

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
Columbus Southern Power Company and ) Case No. 11-346-EL-SSO  
Ohio Power Company for Authority to ) Case No. 11-348-EL-SSO  
Establish a Standard Service Offer )  
Pursuant to §4928.143, Ohio Rev. Code, in )  
the Form of an Electric Security Plan. )

In the Matter of the Application of )  
Columbus Southern Power Company and ) Case No. 11-349-EL-AAM  
Ohio Power Company for Approval of ) Case No. 11-350-EL-AAM  
Certain Accounting Authority. )

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**MEMORANDUM CONTRA AEP OHIO’S MOTION TO STRIKE PORTIONS OF  
THE DIRECT TESTIMONY OF OCC WITNESSES DANIEL J. DUANN,  
IBRAHIM SOLIMAN AND SEBASTIAN COPPOLA  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor in these proceedings on behalf of residential utility customers,<sup>1</sup> files this memorandum contra the motion to strike portions of the testimony of OCC witnesses Daniel J. Duann, Ibrahim Soliman and Sebastian Coppola, filed by Ohio Power Company (“AEP Ohio” or “Company”) on May 14, 2012.<sup>2</sup> The Company claims that the portions of the OCC witnesses’ testimony addressing issues regarding the Phase-In Recovery Rider (“PIRR”)<sup>3</sup> are irrelevant to this proceeding because, the Company contends, the only issue regarding

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<sup>1</sup> R.C. 4911.02.

<sup>2</sup> In an Entry dated May 3, 2012, the Attorney Examiner required (at 2) that any motions to strike intervenor witness testimony shall be filed by May 11, 2012, and any memorandum contra should be filed by May 16, 2012.

<sup>3</sup> Duann’s Direct Testimony on page 20, lines 7-11 and page 22, line 20 through page 28, line 18, and essentially all of Soliman’s Direct Testimony, but specifically page 3, line 3 through page 4, line 10 and all attachments. Motion at 2-3.

the PIRR in this proceeding is the PIRR's delayed implementation.<sup>4</sup> The Company also seeks to strike Mr. Coppola's statement, on page 6 of his testimony, that there is no legal basis for including a pool termination in a utility's electric security plan ("ESP"). AEP Ohio claims that the statement is a legal conclusion and should be stricken because Mr. Coppola is not an attorney.<sup>5</sup> The Company's arguments are baseless for several reasons.

First, the PIRR and its associated carrying charges are part of the rates that the Company is proposing to charge beginning June 1, 2013 through the remaining term of its proposed ESP.<sup>6</sup> Thus, calculation of the PIRR is relevant to the determination of whether the Company's proposed ESP is more favorable in the aggregate than a market rate offer, the determination which the Public Utilities Commission of Ohio ("PUCO" or "Commission") is required by statute to make.<sup>7</sup>

Second, the Company brought the issue of the rates to be charged through the PIRR into this proceeding through the direct testimony of David M. Roush, filed with the Application on March 29, 2012.<sup>8</sup> Further, Mr. Roush discusses implementing the PIRR on a merged basis, i.e., one rate for all AEP Ohio customers instead of separate rates for the Ohio Power and Columbus Southern Power territories.<sup>9</sup> In addition, AEP Ohio witness Robert Powers raised the issue of calculating carrying charges during the delayed implementation period using the Company's weighted average cost of capital

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<sup>4</sup> See *id.*, Memorandum in Support at 3.

<sup>5</sup> *Id.* at 8. AEP Ohio states that it would seek to strike the statement if it is revised to state that Mr. Coppola made the statement on the advice of counsel. *Id.*

<sup>6</sup> See Direct Testimony of David M. Roush at 5-6 and Exhibits DMR-1 and DMR-4. The Company proposes to continue the PIRR beyond the proposed ESP, through 2018. See Direct Testimony of Selwyn J. Dias (March 30, 2012) at 10.

