

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>Columbus Southern Power Company</b>	:	<b>Case No. 09-2298</b>
	:	
<b>Appellant,</b>	:	
	:	<b>Appeal from Public</b>
<b>v.</b>	:	<b>Utilities Commission of Ohio</b>
	:	
<b>The Public Utilities Commission of Ohio,</b>	:	<b>Public Utilities</b>
	:	<b>Commission of Ohio</b>
<b>Appellee.</b>	:	<b>Case No. 08-917-EL-SSO</b>

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**REPLY BRIEF AND ADDITIONAL APPENDIX OF APPELLANT  
COLUMBUS SOUTHERN POWER COMPANY**

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**REPLY BRIEF AND ADDITIONAL APPENDIX OF APPELLANT  
COLUMBUS SOUTHERN POWER COMPANY**

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**INTRODUCTION**

In Columbus Southern Power Company's (CSP) Merit Brief in this appeal, it presented one proposition of law. At its core, that proposition stated that if the Public Utilities Commission of Ohio (Commission) were going to deny approval of CSP's proposed sale or transfer of two generating facilities which never had been included in CSP's plant-in-service for rate making purposes, it was unlawful to deny CSP the right to include, as part of its Electric Security Plan (ESP), a component to recover the costs associated with maintaining and operating those generating assets.<sup>1</sup>

This proposition, besides being reasonable on its face, has the merit of being consistent with the Commission's own reasoning. In its March 18, 2009 Opinion and Order in CSP's ESP case the Commission stated:

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<sup>1</sup> These are the Waterford Energy Center (Waterford) and Darby Electric Generating Station (Darby).

The Commission, however, recognizes that these generating assets *have not and are not included* in rate base and, thus, [CSP] cannot collect any expenses related thereto, even if the facilities... have been used for the benefit of Ohio customers. If the Commission is going to require that [CSP] retain these generation assets, then the Commission should also allow [CSP] to recover Ohio customers' jurisdictional share of any costs associated with maintaining and operating such facilities. Accordingly, we find that while [CSP] still own[s] the generating facilities [it] should be allowed to obtain recovery for the Ohio customers' jurisdictional share of any costs associated therewith. Thus, we believe that any expense related to these generating facilities . . . that are not recovered in the FAC [Fuel Adjustment Clause] shall be recoverable in the non-FAC portion of the generation rate as proposed by [CSP].

(Opinion and Order, p. 52; CSP App. p. 83).

Despite the Commission's cogent reasoning in its Opinion and Order, it reversed this position in its July 23, 2009 Entry on Rehearing, and directed CSP to "remove the annual recovery of \$51 million of expenses and carrying charges related to these generating facilities." (CSP App. pp. 148, 149). While CSP did not challenge on rehearing the Commission's initial decision to provide recovery of \$51 million of costs associated with the two generating assets instead of granting authority to sell or transfer those units, it did oppose the Industrial Energy Users-Ohio's (IEU) rehearing on this point. (CSP's Memorandum Contra Intervenors' Applications for Rehearing, pp. 11, 12; CSP Additional App. pp. 7, 8).<sup>2</sup> CSP also sought supplemental rehearing of the Commission's reversal of that ruling. In its July 31, 2009 Application for Rehearing, CSP urged that since the Commission revoked the authority to recover its customers' jurisdictional share of the costs associated with maintaining and operating the two generating assets it should have authorized the sale or transfer of the assets. (CSP's July

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<sup>2</sup> CSP is including in its Additional Appendix (referred to as "CSP Additional App.") only the portion of its Memorandum Contra Intervenor's Applications for Rehearing that pertains to this issue.

31, 2009 Application for Rehearing; CSP Additional App. pp. 1-5). Once the Commission denied that supplemental rehearing application, CSP initiated this appeal.

Three Merit Briefs were filed in response to CSP's Merit Brief.<sup>3</sup> The Appellee and Intervening Appellees address the merits of the Commission's reversal of position concerning this issue. In addition, the Commission and OCC argue that CSP did not preserve for appeal its arguments concerning the request for authority to sell or transfer Waterford and Darby and concerning the recovery of costs associated with maintaining and operating those facilities. Further, the Commission and IEU argue that the reduction in revenues of \$51 million per year resulting from the Commission's July 23, 2009 Entry on Rehearing is not a sufficient basis for CSP demonstrating that it has been harmed by the Commission's orders. In the following Argument portion of this brief, CSP will demonstrate that the issues it raises are properly before the Court. CSP also will respond to the Appellee's and Intervening Appellees' arguments regarding the merits of CSP's Proposition of Law No. 1 in its Merit Brief.

