

IN THE SUPREME COURT OF OHIO

Columbus Southern Power Company,	:	Case No. 2009-2298
	:	
Appellants,	:	Appeal from the Public Utilities
	:	Commission of Ohio
v.	:	
	:	
The Public Utilities Commission of Ohio,	:	Public Utilities Commission of Ohio
	:	Case Nos. 08-917-EL-SSO
	:	08-918-EL-SSO
Appellee.	:	

MERIT BRIEF OF INTERVENING APPELLEE INDUSTRIAL ENERGY USERS-OHIO

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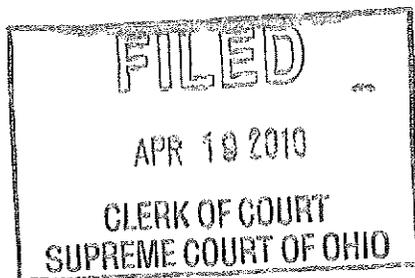
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Station (“Lawrenceburg”). However, AEP-Ohio represented that it had no immediate plans to actually sell or transfer the facilities.⁶ IEU-Ohio and all other parties opposed AEP-Ohio’s request for authority to sell or transfer these assets inasmuch as AEP-Ohio had no current plan to sell or transfer the assets and because AEP-Ohio failed to provide sufficient detail to permit an evaluation of how the sale/transfer might serve to advance state policy.⁷

The Commission issued an Opinion and Order on March 18, 2009 that modified and approved AEP-Ohio’s proposed ESP. In its Opinion and Order, the Commission agreed with the intervenors in this case and Commission Staff and held that AEP-Ohio’s requests were premature and that AEP-Ohio should file a separate application when it wishes to sell or transfer the generation facilities.⁸ However, the Commission permitted AEP-Ohio to recover, through its non-fuel adjustment clause (“FAC”) mechanism, Ohio customers’ jurisdictional share of any costs associated with maintaining and operating AEP-Ohio’s generation facilities, including the Waterford and Darby facilities.⁹

IEU-Ohio filed an Application for Rehearing on April 16, 2009 from the Commission’s decision to permit AEP-Ohio to recover costs associated with the generating facilities.¹⁰ On rehearing, the Commission agreed with IEU-Ohio that AEP-Ohio did not demonstrate “that their current revenue is inadequate to cover the costs associated with the generating facilities, and that those costs should be recoverable through the non-FAC portion of the generation rate from Ohio

⁶ Second Entry on Rehearing at 4 (Appellant’s Appx. at 177) (ICN 279); [Cos. Exhibit 2-A at 42 (ICN 9) (IEU-Ohio Second Supp. at 4)]; [Staff Ex. 7 at 3 (ICN 140) (IEU-Ohio Second Supp. at 21)].

⁷ Opinion and Order at 51-52 (Appellant’s Appx. at 82-83) (ICN 214).

⁸ *Id.* at 52 (Appellant’s Appx. at 83).

⁹ *Id.* at 35 (Appellant’s Appx. at 66).

¹⁰ IEU-Ohio Application for Rehearing at 19-21, 35-38 (April 16, 2009) (ICN 230).

customers.”¹¹ Thus, the Commission ordered AEP-Ohio to modify its ESP to remove the annual recovery of \$51 million of expenses, including associated carrying charges, related to the Darby and Waterford generation facilities.¹²

On July 31, 2009, CSP filed an Application for Rehearing from the Commission’s Entry on Rehearing. Despite filing an Application for Rehearing claiming that the Commission’s Entry on Rehearing was illegal and unreasonable, CSP continued to accept the higher rates authorized in its ESP and did not choose to exercise its statutory right to terminate and withdraw its ESP.¹³ CSP argued that the Commission is required by law to authorize the sale or transfer of the Darby and Waterford facilities if it does not permit CSP to recover costs associated with these facilities.¹⁴ CSP also argued that it was unlawfully required to retain the facilities without an opportunity to recover Ohio customers’ jurisdictional share of the costs associated with the Darby and Waterford facilities.¹⁵ On November 4, 2009, the Commission issued a Second Entry on Rehearing denying CSP’s Application for Rehearing in its entirety. The Commission observed that it did not prohibit AEP-Ohio from selling or transferring the facilities. Rather, the

¹¹ Entry on Rehearing at 35 (Appellant’s Appx. at 148) (ICN 265).

