**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<br>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<br>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 |

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA OHIO POWER COMPANY'S APPLICATION FOR REHEARING**

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**March 26, 2012**

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Ohio Power Company's ("OP") Application for Rehearing filed on March 14, 2012 should be denied because the Public Utilities Commission of Ohio ("Commission") correctly ordered OP to return customers to the rates that existed during OP's and Columbus Southern Power Company's ("CSP") prior electric security plans ("ESP"). Neither CSP's nor OP's prior ESPs (*"ESP I"*)[1] contained the phase-in recovery rider

[1] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order (March 18, 2009) (hereinafter "*ESP I*").

("PIRR"). Because the *ESP I* tariffs did not contain the PIRR, the Commission properly determined that OP should remove the PIRR from its current tariffs while the Commission reviews the evidence and determines an appropriate rate to collect OP's *ESP I* deferrals. As further discussed below, the Commission should deny OP's Application for Rehearing and allow the procedural schedule in Case Nos. 11-4920-EL-RDR, *et al.* (the "PIRR proceeding") to move forward.

## I. BACKGROUND

In *ESP I,* the Commission authorized a phase-in of OP's standard service offer ("SSO") rates. The phase-in was limited to an overall percentage of customers' bills; however, it was not known during *ESP I* what the total amount of the deferral would be.[2] Because of the variable nature of the deferral balance, it was anticipated and expected that OP would request through some future filing the total amount to be amortized that was unknowable when the *ESP I* Opinion and Order was issued.

On September 1, 2011, OP made that anticipated filing and "[sought] approval of a mechanism to recover" the deferred balance.[3] On September 7, 2011, OP, along with various other parties, filed a stipulation and recommendation ("Stipulation") in the consolidated ESP proceeding ("*ESP II"*),[4] which did not alter this premise; OP still

[2] During *ESP I,* customers' bills varied depending on many factors such as usage. Additionally, OP's total authorized ESP increases varied as a function of several different riders and mechanisms that were adjusted and reconciled during the *ESP I* term. OP's expenses deferred as a result of its fuel adjustment clause ("FAC") were also, and continue to be, subject to annual fuel audits that could further alter and reduce the total amount of the deferral. Further, and to the extent that customers' bills were below the total rate caps, the Commission directed OP to begin amortizing the deferrals during *ESP I*. Thus, determining the amount of the deferral ahead of time would have been impossible.

[3] Application at 1.

[4] *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 Nos. 11-346-EL-SSO *et al*. (hereinafter *"ESP II*").

needed and sought authorization to amortize its *ESP I* deferrals.[5] Additionally, throughout the hearing on the Stipulation OP did not mention or claim that it believed it already had approval to implement its recovery mechanism. It was not until after the Commission rejected the Stipulation on February 23, 2012 that OP began asserting that it already had the authority to implement the PIRR.

OP first attempted to push through an unauthorized PIRR in its February 28, 2012 compliance tariffs filed as a result of the Commission's February 23, 2012 Entry on Rehearing. The PIRR, a component of the September 7, 2011 Stipulation, was, however, rejected in the Commission's Entry on Rehearing. In response to the inclusion of the PIRR in the compliance tariffs, Industrial Energy Users-Ohio ("IEU-Ohio") filed objections to the compliance tariffs and argued, *inter alia*, that there was no authorization for the PIRR under *ESP I* and therefore OP must remove it from its compliance tariffs. OP responded that the Commission should authorize the PIRR and "continue [the PIRR] in the manner that was authorized in the *ESP I* decision."[6]

The Commission, however, did not agree with OP and in its March 7, 2012 Entry (the "Compliance Tariff Entry") directed OP to "file, in final form, new tariffs removing the PIRR at this time."[7] The Commission further stated that it would "address AEP-Ohio's application to establish the PIRR by subsequent entry" in the PIRR proceeding.[8] On March 14, 2012, the Commission established a procedural schedule in this proceeding

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[5] *ESP II,* Stipulation at 25-27 (September 7, 2011). In fact, the Stipulation recommended a commencement date for the PIRR of January 1, 2012.

