

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, :
Appellant, : **Supreme Court Case No. 09-2022**
:
: **Appeal From the Public**
: **Utilities Commission of Ohio**
v. :
The Public Utilities Commission of Ohio, : **Case Nos. 08-917-EL-SSO**
Appellee, : **08-918-EL-SSO**

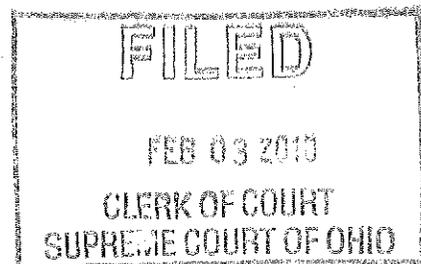
**MEMORANDUM IN OPPOSITION TO THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL'S MOTION TO SUPPLEMENT THE RECORD
SUBMITTED BY APPELLEES,
COLUMBUS SOUTHERN POWER COMPANY
AND OHIO POWER COMPANY**

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On January 25, 2010, Appellant, the Office of the Ohio Consumers' Counsel (OCC), filed a motion to supplement the record on appeal. For reasons explained below, Appellees, Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio") oppose OCC's motion. Nevertheless, AEP Ohio will confirm the pertinent factual information for this Court in order to promote efficiency and transparency in the review of the decision below rendered by the Public Utilities Commission of Ohio (Commission).

The OCC did not file its motion to supplement ahead of its merit brief and did not wait on this Court's ruling in due course prior to relying on the extra-record data. Instead, Appellant has unilaterally decided to include the requested materials in its Supplement to its Merit Brief and relied on the information in presenting factual information to the Court in its Merit Brief. (See OCC Merit Brief at 9; Supp. at 51-52.)

AEP Ohio submits that OCC's approach runs afoul of the Court's procedural rules in several respects.

Under S. Ct. Prac. R. 5.8, a party may move the Court to direct that a supplemental record be certified "[i]f any part of the record is not transmitted ..." Per S. Ct. Prac. R. 7.1, "appellant may prepare and file a supplement to the briefs that contains *those portions of the record* necessary to enable the Supreme Court to determine the questions presented." (Emphasis added.) Because the subject materials were not part of the record in the proceeding before the Commission, they cannot be part of the record "not transmitted" as contemplated in S. Ct. Prac. R. 5.8 and are not "portions of the record" appropriate for inclusion in a Supplement under S. Ct. Prac. R. 7. Indeed, OCC's own motion refers to the material as "non-record" information and it states that the materials were not filed at the PUCO or included in the case as record evidence. (OCC motion at 2.) Thus, OCC's unilateral inclusion of the materials in its Supplement was premature and otherwise inappropriate.

OCC is also misguided in suggesting that AEP Ohio's submittal of supporting workpapers to the Commission's Staff was somehow nefarious. Utilities routinely provide informal workpapers supporting complex calculations in conjunction with rate and tariff compliance filings. It has always been the Commission Staff's role in this context to determine whether the rates filed in response to a rate order of the Commission are supported by accurate calculations and comply with the substantive decisions contained in the Commission's rate order. This same process is used in conjunction with reviewing compliance tariffs in virtually all Commission cases involving rate orders. It is entirely reasonable and appropriate for the Commission to rely on its Staff for this

compliance function and cannot reasonably be characterized as relying on extra-record materials.¹

As a related matter, the OCC improperly raises substantive arguments relating to the requested materials in its motion to supplement. In particular, OCC suggests that the Commission appears to have relied on “non-record” information; raises an argument based on Ohio Rev. Code Ann. 4903.09 in conjunction with the materials; and cites *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, in connection with the PUCO’s alleged “failure to disclose” the information. (OCC motion at 2-3.) Aside from lacking merit, none of these issues were raised by OCC on rehearing below and all of them are non-jurisdictional for consideration in this appeal. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 340, 349 (no party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application for rehearing; setting forth specific grounds for rehearing is a jurisdictional prerequisite for review); *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, 247; *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*(2004), 103 Ohio St.3d 398. Thus, although the OCC did not advance these substantive arguments in its merit brief filed on the same date as its motion to supplement (and it would be equally inappropriate to do so in OCC’s reply brief), the substantive arguments were improperly advanced in the motion to supplement and should be disregarded.

Significantly, the OCC also wrongly states that “While the Companies provided the document to the PUCO Staff, the Companies did not provide it to OCC.” (OCC motion at 2.) On the contrary, as reflected in the e-mails attached to this pleading that

¹ Notably, as further discussed below, the OCC does not dispute any of the calculations made in the workpapers and, indeed, wants to refer to one of the calculations in advancing its appeal.

were previously sent to OCC's Counsel of Record in this appeal, AEP Ohio voluntarily provided this information to OCC on May 13, 2009, a few days after the OCC had requested the information from the Companies. OCC's mischaracterization is even more surprising given that AEP Ohio even brought a team of experts to OCC's offices that same day in order to explain the materials and answer any questions the OCC's experts had about the calculations made therein. There can be no doubt that AEP Ohio not only provided these materials to OCC but voluntarily took the extra time and resources to fully explain the information and answer all of OCC's questions in a face-to-face meeting.

In that same spirit of cooperation and transparency, AEP Ohio will voluntarily agree and verify before this Court (without waiving its substantive opposition to OCC's appeal) that \$63 million is the incremental value included in the Commission's decision to authorize the overall increase to AEP Ohio's 2009 revenue for collection between April through December, in adopting the modified Electric Security Plan package for AEP Ohio.² Thus, to the extent that OCC's underlying goal is to establish before this Court quantification of alleged harm associated with Appellant's (erroneous) retroactive ratemaking theory, the Court need not grant OCC's motion to supplement in order to consider that dollar figure. For all of these reasons, AEP Ohio submits that the Court should deny OCC's motion to supplement and ensure that the extra-jurisdictional issues referenced in OCC's motion are not raised or heard.

² The OCC's improper characterization of the decision below as unlawful retroactive ratemaking has already been briefed before this Court. *See* AEP Ohio Memorandum Contra Appellant's Motion for a Stay of Execution (Filed September 30, 2009 in Case No. 09-1620). In response to the OCC's merit brief in the instant case that again raises these arguments, AEP Ohio will again counter these arguments through its upcoming response brief. Suffice it to say for present purposes that AEP Ohio continues to strenuously disagree with the OCC's characterization of the decision below as unlawful retroactive ratemaking.

Respectfully submitted,



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To <grady@occ.state.oh.us>
cc Marvin I Resnik/OR4/AEPIN@AEPIN,
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bcc

Subject Meeting on Wednesday

It sounds like Wednesday at 1:30pm will work for us -- we can come over to your place if that is easier. We will gather the documents that were submitted to Staff in conjunction with the ESP tariff submittal and provide in advance of the meeting.

Thanks,
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Steven T Nourse/AEPIN
05/13/2009 11:51 AM

To <grady@occ.state.oh.us>
cc
bcc
Subject Requested Documents

Maureen:

Here are the workpapers sent to Staff in connection with our ESP compliance tariffs. Also attached is some additional information that wanted to provide you in connection with our meeting this afternoon. We will probably also have a 4-5 sheet packet to give you at the meeting for additional discussion points.



2009-03-23 ESP Compliance Workpapers - Staff.pdf ESP Rates.pdf

Thanks,
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PROOF OF SERVICE

I certify that Columbus Southern Power Company's and Ohio Power Company's Memorandum in Opposition was served by First Class U.S. Mail upon counsel identified below for all parties of record this 3rd day of February, 2010.



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