

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Fuel Adjustment)	
Clause of Columbus Southern Power)	Case No. 10-268-EL-FAC
Company and Ohio Power Company)	Case No. 10-269-EL-FAC
And Related Matters for 2010)	
 In the Matter of the Fuel Adjustment)	
Clause of Columbus Southern Power)	Case No. 11-281-EL-FAC
Company and Ohio Power Company)	
And Related Matters for 2011)	

**OHIO POWER COMPANY’S MEMORANDUM IN OPPOSITION TO
MOTION TO STRIKE FILED BY INDUSTRIAL ENERGY USERS – OHIO AND
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The Industrial Energy Users – Ohio (IEU) and the Office of the Ohio Consumers’ Counsel (OCC) filed a motion to strike a portion of Ohio Power Company’s (AEP Ohio’s) reply brief. As discussed below, AEP Ohio’s extra-record material referenced on brief was merely offered as an illustration to counter IEU’s presentation of extra-record material. If the Commission does decide to grant the IEU/OCC motion to strike, it is only fair to also strike those portions of IEU’s brief that similarly relies upon extra-record material. But it is not necessary to strike portions of the parties’ briefs from the record in order to avoid relying on the extra-record material and AEP Ohio’s main position is that none of the extra-record material should be relied upon by the Commission.

II. ARGUMENT

The primary purpose of AEP Ohio's arguments in Section II.F.3.c was to show that the excluded evidence proffered by IEU during the evidentiary hearing – and nonetheless relied upon in its initial brief – could not reasonably support the conclusions drawn from it by IEU. Indeed, AEP Ohio's primary argument was (at 17-19) was that IEU's excluded evidence should be disregarded and Section II.F.3.c (including Exhibits A and B) was part of an alternative presentation to show (at 19-25) that the excluded evidence proffered by IEU does not factually support the claims being made and to show (at 25-32) that IEU's asserted conclusions were flawed in numerous ways.

Specifically, Section II.F.3.c was merely an illustration of why a further examination of the double recovery is not needed based on IEU's excluded evidence. AEP Ohio argued (at 30-32) that IEU's static presumptions about double recovery conflict with the Opinion and Order in the *Capacity Case*, since that decision permits a subsequent examination of costs actually incurred as compared to the \$188.88/MW-day.¹ In that context, AEP Ohio offered factual examples – as explained on page 30 – to show what would be presented “[i]f it has now become necessary to engage in such a subsequent examination in order to dispel the double recovery allegations.” In other words, AEP Ohio was responding to IEU's claims that were explicitly based on proffered/excluded evidence by illustrating what kind of evidence could be presented by AEP Ohio to refute IEU's false claims. As such, AEP Ohio was not unilaterally engaging in reliance on extra-record evidence but was simply responding in kind to IEU's reliance on extra-

¹ These same arguments (including the presentation of Exhibits A and B) were presented by AEP Ohio in its December 13, 2013 Application for Rehearing in Case No. 12-3254-EL-UNC.

record evidence. Notwithstanding IEU/OCC's hollow criticism (at 4) that AEP Ohio should have proffered the extra-record material at the hearing, the fact that IEU proffered its extra-record evidence at hearing (after being excluded by rulings by the Attorney Examiner) does not place IEU's reliance on extra-record evidence on any higher ground than AEP Ohio's extra-record examples. Similarly, IEU/OCC (at 5) criticize the Company for not filing rebuttal testimony to address these matters. Of course, the Attorney Examiner would not likely have permitted rebuttal testimony to address matter that she excluded from evidence. Notwithstanding these hollow distinctions, IEU's evidence was excluded and equally remains extra-record material.

Ironically, the motion to strike (at 5) also criticizes AEP Ohio's analysis as addressing "a time frame outside of the audit period that is not under review in these proceedings." Of course, this is one of the same reasons IEU's proffered evidence was excluded from the record and should not be relied upon. Tr. at 53, 55. IEU also improperly uses the motion to strike to improperly expound upon its arguments – after the merit briefing has been completed. For example, IEU offers a late clarification (at 6) that its proffered evidence was intended to show that the 2010-2011 double recovered costs also collected through the FAC in 2010-2011. While this untimely clarification of its merit argument does not advance its cause, it does confirm that IEU's is attempting to launch a collateral attack on the Company's approved base generation rates – as AEP Ohio pointed out in its reply brief. In another improper attempt to present a sur-reply argument, the motion to strike falsely claims (at 6) that the Company's reply brief "concedes that ... it is fully compensated for its capacity and demand related purchased power costs by \$355/MW-day." In making this statement, IEU/OCC refers to page 20 of the Company's reply brief; but the Company's statement was made relative to being compensated

for shopping capacity under its Fixed Resource Requirements obligation whereas IEU's double recover claim relies on Base Generation rates paid by non-shopping SSO customers.

In any case, AEP Ohio's main position was that it is unnecessary for the Commission to rely on any extra-record evidence in this case. All of it should be ignored if the Commission properly decides this case. It was only if the Commission entertained any of the false conclusions being asserted from IEU's extra-record proffer that the Commission should then stop to consider the illustrations by AEP Ohio discussed in Section II.F.3.c (including Exhibits A and B). The bottom line is that, if the Commission wants to move forward to further examine the double recovery allegations (contrary to AEP Ohio's position that it need not be further examined), then the appropriate method for doing so is to conduct a hearing and take appropriate evidence through testimony and arguments. That was not done in this case, which was the correct outcome.

Finally, while IEU/OCC maintain (at 3) that the arguments in Section II.F.3.c should be stricken because "they rely upon extra-record evidence," most of the arguments in Section II.F.3.c of AEP Ohio's Reply Brief that are not related to Exhibits A or B and primarily interpret and apply the *Capacity Case* decision. If the Commission does strike anything in the Company's brief, it should only exclude the quantitative analysis in Exhibits A and B and the specific references on pages 30-32 to figures from Exhibits A and B. But the Commission does not need to strike the extra-record evidence from the briefing process in order to avoid relying on it.

In sum, the point of AEP Ohio's proffer in Section II.F.3.c was to give the Commission pause before relying upon IEU's excluded evidence. AEP Ohio agrees that none of the extra-record material needs to be critically relied upon – neither IEU's proffered exhibits or AEP

Ohio's Exhibits A and B. That does not, however, mean that portions of AEP Ohio's brief should be stricken for making an illustration to rebut IEU's argument on brief that equally uses extra-record evidence. The only way it would be fair to strike Section II.F.3.c of AEP Ohio's reply brief is if the Commission also strikes the portions of IEU's brief that rely upon the excluded evidence – which is pages 8-9 and 12-16 of IEU's initial brief.

III. CONCLUSION

The motion to strike filed by OCC should be denied, unless the Commission also strikes the portions of IEU's brief that explicitly relies upon extra-record evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic mail upon the below-listed counsel this 18th day of February, 2014.

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Summary: Memorandum in Oppoisition electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company