP 1 rates that AEP Ohio seeks to collect through the PIRR. The ESP 1 rates can be properly described as residual rates because they were created through deferral accounting that was intended to moderate or phase-in the ESP rate increases. The deferral accounting approved in ESP 1 allowed regulatory assets to be created in order to maintain capped ESP 1 rates for a three-year period. This is because the capped ESP 1 rates consisted of all elements[21] of the Commission approved ESP 1, including the unjustified POLR charges. Thus, on a dollar-for-dollar basis, the deferrals were overvalued by the approximately $367 million (plus carrying charges) of unjustified POLR charges collected from customers from April 2009 through May 2011. These are the very same deferrals which AEP now seeks to collect from customers through its PIRR as part of its "continued" ESP I rates.

[20] Id.

[21] There were ESP provisions that were not considered part of the rate cap. These provisions included distribution base rate increases, the transmission cost recovery rider, and future adjustments to the energy efficiency/peak demand rider. See Entry on Rehearing at ¶27-28 (July 23, 2009).

II. THE COMMISSION SHOULD REJECT PORTIONS OF AEP OHIO'S COMPLIANCE FILING PERTAINING TO THE PHASE-IN RECOVERY RIDER.

A. A Phase-In Recovery Rider Should Not Be Approved As Part of the Continued ESP 1 Rates.

Although AEP Ohio seeks to collect a PIRR from customers as a part of its continued ESP 1 rates, a review of the ESP I Order reveals that the PUCO did not approve a specific mechanism to collect the phase-in deferrals. Rather the Commission merely authorized a three-year phase-in of ESP rates, which was accomplished by granting the utility accounting authority to create deferrals and regulatory assets for the fuel adjustment expenses incurred above the rate caps. Collection of any of these deferrals with carrying costs was to occur during the 2012 through 2018 period, the Commission ordered.[22]

There was nothing, however, about the Commission's ESP 1 Order that was self-executing. By approving the deferral accounting, the PUCO was not specifically approving rates to collect the deferrals. The Ohio Supreme Court and the PUCO have consistently recognized that accounting and ratemaking are not functionally equivalent[23] and accounting orders are not conclusive for ratemaking purposes.[24] AEP Ohio was to follow up with a subsequent filing to seek approval to implement a mechanism to collect the deferrals beginning in 2012. In such a process, the PUCO would approve a method for collection, and would examine the deferral balance and carrying charges to determine if the balance and carrying charges were appropriate and whether the deferrals were related to ESP I prudently incurred costs of fuel.

[22] ESP 1 Order at 20-24 (Mar. 18, 2009).

[23] See e.g. *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 104.

[24] See *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305, 309.

It was apparent that AEP Ohio understood this as well since they filed two separate applications (Ohio Power and Columbus Southern Power Company) to implement a mechanism to collect the deferrals on September 1, 2011. The cases were docketed as Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR ("Phase-In Rider cases"). Subsequently, the Stipulating Parties in the ESP 2 cases moved to consolidate (for hearing purposes) the phase-in rider cases with the ESP 2 Stipulation hearing.[25] The Attorney Examiner on September 26, 2011 granted the motion and stayed the procedural schedule in the Phase-In Rider cases (and others) until the PUCO ordered otherwise.[26] That procedural schedule for the Phase-In rider cases remains stayed, as the PUCO has not ordered otherwise.

Thus, it is clear that the Commission needs to consider the appropriateness of the PIRR (including the level of the deferrals, the carrying costs, whether the deferrals are tied to prudently "incurred" costs of fuel, etc.). It would be a procedural mistake to rush review of the PIRR—that would collect an incredible amount of money from customers—through the compliance filing and approve this significant rate increase ($577 million OP's customers, $7 million CSP's customers) through a compliance filing. Rather the Commission should utilize the appropriate PIRR dockets where AEP Ohio filed applications for the PUCO to consider a mechanism to implement the phase-in fuel deferrals. This would provide parties the opportunity to sufficiently review the PIRR and challenge the details of implementation through an established process.