## **ARGUMENT**

### **PROPOSITION OF LAW NO. 1.**

**The issues raised on appeal are properly before the Court.**

- A. The issues CSP has raised have been properly preserved for appeal pursuant to R.C. 4903.10.**

The Commission and OCC argue that CSP did not preserve through rehearing applications the issues it brings before the Court. Their argument defies the reality of the

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<sup>3</sup> The Commission, the Ohio Consumers' Counsel (OCC) and Industrial Energy Users-Ohio (IEU). Intervening Appellee, Ohio Energy Group, did not file a brief.

Commission's March 18, 2009 Opinion and Order and its July 23, 2009 Entry on Rehearing.

The Opinion and Order did not simply deny CSP's request for authority to sell or transfer the Waterford and Darby facilities. It went on to include \$51 million in annual revenue recovery as a direct consequence of the refusal to authorize the sale or transfer. Those decisions were not two separate decisions. They represented the Commission's disposition of the sale/transfer issue. The Commission's language in its Opinion and Order clearly makes this point.

If the Commission is going to require that [CSP] retain these generating assets, then the Commission should also allow [CSP] to recover Ohio customers' jurisdictional share of any costs associated with maintaining and operating such facilities. (Opinion and Order, p. 52; CSP App. p. 83).

The Commission's argument in its Merit Brief (at p. 11) that the July 23<sup>rd</sup> Entry on Rehearing did not address the sale/transfer issue ignores the way the Commission itself linked the sale/transfer issue and the cost recovery issue in its Opinion and Order. Given the Commission's original decision concerning this issue, there was no basis for CSP to seek rehearing of the Opinion and Order's resolution of this issue. Indeed, it would have been a new level of *chutzpah* for CSP to treat the refusal of sale/transfer authority as separate from the receipt of authority to collect \$51 million in revenue by seeking rehearing of the former and retaining the latter. Of course, CSP opposed IEU's rehearing request in this regard (CSP Additional App. pp. 7, 8) and once the Commission reversed itself on rehearing and denied the recovery aspect of the Commission's collective ruling on the sale/transfer issue, CSP promptly sought supplemental rehearing of the Commission's failure to authorize the sale or transfer of the Waterford and Darby

facilities. (CSP's July 31, 2009 Application for Rehearing; CSP Additional App. pp. 1-5).

Regarding CSP's July 31, 2009 Application for Rehearing, the Commission now asserts that CSP made only "a passing reference to the recovery of costs being revoked [and] the Commission was left to guess what CSP meant." (Commission Merit Brief, p. 13). Even a cursory review of that application for rehearing makes it obvious that the Commission was not left to guess what CSP's complaint was. CSP made clear that there was a direct linkage between the sale/transfer and cost recovery features of the ESP order. The following excerpts from CSP's July 31, 2009 Application for Rehearing demonstrate the point.

*On rehearing, since the Commission revoked CSP's authority to recover its customers' jurisdictional share of the costs associated with maintaining and operating Waterford and Darby, the Commission should concurrently exercise its authority under §4928.17 (E), Ohio Rev. Code, to authorize CSP to sell or transfer these two facilities. (CSP Additional App. p. 1) (Emphasis added).*

*If the Commission were going to revoke the rate authorization it provided in the Opinion and Order it also should have reconsidered its ruling as it related to authority to sell or transfer the Waterford and Darby facilities and granted CSP the authority it sought under §4928.17 (E), Ohio Rev. Code, regarding Waterford and Darby. (CSP Additional App. p. 3) (Emphasis added).*

*It is unreasonable to force CSP to keep these generating units and not be able to recover any costs associated with these units. (CSP Additional App. p. 3). (Emphasis added).*

*Therefore, with the cost recovery provision of the Opinion and Order being revoked on rehearing, the fair and reasonable course of action now is to authorize CSP to sell or transfer those units. (CSP Additional App. p. 3). (Emphasis added).*

*Authorization of a sale or transfer also is legally required if the Commission is not allowing cost recovery associated with these merchant[plants]. (CSP Additional App. p. 3). (Emphasis added).*

With the Commission's reversal in its Entry on Rehearing of the Waterford and Darby cost recovery, CSP is unlawfully put in the position of being required to retain these facilities but not being *permitted to make any adjustment to the rate plan rate to recover costs of maintaining and operating those units or recover a return on the investment in those plants.* (CSP Additional App. pp. 3, 4). (Emphasis added).

So much for the notion that CSP made only "passing reference to the recovery of costs being revoked."

