21

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 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

OHIO POWER COMPANY'S APPLICATION FOR REHEARING OF THE MARCH 7, 2012 ENTRY

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On February 23, 2012, the Commission issued its Entry on Rehearing rejecting the September 7, 2011 Stipulation and Recommendation (Stipulation) that proposed to resolve ten major proceedings involving Ohio Power Company (dba AEP Ohio), including Case Nos 11-4920 and 11-4921-EL-RDR ("the Deferred Fuel Cost Cases"). As directed by the February 23 Entry on Rehearing, AEP Ohio filed a set of proposed tariffs on February 28, 2012 to implement the provisions of the prior SSO rate plan, *ESP I* (Case Nos. 08-917-EL-SSO et al.) Included among the proposed tariffs were the Phase-In Recovery Rider ("PIRR"), a tariff provision necessary to recover deferred fuel costs whose deferral and ultimate recovery was authorized by the Commission's orders in *ESP I.*

On March 7, 2012, the Commission issued an Entry in the above-captioned cases (March 7 Entry). The March 7 Entry, among other things, at Finding 14, directed Ohio Power Company to file new tariffs removing the Phase-In Recovery Rider (PIRR) at this time. The Commission's March 7 Entry states that it will address AEP Ohio's application to establish the PIRR by a subsequent entry in Case Nos 11-4920 and 11-4921-EL-RDR ("the Deferred Fuel Cost Cases").

Pursuant to § 4903.10, Ohio Rev. Code, and § 4901-1-35(A), Ohio Admin Code, Ohio Power Company ("AEP Ohio" or "the Company") seeks rehearing of the March 7 Entry as further explained below. Specifically, the Compliance Entry is unlawful and unreasonable in the following respects:

I. The Entry's refusal to allow the PIRR to go into effect immediately is in conflict with, and violates, the Commission's decision in *ESP I* that authorized both the deferral of the fuel costs during 2009-2011 and the ultimate recovery of those deferrals during 2012-2018.

II. Moreover, the Entry's failure to permit the PIRR to go into effect immediately violates §4928.144, Ohio Rev. Code, which requires the Commission to ensure the recovery of the fuel cost deferrals authorized in *ESP I* in the manner specified by the Commission's *ESP I* decision.

III Further, the Entry's failure to permit the PIRR to go into effect immediately also violates §§4928.143(C)(2)(b), Ohio Rev. Code, which requires the Commission to issue any order necessary to continue the provisions of ESP I

IV. The Entry also erred by not providing that the PIRR shall continue to incorporate a weighted average cost of capital carrying charge, consistent with the Commission's *ESP I* decision.

V. The Entry also erred by not providing that the PIRR shall recover the deferred fuel expense on a gross-of-tax basis, consistent with the *ESP I* decision.

A memorandum in support is attached and sets forth the specific grounds supporting the above-listed errors.

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MEMORANDUM IN SUPPORT

INTRODUCTION

On February 23, 2012, the Commission issued its Entry on Rehearing rejecting the September 7, 2011 Stipulation and Recommendation (Stipulation) that proposed to resolve ten major proceedings involving Ohio Power Company (dba AEP Ohio), including this proceeding. Through a September 16, 2011 Entry issued by the Attorney Examiner, the Commission had consolidated the ten cases for purposes of considering adoption of the Stipulation. The Entry on Rehearing provided the following directive, after quoting R.C. 4928.143(C)(2)(b) regarding the requirement to return to the prior SSO rate plan:

> Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs 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 I, 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.

(Entry on Rehearing at 12, emphasis added) The underlined directive involves reinstating the prior rate plan and fully implements the statutory provision quoted just prior to issuing the directive. As directed, AEP Ohio filed a set of proposed tariffs on February 28, 2012 to implement the provisions of the prior SSO rate plan, *ESP I* (Case Nos. 08-917-EL-SSO et al.)

While the February 28 tariffs can be referred to as a compliance filing, it is more accurately described as a filing of tariffs to implement the Company's prior *ESP I* rate plan. This is a statutory process outlined by the General Assembly in R.C. 4928.143(C)(2)(b), as contrasted

with a tariff compliance filing which is normally associated with ministerial implementation of a Commission rate order.

Nevertheless, the Commission issued an Entry on March 7, 2012, that, among other things, at Finding 14, directed AEP Ohio to file, in final form, new tariffs removing the PIRR at this time. The Commission stated that it "will address AEP-Ohio's application to establish the PIRR by subsequent entry in the Deferred Fuel Cost Cases [Case Nos 11-4920 and 11-4921-EL-RDR]."