[6] *ESP II*, AEP Ohio Reply to the Tariff Objections Filed By Industrial Energy Users-Ohio, Ormet Primary Aluminum and the Office of the Ohio Consumers' Counsel/Appalachian Peace and Justice Network at 5 (March 6, 2012)

[7] *ESP II*, Entry at 5 (March 7, 2012).

[8] *Id.*

with comments due by April 2, 2012 and reply comments due by April 17, 2012.[9] On March 14, 2012, OP also filed an Application for Rehearing from the Compliance Tariff Entry claiming that the PIRR was authorized under the *ESP I* Opinion and Order and therefore the Commission was required under Section 4928.143(C)(2)(b), Revised Code, to authorize the PIRR in its proposed form.

## II. ARGUMENT

OP's Application for Rehearing does not raise any issues that warrant the Commission granting rehearing. OP's first assignment of error (the PIRR was authorized under *ESP I*) is the same argument that OP raised in its Reply to IEU-Ohio's Objections to OP's compliance tariffs. The Commission rejected this argument in its Compliance Tariff Entry when it directed OP to remove the PIRR.[10] As the Commission has previously held, when an application for rehearing does not raise any new arguments, the Commission regularly denies the application.[11] Therefore, OP's first assignment of error raises no new issues and should be rejected.

Additionally, because the Commission properly concluded that the PIRR was not authorized at this point in time, it did not have any reason to address the going-forward carrying-cost rate or treatment of accumulated deferred income taxes ("ADIT"). Therefore, OP's second and third assignments of error addressing the carrying-cost rate and ADIT treatment do not address an unreasonable or unlawful action of the Commission. As more fully discussed below, the Commission should deny OP's Application for Rehearing.

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[9] Entry at 3 (March 14, 2012).

[10] *Id.*

[11] *See e.g., In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry on Rehearing at 2-3 (February 13, 2008).

### A. The Commission Correctly Ordered OP to Return Rates to *ESP I* Levels That Did Not Include the PIRR

In its Application for Rehearing, OP again incorrectly asserts that the Commission's *ESP I* Opinion and Order requires the Commission "to immediately adopt the proposed PIRR tariffs."[12] Neither Sections 4928.143(C)(2)(b) or 4928.144, Revised Code, nor the *ESP I* Opinion and Order requires the Commission to immediately implement OP's proposed PIRR rates prior to conducting a review of those proposed rates. OP has already presented this argument to the Commission in its Reply to IEU-Ohio's Objections,[13] which the Commission rejected in the Compliance Tariff Entry.[14] Thus, there is no need for the Commission to address this same argument again.[15] Furthermore, OP's legal and factual assertions regarding the PIRR's authorizations are incorrect.

The *ESP I* Opinion and Order authorized OP to begin amortization of its deferrals starting in 2012, in accordance with Section 4928.144, Revised Code. That Section states that if the Commission orders a phase-in of SSO rates, the Commission's order must include two items: (1) authorization "for the creation of regulatory assets … authorizing the deferral of incurred costs … plus carrying charges;" and (2) authorization to collect "those deferrals through a nonbypassable surcharge *on any such rate or price so established for the electric distribution utility by the commission*."[16]

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[12] Ohio Power Company's Application for Rehearing of the March 7, 2012 Entry at 7-8.

[13] *ESP II*, AEP Ohio Reply to the Tariff Objections Filed by Industrial Energy Users-Ohio, Ormet Primary Aluminum and the Office of the Ohio Consumers' Counsel/Appalachian Pace and Justice Network at 5 (March 6, 2012).

[14] *See ESP II*, Entry at 5 (March 7, 2012).

[15] *See e.g., In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry on Rehearing at 2-3 (February 13, 2008).

[16] Section 4928.144, Revised Code (emphasis added).