The Commission and OCC also argue that because CSP did not seek rehearing of the ruling in the Commission's July 23, 2009 Entry on Rehearing that revoked the authority to include in its ESP \$51 million in revenue recovery, it did not properly preserve that issue for appeal.

For all the authority cited by the Commission and OCC regarding the necessity to comply with R.C. 4903.10, they make no mention of this Court's decision in *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St. 3d 177. In that case, the Commission initially ruled in favor of Cincinnati Bell on a particular issue. On rehearing, however, the ruling was raised by an intervenor and the Commission reversed itself and ruled against *Cincinnati Bell*. When Cincinnati Bell raised the issue on appeal the Commission claimed that since Cincinnati Bell did not pursue through a follow-up rehearing the Commission's reversal on rehearing of its initial position, the issue was not properly before the Court.

In response, the Court ruled that the issue was properly brought on appeal.

While assertion of error in an application for rehearing is a statutory jurisdictional prerequisite to an appeal on the alleged error, R.C. 4903.10 does not require that the error be alleged in the appellant's application for rehearing; it can be in an application for rehearing filed by a nonappellant intervening party. Cf. *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d

12, 10 Ohio B. Rep. 166, 460 N.E. 2d 1108. The issue of loop-qualification charges was raised below in an intervenor's application for rehearing. Accordingly, that issue is properly before this court, and we now address it. (92 Ohio St. 3d 180, 181).

That decision is directly on point to CSP's appeal of the Commission's reversal on rehearing of the authorization of the \$51 million revenue recovery. The Commission originally ruled in favor of CSP. An intervenor (IEU) raised that ruling in its rehearing application, CSP opposed the rehearing request and the Commission reversed its position and ruled against CSP's interests. As the Court has observed, since the issue was raised in an intervenor's application for rehearing "that issue is properly before this court." The Commission's and OCC's position, if adopted, would needlessly postpone the time for this Court's review, since they would require a second round on rehearing concerning any issue on which the Commission changed its mind in the initial rehearing process. Such an inefficient process should be, and has been rejected by the Court.

**B. CSP has been prejudiced by the Commission's orders.**

IEU and the Commission contend that CSP has not demonstrated that it will suffer any prejudice or harm by the Commission's orders. The Commission's decision to eliminate \$51 million of revenue recovery, by definition, constitutes harm to CSP's interests. IEU's argument also improperly relies on CSP not showing that its revenues were insufficient to recover the \$51 million of costs related to Waterford and Darby. However, such a showing would require a full cost-of-service analysis. This would be contrary to R.C. 4928.143 which establishes a non-cost basis for evaluating a proposed ESP. The statutory test is the comparison of the ESP to results anticipated under a

Market Rate Offer (MRO). While specific cost-based components can be included in an ESP, R.C. 4928.143 does not permit the Commission to eliminate a component of an ESP on the ground that the electric utility has not shown that the ESP, including the component, meets an over-all cost-of-service test.

The Commission argues that CSP accepted the risk that it might not recover its investment in the Waterford and Darby facilities. (Commission Merit Brief, p. 20). From that premise it then asserts that CSP, therefore, should not expect to recover the costs related to maintaining and operating the Waterford and Darby facilities.

The Commission's argument is flawed in the same manner as the improper argument that IEU makes about CSP having to demonstrate that these costs were not being recovered and thus requiring a traditional cost-of-service analysis as part of an ESP, because it is not supported by R.C. 4928.143. Further, the idea of CSP accepting risk simply ignores the about-face turned by the General Assembly when, as part of SB 221, it amended R.C. 4928.17 (E). At the time CSP acquired these facilities division (E) specifically permitted the divestiture of generating assets without the need for Commission approval. Moreover, at that time the pre-SB 221 version of R.C. 4928.14 not only permitted, but required electric distribution utilities, such as CSP, to provide a market-based Standard Service Offer. (CSP Additional App. p. 9). SB 221 eliminated CSP's ability to implement market-based rates at the conclusion of the rate plan which preceded the ESP. Since SB 221 so dramatically reversed the regulatory playing field, any argument based on CSP having accepted the risk associated with owning the Waterford and Darby facilities must be rejected.