AEP Ohio respectfully submits that the Commission erred by ordering AEP Ohio to withdraw the PIRR tariffs and, thus, cease collection of cost deferrals that have been established pursuant to the *ESP I* decision. In accordance with the Commission's orders in *ESP I*, which are final and non-appealable with regard to the establishment of and recovery of the cost deferrals at issue, and pursuant to the mandates of §§4928.143(C)(2)(b) and 4928.144, Revised Code, the Commission must permit recovery of the deferrals to begin now. Absent the Company's consent, the Commission lacks authority or discretion to either delay recovery of the cost deferrals or modify the carrying charges previously approved. AEP Ohio is aware of the scheduling entry issued on March 14 that establishes a comment cycle in the PIRR cases without any commitment regarding when the case will be resolved; far from resolving AEP Ohio's concerns, that procedural entry appears to open up for comment issues that have been adjudicated years ago and, thus, only serves to further compound the erroneous decision to exclude the PIRR from the tariffs proposed to implement *ESP I*. AEP Ohio is filing this application for rehearing in an attempt to efficiently achieve implementation of the PIRR, but

expressly reserves the right to pursue other available remedies at any time if it becomes evident that the Commission does not intend to swiftly reinstitute the PIRR.[1]

ARGUMENT

I. The proposed PIRR tariffs properly implemented a fundamental component of the *ESP I* rate plan. The Entry's refusal to allow the PIRR to go into effect immediately is in conflict with the Commission's prior orders issued in *ESP I* that authorized the fuel cost deferrals and their ultimate recovery during 2012-2018. It also violates §§4928.143(C)(2)(b) and §4928.144, Ohio Rev. Code, which require the Commission to ensure the recovery of the cost deferrals authorized in *ESP I*.

The fuel cost deferrals during the 2009-2011 term of *ESP I* and the subsequent amortization and recovery of those deferrals beginning in 2012 and continuing through 2018 is a fundamental component of the *ESP I* rate plan that the Commission already has approved. Section 4928.144, Ohio Rev. Code, provided the authority through which the Commission established the fuel cost deferrals in *ESP I*, and invoking that statute was the basis for the Commission being able to phase-in the rate increases that otherwise would have been implemented during the term of *ESP I* for a recovery period after the term expired. *See ESP I*, Opinion and Order (March 18, 2009) at 22 ("we exercise our authority pursuant to Section 4928.144, Revised Code, and find that the Companies should phase-in any authorized increases" that exceed the annual rate caps). The Commission further stated as follows:

> Therefore, we find that the collection of any deferrals, with carrying costs, created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 as necessary to recover the actual fuel expenses incurred plus carrying costs.

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[1] For example, because the Commission has a clear legal duty to implement the PIRR and AEP Ohio suffers harm through a delayed implementation, AEP Ohio can pursue a writ of mandamus before the Supreme Court of Ohio even while the rehearing process is pending. *State, ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 180 (2005) (the Court will issue a writ where relator establishes a clear legal right to the relief requested, a corresponding clear legal duty on the part of the Commission to provide it, and the lack of an adequate remedy in the ordinary course of law).

Id. at 23.

R.C. 4928.144 establishes the requirement that the Commission simultaneously provide for and authorize the recovery of the cost deferrals through the same order that established them:

> The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. *Further, **the order** shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.*

Accordingly, the authority to collect the cost deferrals established during the term of *ESP I* from customers through the PIRR tariffs was established through the *ESP I* decision, which is final and non-appealable as to the establishment of and subsequent amortization and recovery of those cost deferrals. Moreover, as demonstrated above, the Commission admittedly obtained the authority from, and based its decision to allow the deferrals and their subsequent recovery on, R.C. 4928.144. That cost recovery is not contingent upon any other event relative to a future SSO plan – regardless of whether it would be an ESP or an MRO. Thus, the Company is presently entitled, as a matter of law, to implement the PIRR tariffs as part of implementing *ESP I*.

At this point, the Company is entitled to implement the PIRR tariffs, and the Commission's role in approving the PIRR tariffs is, at most, a ministerial one. For example, if the Commission found that the PIRR tariff rates were miscalculated as a result of an arithmetic error, it could correct such a mistake before approving the tariffs. When it issued its March 7 Entry the Commission did not have the authority or discretion to delay or alter the amortization and recovery of those cost deferrals that the *ESP I* decision authorized. In short, the Company's

entitlement to implement the PIRR tariffs that the *ESP I* decision authorized rests squarely on the *ESP I* decision and R.C. 4928.144, Ohio Rev. Code.

