

**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.)	

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

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I. INTRODUCTION

On February 4, 2014, Industrial Energy Users-Ohio ("IEU-Ohio") and the Office of the Ohio Consumers' Counsel ("OCC") filed a motion to strike ("Motion") the extra-record information contained in Section II.F.3.c. and Exhibits A and B of the Reply Brief of Ohio Power Company ("AEP-Ohio"). AEP-Ohio's Memorandum Contra concedes that its Reply Brief contains extra-record information that does not pertain to the audit periods under review in these proceedings.¹ Because the Public Utilities Commission of Ohio ("Commission") cannot base its Opinion and Order in these proceedings on extra-record information, the Commission should grant the Motion and strike Section II.F.3.c. and Exhibits A and B of AEP-Ohio's Reply Brief.

Moreover, the Commission should reject AEP-Ohio's request to strike provisions of IEU-Ohio's Post-Hearing Brief.² Because AEP-Ohio failed to submit a proper motion

¹ AEP-Ohio Memorandum Contra at 1-5 (Feb. 18, 2014).

² AEP-Ohio Memorandum Contra at 5 (Feb. 18, 2014).

to strike and memorandum in support, AEP-Ohio's request is not properly before the Commission. Regardless, following Commission procedure, IEU-Ohio proffered the exhibits and challenged the Attorney Examiner's ruling in its Post-Hearing Brief. Thus, IEU-Ohio Exhibits 7-12 and IEU-Ohio's Post-Hearing Brief were properly presented for the Commission's consideration.

II. ARGUMENT

A. Extra-record information must be stricken

AEP-Ohio admits that Section II.F.3.c. of its Reply Brief contains extra-record information.³ But, AEP-Ohio claims that the "extra-record material referenced on brief was merely offered as an illustration to counter IEU's presentation of extra-record material."⁴ AEP-Ohio claims that it offered the extra-record information to demonstrate that "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."⁵

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.⁶ 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

³ AEP-Ohio Memorandum Contra at 1-5 (Feb. 18, 2014).

⁴ *Id.* at 1.

⁵ *Id.* at 2 (emphasis added).

⁶ *MCI Telecommunications Corp. v. Public Util. Comm'n of Ohio*, 32 Ohio St. 3d 306 (1987).

that rely upon evidence that was not offered as evidence at the hearing in the proceeding.⁷

The Commission cannot rely upon extra-record information in its decisions. It does not matter that AEP-Ohio claims that it offered extra-record information as an illustration. AEP-Ohio's illustration is not part of the record in these proceedings. Thus, Section II.F.3.c. of the Reply Brief of AEP-Ohio should be stricken.

B. IEU-Ohio and OCC are prejudiced because AEP-Ohio's extra-record information is misleading and irrelevant

IEU-Ohio's and OCC's Motion identified that AEP-Ohio's extra-record information pertains to AEP-Ohio's alleged cost of capacity in 2012 and beyond, which is irrelevant to AEP-Ohio's 2010 and 2011 fuel adjustment clause ("FAC") cases. AEP-Ohio responds with two conflicting arguments that are not persuasive.

First, AEP-Ohio claims that the Attorney Examiner excluded IEU-Ohio's proffered exhibits because they pertain to a time-frame outside the audit periods under review.⁸ Second, AEP-Ohio claims that IEU-Ohio improperly used the Motion to clarify that its proffered evidence was intended to show that AEP-Ohio double-recovered purchased power costs through the FAC in 2010 and 2011.⁹ Both of AEP-Ohio's arguments unravel for the same reason—IEU-Ohio's Post-Hearing Brief stated on seven different pages that AEP-Ohio double-recovered purchased power costs through base

⁷ *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).

⁸ AEP-Ohio Memorandum Contra at 3 (Feb. 18, 2014).

⁹ *Id.* at 3.

generation rates and its FAC **during 2010 and 2011.**¹⁰ Moreover, this fact further supports overruling the Attorney Examiner's ruling, which incorrectly assumed that IEU-Ohio's proffered exhibits were not related to the audit periods under review.

AEP-Ohio's Memorandum Contra also clings to the false claim contained in its Reply Brief that "IEU is attempting to launch a collateral attack on the Company's approved base generation rates."¹¹ No party has requested that the Commission modify AEP-Ohio's base generation rates. Rather, IEU-Ohio has urged the Commission to reject AEP-Ohio's duplicative recovery of purchased power costs through an adjustment to the FAC.

Finally, AEP-Ohio claims that most of the arguments in Section II.F.3.c. related to AEP-Ohio's interpretation and appeal of the Commission order that authorized an increase in the compensation AEP-Ohio receives for the provision of capacity service.¹² AEP-Ohio claims that "[i]f 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"¹³ The Commission should deny AEP-Ohio's request.