<sup>7</sup> R.C. 4928.143(C)(1).

<sup>8</sup> See Direct Testimony of David M. Roush at 5-6 and Exhibits DMR-1 and DMR-4.

<sup>9</sup> *Id.*

(“WACC”).<sup>10</sup> These issues were not raised in the PIRR case. Thus, out of fairness, OCC and other intervenors should not be precluded from presenting opposing testimony.<sup>11</sup>

Third, the statement made by Mr. Coppola on page 6 of his testimony is reiterated on page 10 of his testimony and is specifically prefaced with the phrase “I have been advised by counsel that...” The Company’s motion to strike the single sentence on page 6 of Mr. Coppola’s testimony is unnecessary.

As discussed more fully below, the Commission should deny AEP Ohio’s motion to strike those portions of the OCC witnesses’ testimony identified in the motion to strike.

## **II. ARGUMENT**

### **A. The Method of Calculating the PIRR Is Relevant to This Proceeding.**

In its motion to strike, AEP Ohio claims that the only issue in this proceeding regarding the PIRR is the delay in implementing the PIRR as part of the ESP proposed in the Application:

As the Commission is aware, the merits of the PIRR were an issue in the first ESP and, as recognized in the Company’s application in this proceeding, a filing was made in Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR (*PIRR Dockets*) to establish the collection of the deferred fuel expenses authorized for recovery starting in January 2012. *See* Application at 14. The Company, as part of its proposed ESP package in this case, agreed to delay the implementation of the rider. The Company did not seek to litigate in this case the issues that the Commission already fully addressed in the *PIRR Dockets*. The Company merely proposed to delay the commencement of the rider until June 2013. It would appear that parties trying to take a fresh bite at this apple are relying upon the

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<sup>10</sup> Direct Testimony of Robert Powers (March 29, 2012) at 10.

<sup>11</sup> *See In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Related Matters*, Case Nos. 04-221-GA-GCR and 05-221-GA-GCR, Entry (December 29, 2006) at 4.

language in the application that requests to delay the schedule in the *PIRR Dockets* to consider the delayed PIRR as part of the modified ESP. The Company's only request with respect to the PIRR in this case is to delay its implementation until June 2013 and to establish the details necessary to make that happen. The Company never intended to reopen the *PIRR Dockets* or to relitigate the issues addressed therein. Those issues are submitted and the Commission has full comments and an appropriate record to issue a decision. Accordingly, any testimony in this case on the merits or makeup of the PIRR or the issues in *PIRR Dockets* is misplaced and would serve to needlessly extend this hearing and record, which already has an abundance of parties, testimony, and issues that do apply to the case to be considered.<sup>12</sup>

Contrary to the Company's position, however, the Commission has not issued an Order in the PIRR cases and thus has not "fully addressed" the issues in those cases.

Further, this proceeding, regarding the Company's proposed ESP, does not exist in a vacuum. Several other proceedings have an effect on this case. In order for the Commission to make its statutorily required finding in this case, it must consider all alternatives to the Company's position.

The matter of relevance is generally construed broadly. The Ohio Supreme Court has stated that "[e]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>13</sup> The federal system takes the standard for relevance even further: "Whether evidence is highly relevant or just a little relevant, it is relevant nonetheless."<sup>14</sup>

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<sup>12</sup> Motion, Memorandum in Support at 2-3 (emphasis in original).

<sup>13</sup> *State v. Nemeth* (1998), 82 Ohio St. 3d 202, 207, 1998 Ohio 376, 694 N.E.2d 1332.

<sup>14</sup> *Nilavar v. Mercy Health Sys. - W. Ohio*, 210 F.R.D. 597, 608-609, 604 (S.D. Ohio 2002).

In this proceeding, the Commission is required by statute to determine whether the Company's proposed ESP is more favorable in the aggregate than a market rate offer ("MRO"). R.C. 4928.143(C)(1) states, in pertinent part:

Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

Thus, whatever information the Commission may need to make its ESP/MRO comparison is relevant to this proceeding.