In addition, in light of the unresolved status of the *ESP II* proceeding, R.C. 4928.143(C)(2)(b) also specifically reinforces AEP Ohio's present entitlement to the PIRR by providing, in pertinent part, that, in the event there is a gap between the end of an ESP and any subsequent SSO, the Commission must issue any order necessary to continue the provisions of the prior ESP:

> [I]f the commission disapproves an application under division (C)(1) of this section, the commission *shall issue* such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

This provision ensures that the unresolved status of a new ESP does not prevent completion of the prior rate plan, including the residual need to implement a phase-in under R.C. 4928144. Consequently, contrary to any argument that AEP Ohio must have an existing order that previously approved each of the proposed tariffs, implementation of R.C. 4928.143(C)(2)(b) does not work that way, as referenced above. In addition, as a factual matter, as explained above, any contention that authorization for the amortization and recovery of the PIRR has not already occurred is erroneous. Pursuant to R.C. 4928.144, authorization necessarily occurred at the time that the Commission issued its Opinion and Order in *ESP I* (March 18, 2009). As a matter of law the amortization and recovery of the fuel cost deferrals must be implemented now in the manner that the *ESP I* decision authorized. There are multiple aspects of the 2009-2011 rate plan that extend into 2012 and beyond, most notably the PIRR but also including adjustment and/or reconciliation of the EICCR and other riders. See e.g. *ESP I*, Entry on Rehearing (July 23,

2009) at 14. Just because the PIRR had not been implemented at the end of 2011, that does not mean that it is any less of a major component of *ESP I.* Moreover, R.C. 4928.143(C)(2)(b) does not require a prior authorization; rather, it mandates, to the extent necessary, a new Commission order to implement the prior rate plan. At this juncture, the only issue is whether AEP Ohio's proposed PIRR tariffs, appropriately implement the prior rate plan – not whether a prior order exists which authorizes the PIRR tariffs filed by AEP Ohio on February 28. It cannot reasonably be disputed that the PIRR is a critical component of the *ESP I* rate plan and must be implemented as approved.

As noted above, the proposed PIRR tariffs are appropriate because the *ESP I* decision clearly provided for recovery of the deferred fuel regulatory asset through a nonbypassable charge beginning in January 2012:

> Therefore, we find that the *collection of the deferrals* with carrying costs created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 as necessary to *recover* the actual fuel expenses incurred plus carrying costs.

(*ESP I*, Opinion and Order at 23.) Further, as stated in the December 14, 2011 Opinion and Order in this proceeding:

> [T]he phase-in is not part of this proceeding but was the order of the Commission in the Companies' previous ESP case.

(*ESP II*, Opinion and Order at 57.) The PIRR recovery period of 2012-2018 was authorized in the *ESP I* decision and arguments claiming otherwise are simply incorrect.[2] Consequently, the

[2] Since the *ESP I* decision did not contemplate AEP Ohio collecting the PIRR as a combined charge over the Ohio Power and Columbus Southern Power service territories, AEP Ohio proposed that the balances be recovered separately by rate zones. Thus, the collection of the PIRR is in compliance with the *ESP I* decision for continued collection. If the Commission wishes to implement the PIRR on a merged basis (since the regulatory asset is now owned by the merged Company), it could issue an order making that change. But simply avoiding implementation of the PIRR is unlawful and unreasonable.

Commission is required to immediately adopt the proposed PIRR tariffs because they properly implement the *ESP I* decision to commence amortization and recovery of the deferred fuel regulatory asset in January 2012.[3]

Any argument that *ESP I* only provided the authority to create deferrals, but did not also authorize their recovery (IEU's March 7 Response, at 5), is baseless. As recounted above, the *ESP I* decision authorized recovery of the deferrals during 2012-2018, as §4928.144, Ohio Rev. Code, *required* it to do. Similarly, arguments that an accounting order authorizing deferrals is not equivalent to a ratemaking order permitting the recovery in rates of previously authorized deferrals (See OCC/APJN's Memorandum in Support of March 6 Motion to Reject, et cet., at 6-7) miss the point. Section 4928.144 required the Commission to approve in *ESP I*, not only the deferrals necessary to enable the phase-in of rate increases that would otherwise have been required, but also the recovery of the deferrals. The Commission did just that in its *ESP I* decision.

II. The Entry erred by not providing that the PIRR shall continue to incorporate a weighted average cost of capital carrying charge, consistent with the Commission's *ESP I* decision.

