BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility.	)))))))	Case No. 05-376-EL-UNC

INDUSTRIAL ENERGY USERS-OHIO'S REPLY COMMENTS

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ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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In accordance with the Attorney Examiner's August 11, 2014 Entry in the above-captioned matter, Industrial Energy Users-Ohio ("IEU-Ohio") hereby files its Reply Comments addressing matters raised by Ohio Power Company ("AEP-Ohio") in its Initial Comments filed on September 5, 2014.

AEP-Ohio correctly identifies that the only issue remaining in this proceeding is the determination of the amount of the refund that AEP-Ohio must provide to its customers.[1] In recommending that the Public Utilities Commission of Ohio ("Commission") conduct an audit and conclude that AEP-Ohio should only have to refund $4.7 million to customers,[2] AEP-Ohio suggests that the Commission ignore both the law and the Ohio Supreme Court's ("Court") decision on appeal in this case because compliance with the law and the Court's decision would be "a hypothetical exercise."[3] In support of its "hypothetical exercise" position, AEP-Ohio identifies that the statutory

[1] AEP-Ohio Initial Comments at 7-8.

[2] AEP-Ohio argues that the proper amount of the refund is $3.166 million, with interest at the rate of its customer deposits, totaling $4.7 million. *Id.* at 6-7.

[3] *Id.* at 7.

framework governing the regulation of retail electric generation service has changed "since AEP Ohio filed its Application and the Commission issued its prior orders in this case."[4]

The Commission, however, is bound by the law of the case. Moreover, the applicable law, as the Court found in its decision remanding the Commission's order, requires the Commission to refund the amounts collected by AEP-Ohio under the unlawful rider. In its decision reversing the Commission's order authorizing the Phase I charges, the Court confirms that the Commission could not authorize the recovery of competitive costs (*i.e.* retail electric generation service costs) through cost-based rates:

> It is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc.,* 104 Ohio St. 3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 2, we stated that S.B. 3 "provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service." R.C. 4928.03 specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and R.C. 4928.05 expressly removes competitive retail electric services from commission regulation. Moreover, R.C. 4928.14(A) requires an electric-distribution utility to provide a market-based standard service offer of all competitive retail electric services, including electric-generation service.[5]

The proposed integrated gasification combined cycle ("IGCC") generating plant clearly related to competitive generation service. Accordingly, the Commission could not lawfully authorize the Phase I charges to recover the cost of the IGCC generating facility under existing law.

Contrary to AEP-Ohio's claim, the Commission cannot treat the remand as a "hypothetical exercise." The Court's decision forms the law of the case. The law of the case doctrine "provides that the decision of a reviewing court in a case remains the law

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[4] *Id*.

[5] *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, ¶ 20.

of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."[6] The doctrine serves the necessary purpose of providing finality. As the Supreme Court has explained, the rule is necessary "to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution."[7] Based on the law of the case doctrine, AEP-Ohio's claim that the Commission may unilaterally ignore the conclusions of the Court (which held that the Commission cannot establish cost-based recovery for competitive costs) is without merit.

Further, even if the changes effected by Amended Substitute Senate Bill 221 ("SB 221") were applicable to this case, the Commission could not authorize AEP-Ohio to retain the revenue it collected subject to refund under the unlawful rider, as IEU-Ohio demonstrated in its initial comments.[8]

Additionally, AEP-Ohio is effectively arguing that SB 221 may be applied retroactively, but has failed to demonstrate that the legislature intended to have SB 221 apply retroactively. "It is well-settled law that statutes are presumed to apply prospectively unless expressly declared to be retroactive."[9] The declaration that the statute is to be applied retroactively must be express: "A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred."[10] SB 221 contains no provision that

[6] *Nolan v. Nolan,* 11 Ohio St.3d 1, 3 (1984).

[7] *Id.*

[8] IEU-Ohio Initial Comments at 12-13.

[9] *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 20.

[10] *Id*. at ¶ 15.

declares that it is to operate retroactively. Thus, even if SB 221 somehow provided AEP-Ohio with some lawful basis to retain the revenue collected under the rider declared unlawful by the Court, the Commission could not apply the provisions of SB 221 retroactively.