In the *ESP I* Opinion and Order, the Commission authorized the creation of certain regulatory assets, based on OP's deferred expenses plus carrying charges, and authorized OP to begin collecting on a non-bypassable basis its deferred balance in 2012 and continuing through 2018 (the "Recovery Period").[17] Notably, the *ESP I* Opinion and Order did not establish any "rate or price" for the non-bypassable surcharge during the Recovery Period. As mentioned above, due to the variable nature of the deferral balance, it would have been impossible to calculate an appropriate amortization rate when the *ESP I* Opinion and Order was issued.

OP recognized that the *ESP I* Opinion and Order did not establish any "rate or price" for the non-bypassable surcharge and filed its Application in this proceeding.[18] OP's Application specifically requested "the *creation* of a recovery mechanism to ensure recovery of the [deferred balance], including carrying costs, that were the direct result of the Commission's phase-in decision in the Initial ESP cases."[19] From OP's Application, it is apparent that OP is well aware that the *ESP I* Opinion and Order did not pre-authorize a specific recovery mechanism or specific rates and instead only set the basis for a future filing to determine an amortization mechanism during the Recovery Period. Because the *ESP I* Opinion and Order did not authorize the PIRR, OP's arguments that Section 4928.143(C)(2)(b), Revised Code, requires the Commission to implement the PIRR should also be dismissed.

Section 4928.143(C)(2)(b), Revised Code, requires the Commission upon rejecting an SSO application to:

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[17] *ESP I*, Opinion and Order at 23 (March 18, 2009).

[18] Application at 3.

[19] *Id.* (emphasis added).

> 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.

The Commission's February 23, 2012 Entry on Rehearing[20] in conjunction with the Compliance Tariff Entry[21] did just that. The Commission's two orders continue the provisions, terms, and conditions of OP's and CSP's *ESP I* tariffs. Because the Commission's orders are in compliance with Section 4928.143(C)(2)(b), Revised Code, and correctly restored customers to their *ESP I* rates, the Compliance Tariff Entry is reasonable and lawful. Therefore, the Commission should deny OP's first assignment of error in its Application for Rehearing.

### B. The Compliance Tariff Entry's Exclusion of a Discussion on the Going-Forward Carrying Cost Rate and Treatment of ADIT was Reasonable and Lawful

OP's second and third assignments of error should be denied because the Commission did not have a reason in its Compliance Tariff Entry to opine of the going-forward carrying cost rate and treatment of ADIT. OP's second assignment of error asserts that the Commission acted unreasonably and unlawfully by failing to hold that the going-forward carrying cost rate of the deferred balance should be at OP's weighted average cost of capital ("WACC").[22] Similarly, OP's third assignment of error alleges the Commission acted unreasonably and unlawfully when the Commission failed to address the appropriate treatment of ADIT.[23] As discussed above, the PIRR was not properly included in OP's February 28, 2012 compliance tariffs. The Commission recognized

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[20] *ESP II*, Entry on Rehearing at 12 (February 23, 2012).

[21] *ESP II*, Entry at 5 (March 7, 2012).

[22] Ohio Power Company's Application for Rehearing of the March 7, 2012 Entry at 10-11 (March 14, 2012).

[23] *Id.* at 12.

this in the Compliance Tariff Entry and directed OP to remove the PIRR from its compliance tariffs.[24] Notably, the Commission held that it would address the PIRR in the PIRR proceeding.[25] Because the Commission properly determined that it would review the proposed PIRR in the PIRR proceeding, the Commission did not have any reason in the Compliance Tariff Entry to address the PIRR. Thus, the Commission's exclusion of a discussion on the going-forward carrying cost rate and the appropriate treatment of ADIT was reasonable and lawful.

### C. The Commission's Role in Reviewing the Proposed PIRR is More than Ministerial

OP incorrectly claims that the Commission's role in reviewing OP's proposed PIRR rates is ministerial in nature[26] due to the operation of Sections 4928.143(C)(2)(b) and 4928.144, Revised Code, as well as the *ESP I* Opinion and Order. First, neither Section 4928.144, Revised Code, nor the *ESP I* Opinion and Order discusses any limitation on the Commission's authority to review and implement the amortization period of a phase-in authorized under Section 4928.144, Revised Code. Second, under the Commission's general authority, it is charged with ongoing monitoring of the activities of a public utility such as OP.[27] Third, the Commission is charged with

[24] *ESP II*, Entry at 5 (March 7, 2012).