[25] Motion to Consolidate (Sept. 30, 2011).

[26] ESP 2 Entry (Sept. 26, 2011).

B. The Phase-In Recovery Rider, If Implemented, Should Be Collected From Customers At The Utility's Long-Term Cost Of Debt Only, And Not At Its Much Higher Weighted Average Cost Of Capital. Additionally, The Deferrals Should Be Reduced To Reflect Accumulated Deferred Income Taxes.

As indicated above, the PUCO should not approve the PIRR in AEP Ohio's compliance filing, on the basis that the compliance filing is not the appropriate forum. Assuming *arguendo*, however, that the PIRR is an appropriate provision in AEP Ohio's compliance filing, the Commission should adjust the PIRR to account for two corrections to the mechanism.

First, the Commission should order that once collection of the PIRR begins, the carrying charges on the deferrals should be reduced to the long-term cost of debt, rather than the WACC. Consistent with PUCO precedent, once deferral amortization has begun, it is appropriate to drop down to a carrying charge of long -term debt.[27] This reflects the fact that once the deferral collection has begun, the risk of recovery is significantly lessened, making a lower cost of capital (long term cost of debt) more appropriate.

Second, although the carrying costs included in the PIRR are calculated without a reduction for accumulated deferred income tax, doing so is unreasonable. During the deferral period, the balance on which the carrying charges are accrued should be reduced by the applicable deferred taxes. The deferred expenses create a deferred tax obligation that reduces a utility's current tax expense. AEP Ohio will only need to rely on short-term debt borrowed from the capital market to support the net of tax balance of deferred expenses until the expense is collected from customers. If AEP Ohio is permitted to

[27] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider,* Case No. 10-176-EL-ATA, Opinion and Order at 24 (May 25, 2011).

accrue carrying charges on the gross balance, and collect that from customers, it will be over-collecting the actual carrying charges of these expense balances.

Restricting the carrying charges to a net of tax basis is consistent with the PUCO's ruling on this issue in the FirstEnergy standard service offer case.[28] There the Commission accepted arguments by the OCC and the PUCO Staff, finding that the calculation of carrying charges on a net of tax basis is in accordance with "sound ratemaking theory" as well as Commission precedent.[29] The PUCO should honor its precedent and again rule that carrying charges should be calculated on a net of tax basis.

III. THE COMMISSION SHOULD PROTECT CONSUMERS FROM PAYING THE PHASE-IN RECOVERY RIDER DURING THE PENDING OHIO SUPREME COURT APPEALS

In order to prevent injury to the interests of the public and avoid irreparable harm to customers, the Movants file these Motions to request the PUCO to exercise its discretionary power under Title 49 of the Revised Code to protect the customers of AEP Ohio. The Commission's authority to take action to protect customers can be found under various statutes and case precedent.[30]

If the PUCO takes no action to stop the PIRR, AEP Ohio's customers will be required to pay ESP 1 rates which are based on POLR charges that the Court and the PUCO both found were unlawful and unjustified. As each day goes by where customers are

[28] *In re FirstEnergy ESP Case*, Case No. 08-935-EL-SSO, Opinion and Order (Dec. 19, 2008).

[29] Id. at 58(citing to *Cleveland Electric Illuminating Co*., Case No. 88-205-EL-AAM, Entry (Feb. 17, 1988), ordering carrying charges for Perry nuclear power plant to be net of taxes) *and In re Cleveland Electric Illuminating Co*., Case No. 92-713-EL-AAM, Entry (Dec. 17, 1992)(ordering carrying charges on deferred program costs to be on a net of tax basis).

[30] See for example, *In re Columbus & Southern Ohio Electric Co*., Case No. 83-1058-EL-AIR, Entry (November 17, 1982); *Cinnamon Lake Utilities Co. v. Pub. Util. Comm*., 42 Ohio St.2d 259 (1975), where the Ohio Supreme Court noted that R.C. 4909.16 exists to protect the public interest as well as the interests of the public utility.

paying rates under the PIRR, the ability to adjust the remaining deferrals in the fuel adjustment account diminishes. If residual ESP 1 rate collection goes forward, it may become difficult to preserve the ability to fully remedy the unjustified collection of $367 million of POLR. This is important in the event the Court reverses the PUCO, and finds that it can address the unlawful POLR collection by netting collection of POLR against the deferred PIRR balance. However, if the PIRR deferrals continue to be collected, the ability to remedy a $367 million (plus carrying charges) of over-collection may be in jeopardy.