In its ESP/MRO comparison, the Commission must take into account the rates the Company proposes to charge during the term of the ESP. Included in those rates will be the PIRR. As part of Mr. Roush's testimony regarding the rate increases proposed through the ESP, Mr. Roush includes calculations of the PIRR for June 2013 through May 2014 and June 2014 through December 2014.<sup>15</sup> These calculations represent **AEP Ohio's** view of how the PIRR should be calculated, i.e., "a WACC carrying charge on the PIRR...."<sup>16</sup>

In order for the Commission to determine whether the proposed ESP is more favorable in the aggregate than an MRO (as required by R.C. 4928.143(C)(1)), it is

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<sup>15</sup> See Roush Testimony, Exhibit DMR-1 at 2.

<sup>16</sup> Powers Testimony at 10.

important in this proceeding for the Commission to take into consideration other means for calculating the amount of the deferrals that will be collected through the PIRR, should the Commission approve an ESP that includes a PIRR. Alternatives to the Company's proposed WACC-based carrying charges for the PIRR are thus relevant to this proceeding. The Commission should deny AEP Ohio's motion to strike.

**B. AEP Ohio's Own Testimony Discusses the Calculation of the PIRR, and Thus it Would be Unfair to Preclude Intervenors from Presenting Opposing Testimony.**

As noted above, AEP Ohio witness Powers identified that the deferrals to be collected through the PIRR include WACC-based carrying charges. AEP Ohio witness Roush includes "an estimate of the PIRR in Exhibit DMR-1."<sup>17</sup> Exhibit DMR-1 is a "Summary of Proposed ESP Rate Increases (cents kWh)." These are the rate increases the Commission must use in its analysis required by R.C. 4928.143(C)(1). The Company has thus brought the issue of the WACC for calculating carrying charges into this proceeding.

The Commission has noted that once an issue is raised in one party's testimony, it would be unfair to preclude another party from offering testimony on the issue.<sup>18</sup> In the *Columbia* case, the question of the proper allocation of pipeline capacity costs was raised in the report on the management/performance audit of Columbia's gas purchasing practices and policies. Although Columbia addressed the issue in one of its witness's testimony, Columbia nevertheless moved to strike the testimony of an OCC witness related to the allocation of pipeline capacity costs. The Commission, however, denied the

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<sup>17</sup> Roush Testimony at 6.

<sup>18</sup> See *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Related Matters*, Case Nos. 04-221-GA-GCR and 05-221-GA-GCR, Entry (December 29, 2006) at 4.

motion to strike, stating: “Because this issue was raised in the audit report and addressed by Columbia in its testimony, it would be unfair to preclude OCC from offering testimony on the issue.”<sup>19</sup>

A similar result is found in a case involving the energy efficiency and peak demand reduction (“EE/PDR”) portfolio program of Duke Energy Ohio, Inc. (“Duke”). There, Duke had included with its portfolio plan report the verbatim testimony of a Duke witness from Duke’s first ESP case that included subjects in addition to Duke’s EE/PDR program.<sup>20</sup> OCC’s testimony addressed some of these subjects, and Duke filed a motion to strike the testimony.<sup>21</sup> In response, OCC noted that Duke itself brought the subjects into the proceeding through its own testimony and “therefore it is relevant for PUCO consideration and OCC testimony.”<sup>22</sup> Duke’s motion to strike was denied at hearing.<sup>23</sup>

As in the two cases cited above, AEP Ohio has placed the calculation of the PIRR at issue in this proceeding through its own testimony. It is thus relevant for PUCO consideration and intervenor testimony. The Commission should deny AEP Ohio’s motion to strike.

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<sup>19</sup> Id.