[25] Ohio Power Company's Application for Rehearing of the March 7, 2012 Entry at 12 (March 14, 2012).

[26] Ohio Power Company's Application for Rehearing of the March 7, 2012 Entry at 7 (the Commission's role now should be limited to reviewing things such as arithmetic mistakes and correcting such mistakes before approving the tariffs). OP's request that the Commission immediately authorize the PIRR tariffs, however, undercuts the Commission's very ability to review the tariffs for mistakes before authorizing them. Because OP's proposed tariffs contain various unsupported assumptions and potential errors, the Commission must review the proposed tariffs and adjust them appropriately.

[27] Section 4905.05 & 4905.06, Revised Code (Commission has supervisory jurisdiction over public utilities); Section 4928.01(A)(6), (7), & (11), Revised Code (electric distribution utility defined as a public utility under Section 4905.03, Revised Code).

ensuring that all rates are just and reasonable.[28] Thus, there is no factual or legal basis to assert that the Commission's ability to review OP's proposed PIRR rates has been preempted. Therefore, the Commission must review the proposed PIRR rates for their reasonableness and accuracy.

Further review of the proposed PIRR rates through the established procedural process is also necessary because the proposed PIRR rates, as included in its February 28, 2012 compliance tariffs, contain various unreasonable assumptions and a lack of detail necessary to judge the reasonableness of the rates. For instance, the proposed PIRR rates contained in the February 28, 2012 compliance filing reflect OP's expectation that it will be permitted to continue to collect carrying charges based on OP's WACC rate (11.26%),[29] a result contrary to Commission precedent. The Commission has consistently required the authorized carrying costs on a deferral to be limited to the utility's long-term cost of debt once amortization of a deferred asset begins.[30]

Although the issues surrounding OP's carrying costs and tax treatment were determined while OP was deferring its costs through the end of *ESP I* ("the Deferral Period"), the Commission has not yet addressed any issues surrounding the appropriate tariff rates for the amortization of the deferrals, including carrying charges and the treatment of ADIT during the Recovery Period.[31]

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[28] Section 4905.22, Revised Code; *In re Application of Columbus S. Power Co.*, 129 Ohio St. 3d 46, 2011-Ohio-2383 at ¶ 19.

[29] Compliance Tariff, Cover Letter at 2 (Feb. 28, 2012).

[30] *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); *see also* IEU-Ohio Ex. 8 at 14-15; IEU-Ohio Initial Brief at 61-64.

[31] The Commission's Opinion and Order in *ESP I* held "[t]herefore, 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

The *ESP I* Opinion and Order only authorized OP to defer the allowable expenses during the Deferral Period with carrying costs at a WACC rate. Following the Deferral Period, the Commission held OP could begin collecting the deferred balance, *i.e.* the combination of its actual deferred expenses and any carrying costs that had accrued at OP's WACC rate through the Deferral Period. Nothing in the *ESP I* Opinion and Order suggests that the Commission determined an appropriate treatment of carrying charges during the Recovery Period. Additionally, a going-forward carrying charge in excess of 11% is unreasonable given that the current long-term debt rate with the same term as the Recovery Period (7 years) for a BBB-rated company (such as OP's parent company) is currently on the order of 3.1%.[32]

OP also unreasonably assumes that during the Recovery Period it will be allowed to collect carrying charges on the entire deferred balance, without adjusting for ADIT.[33] Although the Commission authorized OP to book its deferred expenses on a gross of tax basis during the Deferral Period,[34] the Commission did not address how the tax issue on the deferred balance would be addressed during the Recovery Period.