Indeed, the Court recognized there is an apparent unfairness when a decision is determined to be unlawful (retroactive ratemaking), and customers get no refund of charges unlawfully collected.[31] However, if the PUCO stays the collection of the entire PIRR, or collects PIRR rates subject to refund, the Commission can avoid further unjust results. Accordingly, the Commission should either stay its collection, or collect the PIRR subject to refund.

A. The Law

1. Stay of a Commission order

The Commission has noted that there is no controlling precedent in Ohio setting forth the conditions under which the Commission will stay one of its own orders.[32] The Commission, however, has favored the four-factor test governing a stay that was supported in a dissenting opinion by Justice Douglas,[33] and which has been deemed appropriate by courts when determining whether to stay an administrative order pending

[31] See *In re: Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶15-21.

[32] See *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (February 20, 2003) ("Access Charge Decision") at 5.

[33] See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604.

judicial review.[34] This test involves examining:

(a) Whether there has been a strong showing that movant is likely to prevail on the merits;

(b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;

(c) Where lies the public interest? and

(d) Whether the stay would cause substantial harm to other parties.[35]

As discussed below, the Movants here meet this test.

2. Collection of rates subject to refund

The Commission has acted to prevent harm from occurring by ordering utilities, on an ongoing basis, to collect an existing rate increase subject to refund and subject to appropriate interest charges. The Commission has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. For instance, the Commission granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.[36] In that rate case, one week after the issuance of the PUCO's rate order, the Nuclear Regulatory Commission issued an Order that suspended construction at the Zimmer Nuclear Power Plant ("Zimmer"). The original Opinion and Order included a rate base allowance for construction work in progress ("CWIP") for Zimmer.[37]

In its order setting the rehearing, the Commission approved the utility's filed tariffs but expressly found the portion of the increase granted attributable to Zimmer

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[34] *Access Charge Decision* at 5.

[35] Id.

[36] *In re Columbus & Southern Ohio Electric Co.*, Case No. 83-1058-EL-AIR, Entry (November 17, 1982).

[37] Id., Opinion and Order at 8-14 (November 5, 1982).

CWIP "should be made subject to refund, pending a rehearing on the CWIP issue."[38] A rehearing was held and the Commission ordered that all of the Zimmer costs should be excluded from CWIP. The Commission ordered the utility to file tariffs reducing the total revenue requirements by approximately $13 million.[39] The utility appealed and sought a stay of the Commission's Order on Rehearing from the Ohio Supreme Court. The Supreme Court granted the stay but subsequently affirmed the Commission's denial of a CWIP allowance.[40] The PUCO then ordered refunds (with interest) of the revenues attributable to Zimmer that were collected from customers, subject to refund, since the issuance of the Entry on Rehearing.[41]

Another example where the Commission has collected rates subject to refund involved the Ohio Utilities Company.[42] After a rate order was issued,[43] legislation was enacted that changed Ohio's ratemaking formula. The Commission opened an investigation to determine if the previously established rates were still reasonable in light of the new law.[44] The Commission determined that the rates were excessive, taking into account the new law, and ordered the utility to withdraw its tariffs and file new lower rates consistent with the PUCO's findings.[45] The utility sought a stay of the

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[38] Id., Entry at 1 (November 17, 1982).

[39] Id., Order on Rehearing (March 16, 1983).

[40] *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.*, (1984) 10 Ohio St.3d 12.

[41] *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing at 3 (May 1, 1984).

[42] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

[43] *In the Matter of the Ohio Utilities Co. Application for an Increase in Rates*, Case No. 79-529-WS-AIR, Opinion and Order (January 18, 1977).

