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Via Overnight Mail

May 22, 2006

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 05-376-EL-UNC

Dear Sir/Madam:

Please find enclosed an original and three (3) copies of Memorandum in Opposition of the Ohio Energy Group to Columbus Southern Power Company and Ohio Power Company's Request for Clarification in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

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Encl.

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served by electronic mail (when available) and regular mail, this 22nd day of May, 2006.

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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 Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility	))))))))	Case No. 05-376-EL-UNC

MEMORANDUM IN OPPOSITION OF THE OHIO ENERGY GROUP TO COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S REQUEST FOR CLARIFICATION

On May 10, 2006, the American Electric Power ("AEP") companies, filed a Request for Clarification of Columbus Southern Power Company ("Request") asking the Public Utilities Commission of Ohio ("Commission") to further explain parts of its April 10, 2006 Opinion and Order ("Order") in this case. While some have treated this as an Application for Rehearing (indeed it sounds like one) OEG has taken it at face value as a general "motion" and responds according to the provisions of OAC 4901-1-12(B)(1). The Ohio Energy Group ("OEG"), an active participate and opponent of virtually every aspect of AEP's integrated gasification combined cycle ("IGCC") filing herewith, submits its opposition to these latest requests.

1. AEP's first "request" refers to a part of the following sentence on page 20 of the Order: *"Given that this Order directs the Companies to file additional information and anticipates that additional evidentiary hearings will be necessary, the Phase II and Phase III surcharges shall not become effective 90 days after the filing of the application as proposed by the Companies."* AEP notes that the Companies have in place a construction schedule that calls for the IGCC unit to be in-service by 2010 and urges the Commission to clarify that any further hearings should be "expedited". AEP argues that there has already been extensive discovery and the Commission should not permit this second phase of the proceeding to *"re-start their discovery efforts or otherwise unduly prolong the process"*. (Request at page 4).

To start, the Commission will note that the initial proceeding filed by AEP was held on an expedited basis at AEP's request and made no attempt to track the traditional time schedule of a major rate case to recover the cost of a $1.8 billion (depending on whose predictions one believes) power plant because AEP was in a hurry. In such a hurry, in fact that, by the testimony of its own witnesses, it had not even found the time to begin the design of the very plant that it sought to have approved. The hurried discovery that was afforded to intervenors revealed that virtually nothing about the proposed IGCC had been decided by AEP except who would pay the bills – Ohio consumers. The evidence showed that the front-end engineering design ("FEED") phase of the project had not even begun and according to a May 6, 2005 internal AEP document, some 61 outstanding issues had to be resolved before the FEED phase could even begin. Moreover, when last the issue was visited, the contract with GE/Bechtel to construct the plant had not been negotiated and such critical issues as performance warranties by GE/Bechtel were not resolved. In short, the factual revelations of discovery were that there were very few known or decided facts. But now AEP claims that the intervenors have already had there shot at discovery for the most part and are entitled to only a hurried chance to see

what the plant, and the technology and the contracts and costs will be when, if in fact such proves to be the case, they are finally known.

OEG maintains that since the answers to the important questions were not known or decided on AEP's initial application,[1] extensive discovery under a generous schedule should be allowed when AEP does finally decide the important questions.

As to AEP's request that the items to be "discussed" in the further hearings be limited to those "specifically delineated" in the Commission's Order, OEG (subject to the matters raised in its Application for Rehearing) does not object so long as it is understood, as a "matter of clarification", that those issues include not just those listed as "specific issues" on page 21 of the Order *("in addition to the level of cost recovery and rate design issues; there are certain specific issues that the Commission believes should be addressed in the next phase of this proceeding which are enumerated below. ...")*, but all issues which the Commission declared to be open and still subject to proof. These include those set forth on page 20 of the Order, i.e., economic justification of:

a) its construction choices;
b) its technology choices;
c) its timing;
d) its financing structure; and
e) other matters that have been left open in the current application.

2. AEP's second request for clarification goes well beyond any explanation of the April 10th Order. The April 10th Order clearly states that AEP may proceed with and recover the cost of its proposed Phase I activities, defined by AEP as pre-construction costs, such as an engineering and scoping study; costs incurred prior to the Companies' entering an engineering, procurement and

[1] On page 20 of the Order the Commission also notes the dearth of information supporting AEP's first attempt by ordering it to *"economically justify its construction choices, technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application."* (Emphasis added).

construction ("EPC") contract which is a part of Phase II. Just as clearly, the Commission has not allowed AEP to proceed with and recover the costs of Phase II. But now comes AEP and says the Commission did not mean what it said and that AEP should get its Phase II costs up until the IGCC project is shut down, if, as a result of the second round of hearings, *"the Companies do not construct the IGCC facility ..."*. AEP wants a "clarification" that these costs should also include costs associated with shutting down the project along with a carrying charge applied to the balance of such costs.

