BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company.	)))	Case No. 09-872-EL-FAC Case No. 09-873-EL-FAC

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Entry on Rehearing issued by the Public Utilities Commission of Ohio ("Commission") on April 11, 2012, *in the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company.* The Commission's Entry on Rehearing is unlawful and unreasonable for the following reason:

The Commission's Entry on Rehearing is Unlawful and Unreasonable in that the Commission Limited the Credit for the Settlement Agreement to the Ohio Retail Jurisdiction.

As discussed in greater detail in the Memorandum in Support, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and modify the Entry on Rehearing to remove the unlawful and unreasonable provisions. In the alternative, the Commission should clarify its Entry on Rehearing so as to provide that 100% of the credit is allocable to Ohio retail jurisdictional customers.

Respectfully submitted,

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In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company.	)))	Case No. 09-872-EL-FAC Case No. 09-873-EL-FAC

MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On January 23, 2012, following an audit of the Columbus Southern Power Company's ("CSP") and Ohio Power Company's[1] ("OP") fuel adjustment clauses ("FAC") for 2009, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order directing OP to credit against the deferral balance all of the benefits OP received from a settlement agreement with one of its coal suppliers. The Commission's Opinion and Order, however, did not specify the extent to which the deferral balance needs to be adjusted to account for carrying charges.

Industrial Energy Users-Ohio ("IEU-Ohio") filed an Application for Rehearing, requesting that the Commission clarify that the credit should contain a carrying cost component.[2] The Commission granted IEU-Ohio's Application for Rehearing.[3]

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[1] The merger of CSP and OP was approved by the Commission and the remaining company is hereinafter referred to as OP. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, Entry (Mar. 7, 2012).

[2] Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 8-10 (Feb. 22, 2012).

[3] Entry on Rehearing at 9 (Apr. 11, 2012).

OP, however, also filed an Application for Rehearing, claiming it would be unlawful and unreasonable to direct OP to return any amounts allocable to wholesale and non-Ohio retail jurisdictions.[4] In its Entry on Rehearing, the Commission stated, "[w]e clarify that the 2009 FAC under-recovery need only be credited for the share of the settlement agreement allocable to Ohio's retail jurisdictional customers."[5] On Rehearing, the Commission should clarify that all of the credit should be allocated to Ohio retail jurisdictional customers. Since OP was required to allocate its least cost fuel to standard service offer ("SSO") customers, 100% of the credit stemming from a below-market coal contract should be allocated to Ohio retail jurisdictional customers (SSO customers).[6] To the extent that the Commission determines that OP need not allocate 100% of the credit to Ohio retail jurisdictional customers, the Entry on Rehearing is unlawful and unreasonable.

II. BACKGROUND

A. The Companies' Electric Security Plan

On March 18, 2009, the Commission issued an Opinion and Order approving an electric security plan ("ESP") for OP.[7] In *ESP I*, the Commission authorized OP to establish a FAC subject to annual audit and reconciliation. But the Commission stated, "***we emphasize that FAC costs are to continue to be allocated on a least cost***

[4] Application for Rehearing and Memorandum in Support of Ohio Power Company at 12-14 (Feb. 22, 2012).

[5] Entry on Rehearing at 6 (Apr. 11, 2012).

[6] *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.*, Entry on Rehearing at 4 (Jul. 23, 2009) (hereinafter "*ESP I*").

[7] *ESP I*, Opinion and Order (Mar. 18, 2009).

basis to POLR customers and then to other types of sale customers. Allocating the lowest fuel cost to POLR service customers is consistent with the electric utilities' obligation to POLR customers and will minimize the burden on most ratepayers."[8] OP did not file an application for rehearing with respect to this aspect of the order.

B. The Coal Contract Buy-Out

The main dispute in this proceeding stems from OP's voluntary renegotiation of a below-market coal contract ("Supplier Contract"). In 2007, OP entered into a settlement agreement ("Buy-Out") with one of its coal suppliers which relieved the supplier from performing under the terms of the Supplier Contract. The Supplier Contract required the coal supplier to deliver coal at a price that was below the prevailing market price.[9] Had OP not voluntarily renegotiated the Supplier Contract, ratepayers would have received the benefits of the lower priced coal through at least 2012.[10] OP has never claimed that the Supplier Contract was not its lowest cost fuel. In return for agreeing to the Buy-Out, OP received $30 million, paid in installments,[11] and a coal reserve in West Virginia (the "Coal Reserve").[12] OP booked the value of the Coal Reserve at approximately $41 million.[13]

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[8] *ESP I*, Entry on Rehearing at 4 (Jul. 23, 2009). POLR stands for provider of last resort. POLR customers are SSO customers.

