

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of                    )  
Columbus Southern Power Company                ) Case No. 11-4920-EL-RDR  
for Approval of a Mechanism to                    )  
Recover Deferred Fuel Costs Ordered            )  
Under Ohio Revised Code 4928.144.             )

In the Matter of the Application of                    )  
Ohio Power Company for Approval of             ) Case No. 11-4921-EL-RDR  
a Mechanism to Recover Deferred Fuel            )  
Costs Ordered Under Ohio Revised                )  
Code 4928.144.                                        )

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**REPLY TO AEP OHIO’S MEMORANDUM CONTRA OEG’S MOTION TO  
SUSPEND RATES  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

One of the many charges that customers of Ohio Power Company (“AEP Ohio”) pay each month is the Phase-In Recovery Rider (“PIRR”). This case will determine how much customers will pay through the PIRR for the last 30 months of the rider’s existence.

The Public Utilities Commission of Ohio (“PUCO”) authorized the PIRR in AEP Ohio’s first Electric Security Plan (“ESP 1”)<sup>1</sup> as a means to mitigate the impact of the rate increases caused by the ESP.<sup>2</sup> Through the PIRR, AEP Ohio collects deferred fuel costs that were not collected from customers in rates approved in ESP 1, plus carrying charges on the deferrals. AEP Ohio’s collection of charges from customers through the

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<sup>1</sup> Case Nos. 08-917-EL-SSO and 08-918-EL-SSO.

<sup>2</sup> See Case No. 11-4920 et al., Order (August 1, 2012) (“PIRR Order”) at 1-2.

PIRR began in September 2012 and will end in December 2018.<sup>3</sup> By the end of June 2016, AEP Ohio customers will have paid approximately \$300 million through the PIRR.<sup>4</sup>

In deciding an appeal of the PIRR Order, the Supreme Court of Ohio reversed the PUCO's decision and remanded the case in order to recalculate the carrying charges based on a higher rate – AEP Ohio's weighted average cost of capital ("WACC") rate.<sup>5</sup> On May 23, 2016, AEP Ohio filed new compliance tariffs that apparently recalculated carrying charges at the WACC rate going back to September 2012.<sup>6</sup> The new tariff would increase the amount customers pay through the PIRR by approximately 79 percent.<sup>7</sup> This means that residential customers in the Ohio Power Rate Zone who use 1,000 kWh a month would pay \$3.33 per month more than they now pay.<sup>8</sup> AEP Ohio proposes that the new charges become effective with the first billing cycle of July 2016.<sup>9</sup>

The Ohio Energy Group ("OEG") filed a motion to suspend the rates on May 24, 2016. OEG argues that AEP Ohio's rates appear to violate the Ohio Supreme Court's

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<sup>3</sup> See Compliance Tariff (August 8, 2012), Exhibit A at 3-4.

<sup>4</sup> In 2012, AEP Ohio estimated that it would collect \$118,156 per month from customers in its Columbus Southern Power Rate Zone. See *id.* This amount was collected for 14 months, from September 2012 through October 2013. (Collection was discontinued in response to the PUCO's decision in AEP Ohio's Significantly Excessive Earnings Test case. See AEP Ohio's October 28, 2013 letter in Case No. 11-4571-EL-UNC.) The total collected from Columbus Southern Power Rate Zone customers through the PIRR during those 14 months was approximately \$1,654,184. AEP Ohio also will have collected approximately \$222 million in the deferral balance through the PIRR from customers in its Ohio Power Rate Zone by the end of June 2016. See Compliance Tariff (May 23, 2016) ("May 23 Tariff"), Attachment 1 at 2. With a monthly carrying charge rate of 0.4450 percent, AEP Ohio will also have collected approximately \$80 million in carrying charges from Ohio Power Rate Zone customers by the end of June 2016.

<sup>5</sup> *In re Application of Ohio Power Co.*, 144 Ohio St. 3d 1, 2015-Ohio-2056, 40 N.E.3d 1060.

<sup>6</sup> See May 23 Tariff, Attachment 1 at 2.

<sup>7</sup> See *id.*, Attachment 2 at 1, 2.

<sup>8</sup> *Id.*, Attachment 3 at 1. The PIRR rate for customers in the Columbus Southern Rate Zone remains at zero.

<sup>9</sup> See *id.*, Attachment 2 at 1.

prohibition against retroactive ratemaking.<sup>10</sup> OEG asks that the PUCO suspend the rates and order an investigation into whether AEP Ohio's proposed tariff rates are unlawful.<sup>11</sup> On May 27, 2016, AEP Ohio filed a memorandum contra OEG's motion.

In order to ensure that residential consumers pay only rates that are just and reasonable, the Office of the Ohio Consumers' Counsel ("OCC") files this Reply to AEP Ohio's memorandum contra.<sup>12</sup> OCC urges the PUCO to grant OEG's motion and suspend AEP Ohio's May 23 Tariff until it has been properly reviewed by the PUCO.

