

IN THE SUPREME COURT OF OHIO

ORIGINAL

Columbus Southern Power Company :
and Ohio Power Company : Case No. 09-2060
: :
Appellants, : Appeal from the Public
: Utilities Commission of Ohio
v. :
: Public Utilities
The Public Utilities Commission of Ohio, : Commission of Ohio
: Case No. 09-119-EL-AEC
Appellee. :

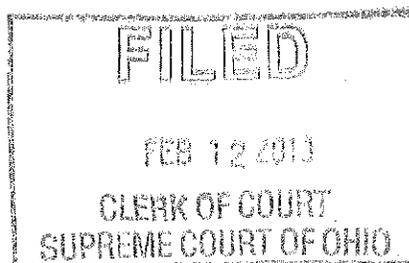
MEMORANDUM IN OPPOSITION TO
INTERVENING APPELLEES' MOTION TO STRIKE
SUBMITTED BY APPELLANTS

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MEMORANDUM IN OPPOSITION

The Office of Consumers' Counsel (OCC) and the Ohio Energy Group (OEG), two of the Intervening Appellees, filed a motion to strike portions of the Merit Brief filed by Columbus Southern Power Company (CSP) and Ohio Power Company (OP), Appellants (collectively "AEP Ohio"). Neither the Appellee, the Public Utilities Commission of Ohio (Commission), nor the other Intervening Appellees joined in the motion to strike. OCC/OEG's motion encompasses three items, arguing that: (1) Appellants' argument challenging the Commission's revised approach on rehearing of considering only three years of the ten-year agreement is not properly before the Court; (2) Appellants' demonstration that the contract ordered by the Commission conflicts with its decision is not properly before the Court; and (3) Appellant's brief contained improper references to information not in the record below. (OCC/OEG Motion to Strike at 1-3.)

AEP Ohio submits that the motion to strike should be denied on all three counts.

First, the scope of time relating to the Commission's finding of "no shopping risk" was directly raised by AEP Ohio as the first error listed in application for rehearing:

The Commission's conclusion that *during the ten-year term* of this unique arrangement there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP Ohio is unreasonable and conflicts with the Commission's orders in AEP Ohio's ESP Cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO ("*ESP Cases*").

(AEP Application for Rehearing at 2, 4-5, Ap. at 52, 54-55) (emphasis added). Hence, AEP Ohio argued in connection with the first assignment of error number in its application

for rehearing that finding no risk of shopping *during the entire ten-year term of the contract* was unsupportable. As a related matter, AEP Ohio also argued in connection with the third assignment of error in its application for rehearing that finding that AEP Ohio would be the exclusive supplier, thus purporting to prevent shopping, *for the entire ten-year term of the contract* was unlawful and unreasonable. (AEP Application for Rehearing at 13-14, Ap. at 63-64.) In short, AEP Ohio explicitly referenced the ten-year term of the contract at least five times in advancing its allegations of error on rehearing.

Indeed, the Commission's "clarification" on rehearing, finding the appropriate scope of inquiry regarding the risk of shopping to be three years rather than ten, was made directly in response to the arguments raised in AEP Ohio's application and the entire three-year theory was developed in the course of ruling on AEP Ohio's application for rehearing.

The Commission finds that rehearing on [AEP Ohio's first assignment of error] should be granted in order to clarify that the relevant period when Ormet cannot shop is the duration of AEP-Ohio's current approved electric security plan (ESP). It is not necessary to reach the question of whether Ormet can shop beyond the duration of the current ESP because no determination has been made whether future standard services offers will include a comparable POLR charge. Under the terms of the unique arrangement as approved by the Commission, AEP-Ohio will be the exclusive supplier to Ormet for ten years, commencing January 1, 2009 (Tr. I at 37-38; Tr. IV at 484)

(*Ormet Case*, Entry on Rehearing at 8, Ap. at 84.) The Commission "granted" rehearing in order to clarify its rationale, not change its finding. The Commission merely reaffirmed its finding on the issue now being appealed that no shopping risk will be present and the effect of the ruling remained to reject AEP Ohio's arguments regarding the ten-year term of the contract.

In other words, AEP Ohio challenged the Commission's finding of "no risk" for the ten-year term of the contract in its application for rehearing and, in response, the Commission said it was only necessary to look three years into the term of the contract. Either the Commission needs to consider the full ten-year term or it is permitted to only consider three years; these are two sides of the same issue. OCC/OEG's position that they are two unrelated and distinct issues is without merit. As further confirmation that the two arguments are inextricably intertwined, the Commission ended the above-quoted discussion by referencing the ten-year "exclusive supplier" provision. Thus, AEP Ohio adequately raised in its application for rehearing the same issue being pursued on appeal. Unlike the situation where a party has not raised an issue before the Commission in order to allow the Commission an opportunity to fully consider and address an issue prior to bringing it before the Court, the Commission considered and decided on rehearing that it should only consider three years of the ten-year contract.