Even if AEP-Ohio subsequently argues that the research and design costs for a generation facility were noncompetitive costs, AEP-Ohio would still have to refund the entire $24.24 million. As the Court held in its decision in this case, the Commission may only authorize the collection of noncompetitive costs in accordance with R.C. Chapter 4909.[11] Under R.C. 4909.15, the recovery of costs related to physical facilities that are not in service is limited to those that are eligible for an allowance for construction work in progress. The requirements for such an allowance require the applicant to demonstrate that the project for which the allowance is sought is 75% complete. AEP-Ohio admits in its Initial Comments that it did not begin construction of the IGCC generating facility; as a result, the project, even if it were an eligible project, is not at least 75% complete. Thus, even if the remaining requirements in R.C. Chapter 4909 were complied with (*e.g.* notice of intent, application requirements, public notice, Staff Report of Investigation, etc.), AEP-Ohio's admission would prove fatal to its ability to collect any noncompetitive costs (again assuming that the law could be ignored and generation-related costs could be considered noncompetitive). Accordingly, there is no need for the Commission to conduct the audit required by the Commission's June 28, 2006 Entry on Rehearing to determine if the $21 million of AEP-Ohio's claimed

[11] *Indus Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990, ¶¶ 28-29, 31-32.

expenditures were prudent and the extent that any prudently incurred expenditures may be utilized at other projects.

The only remaining issue is the amount of carrying charges to apply to the principal amount of $24.24 million that must be returned. With regard to the amount of carrying charges appropriate to apply to the principal balance of $24.24 million, the Commission should apply symmetrical treatment and refund that balance plus carrying charges at the carrying charge rate AEP-Ohio requested in this case; AEP-Ohio's grossed-up weighted average cost of capital ("WACC") rate.[12] For obvious equitable reasons, the Commission has consistently held that if a utility is permitted to recover carrying charges on under-recovery balances associated with a given rider, then any refunds due customers under the rider will occur with the same amount of carrying charges.[13] Further, the Commission has rejected a previous request of AEP-Ohio to apply carrying charges at AEP-Ohio's customer deposit rate to refunds owed to customers.[14]

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[12] In AEP-Ohio's application and supporting testimony, AEP-Ohio requested carrying charges on expenditures at its grossed-up WACC rate, which was 12.78% for the Columbus Southern Power Company ("CSP") zone and 12.73% for the Ohio Power Company ("OP") zone. Direct Testimony of Philip J. Nelson at 4-5 (May 5, 2005).

[13] *See, e.g.*, *In the Matter of the Fuel Adjustment Clauses tor Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Entry on Rehearing at 9 (Apr. 11, 2012). In this decision, the Commission held:

> In accordance with our finding that all of the realized value from the settlement agreement should be credited to the benefit of ratepayers, we find that AEP-Ohio should flow through to its customers a carrying charge component in applying the credit to OP's FAC under-recovery. Such carrying charge component should be calculated in a manner consistent with calculation of the FAC deferrals, as approved in the ESP 1 order, including use of the approved weighted average cost of capital.

[14] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand at 34 (Oct. 3, 2011).

Finally, as identified in IEU-Ohio's Initial Comments, the $24.24 million, plus interest at AEP-Ohio's grossed-up WACC rate, should be refunded to all customers through a nonbypassable credit because at the time the Phase I charges were collected there was no shopping in AEP-Ohio's service area.[15] Thus, all of AEP-Ohio's customers paid the Phase I charges and all of AEP-Ohio's customers are due a refund.

In sum, IEU-Ohio agrees with AEP-Ohio that the only remaining issue in this proceeding is the determination of the amount that AEP-Ohio must refund to customers. For the reasons stated above, that amount should be $24.24 million, plus interest at AEP-Ohio's grossed-up WACC rate.

Respectfully submitted,

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[15] IEU-Ohio Initial Comments at 16.

CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Reply Comments* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 19th day of September 2014, *via* electronic transmission.

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