¹² *Id.* at 35-36 (Appellant’s Appx. at 148-149). The Commission’s decision permitting cost recovery associated with the OVEC and Lawrenceburg generating units was undisturbed by the Commission’s Entry on Rehearing and IEU-Ohio is appealing this aspect (and many others) of the ESP Orders in Ohio Supreme Court Case No. 2009-2022.

¹³ In its own appeal of AEP-Ohio’s ESP proceeding, IEU-Ohio demonstrates that the Commission’s decision to permit AEP-Ohio to take the benefits of the higher rates approved by the Commission while simultaneously allowing AEP-Ohio to hold out the right to withdraw and terminate the ESP is unlawful and unreasonable. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022.

¹⁴ CSP Application for Rehearing at 3 (July 31, 2009) (Appellant’s Appx. at 352) (ICN 270).

¹⁵ *Id.* at 3-4 (Appellant’s Appx. at 352-353).

Commission directed CSP to make a separate application to sell or transfer the facilities when it has an actual plan and intent to transfer or sell the facilities.¹⁶

Instead of exercising its statutory right to withdraw and terminate its approved ESP in the belief that the Commission's Orders are illegal and unreasonable after the issuance of the Second Entry on Rehearing, CSP filed its Notice of Appeal in this proceeding on December 22, 2009 and has continued to accept the benefits of its approved ESP during the pendency of this appeal. CSP filed its Merit Brief on March 19, 2010. IEU-Ohio hereby offers its Merit Brief in support of the Commission's Orders on this particular matter. For the reasons explained below, the Court should uphold the Commission's lawful and reasonable decision finding that CSP failed to demonstrate it should be permitted to collect the costs associated with the Darby and Waterford facilities from customers through its non-cost-based ESP.¹⁷

STANDARD OF REVIEW

R.C. 4903.13 states that “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the Supreme Court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” With regard to the Commission's determinations regarding questions of fact, the Court has held that it “will not reverse or modify a [commission] decision as to questions of fact where the record contains sufficient probative evidence to show that the determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension,

¹⁶ Second Entry on Rehearing at 4 (Appellant's Appx. at 177) (ICN 279).

¹⁷ IEU-Ohio's support of the Commission's decision that is the subject of this appeal should not be construed as an endorsement of any other portion of the Commission's Orders in this case. IEU-Ohio firmly stands behind its arguments in Ohio Supreme Court Case No. 2009-2022 (which has been fully briefed and awaits scheduling of oral arguments) that demonstrate virtually every other determination in the ESP Orders are unlawful and unreasonable.

mistake, or willful disregard of duty.”¹⁸ The appellant “bears the burden of demonstrating that the commission’s decision is against the manifest weight of the evidence or is clearly unsupported by the record.”¹⁹ As to matters of law, the Court has “complete and independent power of review of all questions of law” in appeals from the Commission.²⁰

The Commission’s Orders should be upheld inasmuch as CSP has not and cannot meet the heavy burden to overturn the Commission’s decision regarding its factual decision that CSP did not demonstrate that its current revenues do not already compensate CSP for the costs associated with the Darby and Waterford facilities. The Court cannot permit CSP to turn a factual decision made by the Commission into a legal question. Regardless, as IEU-Ohio demonstrates below, CSP is wrong both factually and legally and the Court should affirm the Commission’s decision.

ARGUMENT

CSP claims the Commission should have permitted it to recover the costs of ownership in the Darby and Waterford facilities if it was not going to approve its request for authority to transfer or sell these facilities. CSP also repeatedly asserts throughout its Merit Brief that the Commission unlawfully reverted back to a cost-of-service traditional ratemaking formula when determining that CSP had not demonstrated that it should be afforded a specific revenue collection opportunity associated with Ohio customers’ jurisdictional share of costs associated with the Waterford and Darby facilities. For the reasons explained below, the Court must reject

¹⁸ *The Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999).

¹⁹ *Constellation NewEnergy v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767 at ¶50.

²⁰ *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1977).

CSP's arguments. CSP's baseless arguments have no factual basis or grounding in Ohio law and the Commission's decision should be upheld.

PROPOSITION OF LAW NO. I

R.C. 4928.143 does not mandate cost recovery for any particular cost or category of costs and CSP failed to prove the Commission should permit it to collect Ohio jurisdictional customers' share of costs associated with the Darby and Waterford facilities.