<sup>20</sup> *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning Its Energy Efficiency and Peak-Demand Reduction Programs and Portfolio Planning*, Case No. 09-1999-EL-POR, Direct Testimony of Theodore Schultz (docketed December 29, 2009); id., Supplemental Testimony of Theodore Schultz (docketed December 29, 2009).

<sup>21</sup> Id., Duke’s Motion to Strike the Testimony of Wilson Gonzalez (May 3, 2010).

<sup>22</sup> Id., OCC Memorandum Contra (May 10, 2010) at 10.

<sup>23</sup> Id., Tr. at 8.

**C. The Single Sentence in Mr. Coppola's Testimony the Company Seeks to Have Stricken is Later Qualified as Being at the Advice of Counsel, and Thus the Company's Motion is Unnecessary.**

The Company has moved to strike a single sentence in Mr. Coppola's testimony.<sup>24</sup> The sentence, on page 6, line 1 of Mr. Coppola's testimony, states: "There is no legal basis to include a pool termination provision in a utility's ESP." The Company contends that this sentence "states a legal conclusion that is more appropriate for briefing and argument by counsel."<sup>25</sup> AEP Ohio also argues that "as there is no indication that Mr. Coppola is an attorney licensed to practice law in Ohio yet he is clearly offering a legal conclusion."<sup>26</sup> As an alternative to striking this single sentence, the Company proposes that "if Mr. Coppola made this statement after being advised by his counsel and revises this portion of his testimony to indicate as much, the Company would not seek to strike this portion of his testimony."<sup>27</sup> The Company's motion to strike the sentence on page 6, however, is rendered moot by a later portion of Mr. Coppola's testimony.

The sentence in question is in a section of Mr. Coppola's testimony summarizing the purpose of his testimony and his recommendations. Four pages later – in his detailed discussion of the Company's proposed pool termination provision, and in response to the question "Is the provision related to power pool termination authorized under Ohio statutes?" – Mr. Coppola stated, "I have been advised by counsel that there is no legal

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<sup>24</sup> Motion, Memorandum in Support at 8.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.



basis to include a pool termination provision in a utility's ESP.”<sup>28</sup> Thus, Mr. Coppola made clear in his testimony that the statement in question was made after he was advised by legal counsel.

The Company's motion to strike the sentence on page 6 of Mr. Coppola's testimony is superfluous. The Commission should deny the motion.

### **III. CONCLUSION**

As shown in the testimony of AEP Ohio witnesses Powers and Roush, the carrying charges included in the PIRR are a portion of the rate increases the Company proposes through the ESP. The Commission must consider these increases in making its statutorily required determination whether the proposed ESP is more favorable in the aggregate than an MRO. Witness Powers stated that the Company calculated the carrying charges using the WACC; the testimony of OCC witnesses Duann and Soliman present an alternative for calculating the carrying charges.

Not only is the testimony of OCC witnesses Duann and Soliman relevant, it would be unfair for the Commission to preclude OCC and other intervenors from presenting alternatives to the Company's method of calculation. In order for the Commission to properly make the determination required by law, and out of fundamental fairness, the Commission should deny the Company's motion to strike the portions of these OCC witnesses' testimony identified in the motion to strike.

The Commission should also deny AEP Ohio's motion to strike the single sentence on page 6 of Mr. Coppola's testimony. The sentence is in a portion of the testimony summarizing the testimony, and the statement made in the sentence is later

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<sup>28</sup> Coppola Testimony at 10.

qualified as made on the advice of counsel. It is unnecessary for the Commission to strike the sentence on page 6 of Mr. Coppola's testimony.

Respectfully submitted,

**BRUCE J. WESTON**  
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*/s/ Terry L. Etter*

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served by electronic mail to the persons listed below, on this 16<sup>th</sup> day of May 2012.

/s/ Terry L. Etter

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Summary: Memorandum Memorandum Contra AEP Ohio's Motion to Strike Portions of the Direct Testimony of OCC Witnesses Daniel J. Duann, Ibrahim Soliman and Sebastian Coppola by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.