[44] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (September 7, 1977).

[45] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Opinion and Order (May 18, 1978).

Commission's order, pending further review, which was granted with the condition that the utility was required to collect rates subject to refund.[46]

B. The Commission Should Grant A Stay To Prevent Collection of the Phase In Recovery Rider as the Grounds for a Stay Are Met.

1. There is a strong likelihood that Movants will prevail on the merits.

On POLR, the Court reversed the order on the basis that the Commission committed error in claiming that the POLR was a cost-based charge, when the evidence did not support such a claim.[47] On remand, the Commission agreed.[48] The POLR charges collected from customers during the ESP term were not justified. What the Commission refused to do, however, was to reduce the deferrals in the fuel adjustment accounts to address the unjustified collection of POLR.

Yet it is clear that the deferred fuel account balance, which constitutes the basis of the PIRR rates, can be adjusted. There is nothing sacrosanct about these deferrals or the fuel clause that created them that make them untouchable. Thus, unlike in *Lucas County Board of Commissioners v. Pub. Util. Comm.*,[49] here there is a mechanism within the ESP residual rates to make adjustments. The PIRR rates are based on deferrals and regulatory assets that AEP Ohio was given accounting authority to create. These fuel

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[46] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (June 7, 1978). The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the Commission (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. Id.

[47] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶24.

[48] *In the Matter of the Application of the Columbus Southern Power Co.*, Case No. 08-917-EL-SSO et al., Order on Remand at 22-24 (Oct. 3, 2011).

[49] 80 Ohio St.3d 344, 686 N.E.2d 501.

adjustment account deferrals and the regulatory assets created can be adjusted or revalued to balance the overpayment of POLR, or credit customers for unlawful charges. Adjustments to the value of deferrals are regularly made by the Commission in numerous cases, including fuel adjustment clause cases.

It is unlikely that the Court will agree with the PUCO that adjusting deferrals or the value of regulatory assets is retroactive ratemaking that is prohibited in a post-SB 221 environment. Based on these factors, there is a strong likelihood that the Movants will prevail on the merits regarding both of these issues on remand.

2. Allowing unlawful rates to be collected pending the appeal would likely cause irreparable harm to AEP Ohio's customers.

Harm is irreparable "when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult, or incomplete.'"[50] In the context of judicial orders, the Supreme Court of Ohio traditionally looks to whether there is an effective legal remedy if the order takes effect, to determine whether to stay the proceedings.[51]

In *Tilberry v. Body*, the Ohio Supreme Court found that the effect of a court order calling for the dissolution of a business partnership would cause "irreparable harm" to the partners because "a reversal … on appeal would require the trial court to undo the entire accounting and to return all of the asset distributions" – a set of circumstances that would be "virtually impossible to accomplish."[52] In *Sinnott v. Aqua-Chem, Inc.*, the Ohio

[50] *FOP v. City of Cleveland* (8th Dist. 2001), 141 Ohio App.3d 63, 81, citing *Cleveland v. Cleveland Elec. Illuminating Co.* (8th Dist. 1996), 115 Ohio App.3d 1, 12, appeal dismissed, 78 Ohio St.3d 1419 (1997).

[51] See, e.g., *Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St. 3d 158, 161.

[52] *Tilberry* (1986), 24 Ohio St. 3d at 121.

Supreme Court found that a lower court's pre-trial findings could be appealed at the point they were issued because the findings allowed the case to proceed to trial.[53] The majority reasoned that "the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,"[54] and so concluded that "[i]n some instances, '[t]he proverbial bell cannot be unrung and an appeal after final * * * judgment on the merits will not rectify the damage' suffered by the appealing party."[55] Here, the bell is ringing loudly that Ohio customers need the PUCO to protect their interests.

