

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

I. INTRODUCTION.

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to construct the IGCC project was just and reasonable.¹ AEP Ohio incorrectly asserts that the PUCO already held that that it was reasonable for AEP to proceed with Phase I and to recover those costs. More importantly, this assertion by AEP Ohio ignores the direction of the Supreme Court of Ohio. As argued below, AEP Ohio's Motion to Strike should not be granted.

II. ARGUMENT.

A. OCC's testimony addresses an unresolved issue and rebuts the testimony of AEP Ohio witnesses; therefore, it is relevant to these proceedings and should not be stricken.

AEP Ohio's 1.2 million residential customers should not have to pay for the Phase I cost unless there is a finding that the costs were prudently incurred. To date, however, there has been no Order issued by the PUCO that addressed the prudence of the Phase I IGCC spending. At no point during the Phase I litigation did the PUCO expressly find that the costs were just and reasonable in accordance with R.C. 4909.18. In fact, the PUCO specifically withheld its decision on that issue by finding that "[a]ll Phase I costs will be the subject of subsequent audit(s) to determine whether such expenditures were reasonably incurred to construct the proposed IGCC facility in Ohio."² Yet, AEP Ohio filed a Motion to Strike portions of the Direct Testimony filed by OCC witness Scott Norwood that addresses the prudence of that spending.

Despite AEP Ohio's assertions to the contrary, Mr. Norwood's testimony is not directed at future plans to construct the IGCC plant. Certainly, the Utility has conceded

¹ AEP Ohio Motion to Strike at 1.

² Entry on Rehearing at 16.

that the IGCC project has not been constructed³ and has ceased all efforts to pursue constructing the facility -- in fact stating that “it is an undisputed fact that the Great Bend IGCC will not be constructed.”⁴ Rather, Mr. Norwood addresses the paucity of evidence that the Utility has produced to support its case that the IGCC Phase I pre-construction costs were reasonably incurred to meet its POLR obligations – an issue specifically identified by the Supreme Court.⁵

Mr. Norwood testifies that there is no indication that AEP Ohio made any efforts to justify why it needed to build generation over other alternatives to obtain generation to meet its provider of last resort (“POLR”) obligation, or why it pursued the IGCC technology over other types of generation technology. While these concerns may have been raised before the PUCO on the first phase of this litigation, the PUCO reserved any explicit determination that the Phase I costs were reasonably incurred.⁶

But even if the PUCO had decided the prudence issue (which it has not), AEP continues to place the reasonableness of the Phase I costs at issue in this case. For instance, AEP Ohio’s remand witness, Gary Spitznogle, opined that “[m]y opinion is based on the fact that the decision to evaluate the possible construction of the IGCC facility was reasonable and prudent based upon the facts known, and the assumptions that had to be made, in 2005.”⁷ Similarly, AEP Ohio’s remand witness, Daniel Duellman, explained that the purpose of his testimony was to “support the reasonableness of the

³ Direct Testimony of Gary O. Spitznogle at 18.

⁴ AEP Ohio Motion to Strike at 1, *see also*, Direct Testimony of Daniel M. Duellman at 5-6.

⁵ *See supra*, Section II(B); *see also*, *Industrial Energy Users-Ohio v. Pub. Util. Comm. Ohio*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶32.

⁶ Entry on Rehearing at 16.

⁷ Direct Testimony Gary O. Spitznogle at 5, 10.

costs incurred to perform those Phase I activities . . .”⁸ If the prudence issue is not relevant to the proceedings, the Utility would not have felt the need to file testimony supporting the prudence of its actions. It seems paradoxical that AEP Ohio filed multiple pieces of testimony to support the reasonableness of the Phase I costs but then moves to strike the Mr. Norwood’s testimony on the same issue. Therefore, AEP Ohio’s Motion to Strike should be denied.

B. OCC is not relitigating issues previously decided; rather, OCC is litigating the reasonableness of AEP Ohio’s Phase I expenditures that are at issue in this proceeding because of the Supreme Court of Ohio’s remand.