## **II. RECOMMENDATIONS**

On November 30, 2012, AEP Ohio appealed the PIRR Order to the Ohio Supreme Court. The main issue in AEP Ohio's appeal was the calculation of carrying charges. The Order in the ESP 1 case allowed carrying charges to be calculated at AEP Ohio's WACC; the PIRR Order provided that carrying charges would be calculated at WACC during the ESP 1 period (2009-2011) and at AEP Ohio's long-term cost of debt from 2012 through 2018.<sup>13</sup> In a June 2, 2015 decision, the Court ruled that because the PUCO changed the method for calculating the PIRR's carrying charges after the ESP 1 term had expired, AEP Ohio was deprived of its right under R.C. 4928.143(C)(2)(a) to withdraw the ESP.<sup>14</sup> The Court reversed the PIRR Order and remanded the case back to the PUCO for reinstatement of the WACC rate.

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<sup>10</sup> OEG Motion, Memorandum in Support at 2.

<sup>11</sup> *Id.*

<sup>12</sup> Ohio Adm. Code 4901-1-12(A)(2) provides that any party may file a reply within seven days after the service of a memorandum contra.

<sup>13</sup> PIRR Order at 17-19.

<sup>14</sup> 144 Ohio St. 3d 1, 7.

In its May 23 Tariff, AEP Ohio apparently recalculated carrying charges at the WACC rate going back to September 2012.<sup>15</sup> In its motion, OEG argued that it is unlawful for AEP Ohio to reach back before the Court’s June 2015 decision and seek WACC-based carrying charges on deferral amounts in the PIRR dating back to September 2012.<sup>16</sup> OEG argued that AEP Ohio’s May 23 Tariff violates the prohibition against retroactive ratemaking in *Keco*.<sup>17</sup> OEG cited the *Keco* Court’s ruling that any utility’s rates set by the PUCO are lawful until such time as the Court sets them aside as unlawful and unreasonable.<sup>18</sup> OEG asked the PUCO to suspend the proposed PIRR rates and open an investigation into the lawfulness of AEP Ohio’s May 23 Tariff.<sup>19</sup>

In its memorandum contra, AEP Ohio asserts that implementing the Court’s ruling is a “simple mathematical exercise” that does not require a PUCO investigation.<sup>20</sup> AEP Ohio also contends that previous Ohio Supreme Court cases make clear that if PUCO modifications to a rider are later overturned on appeal, the rider remains subject to reconciliation on remand.<sup>21</sup> AEP Ohio also claims that because the PIRR is still being collected from customers, the rider amount can be adjusted to reflect the Court’s decision, without involving retroactive ratemaking.<sup>22</sup>

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<sup>15</sup> See May 23 Tariff, Attachment 1 at 2.

<sup>16</sup> OEG Motion, Memorandum in Support.

<sup>17</sup> *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

<sup>18</sup> OEG Motion, Memorandum in Support at 2.

<sup>19</sup> *Id.*

<sup>20</sup> AEP Ohio Memorandum Contra at 2.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 6. The fact that this case does not involve a customer seeking restitution (*id.* at 5) is irrelevant. For example, the Ohio Supreme Court has found that “[a] rate increase making up for revenues lost due to regulatory delay is precisely the action that we found contrary to law in *Keco*.” *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 515, 2011-Ohio-1788, 947 N.E.2d 655.

AEP Ohio's arguments against OEG's motion, however, demonstrate the need for a PUCO investigation. This setting of the new PIRR rates is more than "a simple mathematical exercise." The PUCO must determine the starting point for calculating the new charges that customers must pay. OEG noted that the starting point should be no earlier than June 2, 2015 (the date of the Court's decision) and possibly not before May 23, 2016 (the date the compliance tariff was filed). OCC agrees.

This is a valid concern because, as OEG rightly pointed out, *Keco* stands for the proposition that a PUCO-approved rate is lawful until it is overturned on appeal. Time and time again customers have been precluded from receiving refunds for charges collected as "lawful" that were later overturned on appeal to the Ohio Supreme Court.<sup>23</sup> The Court has found that even if there is a mechanism to adjust rates prospectively (such as the Phase-In Recovery Rider) that does not alter the nature of the remedy requested.<sup>24</sup> It should be no different here for the utility; *Keco* applies. AEP Ohio should be precluded from reaching back to 2012 to reset future PIRR rates in order to make up for the carrying charge that AEP Ohio alleges should have been in place since September 2012.

Moreover, AEP Ohio did not seek a stay in this case – either at the Court or the PUCO. In fact, in its opposition to OCC's request for a stay in this case, AEP Ohio argued that the PUCO "found that it cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified."<sup>25</sup>

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<sup>23</sup> See *id.*, 128 Ohio St. 3d at 515-517.

<sup>24</sup> *In re Columbus Southern Power Co.*, 138 Ohio St. 3d 448, 461, 2014-Ohio-462, 8 N.E.3d 863.