Although, as Justice Rehnquist observed, "the temporary loss of income, *ultimately to be recovered*, does not usually constitute irreparable injury,"[56] *Tilberry* and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. Here, Ohio customers, who will be paying the PIRR are confronted with arguments that they cannot recover the unlawful charges they have already paid. So as the PIRR rates continue to be collected, the amount of the deferral balance left to be collected diminishes. At some point, the possibility of fulfilling a Court-ordered full refund of the $367 million POLR charges, plus carrying charges, may be gone unless the Court acts quickly on the appeal (which is outside OCC's or others' control) or the Commission stays the collection of rates.

The Commission can act to protect AEP Ohio customers from this harm. The Commission should stay the collection of PIRR until the appeal before the Supreme Court has been decided.

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[53] *Sinnott* (2007), 116 Ohio St. 3d at 164.

[54] Id. at 163.

[55] Id. at 162 (quoting *Gibson-Myers & Assocs. v. Pearce* (9th Dist.), 1999 Ohio App. LEXIS 5010, *7-*8 (compelled disclosure of a trade secret would "surely cause irreparable harm").

[56] *Sampson v. Murray* (1974), 415 U.S. 61, 90 (Emphasis added).

3. A stay would further the public interest.

In the dissent in the Supreme Court case in which Justice Douglas recommended standards for a stay of a PUCO decision, he noted that PUCO Orders "have effect on everyone in this state -- individuals, business and industry."[57] That effect on customers is all the more pronounced in these difficult economic times when customers can ill afford increases in what they pay for an essential service--electricity. It thus was fitting that Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is "above all in these types of cases, where lies the interest of the public" and that "the public interest [] is the ultimate important consideration for this court in these types of cases."[58]

As discussed above, the stay sought by Movants would prevent irreparable harm to AEP Ohio's customers, with no substantial harm to the utility, as discussed below. In addition, the stay would provide some relief to customers who are already burdened by the fragile state of the economy. The public interest, therefore, would be furthered by a stay of the collection of the rate elements found to be unlawful by the Ohio Supreme Court.

4. A stay would not cause substantial harm to AEP Ohio.

Any harm that AEP Ohio will suffer if they are prohibited from collecting the PIRR is not a legally cognizable harm because it flows from the ultra vires acts of the Commission. There is no entitlement to additional revenues, because the Commission's action in approving the collection of increased rates was an ultra vires act that is

[57] *MCI*, 31 Ohio St.3d at 606.

[58] Id.

prohibited by law. To permit AEP Ohio to claim harm based on not receiving revenues it is not entitled to collect would permit it to be unjustly enriched.

Additionally, a stay of the collection of the PIRR while the appeals are pending will not ultimately preclude AEP Ohio from collecting that charge, should the Supreme Court decline to adjust the ESP 1 rates.[59] It will merely be a matter of timing which does not rise to substantial harm.

C. In the Alternative, the PUCO Should Make the Rate Collections Subject to Refund.

An alternative approach to protecting customers is for the PUCO to make AEP Ohio's PIRR rate collections subject to refund. The PUCO has, in the past, ordered that utility rates should be subject to refund. In 1983, for example, the Commission determined that a portion of the allowance related to Columbus & Southern Ohio Electric Company's construction work in progress ("CWIP") for the Zimmer plant would be collected subject to refund to customers.[60] After the Commission's action was upheld on appeal,[61] the Commission ordered the utility to refund approximately $4.5 million to its customers.[62] The Commission ordered the collection, subject to refund to protect customers in the event of a later decision that the utility was collecting more from customers than warranted by law, rule, or reason.

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[59] See e.g. *In the Matter of the Complaint of the Northeast Ohio Public Energy Council v. Ohio Edison Company*, Case No. 09-423-EL-CSS, Entry at ¶15 (July 8, 2009) (granting a stay and noting that the utility failed to show substantial harm and had not argued that it would be unable to collect switching fees if it ultimately prevailed in the proceeding).

[60] *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

[61] *Columbus & Southern Ohio Electric Co. v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 12.

[62] *In re Columbus & Southern Ohio Electric Co.*, Case No. 81-1058-EL-AIR, Order on Rehearing (May 1, 1984).