[9] Opinion and Order at 4-5 (Jan. 23, 2012).

[10] *Id.* The Companies had the unilateral option to extend the Supplier Contract for an additional five years at the same price. *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedule of Ohio Power Company and Related Matters*, Case No. 93-01-EL-EFC, Opinion and Order, 1993 WL 316749 at *13 (May 26, 1993).

[11] Only a portion of the $30 million has been flowed back to ratepayers. Opinion and Order at 12; *see also* Tr. Vol. I at 121-123.

[12] Opinion and Order at 12.

As a result of the Buy-Out, OP had to purchase coal in the market to replace the coal that would have otherwise been delivered pursuant to the Supplier Contract.[14] The replacement coal was significantly more expensive.[15] OP passed the cost of the more expensive coal onto customers through the FAC while retaining the benefits realized from the Buy-Out for shareholders.[16]

Energy Ventures Analysis ("EVA") performed a management performance and financial audit of the FAC for the term of January 1, 2009 to December 31, 2009. Due to the inequity of OP's treatment of the Buy-Out—booking the benefits for shareholders and passing the higher costs onto ratepayers—EVA recommended that the Commission consider whether OP should be required to credit the deferral balance for the entire value realized by OP as a result of the Buy-Out.[17] In its Post-Hearing Brief and Reply Brief, IEU-Ohio advocated that all of the benefits of the Buy-Out should flow to Ohio retail customers.

On January 23, 2012, the Commission issued an Opinion and Order adopting EVA's recommendation and directed OP to credit the deferral balance so that customers received the benefits to which they are entitled under the Buy-Out. Specifically, the Commission held:

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 5-6.

[16] Opinion and Order at 12; *see also* Tr. Vol. I at 125, 166.

[17] Opinion and Order at 7.

> ***[T]he Commission determines that all of the realized value from the Settlement Agreement should be credited against OP's FAC under-recovery namely the portion of the $30 million 2008 lump sum payment not already credited to OP ratepayers as well as the $41 million value of the West Virginia coal reserve that AEP booked when the Settlement Agreement was executed.*** Additionally, because the value of the West Virginia coal reserve is not clear and because AEP had planned to begin the permitting process at the time of the audit which should enhance the value of the coal reserve, we direct AEP to hire an auditor specifically to examine the value of the West Virginia coal reserve and to make a recommendation to the Commission as to whether the increased value, if any above the $41 million already required to be credited against OP's under-recovery, should accrue to OP ratepayers beyond the value of the reserve that AEPSC booked under the Settlement Agreement. The Commission will issue by subsequent entry a Request for Proposal to hire the auditor discussed above.[18]

Despite determining that customers should receive all of the value realized from the Buy-Out, on Rehearing the Commission clarified that Ohio customers are only entitled to the portion of the benefits associated with the Buy-Out that are "allocable to Ohio's retail jurisdictional customers."[19] The Commission should clarify its Entry on Rehearing to state that 100% of the benefits associated with the Buy-Out should be allocated to Ohio customers. To the extent that the Commission does not make this clarification, the Entry on Rehearing is unlawful and unreasonable because OP must allocate its lowest cost fuel to Ohio customers.

III. ARGUMENT

A. The Commission's Entry on Rehearing is Unlawful and Unreasonable in that the Commission Limited the Credit for the Settlement Agreement to the Ohio Retail Jurisdiction.

In *ESP I*, the Commission authorized OP to establish the FAC. In return for granting OP a dollar for dollar recovery mechanism, the Commission required OP to

[18] *Id. at* 12 (emphasis added).