Further, there is no statutory requirement that an appellant's entire argument be set forth on rehearing in an identical manner that it will be presented to the Court on appeal. Similarly, an appellant need not list all of its supporting points or sub-arguments on rehearing – it simply must preserve the claims through rehearing that it wishes to pursue on appeal.

Ironically, movant OCC has benefited from the Court ruling that OCC had adequately raised an issue even where it refined its claim by adding new supporting statutory arguments on appeal. For example, in *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 110 Ohio St.3d 394, the Court rejected parties' claims that the OCC did not properly raise an issue on rehearing with enough specificity so as to preserve the

issue for appeal by stating: “[T]he Consumers' Counsel did challenge the default recovery *mechanism* in the application for rehearing, and the PUCO addressed the *issue* in its order denying rehearing. The Consumers' Counsel has therefore properly raised the issue.” *Consumers' Counsel*, 110 Ohio St.3d at 401 (emphasis added). In the *Consumers' Counsel* case, the default recovery mechanism was generally challenged in the OCC's application for rehearing in that case and with greater specificity on appeal, including making additional statutory arguments to challenge the mechanism. (See attached Exhibit A, OCC Application for Rehearing in Case No. 03-2405-EL-CSS, item A.6; Exhibit B, OCC Notice of Appeal in Case No. 05-945, item 4.) Likewise, the Court should find in the case at bar that AEP Ohio's application for rehearing sufficiently raised the issue that was subsequently contained in its notice of appeal and ultimately addressed on brief.

Moreover, even if the Court takes a more restrictive view of AEP Ohio's application for rehearing in this case, the OCC/OEG motion to strike should be rejected. This Court has recognized that an appellant can properly raise a claim before this Court even though it was not contained in the appellant's application for rehearing before the Commission, where the matter was raised by another party and decided on rehearing by the Commission in a manner that was adverse to the would-be appellant. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St.3d 177, 180-181. Similarly, where the Commission merely refines its rationale supporting the same conclusion being challenged in an application for rehearing, it is appropriate for the aggrieved party to pursue its challenge of that conclusion through its notice of appeal before this Court.

Here, the Commission fully addressed its view that only three years of the contract should be considered and this finding was done directly in response to the issue raised in AEP Ohio's application for rehearing. (*Ormet Case*, Entry on Rehearing at 8, Ap. at 84.) Thus, the issue was raised and addressed on rehearing and it is fair to require the Commission to defend that finding on rehearing before this Court. It would have been a vain act for AEP Ohio to file a second round of rehearing, to separately raise the sub-argument that considering three years out of the ten-year contract was unreasonable and unlawful. This is especially true given that, for every week that passes, AEP Ohio loses additional revenues based on the Commission's decision below. Consequently, it is appropriate for AEP Ohio to raise that same issue in its notice of appeal and on brief for this Court to review, in response to the Commission's supplemental rationale attempting to merely reinforce its original ruling on rehearing.

Similarly, OCC/OEG claims that AEP Ohio's argument that the contract language conflicted with the Commission's decision (on page 27 of Appellant's Merit Brief) should be disregarded and stricken because the same point was not raised in AEP Ohio's application for rehearing. This claim misperceives the nature and context of AEP Ohio's argument. The supporting point was one paragraph of a 15-page argument asserting that the Commission's decision runs afoul of the controlling statute, Ohio Revised Code § 4905.31. The point that the decision conflicts with the contract language was not even a sub-argument supporting the overall proposition of law, but was merely a supporting and related point. The contract is a matter of record and AEP Ohio's observation is a valid point for the Court to consider in the context of determining whether the Commission misapprehended the larger statutory issue. Thus, for the same reasons set forth above

regarding the three-year versus ten-year characterizations of the question concerning the appropriate temporal scope of inquiry for the shopping risk issue, OCC/OEG's motion should also be denied with respect to this related point made by Appellants on brief.