The Ohio Supreme Court determined that the POLR rates approved in the ESP 1 case were not supported by record evidence, and remanded that issue to the PUCO for further consideration.[63] The Commission itself found that the POLR rates were not justified.[64] But instead of protecting customers by adjusting the deferrals or revaluing the regulatory assets, the Commission declined to act.[65]

The Commission can act now to prevent further harm during the pendency of the Ohio Supreme Court appeal on this issue by IEU-Ohio and OCC. It should act now to protect consumers. It can protect consumers in any number of ways. It can reject the PIRR as part of the ESP 1 rates to be implemented. It could exercise its emergency powers to suspend implementation of the PIRR. The PUCO could stay the implementation of the PIRR. The Commission could allow the PIRR to be collected subject to refund. Any one of these protections would ensure to the benefit of customers who have since 2009 been unjustly charged for POLR "expenses" that the PUCO determined are non-existent.

IV. CONCLUSION

AEP Ohio's attempt to implement the PIRR through its compliance filing should be rejected. The PIRR should be subject to a more explicit examination in the context of the two phase-in rider proceedings that were implemented by AEP Ohio in September 2011. This will allow for a more thorough examination and will allow parties to sufficiently challenge all aspects of the deferred fuel adjustment expense.

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[63] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶24.

[64] *In the Matter of the Application of the Columbus Southern Power Co.*, Case No. 08-917-EL-SSO et al., Order on Remand at 22-24 (Oct. 3, 2011).

[65] Id. at 34-36.

In the event that the PUCO determines to allow the non-bypassable phase-in recovery rider to be implemented as part of AEP Ohio's compliance tariff, it should make adjustments to the rider as discussed herein. The adjustments–reducing the carrying charge once the deferrals begin to be collected from customers and requiring the value of the deferrals to be calculated net of tax—will reduce the rate increases associated with these non-bypassable charges and lessen the rate impact on all customers of AEP Ohio.[66]

And if the Commission determines to implement the PIRR, over the objection of OCC, APJN and others, it should only do so under specific conditions where the collection does not negatively impact the remedy being pursued in the recent OCC and IEU-Ohio appeals to the Ohio Supreme Court. The customers of AEP Ohio should be protected so they do not have to endure any more of the unfairness resulting from the *ESP 1* case, an unfairness manifesting itself in the finding of the Ohio Supreme Court that retroactive ratemaking is unlawful, and yet there can be no refund for the $63 million collected retroactively.[67]

The most direct and understandable protection this Commission has the discretion to provide is to take the unlawful elements out of rates, providing customers with a lower utility bill. The Commission can take this action to protect customers under its broad powers to protect the public interest under R.C. 4909.16. Alternatively, the Commission could do so by exercising its powers to stay the collection of the PIRR. This can be done without substantial harm to the utility. It is clearly in the interest of the public to grant a stay.

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[66] The impact of the PIRR on Ohio Power customers is quite significant. See AEP Ohio's compliance filing.

[67] *In re Columbus S. Power Co.*, 2011-Ohio-1788, ¶17.

The PUCO could also protect customers by ruling that the PIRR rates are to be collected subject to refund during the period in which the appeal before the Court is unresolved. In this case, there will be no harm whatsoever to AEP Ohio since the moneys can be either disbursed to the utility or credited to customers following resolution of the appeals. What all of these recommended approaches share in common is that, at most, the "harm" incurred by AEP Ohio will merely be delay in collecting these revenues, not denial. However, should the Commission decide not to accept any of the options offered in this motion, AEP Ohio customers will not have that same advantage. For these reasons, we believe it is incumbent upon the Commission to act in order to protect all AEP Ohio customers.

Respectfully submitted,

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On Behalf of the Appalachian Peace and Justice Network

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motions has been served via electronic service, to the counsel identified below this 6th day of March, 2012.

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Summary: Motion Motion to Reject Certain of AEP Ohio's Proposed Rates and Tariffs or, in the Alternative, Motion to Stay AEP Ohio's Collection of Phase-In Recovery Rider Rates from Customers or Motion for AEP Ohio to Collect Phase-In Recovery Rider Rate Subject to Refund by the Office of the Ohio Consumers' Counsel and Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.