Finally, and most remarkably, the Commission argues that CSP “made no apparent effort to mitigate any harm that it might claim from ongoing expenses by attempting to sell or transfer these plants prior to filing its ESP case.” (Commission Merit Brief, p. 20). What is so remarkable about this argument is that when Duke Energy Ohio attempted such a pre-ESP transaction the Commission issued a News Release on April 28, 2008 which quoted the Chairman of the Commission as follows:

The motive behind the timing of Duke’s announcement is, at best, suspect. Therefore, we believe that it is important to intervene at the FERC on behalf of the electric ratepayers of Ohio and to ensure that Duke’s filing is not an attempt to skirt our recently passed legislation, Substitute Senate Bill 221. (CSP Additional App. p. 10)

The Commission should not be heard today to argue that CSP should have “skirted” SB 221 before it became effective, when two years ago it publicly criticized another electric utility for allegedly attempting to accomplish pre-ESP asset transfers.

CSP was very clear in its ESP filing why it did not try to unilaterally avoid the impact of SB 221. Mr. Baker, then Senior Vice President-Regulatory Services for American Electric Power Service Corporation, testified as follows:

Q. If prior to July 31, 2008, CSP could have sold those plants without having to obtain Commission authority why did it not do so?

A. There are two parts to the answer to that question -- a practical part and a philosophical part. As a practical matter transactions of this nature do not happen over night. It is not clear to me that the transaction could be completed in time. More important, however, is the philosophical part. The implementation of S.B. 221 should occur in a fair and responsible manner. Since rushing to sell these plants might be perceived by some as trying to avoid the General Assembly’s intent in this regard, we chose to bring this issue before the Commission.

(Co. Ex. 2A p. 43; CSP Additional App. p. 12)

The argument that CSP should have mitigated the harm resulting from the Commission's orders must be rejected.

## **PROPOSITION OF LAW NO. 2**

**Requiring an electric distribution utility to demonstrate in an Electric Security Plan proceeding that a particular cost is not already being recovered in its overall rates, mandates a traditional rate making cost-of-service study and therefore violates R.C. 4928.143.**

As CSP argued in its Merit Brief, an ESP proceeding is markedly different from traditional rate making under R.C. Chapter 4909. In an ESP proceeding there is no room for performing a cost-of-service study as a preliminary step to determining the electric utility's revenue requirement. Instead, as the Commission acknowledges in its Merit Brief "R.C. 4928.143 (B)(2) permits electric distribution utilities to request a wide range of services, charges, and increases as part of their ESP proposals." (Commission Merit Brief, p. 16). This "wide range" of proposals then is evaluated by the Commission to determine if the ESP "is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." (R.C. 4928.143 (C)). In this regard, the policy statements on which OCC relies at pages 19-21 of its Merit Brief cannot be applied to ignore the statutory standard for evaluating an ESP.

This comparison of the ESP to a Market Rate Offer (MRO) under R.C. 4928.142, does not permit consideration of whether the electric utility already is recovering all of its costs or, stated differently, whether it "needs" everything it has requested. While some may believe such a test to be unnecessarily generous to the utility, it is important to remember that without the passage of SB 221 electric utilities would be charging market-

based rates to all customers who would not have the protection of lower ESP-based rates. Therefore, legislation that required an ESP to be more favorable than an MRO, but permitted rates to recover revenues that might exceed a cost-of-service based revenue requirement makes sense. This is particularly true given that the General Assembly also chose to include in R.C. 4928.143 a “significantly excessive earnings” test which is applied after each year of the ESP to determine if an EDU should return revenues to its customers. Moreover, even without these considerations, the ESP versus MRO test is the only test of an ESP that is provided in R.C. 4928.143, regardless of whether some parties may not like it. As this Court noted many years ago, “The liberality of this section of the General Code may subject it to criticism, but as the Christian says of the Bible, ‘It is in the book.’” (*Cleveland v. Pub. Util. Comm.* (1934), 127 Ohio St. 432, 439)<sup>4</sup>

Despite the absence of a traditional cost-of-service basis for judging an ESP, the Commission argues that CSP “failed to demonstrate that it was incurring costs that it was not already recovering.” (Commission Merit Brief, p. 18). To the extent the Commission contends that CSP did not demonstrate that the specific Waterford and Darby costs previously had not been included in its rates, that clearly is wrong. As demonstrated in CSP’s Merit Brief, CSP’s rates never included recovery for CSP’s return on or of its investment in Waterford or Darby. (CSP Merit Brief, pp. 3, 4). No party to this appeal denies that fact. Similarly, neither the Commission nor any party contested CSP’s

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<sup>4</sup> IEU appears to agree with CSP’s position (and the Commission’s ruling in its Opinion and Order) concerning the test to be applied when judging an ESP. “The specific statutory criteria only requires the PUCO to find that an ESP is ‘more favorable in the aggregate’ compared to the expected results of an MRO in order to approve an ESP.” (IEU Merit Brief, p. 1, footnote omitted).

testimony regarding the \$51 million annual cost associated with these substantial capital investments.