Finally, OCC/OEG seek to strike AEP Ohio's reference on brief to matters that OCC/OEG characterize as "extra-record information." The primary item challenged is a mathematical calculation made by AEP Ohio on page 33 of its Merit Brief to illustrate the impact of the Commission's decision. The illustrative calculation was based on the electric load explicitly reflected in the contract approved below – clearly a matter of record. Because the contract expresses the customer's electric load in megawatt hours, AEP Ohio wanted to explain the impact in a manner that was more readily understandable. OCC/OEG apparently take issue with AEP Ohio's use of publicly-available data (which was not and cannot be disputed by OCC/OEG) that was merely used to convert the large industrial customer's electric load under the contract to an equivalent amount of electric load for a number of typical households. Again, this was merely a straightforward mathematical calculation based on the electric load specified in the contract, using publicly-available data; there are no new arguments or issues raised and the calculation was not used to refute any record evidence or supplant any Commission findings. AEP Ohio merely offered the illustration as a means to help the Court (who does not frequently deal with megawatts or kilowatts and other technical forms of expressing electric usage) better understand the impact of the Commission's decision.¹

¹ Because it also involves OCC and AEP Ohio, AEP Ohio notes that it voluntarily agreed, through its February 3, 2010 Memorandum in Opposition filed in Case No. 09-2022, to an extra-record stipulation of fact that OCC sought to be inserted into the record

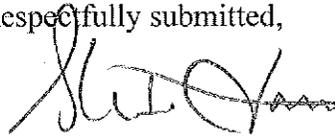
OCC/OEG also challenges AEP Ohio's statement (on page 35 of AEP Ohio's Merit Brief) that, weeks after the initial decision below, the ongoing operations of the involved customer were drawn into question. This passing statement refers to matters that were addressed in the Commission's Entry on Rehearing at pages 4-5. Though the Commission concluded that it would not rely on the particular development in deciding the case, it went on in the same paragraph to strengthen its conditions on the customer's special discount tied to ongoing employment levels and required the customer to report monthly employment levels. (*Ormet*, Entry on Rehearing at 4-5, Ap. at 80-81.) AEP Ohio believes the minor reference it made to a relevant development was appropriate, given that it was discussed in the Commission's Entry on Rehearing and the Commission modified its decision in connection with it. In any case, AEP Ohio merely used the example as one of countless points supporting the uncertain developments over the ten-year term of the contract.

on appeal based on a Motion to Supplement the Record. Unlike here, the fact sought to be inserted into the record on appeal had a direct bearing on the issues and involved materials directly related to the case that were not part of the evidentiary record. In any case, AEP Ohio stipulated to the pertinent fact in a "spirit of cooperation and transparency" so that the Court would be able to fully understand the precise impact of the Commission's decision involved in that appeal.

CONCLUSION

For the foregoing reasons, AEP Ohio respectfully requests that this Court deny OCC/OEG's motion to strike.

Respectfully submitted,



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FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)
 Dominion Retail, Inc.)
)
 Complainant,)
 v.) Case No. 03-2405-EL-CSS
)
 The Dayton Power and Light Company)
)
 Respondent.)

In the Matter of the Complaint of)
 Miami Valley Communication Council)
)
 Complainant,)
 v.) Case No. 04-85-EL-CSS
)
 The Dayton Power and Light Company)
)
 Respondent.)

In the Matter of the Application Not for an)
 Increase in Rates of The Dayton Power and)
 Light Company for Approval to Modify its) Case No. 03-2341-EL-ATA
 Existing Alternate Generation Supplier (AGS))
 Tariff Sheet No. G8.)

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APPLICATION FOR REHEARING
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential electric consumers of the Dayton Power and Light Company ("Company" or "DP&L") and pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("PUCO" or "the Commission") on February 2, 2005 in the above-captioned cases. The OCC submits that

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the Commission's Order, which adopted a modified stipulation ("Partial Stipulation") signed by some but not all of the parties, is unreasonable and unlawful in the following particulars:

A. THE COMMISSION'S ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE IT HAS ADOPTED A STIPULATION THAT VIOLATES IMPORTANT REGULATORY PRINCIPLES AND PRACTICES.

1. The Commission violated the doctrine of collateral estoppel by providing DP&L with early recovery of its deferred billing system modification costs in violation of the Electric Transition Plan ("ETP") Stipulation and Order.
2. The Commission violated the doctrine of collateral estoppel by providing DP&L with early recovery of its deferred billing system modification costs in violation of the Market Development Period ("MDP") Extension Stipulation and Order.
3. The Commission erred by approving a recovery mechanism that will increase DP&L's distribution rates without conducting a proceeding according to the requirements of R.C. 4909.18 and R.C. 4909.19.
4. The Commission's approval of the Partial Stipulation violates the ETP Stipulation by approving consolidated billing charges that do not recover any of DP&L's investment in its billing system modification costs.
5. The Commission erred by authorizing DP&L to collect billing system modification costs from residential customers in spite of DP&L's agreement with OCC that exonerates residential customers from paying such costs.
6. The Commission's approval of the Partial Stipulation provides DP&L with a default recovery rider that violates Commission rules and practices, and creates a potential double recovery for DP&L.

