

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Columbus)	
Southern Power Company for Administration)	
of the Significantly Excessive Earnings Test)	Case No. 11-4571-EL-UNC
under Section 4928.143(F), Revised Code,)	
and Rule 4901:1-35-10, Ohio Administrative)	
Code.)	

In the Matter of the Application of Ohio Power)	
Company for Administration of the Significantly)	
Excessive Earnings Test under Section)	Case No. 11-4572-EL-UNC
4928.143(F), Revised Code, and Rule)	
4901:1-35-10, Ohio Administrative Code.)	

**MEMORANDUM IN OPPOSITION TO OHIO POWER COMPANY'S APPLICATION
FOR REHEARING AND REQUEST FOR CLARIFICATION**

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I. INTRODUCTION

Columbus Southern Power Company (“CSP” or “AEP-Ohio”)¹ seeks rehearing and clarification of prior final orders of the Public Utilities Commission of Ohio (“Commission”) requiring AEP-Ohio to make an acceptable \$20 million investment by the end of 2013. The Commission should deny the request for rehearing and clarification because AEP-Ohio seeks to collaterally attack prior final orders of the Commission. If the Commission grants rehearing, it should order AEP-Ohio to return \$20 million and interest to customers through a uniform cent per kilowatt-hour (“kWh”) bill credit.

¹ Columbus Southern Power Company (“CSP”) merged with Ohio Power Company in December 2011. The surviving entity is Ohio Power Company. For convenience, CSP and AEP-Ohio will be used interchangeably unless the context requires different treatment.

II. AEP-OHIO HAS FAILED TO COMPLY WITH THE COMMISSION'S PRIOR FINAL ORDERS TO INVEST \$20 MILLION IN THE TURNING POINT SOLAR PROJECT OR OTHER SIMILAR PROJECT

On January 11, 2011, the Commission increased the threshold for finding that CSP earned significantly excessive earnings under its first electric security plan ("ESP") because AEP-Ohio indicated it intended to invest \$20 million in a solar generation project.² The Commission also noted that "should this project not move forward in 2012, such that the funds are expended in 2012, the Commission requires the \$20 million to be spent in 2012 on a similar project."³

The Commission's 2009 SEET order directing AEP-Ohio to invest in a generation facility or other project is final. Although AEP-Ohio sought rehearing of the Commission's order that it invest in a generation facility,⁴ AEP-Ohio did not appeal the Commission's entry on rehearing denying AEP-Ohio's application for rehearing of that issue.⁵ Subsequently, the Supreme Court affirmed the Commission's decision on the issues that were appealed by AEP-Ohio and customers in that case.⁶

In AEP-Ohio's 2010 Long-Term Forecast Report ("LTFR") case,⁷ AEP-Ohio requested that the Commission make a finding of need for the Turning Point Solar Project. The Commission, however, found that AEP-Ohio had failed to demonstrate

² *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 26-27 (Jan. 11, 2011) (hereinafter, the "2009 SEET Case").

³ *Id.*

⁴ *Id.*, Application for Rehearing of Columbus Southern Power Company at 2-3 (Feb. 10, 2011).

⁵ *Id.*, Notice of Cross-Appeal of Columbus Southern Power Company (May 13, 2011).

⁶ *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392 (2012).

⁷ *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR, *et al.* (hereinafter, the "2010 LTFR Case").

that the Turning Point Solar Project was needed.⁸ The Commission also noted that “AEP-Ohio remains obligated to expend \$20 million on the Turning Point project or other similar project, pursuant to Commission orders issued in Case No. 10-1261-EL-UNC” and “direct[ed] AEP-Ohio to expend \$20 million to the extent the Company has not already done so, and provide an updated status report regarding Turning Point or another investment in a similar project subject to Staff approval, by the end of 2013.”⁹ The Commission also held, “[a]lternatively, if AEP-Ohio is unable to make the \$20 million investment in the Turning Point or similar project by the end of the year [2013], the Company should submit a proposal for another appropriate use for the \$20 million investment.”¹⁰

The Commission’s order in 2010 LTFR Case also is final. The Commission issued its Opinion and Order on January 9, 2013. AEP-Ohio did not file an application for rehearing challenging the Commission’s order to invest \$20 million, and the Commission issued its entry on rehearing on March 6, 2013, affirming its Opinion and Order.¹¹ No party appealed the Commission’s Opinion and Order.

On September 13, 2013, AEP-Ohio filed an application to initiate Phase 2 of its gridSMART program. AEP-Ohio proposed to satisfy its “outstanding obligation by investing \$20 million in [Volt/Var Optimization (“VVO”)] technology as part of the

⁸ *Id.*, Opinion and Order at 27 (Jan. 9, 2013).

⁹ *Id.* at 27-28 (emphasis added).

¹⁰ *Id.* at 28.

¹¹ 2010 LTFR Case, Entry on Rehearing (Mar. 6, 2013).

gridSMART Phase 2 project.”¹² It is evident from AEP-Ohio’s application, however, that AEP-Ohio will not make a capital investment in VVO technology by the end of 2013.

Moreover, even if it did make that investment, it would be without Staff approval. In comments filed in the gridSMART Phase 2 proceeding, Staff recommended that AEP-Ohio not move forward with the Phase 2 program at this time.¹³ As summarized by Staff, “The Application provides a generalized approach and plan for moving forward. It is, however, less than definitively detailed *and lacks essential elements and information that would enable Staff to support moving forward at this time.*”¹⁴

In the October 23, 2013 Opinion and Order in this case, the Commission did not change its prior orders that AEP-Ohio invest \$20 million by the end of 2013. Instead, the Commission “reiterate[d its] expectation that AEP-Ohio expend \$20 million, to the extent the [*sic*] it has not already done so, on Turning Point or another investment in a similar project subject to Staff approval, by the end of 2013.”¹⁵

AEP-Ohio has sought rehearing and clarification that it may further delay compliance with the Commission’s long-standing and final order that AEP-Ohio invest \$20 million in an acceptable project. AEP-Ohio seeks rehearing and clarification “that the Company can pursue its current efforts to satisfy the outstanding obligation to invest

¹² *In the Matter of the Application of Ohio Power Company to Initiate Phase 2 of its gridSMART Project and to Establish the gridSMART Phase 2 Rider*, Case No. 13-1939-EL-RDR, Application at 4 (Sept 13, 2013) (“*gridSMART Rider Case*”).

¹³ *Id.*, Staff Comments at 3 (Nov. 1, 2013). OCC’s comments also recommended that AEP-Ohio not move forward with Phase 2 of the gridSMART program at this time. *Id.*, OCC Comments at 2 (Nov. 1, 2013); *see also id.*, RESA Comments at 4 (Nov. 1, 2013).

¹⁴ *Id.*, Staff Comments at 3 (emphasis added).

¹⁵ Opinion and Order at 18-19 (Oct. 23, 2013).

\$20 million without prejudice.”¹⁶ Relying on the gridSMART Phase 2 application’s proposal to invest in VVO, AEP-Ohio argues that “it is highly impractical at this point that funds can be expended in 2013” and requests that the “stated 2013 deadline” be held in abeyance.¹⁷

III. THE COMMISSION SHOULD DENY AEP-OHIO’S APPLICATION FOR REHEARING BECAUSE IT IS AN UNLAWFUL COLLATERAL ATTACK ON PRIOR COMMISSION ORDERS THAT ARE FINAL AND NOT SUBJECT TO FURTHER APPEAL

Res judicata and collateral estoppel are applicable to Commission proceedings and bar the attempts of parties to relitigate issues decided in prior proceedings that are finally decided. In the *Ohio Consumers’ Counsel v. Public Utilities Commission of Ohio*,¹⁸ for example, the Office of the Ohio Consumers’ Counsel (“OCC”) sought an adjustment to remove all system loss costs previously unlawfully overcollected under an electric fuel clause (“EFC”). During the review of a prior audit period, the Commission had permitted an overcollection, but OCC had not sought rehearing or appealed the Commission’s decision. In the next EFC case, OCC sought an order adjusting the EFC for the overcollection that occurred in the prior audit period. The Commission recognized that there was an overcollection in the prior period but refused to reduce the current charges for the prior overcollection. OCC appealed. Finding that both *res judicata* and collateral estoppel apply to Commission proceedings, the Court found that the Commission did not act unlawfully or unreasonably, holding that the prior final Commission decision barred OCC’s claim.

¹⁶ Ohio Power Company’s Application for Rehearing and Request for Clarification at 1-2 (Nov. 22, 2013) (“AEP-Ohio Application for Rehearing”).

¹⁷ *Id.* at 5.

¹⁸ 16 Ohio St.3d 9 (1985).

In the interest of affording finality to the decisions of administrative bodies which are left unchallenged, we hereby determine that OCC lost its only opportunity to challenge the propriety of CEI's system loss costs computation for the period prior to September 1, 1982, when it failed to appeal or to request a rehearing of the previous order. This question was directly at issue in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question.¹⁹

Similarly, AEP-Ohio is barred from reopening the Commission's prior order that it make an appropriate \$20 million investment or provide an acceptable alternative by the end of 2013. The 2009 SEET Case and the 2010 LTFR Case are final, and the time for further appeals has passed. Because those orders became final, AEP-Ohio cannot now seek to reopen them. Accordingly, the Commission should deny AEP-Ohio's application for rehearing seeking to allow it to further delay its compliance with prior final orders.

IV. IF THE COMMISSION GRANTS AEP-OHIO'S APPLICATION FOR REHEARING, THE COMMISSION SHOULD ORDER AEP-OHIO TO RETURN \$20 MILLION WITH INTEREST TO ITS CUSTOMERS THROUGH A UNIFORM CUSTOMER CREDIT

Because AEP-Ohio will not make \$20 million capital investment in the Turning Point Solar Project or other Staff-approved project by the end of 2013, it will not comply with the Commission's prior final orders. The problem becomes one of finding an appropriate remedy for AEP-Ohio's noncompliance.

One solution is for the Commission to grant AEP-Ohio's application for rehearing, reject AEP-Ohio's delaying tactics, and instead modify the findings in this case so as to direct AEP-Ohio to return to AEP-Ohio's customers \$20 million, with interest at the long term debt rate since January 11, 2011, through a uniform cent per kWh credit.²⁰ In light

¹⁹ *Id.* at 10 (citations omitted).

²⁰ In its application for rehearing, OCC requests that \$20 million be applied to the Storm Damage Recovery Rider. Application for Rehearing by the Office of the Ohio Consumers' Counsel at 2 (Nov. 22,

of the rate increases caused by the ESP II Order²¹ and the Commission's recent determination that CSP continued to have significantly excessive earnings in 2010,²² some relief for customers is justified and reasonable.

V. CONCLUSION

For the reasons discussed above, the Commission should either deny AEP-Ohio's Application for Rehearing seeking an order that would permit AEP-Ohio to further delay its compliance with final Commission orders or, if the Commission grants rehearing, do so for the limited purpose of modifying the order in this case so as to direct AEP-Ohio to return \$20 million with interest to customers through a uniform Kwh bill credit.

Respectfully submitted,

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2013). Because the Storm Damage Recovery Rider should be allocated based on distribution revenue, the crediting approach suggested by OCC is not correct.

²¹ *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 Nos. 11-346-EL-SSO, *et al.*, Opinion and Order (Aug. 8, 2012) ("ESP II Order").

²² Opinion and Order at 28.

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum in Opposition to Ohio Power Company's Application for Rehearing and Request for Clarification* was served upon the following parties of record this 2nd day of December 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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