The surprising rationale for this clarification is that AEP has a contract with GE/Bechtel and the contract must move forward regardless of what the Commission orders, and therefore they must recover (with a carrying charge) the monies necessary to fulfill that contract. The rationale is cogently, if perhaps too bluntly, explained by AEP on page 6 of its request: The *"Companies' plans to construct an IGCC facility in Ohio must go forward at the pace that is most efficient rather than at a pace designed to reflect the regulatory process."* The Commission is being told that whatever its Order says about the pace of this proceeding and the need to prove that what AEP proposes to do is sound and reasonable, before it is allowed to do it, AEP is going ahead, perhaps well into Phase II, and by God they will be paid for it or they will build there nifty plant in another state.[2] The clarification that AEP is seeking is really as to who is calling the shots here – AEP or the Commission.

The bold assertion that its contract trumps Ohio utility regulation is all the more remarkable because it comes from companies that have chosen utility regulation over the competitive market as the way to get this risky IGCC investment paid for by the ratepayers. Moreover, the GE/Bechtel contract which supposedly drives the imperative of an unabated construction schedule was (a) not even drafted at the time of the hearings in this matter, (b) may still not exist at this time as a complete and executed

[2] The threat to take their show to another state is only thinly disguised *"if recovery of these costs is not assured, the Companies have to decide whether they should postpone construction activities until after a Commission Order is issued and risk penalties or termination, or whether they should end their plans to build an IGCC facility in Ohio due to regulatory uncertainties."*

document, and (c) in any event, has not been attached to the instant Request in support thereof or otherwise presented to the Commission. Finally, the claim that shutting down an IGCC project, like constructing an IGCC project, is *"in furtherance of the Companies' POLR obligations"* is hard to swallow. "Shutting down" would seem to be the practical and philosophical opposite of "building" and therefore the same rationale does not logically support the both. The Commission Order, as OEG reads it, is that AEP has put on only enough evidence to allow it to receive the costs of investigating and attempting to justify that an IGCC plant, with some specific costs and construction is necessary, and that is all it is to do, and all it is to be paid for unless and until the Commission orders some further and additional steps after hearings are held upon the completion of Phase I. Any activities and expenditures before the future Commission Order are AEP's responsibility. Clearly this interpretation is manifested not only by the plain words of the April 10th Order, but also by the plain logic of the Order, i.e., that AEP's application was woefully inadequate, devoid of specifics as to technology, costs, timing, etc., and could only justify an Order allowing it the costs of providing an adequate and complete application. The Commission must not allow AEP to bootstrap its way past Phase I approval by threats to take its game to another field.

3. The Commission did indeed rule on certain questions of law and mixed law as noted in the Request. These are all the subjects of various applications for rehearing, and if the applicants are denied and the rulings stand, they will unquestionably be appealed to the Ohio Supreme Court. They are what they are, and OEG does not perceive the necessity of listing them or extracting an oath from the Commission that they will never come up again or be reconsidered regardless.

4. In their fourth request for clarification, AEP refers to that part of the Order that notes that *"SB3 contemplates that the EDU would provide ancillary service from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow*

declaration of competitiveness." AEP worries that the "rug" will be pulled out from under it in the future should the Commission determine that market conditions had developed sufficiently to allow a declaration that distribution ancillary services had become competitiveness.

AEP obviously wants the Commission to declare that whatever the law says, and whatever the market does, AEP may find comfort in the assurance of the Commission that ratepayers will be on the hook for their radical new power plant from here to eternity.

It is one of the infelicities of the Commission's theory of the IGCC as a provider of "*distribution ancillary service*" and therefore a noncompetitive service, that the law allows, indeed may require, the Commission to declare ancillary services to be competitive after a hearing at which it is found either (1) there will be effective competition with respect to the service; or (2) the customers of the service have reasonably available alternatives.

OEG thinks it is clear that this Commission may not, for itself and for all future Commissions, forever declare that it will not, and they will not, make such a determination. Such a declaration is in reality, attempted legislation by the Commission and cannot pass legal muster. *OCC v. PUCO*, 670 Ohio St.2d 153, 166, 423 N.E.2d 280, 288 (1981). This prayer of AEP, highlights just one of the many flaws of the legal theory concocted to get AEP and the Commission past the obstacle of §4923.03 that declares retail generation service to be a competitive service. SB3 did away with the regulatory compact that allowed utilities the safety of rate recovery for power plants in exchange for rate regulation. The haven of guaranteed rate recovery of power plants, and such things as distribution ancillary services, is gone forever. In the end AEP, not the ratepayers, must assume the risk of this investment. That is as it should be.

CONCLUSION

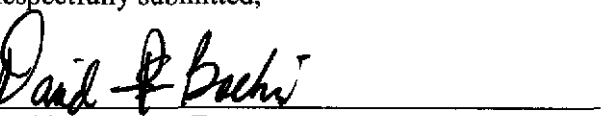
Accordingly, OEG asks the Commission to reject AEP's Request for Clarification, or in the alternative, to clarify that:

1. Future hearings in the proceeding and the discovery attendant to those hearings should be scheduled to reflect the facts that the proceeding involves the proposal of AEP to construct a $1.8 billion power plant whose specific design, technology, costs, cost recovery, etc. remain to be defined.

2. Only Phase I recovery has been approved and that AEP expenditure of Phase II costs is on its own nickel.

3. If in the future this or another Commission determines that distribution ancillary service is competitive, cost recovery of this IGCC plant, justified as it is, must cease.

Respectfully submitted,



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