The Court should affirm the Commission's Orders inasmuch as R.C. 4928.143 does not require the Commission to order the collection of any specific costs as part of an ESP. Further, the Commission correctly determined that CSP failed to demonstrate that it should be awarded a revenue collection opportunity associated with Ohio jurisdictional customers' share of the Darby and Waterford generating facility costs.

As CSP recognizes throughout its Merit Brief, R.C. 4928.143 does not return Ohio to pre-SB 3 cost-based ratemaking or require a utility's revenue requirement to be developed by looking at an EDU's costs and including a return on invested capital.²¹ R.C. 4928.143 contains no mandates directing the Commission to permit the recovery of any particular costs or category of costs. Instead, R.C. 4928.143 grants the Commission the discretion to permit an EDU to recover certain costs or categories of costs as part of an ESP that are substantiated by record evidence and ultimately R.C. 4928.143 simply requires the Commission to find that an approved ESP is more favorable in the aggregate than the expected results of an MRO plan. The Commission's determination that CSP failed to demonstrate its current revenues were not already compensating CSP for the costs associated with the Darby and Waterford facilities is lawful under R.C. 4928.143.

²¹ See CSP Merit Brief at 10.

Further, CSP's arguments in this appeal amount to nothing short of a complete and total flip-flop from its positions in the ESP case at the Commission as well as its positions in the appeals of the ESP case taken by IEU-Ohio and the Ohio Consumers' Counsel ("OCC"). CSP repeatedly asserted in the ESP proceeding below, when it benefited CSP, that an ESP under R.C. 4928.143 is not a cost-based exercise and that there is no requirement that any element of the ESP be cost-based.²² However, CSP now attempts to manipulate R.C. 4928.143 for the proposition that CSP must be awarded cost recovery for expenses directly related to the Darby and Waterford facilities. CSP's complete turnabout vividly illustrates the weakness and hypocrisy of CSP's arguments in this Appeal. R.C. 4928.143 does not require the Commission to selectively increase rates (which are not based on costs) because the non-cost-based rates do not reflect a particular category of costs. CSP's arguments must be denied.

Additionally, the Commission's Orders related to cost recovery for Ohio customers' jurisdictional share of costs associated with the Darby and Waterford generating facilities are not grounded in a traditional cost-of-service rationale. The Commission simply and correctly determined that CSP had not proven that its current revenue was not already compensating CSP for its costs associated with the Darby and Waterford facilities.²³ Nowhere in the Commission's Entries on Rehearing are there any citations to R.C. Chapter 4909 or any discussion of record evidence related to traditional ratemaking principles. The Commission's rationale does not evince any return to traditional cost-of-service ratemaking. CSP's red-herring argument should be discarded by the Court.

²² See Tr. Vol. XI at 86-87 (IEU-Ohio Second Supp. at 25-26). See also AEP-Ohio Initial Brief at 15 (December 30, 2008) (ICN 179).

²³ Entry on Rehearing at 35 (Appellant's Appx. at 148) (ICN 265).

Even if the Commission had reverted back to traditional ratemaking concepts to establish CSP's default generation supply price, its Orders regarding specific cost recovery for the Darby and Waterford facilities would have been lawful. The traditional ratemaking process does not track costs by individual category or facilities; it produces a regulatory authorization to collect revenue through the application of rates and charges to the service provided by the utility. Once the ratemaking process has produced authority to bill and collect revenue for service, the rates and resulting revenue are presumed to be reasonable (for both the utility and customers).²⁴ A showing that a particular category of costs or costs related to specific facilities is not currently reflected in rates may be, circumstantially speaking, some indication that current rates and revenue may not provide adequate compensation, but it is not proof that current rates and charges and the revenue derived there from are inadequate or unreasonable.

CSP is not lawfully entitled under R.C. 4928.143 to revenue recovery connected to any particular category of costs. As CSP itself pointed out several times in its own Merit Brief, generation rates are no longer cost-based. CSP's arguments asserting a reversion to traditional cost-based ratemaking are likewise wrong and unpersuasive. The Commission correctly determined that CSP failed to demonstrate that it should be permitted to collect revenue to recover the alleged costs associated with the Darby and Waterford facilities. Accordingly, the Court should affirm the Commission's decision.