[19] Entry on Rehearing at 6 (Apr. 11, 2012).

allocate its lowest cost fuel to SSO customers.[20] OP has not claimed that the Supplier Contract at issue in this proceeding was not OP's lowest cost fuel source. Based on the Commission's July 23, 2009 Entry on Rehearing in *ESP I*, the below-market Supplier Contract would have been fully allocated to the Ohio retail jurisdiction.[21] Accordingly, any benefits obtained from renegotiating the Supplier Contract should also have been allocated 100% to Ohio retail jurisdictional customers. The Commission should clarify on Rehearing to indicate that 100% of the benefits from the Buy-Out should be allocated to Ohio retail jurisdictional customers. To the extent the Commission fails to make this clarification, and OP is permitted to keep a portion of the benefits obtained from the Buy-Out, the Commission's Entry on Rehearing is unlawful and unreasonable.

Second, OP's jurisdictional argument is only conceptually relevant, if at all, in a traditional cost of service ratemaking context which does not exist here. Here, the Commission is dealing with pricing for default generation supply service which is, as a matter of law, not based on a jurisdictionalized cost of service methodology. Generation rates are fixed at a set rate and OP is given a dollar for dollar recovery mechanism for fuel, with the caveat that OP must allocate its least cost fuel to SSO customers.

Third, OP has failed to provide any proof that Ohio consumers should be deprived of the full amount of the benefits received by OP in exchange for the higher costs of fuel paid by Ohio customers. It is important to note that OP's voluntary

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[20] *ESP I*, Entry on Rehearing (Jul. 23, 2009). In approving the FAC, the Commission relied upon the testimony of Philip Nelson, who stated that OP's internal load, including the default supply provided to SSO consumers, is supplied from its lowest-cost generation resources. *ESP I*, Cos. Ex. 7 at 12 (Direct Testimony of Phillip Nelson). Since the Buy-Out involved a below-market Supplier Contract, the generation resources that would have used that coal, but for OP's voluntary termination, would have supplied the needs of Ohio customers.

[21] *ESP I*, Entry on Rehearing at 4 (Jul. 23, 2009).

termination of the Supplier Contract also eliminated an option to further extend the below-market Supplier Contract for five years.[22] Rather than compensate customers for the harm caused by OP's voluntary termination, OP claims that it should keep the non-jurisdictional gains for its shareholders. A more inequitable result is hard to fathom.

Fourth, OP failed to claim that customers were entitled to only the Ohio retail jurisdictional portion of the benefits of the Buy-Out in either its Initial Brief or Reply Brief. Section 4903.10(B), Revised Code, states that if the Commission grants rehearing it **shall** not, upon such rehearing, take any evidence that could have been offered in the original hearing. Clearly, OP could have and should have offered evidence to support its jurisdictional claim during the litigation phase of this proceeding but it elected to not do so and it also failed to mention this topic during the briefing phase. The only evidence[23] that OP offered during the litigation phase was that OP had fuel costs associated with non-jurisdictional sales—but OP never argued that there was a basis to allocate its lowest cost fuel to non-jurisidictional sales. OP's belated interest in a jurisdictional analysis operates to preclude OP from introducing this subject at the rehearing phase. Thus, it was unlawful and unreasonable for the Commission to grant this aspect of OP's Application for Rehearing.

Finally, the Commission should also reject OP's jurisdictional claim because it is a claim that OP selectively advances when it operates to tilt the playing field against

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[22] *In the Matter of the Regulation of the Electric Fuel Component Contained Within the Rate Schedule of Ohio Power Company and Related Matters*, Case No. 93-01-EL-EFC, Opinion and Order, 1993 WL 316749 at *13 (May 26, 1993).

[23] Application for Rehearing of Ohio Power Company and Memorandum in Support at 12-14 (Feb. 22, 2012); *see* Tr. Vol. I at 15-16 and 121-122.

Ohio consumers. OP has demonstrated that it will either support or oppose a jurisdictional allocation depending on its impact on earnings.[24]

IV. CONCLUSION

For the reasons stated herein, the Commission should grant IEU-Ohio's Application for Rehearing.

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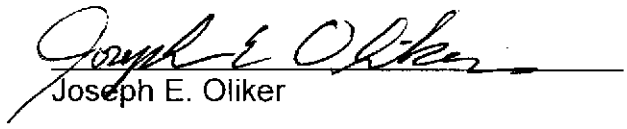
[24] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at 11-12 (Jan. 11, 2011).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 11th day of May, 2012, via electronic transmission, hand-delivery or first class mail, postage prepaid.



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