B. THE COMMISSION'S ADOPTION OF THE STIPULATION IN ITS ORDER IS UNLAWFUL BECAUSE THE STIPULATION DOES NOT, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST.

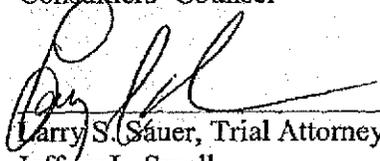
1. The Commission erred by finding the Partial Stipulation as a package benefits ratepayers when no parties representing ratepayers executed key portions of the Partial Stipulation regarding its cost recovery mechanism.
2. The Commission erred by finding it reasonable to modify prior stipulations based upon the alleged benefits of the Partial Stipulation.
3. The Commission erred by approving the distribution rider outside the context of a distribution rate proceeding.

4. The Commission's approval of the Partial Stipulation inappropriately provides for the costs of the prudency review to be charged to consumers when PUCO practice is to charge such costs to the utility under review.

**C. THE COMMISSION'S ORDER IS UNLAWFUL AND UNREASONABLE
BECAUSE THE STIPULATION THE COMMISSION ADOPTED IS NOT A
PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE,
KNOWLEDGEABLE PARTIES.**

Respectfully submitted,

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Consumers' Counsel



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FILE

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IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

The Office of the Ohio Consumers' Counsel,)
)
 Appellant,)
)
 v.)
)
 The Public Utilities Commission)
 of Ohio,)
)
 Appellee.)

Case No. _____

Appeal from the Public
Utilities Commission of Ohio
Case Nos. 03-2405-EL-CSS,
04-85-EL-CSS and
03-2341-EL-ATA

NOTICE OF APPEAL
OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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FILED
MAY 23 2005
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11, 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on February 2, 2005 and its Entry on Rehearing entered in its Journal on March 23, 2005 in the above-captioned consolidated cases.

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of The Dayton Power and Light Company ("DP&L"). Appellant was a party of record in the above-captioned PUCO cases.

On March 4, 2005, Appellant timely filed an Application for Rehearing from the February 2, 2005 Opinion and Order pursuant to R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on March 23, 2005.

Appellant complains and alleges that Appellee's February 2, 2005 Opinion and Order and the March 23, 2005 Entry on Rehearing are unlawful, unjust, and unreasonable, and the Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

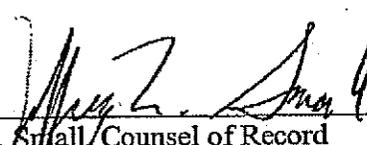
- 1) The PUCO erred by providing DP&L with recovery of its deferred billing system modification costs in violation of the Electric Transition Plan ("ETP") Stipulation and Order in PUCO Case Nos. 99-1687-EL-ETP *et al.*
- 2) The PUCO erred by providing DP&L with recovery of its deferred billing system modification costs in violation of the Market Development Period ("MDP") Extension Stipulation and Order in PUCO Case Nos. 02-2779-EL-ATA *et al.*

- 3) The PUCO erred by allowing DP&L to increase distribution rates without conducting a proceeding according to the requirements of R.C. Sections 4903.082, 4903.083, 4909.15, 4909.18, 4909.19 and 4909.43.
- 4) The PUCO erred by approving a default recovery rider for DP&L's alternative generation service tariff that violates R.C. 4928.08(B), and whose approval is otherwise against all the evidence presented in the case.
- 5) The PUCO erred by authorizing DP&L to collect billing system modification costs from its residential customers in spite of DP&L's agreement with OCC that prohibits collection of such costs from residential customers.

WHEREFORE, Appellant respectfully submits that the Appellee's February 2, 2005 Opinion and Order and March 23, 2005 Entry on Rehearing are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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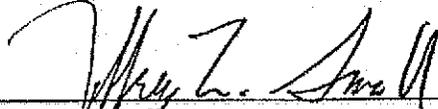
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record by hand-delivery or regular U.S. Mail this 23rd day of May 2005.



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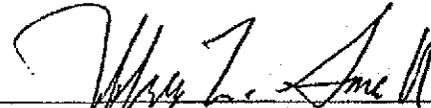
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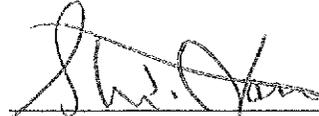
I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



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The Office of the Ohio Consumers' Counsel

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 for all parties of record identified below this 12th day of February, 2010.



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