²⁴ Section 4909.03, Revised Code (IEU-Ohio Appx. at 1). *See also* IEU-Ohio's cross-examination of Commission Staff Witness Richard Cahaan at Tr. Vol. XII at 221-222 (IEU-Ohio Second Supp. at 30-31).

PROPOSITION OF LAW NO. II

The Commission lawfully determined that CSP's request for authority to sell or transfer the Darby and Waterford facilities was premature.

The Court should reject CSP's attempts to weave together a hypocritical legal theory supporting its argument that the Commission should have authorized some sort of cost recovery in CSP's non-cost-based ESP if the Commission would not approve CSP's request for permission to sell or transfer the Darby and Waterford facilities. There is no legal authority that provides any support for CSP's arguments and the Commission's decision should be upheld. The Commission correctly found that CSP's request for authority to sell or transfer the Darby and Waterford facilities was premature and that CSP failed to demonstrate that the Commission should authorize cost recovery for the Darby and Waterford facilities.

R.C. 4928.17(E) states that "No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval." The only matter R.C. 4928.17(E) addresses is the sale or transfer of generation assets.²⁵ Nowhere does R.C. 4928.17 or any other section of R.C. Chapter 49, including R.C. 4928.143, say that the Commission must grant an EDU cost recovery related to a generation asset if the Commission does not approve an EDU's application to sell or transfer that generating asset. As demonstrated above, R.C. 4928.143 does not require a cost-based examination of rates as a whole or by particular category of costs under any circumstances. The Commission properly found that CSP's request for authority to sell or transfer the Darby and Waterford facilities (as well as the other facilities that CSP sought authority to sell or transfer) was

²⁵ CSP's attempts to gather some sort of sympathy from the Court for its "fairness" arguments regarding the General Assembly's modification of R.C. 4928.17 should be rebuffed. CSP Merit Brief at 10-11. The General Assembly is tasked with modifying the law to adapt to changing times and all persons operate under the risk that the General Assembly may change the law.

premature.²⁶ CSP did not demonstrate why its request in the ESP proceeding was not premature; nor did CSP provide additional details on a proposed sale or transfer or how the sale or transfer might serve to advance the state policy in R.C. 4928.02.

The Commission was correct to modify its Opinion and Order in its Entry on Rehearing. R.C. 4903.10 permits the Commission to modify or even abrogate its previous orders on rehearing if it determines that its prior orders should be revised. On rehearing and upon review of IEU-Ohio's Application for Rehearing, the Commission correctly agreed with IEU-Ohio and determined that CSP did not demonstrate that CSP's revenue is inadequate to cover the costs associated with the Darby and Waterford facilities. Contrary to CSP's arguments, the Commission then explicitly made the only statutorily-required determination, finding that the ESP, as modified on rehearing by the Commission, remained more favorable in the aggregate than the expected results of an MRO plan.

The Commission is not required, as part of an ESP proceeding or otherwise, to authorize CSP to sell or transfer the Darby and Waterford facilities or to permit CSP cost-based recovery of expenses associated with the Darby and Waterford facilities in a non-cost-based ESP proceeding. CSP's argument lacks merit and should be denied inasmuch as CSP has not demonstrated that the Commission's Orders are unlawful or unreasonable.

²⁶ Opinion and Order at 52 (Appellant's Appx. at 83) (ICN 214).
{C30558:3 }

PROPOSITION OF LAW NO. III

The Commission's Orders must be upheld as CSP cannot demonstrate any harm or prejudice by the Commission's Orders.

This Court has repeatedly held that it will not reverse an order of the Commission unless the party seeking reversal demonstrates the prejudicial effect of the order.²⁷ CSP cannot demonstrate the Commission's Orders harm or prejudice CSP and therefore the Commission's Orders should be upheld by this Court.

First, IEU-Ohio proved during the evidentiary hearing in this case that CSP's revenue fully recovers all of its costs, including those associated with the Darby and Waterford generating facilities, plus a very healthy return on equity (using balance sheet equity values that include all interests in generating assets).²⁸ The Commission explicitly agreed in its Entry on Rehearing, describing IEU-Ohio's arguments as "persuasive" and finding that the "Companies have not demonstrated that their current revenue is inadequate to cover the costs associated with the generating facilities, and that those costs should be recoverable through the non-FAC portion of the generation rate from Ohio customers."²⁹ The Commission's Orders did not deprive CSP of revenue to recover costs associated with the Darby and Waterford facilities; the Commission found the revenue authorized by the Commission already compensates CSP for these costs and therefore the Commission's Orders did not harm or prejudice CSP's recovery of the costs

²⁷ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 92, 706 N.E.2d 1255. *See also Myers v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 299, 302, 595 N.E.2d 873.