AEP-Ohio's arguments related to its appeal of the \$188.88/megawatt day ("MW-Day") price in the *Capacity Case* and its interpretation of that case are misleading and not relevant to these proceedings. 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

¹⁰ See IEU-Ohio Post-Hearing Brief at 8, 9, 11, 12, 14, 16, 26 (Jan. 8, 2014). During the hearing, IEU-Ohio's counsel indicated that the proffered exhibits demonstrate that AEP-Ohio double-recovered its purchased power costs through base generation rates and the FAC in 2010 and 2011. Tr. Vol. I at 61-62.

¹¹ AEP-Ohio Memorandum Contra at 3 (Feb. 18, 2014).

¹² *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 (Jul. 2, 2012) (hereinafter "*Capacity Case*").

¹³ AEP-Ohio Memorandum Contra at 4 (Feb. 18, 2014).

evidence that it does not), its injection of the price of capacity determined in the *Capacity 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 purchased power costs. IEU-Ohio and OCC are prejudiced by these arguments and they should be stricken from AEP-Ohio's Reply Brief.

C. The Commission should not strike information properly proffered by IEU-Ohio; the Commission should take administrative notice of the proffered exhibits because AEP-Ohio verified the information in its Reply Brief

AEP-Ohio claims that if the Commission grants the Motion, "it is only fair to also strike those portions of IEU's brief that similarly relies [sic] upon extra-record material."¹⁴ AEP-Ohio claims that "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."¹⁵

AEP-Ohio's request is procedurally improper and substantively wrong. AEP-Ohio has failed to submit an appropriate motion and memorandum in support, as required by Rule 4901-1-12(A), Ohio Administrative Code ("OAC"). Moreover, IEU-Ohio followed Commission procedures for consideration of excluded evidence, and AEP-Ohio does not contest the validity of the proffered exhibits.

The Attorney Examiner refused to admit IEU-Ohio Exhibits 7 through 12 related to AEP-Ohio's double-recovery of non-fuel purchased power costs through the FAC and base generation rates on the ground that they were not relevant. To preserve its

¹⁴ AEP-Ohio Memorandum Contra at 1 (Feb. 18, 2014).

¹⁵ *Id.* at 3.

objection to the Attorney Examiner's ruling, IEU-Ohio proffered those exhibits.¹⁶ Under Rule 4901:1-15(F), OAC, any party that is adversely affected by any oral ruling issued during a hearing "may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief" Following Commission procedure, IEU-Ohio correctly raised the issue in its Post-Hearing Brief.¹⁷

Moreover, AEP-Ohio is not unduly prejudiced by the information IEU-Ohio sought to have admitted. Indeed, AEP-Ohio's Reply Brief relies upon proffered Exhibits 7-12 at length.¹⁸ Although AEP-Ohio disputes¹⁹ the conclusion that the \$355/MW-day price produced by its base generation rates fully compensates it for its capacity and purchased power costs—claiming that capacity supplied to shopping customers is not the same as capacity supplied to non-shopping customers²⁰—AEP-Ohio does not dispute that its base generation rates do, in fact, produce compensation equivalent to \$355/MW-day.

Commission precedent²¹ and Ohio Rule of Evidence 201 provide that the Commission can take administrative notice of any fact that is generally known or capable of ready determination.²² IEU-Ohio's Post-Hearing Brief requested that the

¹⁶ Tr. at 53. See also *id.* at 49-53.

¹⁷ IEU-Ohio Post-Hearing Brief at 9-19 (Jan. 8, 2014).

¹⁸ AEP-Ohio Reply Brief at 20-23 (Jan. 21, 2014).

¹⁹ AEP-Ohio Memorandum Contra at 3 (Feb. 18, 2014).

²⁰ For reasons why AEP-Ohio's legal argument is unsound, see *The Kroger Co. v. Pub. Util. Comm.*, S.Ct. Case No. 2013-521, Third Merit Brief of Public Utilities Commission of Ohio at 13-15 (Dec. 10, 2013).

²¹ See *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No 12-1230-EL-SSO, Opinion and Order at 20-21 (Jul. 18 2012).

²² Ohio Rule of Evidence 201 provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court {C42918:3 }

Commission take administrative notice of proffered exhibits 7-12 because the exhibits were each a part of the record in other Commission proceedings,²³ and the information was, with one exception, produced by AEP-Ohio. AEP-Ohio's Reply Brief and Memorandum Contra rely upon the information in IEU-Ohio's proffered exhibits 7-12 and verify the veracity of those exhibits. Because the information contained in IEU-Ohio's proffered exhibits is generally known and not contested by AEP-Ohio, the Commission should take administrative notice of the information.

III. CONCLUSION

For the reasons stated herein, IEU-Ohio and OCC urge the Commission to grant the Motion and deny AEP-Ohio's request to strike IEU-Ohio's Post-Hearing Brief.

Respectfully submitted,

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or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

²³ IEU-Ohio Post-Hearing Brief at 21 (Jan. 8, 2014).

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**ON BEHALF OF THE OFFICE OF THE OHIO
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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 Reply to Ohio Power Company's Memorandum in Opposition to Motion to Strike* was served upon the following parties of record this 25th day of February 2014, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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