Traditionally, the Commission has recognized the impact of ADIT liabilities, essentially a cost-free source of capital, and removed the ADIT impact from the rate base of utilities in recognition of the fact that no return should be earned by the utility on

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occur from 2012 to 2018 as necessary to recover the actual fuel expenses plus carrying costs." Opinion and Order at 23 (March 18, 2009). This reference to the approval of carrying costs clearly relates to the "ESP term." The Opinion and Order did not hold or address the appropriate level of carrying costs that it would allow subsequent to the "ESP term" while the deferral was being amortized. *See id.*

[32] With the passage of House Bill 364, OP now has the potential to securitize the deferred balance (once all appeals have been exhausted and all audits completed). Because securitization would further reduce the carrying cost rate below a long-term debt rate, it further alleviates any reason for continuing carrying charges at anything in excess of the current long-term debt rate.

[33] The workpapers provided by OP to parties to support its proposed PIRR in its February 28, 2012 compliance tariffs demonstrate that OP failed to adjust the proposed going-forward PIRR rate for ADIT.

[34] *See ESP I*, Opinion and Order at 24 (March 18, 2009).

cost-free capital.[35] Similarly, in the case of the deferrals in this proceeding, the ADIT should be deducted from the amount to which carrying charges are applied on a going-forward basis. In short, because the ADIT represents tax savings realized by OP, it will not be financing 100% of its going-forward deferred balance and will only be financing the deferred balance net of the associated ADIT.

Finally, the February 28, 2012 compliance tariffs and supporting workpapers that were served on parties do not contain the appropriate level of detail to ascertain whether OP has made all of the appropriate Commission-ordered adjustments to its deferred balance. Over the previous year, the Commission has ordered three adjustments to the deferred balances created by *ESP I*: (1) an adjustment for the provider of last resort ("POLR") charges that OP and CSP had been collecting subject to refund following the remand from the Ohio Supreme Court,[36] (2) an adjustment for CSP's 2009 earnings that the Commission determined were significantly excessive,[37] and (3) an adjustment for the value OP received as part of a coal contract buy-out.[38] Additionally, OP began collecting its deferred balance through the PIRR while it was operating under and billing pursuant to its *ESP II* tariffs. The amounts collected through the PIRR under the *ESP II* tariffs must serve as an offset to the deferred balance determined in the PIRR proceeding.

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[35] *Cincinnati v. Public Utilities Comm.*, 161 Ohio St. 395, 405-06 (1954).

[36] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 39 (October 3, 2011).

[37] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code.,* Case No. 10-1261-EL-UNC Opinion and Order at 36-37 (January 11, 2011).

[38] In the Matter of the Fuel Adjustment Clauses for Columbus Southern Company and Ohio Power Company, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order at 12 (January 23, 2012).

From the information contained in OP's Application in this proceeding, along with the February 28, 2012 compliance tariffs and supporting workpapers, it is not possible to ascertain whether all of the appropriate adjustments to the deferred balances have been accounted for.[39] The Commission should assure that all appropriate adjustments have been made to the deferred balances prior to granting any recovery of the deferrals. Thus, the Commission should proceed with the procedural schedule set forth in its March 14, 2012 Entry.

## III. CONCLUSION

The Commission should deny OP's Application for Rehearing. The assignments of error in the Application for Rehearing do not address any unreasonable or unlawful actions taken by the Commission. In returning customers to the rates under *ESP I,* the Commission was following the law and upholding Section 4928.143(C)(2)(b), Revised Code. Additionally, because the Commission returned customers to the *ESP I* rates that did not contain a PIRR, the Commission did not have any reason to address the amortization rate of the *ESP I* deferrals, the basis for OP's second and third assignments of error. Therefore, the Commission should deny OP's Application for Rehearing and allow the procedural schedule in this case to move forward.

[39] Although OP's workpapers served on parties with the February 28, 2012 compliance tariffs indicate OP credited some amount collected through the PIRR against its deferred balance, it is not apparent if those values reflect the total amounts collected through the PIRR, or only reflect amounts collected as of the date the compliance tariffs and workpapers were prepared.

Respectfully submitted,

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I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Application for Rehearing* was served upon the following parties of record this 26th day of March 2012, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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Summary: Memorandum Contra of IEU-Ohio to Ohio Power Company's Application for Rehearing electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio