

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Fuel Adjustment	)	Case No. 10-268-EL-FAC
Clauses for Columbus Southern Power	)	Case No. 10-269-EL-FAC
Company and Ohio Power Company and	)	
Related Matters for 2010.	)	

In the Matter of the Application the Fuel	)	
Adjustment Clauses for Columbus Southern	)	Case No. 11-281-EL-FAC
Power Company and Ohio Power Company	)	
and Related Matters.	)	

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**INDUSTRIAL ENERGY USERS-OHIO'S AND THE OFFICE OF THE OHIO CONSUMERS'  
COUNSEL'S MOTION TO STRIKE REPLY BRIEF  
OF OHIO POWER COMPANY AND MEMORANDUM IN SUPPORT**

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**February 4, 2014**

**ON BEHALF OF THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

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The Industrial Energy Users-Ohio ("IEU-Ohio") and the Office of the Ohio Consumers' Counsel ("OCC") move the Public Utilities Commission of Ohio ("Commission") for an order striking all of Section II.F.3.c. (from the top of page 30 through the first full paragraph of page 32 ending in the word "baseless") of the Reply Brief of Ohio Power Company ("AEP-Ohio"), as well as Exhibits A and B attached to that Reply Brief. As discussed in more detail in the accompanying memorandum, these portions of AEP-Ohio's Reply Brief are based upon extra-record evidence from 2012 and 2013 that is irrelevant to the period under review (2010 and 2011) in these proceedings.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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In this Motion, IEU-Ohio and OCC move the Commission for an order striking all of Section II.F.3.c. of the Reply Brief of AEP-Ohio, beginning at the top of page 30 through the first full paragraph of page 32 ending in the word “baseless,” as well as Exhibits A and B. The Commission should strike these portions of AEP-Ohio’s Reply Brief because they rely upon extra-record evidence.

In the portions of AEP-Ohio’s Reply Brief the Commission should strike, AEP-Ohio claims that the 2012 and 2013 information it relies upon demonstrates that the \$188.88 per megawatt day (“MW-day”) cost-based capacity charge authorized by the Commission<sup>1</sup> in the *Capacity Charge Case* does not fully compensate AEP-Ohio for its cost of capacity; thus, no double recovery occurred through the cost-based capacity charge and the Fuel Adjustment Clause (“FAC”) in 2010 and 2011.<sup>2</sup> To support these claims, AEP-Ohio submits Exhibit A, a recalculation of its capacity costs and energy

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<sup>1</sup> *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, Opinion and Order at 24-36 (Jul. 2, 2012) (hereinafter “*Capacity Charge Case*”).

<sup>2</sup> AEP-Ohio Reply Brief at 30 (Jan. 21, 2014). “[A] threshold analysis using 2012 costs confirms that the allegations of double recovery are meritless.” *Id.*

credit based upon 2012 information, and Exhibit B, a comparison of 2012 and 2013 fuel costs.

R.C. 4903.09 requires the Commission to make a complete record in all contested proceedings. The Commission must show in sufficient detail the facts in the record upon which its decision is made. *MCI Telecommunications Corp. v. Public Util. Comm'n of Ohio*, 32 Ohio St. 3d 306 (1987). Because reliance on assertions that are extraneous to the record would violate a statutory requirement governing the Commission's decision making process, the Commission has stricken portions of briefs that rely upon evidence that was not offered as evidence at the hearing in the proceeding.<sup>3</sup>

Based on the requirements of R.C. 4903.09 and Commission precedent, the Commission should strike the portions of AEP-Ohio's Reply Brief that rely upon extra-record evidence. AEP-Ohio did not offer the information it relies upon in the identified sections in its written testimony, as an exhibit, or through live testimony at the hearing.<sup>4</sup> AEP-Ohio provides no explanation of why this material was not presented in the course

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<sup>3</sup> *In the Matter of the Complaint of Andrew Hehemann v. Ohio American Water Company*, Case No. 05-1275-WW-CSS, Opinion and Order at 4 (Apr. 23, 2008) ("The Commission finds that the motion to strike should be granted with respect to the deposition testimony of Mr. Hehemann, the opinions of the health scientists and the references to newsletter and website. **These documents were not introduced or admitted into evidence at the proceeding.**") (emphasis added); *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR, Opinion and Order at 9 (May 5, 2010) (striking non-record statements contained in brief).

<sup>4</sup> Unlike AEP-Ohio, IEU-Ohio attempted to admit proffered Exhibits 7-12 into evidence, but was prohibited from doing so by the Attorney Examiner. Following Commission procedure, IEU-Ohio correctly raised the issue in its Post-Hearing Brief. Post-Hearing Brief of Industrial Energy Users-Ohio at 9-19 (Jan. 8, 2014). Moreover, unlike AEP-Ohio's non-record information, the validity of IEU-Ohio's proffered Exhibits is uncontested. Indeed, AEP-Ohio's Reply Brief relies upon proffered Exhibits 7-12 and confirms that AEP-Ohio is fully compensated for its capacity and purchased power costs by compensation of \$355/MW-day and that AEP-Ohio receives such compensation through its 2010 and 2011 base generation rates. AEP-Ohio Reply Brief at 20-23.

of these proceedings. Thus, Exhibits A and B and the related portion of the Reply Brief citing those Exhibits are not properly before the Commission.

Moreover, IEU-Ohio, OCC and other parties are prejudiced by AEP-Ohio's unlawful attempt to present extra-record evidence to the Commission through its Reply Brief. AEP-Ohio was on notice that IEU-Ohio identified a potential double recovery of purchased power costs, but AEP-Ohio chose to not file rebuttal testimony.<sup>5</sup> Instead, AEP-Ohio has attempted to make arguments based upon unsupported extra-record evidence in its Reply Brief where no party has an opportunity to respond.<sup>6</sup> Without an opportunity to challenge AEP-Ohio's claims, IEU-Ohio, OCC and other intervenors are prejudiced.

The prejudice to intervenors is aggravated because AEP-Ohio's claim is misleading. AEP-Ohio claims that the \$188.88/MW-day price of capacity authorized by the Commission<sup>7</sup> does not fully recover its costs related to the Lawrenceburg Generating Station ("Lawrenceburg") and the Ohio Valley Electric Corporation ("OVEC") during **2012 and 2013**.<sup>8</sup> AEP-Ohio's claim does not address IEU-Ohio's argument, and, even if it did, AEP-Ohio addresses a time frame outside of the audit period that is not under review in these proceedings. These proceedings address the fuel costs from **2010 and 2011** that customers will pay through the FAC.

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<sup>5</sup> Tr. at 54-63; IEU-Ohio Ex. 7-12. Moreover, Commission Staff witness Ralph Smith (the auditor) stated, "I think if there's an issue of a double count **such as we seem to have here**, it seems like that issue may deserve some further investigation." (Emphasis added.) Tr. at 67-68.

<sup>6</sup> As AEP-Ohio recently noted, "the Commission has rebuked sandbagging by either striking the offending pleading or granting the harmed party an opportunity to submit sur-reply." *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support Its Standard Service Offer*, Case No. 12-3254-EL-UNC, Ohio Power Company's Motion to Strike or, in the Alternative, For Leave to File Instantly the Attached Sur-Reply Comments at 5 (Mar. 20, 2013) (hereinafter "*CBP Case*").

<sup>7</sup> *Capacity Charge Case*, Opinion and Order at 24-36 (Jul. 2, 2012).

<sup>8</sup> AEP-Ohio Reply Brief at 30-32.

IEU-Ohio has not claimed in these proceedings that AEP-Ohio double recovered its purchased power costs because it was recovering the price of capacity at \$188.88/MW-day.<sup>9</sup> Rather, IEU-Ohio proffered evidence that AEP-Ohio double recovered its purchased power costs through its 2010 and 2011 base generation rates and the FAC in effect during 2010 and 2011, to the detriment of customers. Even if AEP-Ohio were correct that \$188.88/MW-day did not compensate it for its capacity costs in 2012 or 2013 (and there is no evidence that it does not), its injection of the price of capacity determined in the *Capacity Charge Case* is clearly misleading and unresponsive to the claim made by IEU-Ohio that base generation rates in effect during 2010 and 2011 fully compensated AEP-Ohio for its Lawrenceburg and OVEC demand related costs.

Notably, AEP-Ohio does not contest that its base generation rates fully compensated it for its capacity and purchased power costs. AEP-Ohio's Reply Brief concedes that its base generation rates in effect during 2010 and 2011 provided compensation equivalent to \$355/MW-day.<sup>10</sup> AEP-Ohio's Reply Brief also concedes that, based upon its 2010 Federal Energy Regulatory Commission ("FERC") Form 1, it is fully compensated for its capacity and demand related purchased power costs by \$355/MW-day.<sup>11</sup> As a result, AEP-Ohio was fully compensated for its OVEC and Lawrenceburg demand related costs through its base generation rates. Nonetheless, it

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<sup>9</sup> IEU-Ohio, however, does believe that after the \$188.88/MW-day rate became effective, AEP-Ohio double recovered its purchased power costs through the \$188.88/MW-day rate and the FAC. During that time, AEP-Ohio received full compensation for its capacity and purchased power costs through either base generation rates (when customers do not shop) and through the \$188.88/MW-day rate (when customers shop). Thus, additional recovery through the FAC is duplicative.

<sup>10</sup> AEP-Ohio Reply Brief at 23.

<sup>11</sup> "The Company never said it was fully compensated by the \$188.88/MW-day rate **but maintained that the \$355/MW-day rate would have been fully compensatory.**" AEP-Ohio Reply Brief at 20 (emphasis added). "AEP Ohio's original \$355.72/MW-day calculation in the *Capacity Case* included capacity costs that reflected OVEC and Lawrenceburg demand charges." *Id.* See also *id.* at 20-22.

is seeking the Commission's approval of additional recovery of those demand related costs through the FAC. Thus, AEP-Ohio's additional recovery of demand related costs through the FAC would allow AEP-Ohio to double recover, as demonstrated by AEP-Ohio.

For the reasons identified above, and to protect the interests of customers, IEU-Ohio and OCC urge the Commission to strike all of Section II.F.3.c. of AEP-Ohio's Reply Brief (from the top of page 30 through the first full paragraph of page 32), as well as Exhibits A and B.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's and the Office of the Ohio Consumers' Counsel's Motion to Strike Reply Brief of Ohio Power Company and Memorandum in Support* was served upon the following parties of record this 4th day of February 2014, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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Summary: Motion (Joint Motion) Industrial Energy Users-Ohio's and the Office of the Ohio Consumers' Counsel's Motion to Strike Reply Brief of Ohio Power Company and Memorandum in Support electronically filed by Mr. Joseph E. Olier on behalf of Industrial Energy Users-Ohio