Second, in addition to unlawfully requiring the Company to withdraw its PIRR tariff, the March 7 Entry also erred by failing to confirm that the Company is authorized to continue to collect carrying charges on the unamortized balance of deferred fuel costs based on AEP Ohio's

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[3] The Company's right to begin recovery of the deferred fuel costs is also independent of any initiative to recover any remaining deferred costs through securitization. For example, the Stipulation previously adopted in this proceeding authorized the PIRR recovery period to commence and contemplated that subsequent securitization could occur, thus prospectively reducing the carrying charges at that time. Thus, in the event that securitization of deferred costs and recovery of them through that mechanism occurs, it would complement any partial recoupment through the PIRR that would have occurred prior to securitization. But simply avoiding implementation of the PIRR is unlawful and unreasonable.

Weighted Average Cost of Capital (WACC). In its March 18, 2009 *ESP I* decision The Commission clarified its directive regarding carrying charges:

> Based on the record in this proceeding, we do not find the intervenors' arguments concerning the calculation of the carrying charges persuasive. Instead, for purposes of a phase-in approach in which the Companies are expected to carry the fuel expenses incurred for electric service already provided to the customers, we find that the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable as proposed by the Companies.

(*ESP I*, Opinion and Order at 23 note omitted.) Further, as stated in the December 14, 2011 Opinion and Order in this proceeding:

> The Companies offer that the carrying charge rate on deferred fuel expense was argued extensively by the parties to the ESP 1 case, and the Commission ultimately decided that the WACC, as proposed by the Companies, was reasonable. ... The Commission agrees with the Signatory Parties that the carrying charge on the deferred fuel expenses was established in the ESP 1 proceeding.

(*ESP II*, Opinion and Order at 58.) In sum, the carrying charge issues were fully litigated in the *ESP I* case and the Commission adjudicated that the WACC was a reasonable carrying cost rate. Consequently, the proposed PIRR tariff's prospective use[4] of the WACC appropriately implements the prior rate plan as reflected in the *ESP I* decision. In accordance with the ESP I decision and §§4928.144 and 4928.143(C)(2)(b), Ohio Rev. Code, the Commission must confirm that the WACC is the appropriate carrying cost rate to use during the 2012-2018 amortization and recovery period.

[4] The Company notes that it did adjust the deferral balance to reflect the carrying charge to only be the 5.34% for January and February 2012 operating under the approved Stipulation for that timeframe.

III. The Entry erred by not providing that the PIRR shall recover the deferred fuel expense on a gross-of-tax basis, consistent with the *ESP I* decision.

The Commission reiterated in both the *ESP I* decision and the December 14, 2011 Opinion and Order in this proceeding that the PIRR should be recovered on a gross-of-tax basis.

> Therefore, we find that the carrying charges on the FAC deferrals should be calculated on a gross-of-tax rather than a net-of-tax basis in order to ensure that the Companies recover their actual fuel expenses.

(*ESP I*, Opinion and Order at 24.) Similarly, the Commission reiterated in its December 14, 2011 Opinion and Order in this proceeding as follows:

> In the ESP 1 order, the Commission rejected request[s] to calculate the deferrals net of taxes. We again reject the request in this case. As we concluded in ESP 1, if carrying charges on the FAC deferrals are calculated on a gross of tax rather than a net of tax basis, it violates the clear directive to the Commission. Section 4928.144, Revised Code, states that if a phase-in is ordered, the order shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount.

(*ESP II*, Opinion and Order at 58.) As with the other aspects of the proposed PIRR tariff, the ADIT issue was already adjudicated and it cannot be challenged at this point. AEP Ohio's proposed PIRR tariffs properly implement the prior rate plan as reflected in the *ESP I* decision. Accordingly, the Commission's March 7 Entry erred by not confirming that the PIRR should be recovered on a gross-of-tax basis.

CONCLUSION

For the foregoing reasons, Ohio Power Company requests that the Commission grant its application for rehearing of the March 7, 2012 Entry.

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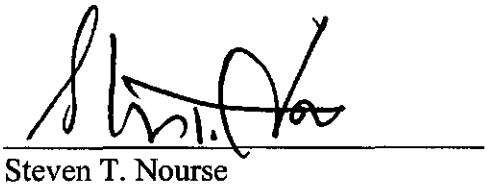
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ohio Power Company's Application for Rehearing has been served upon the below-named counsel and Attorney Examiners by U.S. Mail and by electronic mail to all Parties this 14th day of March, 2012.



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