AEP Ohio argues that Mr. Norwood’s testimony is an attempt by OCC to relitigate the PUCO’s prior decision in violation of res judicata and collateral estoppel.⁹ However, the portions of Mr. Norwood’s testimony that AEP Ohio seeks to strike are certainly not an attempt to re-litigate issues that were previously litigated such that it would be barred by the doctrine of res judicata.¹⁰ Indeed, the Supreme Court of Ohio has held that collateral estoppel and res judicata do not apply to a remanded proceeding that is part of the same administrative proceeding.¹¹ Therefore, AEP Ohio’s Motion to Strike should be denied.

AEP Ohio ignores the fact that the PUCO’s April 20, 2006 decision was reversed and remanded by the Supreme Court of Ohio for further factual development. In support of its Motion to Strike, AEP Ohio consistently relies upon the PUCO’s original Opinion and Order arguing that portions of Mr. Norwood’s testimony are not relevant because

⁸ Direct Testimony of Daniel M. Duellman at 3.

⁹ AEP Ohio Motion to Strike at 4.

¹⁰ AEP Ohio Motion to Strike at 4.

¹¹ *United Tel. Co. v. Tracy*, 84 Ohio St.3d 506, 511, 705 N.E.2d 679 (1999), citing *Superior’s Brand Meats, Inc. v. Lindle* (1980), 62 Ohio St.2d 133, 16 Ohio Op.3d 150, 403 N.E.2d 996.

“[t]he Commission’s’ prior orders . . . made the determination that it was reasonable for AEP Ohio to proceed with Phase I and to recover those costs.”¹² But the Supreme Court **reversed** that prior decision because “[t]he evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility.”¹³

The Supreme Court not only reversed that decision, but specifically directed the PUCO, on remand, to “supplement the record with evidence” in order to “verify that AEP has complied with the application requirements under R.C. 4909.18.”¹⁴ R.C. 4909.18 sets forth the standard that requires that increases in utility rates, such as the Phase I costs charged to customers, must be “just and reasonable.” Thus, in addition to rebutting AEP Ohio’s testimony set forth by the Utility on remand,¹⁵ the portions of Mr. Noorwood’s testimony AEP Ohio has moved to strike – Questions 16 through 20, and 22 – addresses the concerns explicitly expressed by this state’s highest court. Specifically, Mr. Norwood addresses the germane issues regarding AEP Ohio’s lack of evidence supporting its Phase I costs including whether it was just and reasonable to incur such costs without first comparing other alternatives to serve the POLR load, or whether IGCC was a reasonable generation technology to pursue in the first place. But the Supreme Court decision goes completely unmentioned in AEP Ohio’s Motion to Strike.

¹² AEP Ohio Motion to Strike at 1.

¹³ *Industrial Energy Users-Ohio v. Pub. Util. Comm. Ohio*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 32.

¹⁴ *Industrial Energy Users-Ohio v. Pub. Util. Comm. Ohio*, 117 Ohio St.3d 486, 2008-Ohio-990 at ¶ 32.

¹⁵ See *infra*, Section II(A); see also, Direct Testimony Gary O. Spitznogle at 5, 10; Direct Testimony of Daniel M. Duellman at 3.

III. CONCLUSION

Mr. Norwood's testimony, addressing the just reasonableness of the Phase I costs is certainly relevant to issues set forth by the Supreme Court of Ohio's reversal and remand as well as the remand testimony filed by AEP Ohio. Furthermore, Mr. Norwood's testimony is not an attempt to relitigate issues previously decided by the PUCO, but rather is consistent with issues the Court directed the PUCO to address on remand. For that reason, the PUCO should deny AEP Ohio's Motion to Strike portions of OCC witness Scott Norwood's Direct Testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra Ohio Power's Motion to Strike* was served on the persons stated below *via* electronic transmission, this 1st day of December, 2014.

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Summary: Memorandum Memorandum Contra Ohio Power Company's Motion to Strike by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Grady, Maureen