²⁸ IEU-Ohio Application for Rehearing at 20 (April 16, 2009) (ICN 230). *See also* OEC Exhibit 3 at Exhibit LK-2 (Exhibit 2 of Direct Testimony of Lane Kollen) (IEU-Ohio Second Supp. at 10) (ICN 122).

²⁹ Entry on Rehearing at 35 (Appellant's Appx. at 148) (ICN 265).

associated with the Darby and Waterford facilities.³⁰ Finally, the fact that CSP did not choose to terminate and withdraw its ESP further shows that the Commission's Orders did not harm CSP's revenue collection opportunities to recover the costs associated with the Darby and Waterford facilities – if the Commission's decisions were harming CSP it would have chosen to withdraw and terminate its ESP under R.C. 4928.143(C)(2)(a).

Second, CSP cannot show any harm or prejudice related to the Commission's decision to direct CSP to file an Application with the Commission for permission to sell or transfer these facilities at the time that it wishes to sell or transfer them.³¹ CSP admitted during the ESP proceedings that it had no immediate plans to transfer or sell the Darby or Waterford generation facilities.³² And, as the Commission observed in its Second Entry on Rehearing, contrary to CSP's viewpoint, the Commission did not prohibit CSP from selling or transferring the facilities.³³ The Commission invited CSP to file an Application for authority to sell or transfer the Darby and Waterford generating assets once CSP has established a plan for selling or transferring the assets.³⁴ Thus, the Commission's Orders do not harm or prejudice CSP's plans to transfer or sell the generating units.

³⁰ IEU-Ohio Application for Rehearing at 20 (April 16, 2009) (ICN 230). Indeed, Staff Witness Richard Cahaan testified that CSP was obviously recovering its fuel costs (which include purchased power costs such as those associated with the Darby and Waterford facilities) in 2007 or CSP's earnings would have been negative, or at least, insufficient. *See also* Staff Exhibit 10 at 3 (Direct Testimony of Richard Cahaan) (IEU-Ohio Second Supp. at 14) (ICN 137).

³¹ Opinion and Order at 52 (Appellant's Appx. at 83) (ICN 214). CSP complains in its Merit Brief that the Commission's citation to O.A.C. 4901:1-37-09 as the rule under which to bring an Application to sell or transfer its generating facilities was not yet effective when the Commission issued its Orders. CSP Merit Brief at 4-5. This argument is of no avail and does not demonstrate any harm or impact on CSP inasmuch as CSP has no current plans to sell or transfer these generating facilities.

³² Second Entry on Rehearing at 4 (Appellant's Appx. at 177) (ICN 279).

³³ *Id.*

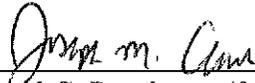
³⁴ *Id.*

CSP cannot and did not prove that its revenue does not cover the costs associated with the Darby and Waterford facilities.³⁵ Additionally, the Commission's decision in this case did not impact in any way the sale or transfer these facilities because there is no current plan to do so. For these reasons, the Commission's Orders should be upheld inasmuch as CSP cannot demonstrate that the Commissions' Orders harm or prejudice CSP.

CONCLUSION

For the reasons explained above, IEU-Ohio requests the Court affirm the Commission's Orders regarding the Darby and Waterford generation facilities.

Respectfully submitted,



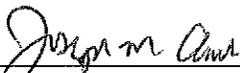
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³⁵ Entry on Rehearing at 35 (Appellant's Appx. at 148) (ICN 265).

CERTIFICATE OF SERVICE

I hereby certify that copies of this *Merit Brief of Intervening Appellee Industrial Energy Users-Ohio* has been served by first class mail, postage prepaid, or hand-delivered to the following parties of record this 19th day of April 2010.



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APPENDIX

4909.03 Effect of rates fixed by commission.

All rates, fares, charges, classifications, and joint rates of railroad companies and telegraph companies fixed by the public utilities commission shall be in force and be prima-facie lawful for two years from the day they take effect, or until changed or modified by the commission or by an order of a competent court in an action under Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code.

Effective Date: 10-01-1953