<sup>25</sup> AEP Ohio Memorandum Contra OCC's Motion for Stay (August 17, 2012) at 4, citing Case No. 08-917-EL-SSO, Remand Order (October 3, 2011) at 36.

Further, the case AEP Ohio cites to support its position is inapposite to OEG's motion. AEP Ohio cited *River Gas Co. v. Public Utilities Com.*<sup>26</sup> in an effort to show that the PUCO may change an existing rate on a prospective basis to account for past adjustments to revenue.<sup>27</sup> But the facts in *River Gas* are dissimilar to the facts in this case.

In *River Gas*, the PUCO had adopted a Uniform Purchased Gas Adjustment Clause ("UPGA") in December 1979, as required by R.C. 4905.302, and had ordered that the tariffs of all gas and natural gas companies contain the UPGA. In response to the PUCO's directive, River Gas Co. had cancelled its previous tariffs and adopted new tariffs containing the UPGA. The PUCO then conducted an audit of River Gas's operations under the UPGA. The audit discovered that River Gas had received refunds from a supplier for gas purchases, including one for gas purchases made between November 1957 and July 1969. Although the refunds had been received during the audit period, River Gas accounted for the refunds as if they had been actually received during the period to which they related. Hence, the refund covering the purchases between 1957 and 1969 was not credited to customers. The Court determined that, by ordering River Gas to recalculate its rates on a prospective basis, the PUCO was correctly applying the UPGA: "The UPGA does not differentiate between supplier refunds on the basis of the period to which they relate."<sup>28</sup>

Here, the PUCO is not applying a statute. Instead, the PUCO must decide the appropriate starting date for recalculating the carrying charge rate. In remanding the

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<sup>26</sup> 69 Ohio St. 2d 509, 433 N.E.2d 568 (1982).

<sup>27</sup> AEP Ohio Memorandum Contra at 5.

<sup>28</sup> 69 Ohio St. 2d at 514.

case, the Court did not make clear the timeframe for calculating carrying charges using the WACC. The Court only stated: “we reverse the commission’s orders on this issue and remand the cause to the commission for reinstatement of the WACC rate.”<sup>29</sup> The PUCO should address the issue of when the WACC should be applied to the PIRR.

Moreover, in *River Gas* the Court held that the PUCO had not engaged in ratemaking, and thus there could be no retroactive ratemaking.<sup>30</sup> The Court stated that the PUCO’s adoption of the UPGA represented a statutory plan that authorizes rates without prior PUCO approval, and independently from the formal ratemaking process.<sup>31</sup> That is not the case here.

The PIRR was established through a ratemaking process in AEP Ohio’s ESP 1 case. The rates themselves were determined through a ratemaking process in this proceeding. Hence, *River Gas* does not apply. AEP Ohio’s reliance on *River Gas* is misguided.

The PUCO should also conduct the investigation sought by OEG in order to examine AEP Ohio’s calculations of the charges proposed for collection through the PIRR. There are questions about the validity of the calculations in the May 23 Tariff.

There are several discrepancies between the August 2012 compliance tariff and the May 23 Tariff that the PUCO should examine. In the August 2012 tariff, AEP Ohio estimated that its monthly collection from customers in the Ohio Power Rate Zone would be \$9,133,093.<sup>32</sup> AEP Ohio identified this amount as the “recovery” amount in every month from September 2012 through December 2016.<sup>33</sup> In the May 23 Tariff, however,

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<sup>29</sup> 144 Ohio St.3d 1, 12.

<sup>30</sup> 69 Ohio St. 2d at 513.

<sup>31</sup> *Id.*, quoting *Consumers’ Counsel v. Pub. Util. Comm.* (1979), 57 Ohio St. 2d 78, 82-83.

<sup>32</sup> August 2012 Tariff, Exhibit A at 4.

<sup>33</sup> *Id.*

there are varying amounts listed from September 2012 through June 2016.<sup>34</sup> Beginning in July 2016, AEP Ohio estimates that it will collect \$15,403,175 each month from Ohio Power Rate Zone customers through December 2018.<sup>35</sup> AEP Ohio does not provide support for these numbers. In addition, these numbers have not been audited and should be scrutinized.

### III. CONCLUSION

The PUCO should not approve AEP Ohio's proposed tariffs because doing so would involve retroactive ratemaking. Instead the PUCO should suspend the rates as requested by OEG, and order an investigation into whether AEP Ohio's proposed tariff rates are unlawful. To protect consumers, the PUCO should grant OEG's motion.

Respectfully submitted,

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<sup>34</sup> May 23 Tariff, Attachment 1 at 2.

<sup>35</sup> *Id.*



## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Memorandum Contra was served electronically to the persons listed below, on this 3<sup>rd</sup> day of June 2016.

/s/ Terry L. Etter

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Summary: Reply Reply to AEP Ohio's Memorandum Contra OEG's Motion to Suspend Rates by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.