Therefore, the Commission only could have meant that CSP did not demonstrate that its *overall rates* did not provide sufficient revenue recovery to cover the Waterford and Darby costs. Nonetheless, the Commission now argues that it did not “demand that the Company demonstrate its overall cost of rendering service or that its gross annual revenues were insufficient to recover those costs.” (Commission Merit Brief, p.18).

However, it immediately contradicts itself by pointing out that it found on rehearing 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. (*Id.*).

These circular arguments by the Commission, which are joined in by OCC and IEU in their Merit Briefs, always come back to the same point; instead of adhering to the statutory test for evaluating a proposed ESP, the Commission on rehearing reverted to traditional rate making concepts to support its decision to strip away the \$51 million its prior decision authorized as recovering legitimate costs.<sup>5</sup>

IEU and OCC argue that the Commission is permitted to change its mind on rehearing and modify its initial orders. (IEU Merit Brief, p. 11; OCC Merit Brief, p. 18). CSP does not dispute that assertion. However, the Commission can change its mind only on a lawful basis. As previously discussed, the Commission changed its mind by reverting to traditional cost-of-service rate making concepts, contrary to R.C. 4928.143. IEU’s assertion that the Commission’s modification on rehearing was lawful because the ESP “remained more favorable in the aggregate than the expected results of an MRO

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<sup>5</sup> See IEU Merit Brief, pp. 7, 8 and OCC Merit Brief, p. 8).

plan” is not persuasive. (*Id.*) It is hardly surprising that an ESP that was more favorable for customers than an MRO would continue to be more favorable for customers once \$51 million of revenue recovery is stripped away from the ESP. More to the point, the Commission’s decision on rehearing did not make such a determination based on the controlling statutory standard; rather, the Commission unlawfully reverted to traditional rate making concepts.

IEU also argues that R.C. 4928.17 (or for that matter R.C. Title 49) does not “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.” (*Id.* at 10). The point IEU misses is that not only did the Commission say this in its March 18, 2009 Opinion and Order (CSP App. p. 83), but the Commission still argues in its Merit Brief that it *never* reversed its finding that CSP could recover its Waterford and Darby costs. (Commission Merit Brief, p. 17).<sup>6</sup>

## **CONCLUSION**

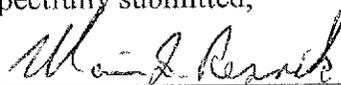
The Commission’s Opinion and Order properly held that if it were not going to authorize CSP to sell or transfer the Waterford and Darby generating facilities, it should permit CSP to recover the costs associated with maintaining and operating those units. The Commission also properly held that even with the recovery of those costs being included in CSP’s Electric Security Plan, the plan still passed the statutory test of being more favorable in the aggregate than the expected results of a Market Rate Offer.

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<sup>6</sup> As previously discussed the Commission unlawfully held that CSP did not demonstrate that those costs were not being recovered in existing rates.

On rehearing, however, the Commission reverted to traditional, and unlawful in the ESP context, ratemaking concepts and held that CSP did not show its *need* to recover those costs. The Commission's failure to either authorize the sale or transfer of these generating assets or to authorize the recovery of costs from customers is unlawful and unreasonable. These issues are properly before the Court and the Court should reverse the Commission's rulings in this regard.

Respectfully submitted,



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# ADDITIONAL APPENDIX

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BEFORE THE  
PUBLIC UTILITY COMMISSION OF OHIO

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 No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	)	Case No. 08-918-EL-SSO

COLUMBUS SOUTHERN POWER COMPANY'S  
APPLICATION FOR REHEARING

Pursuant to §4903.10, Ohio Rev. Code, and §4901-1-35 (A), Ohio Admin. Code, Columbus Southern Power Company (CSP) seeks rehearing of the Commission's July 23, 2009 Entry on Rehearing. The Commission's Entry on Rehearing reversing its March 18, 2009, Opinion and Order in this proceeding regarding CSP's proposal to sell or transfer its Waterford Energy Center (Waterford) and Darby Electric Generating Station (Darby) is unlawful and unreasonable. On rehearing, since the Commission revoked CSP's authority to recover its customers' jurisdictional share of the costs associated with maintaining and operating Waterford and Darby, the Commission should concurrently exercise its authority under §4928.17 (E), Ohio Rev. Code, to authorize CSP to sell or transfer these two facilities.

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## MEMORANDUM IN SUPPORT OF REHEARING

In its March 18, 2009, Opinion and Order, the Commission stated:

If the Commission is going to require that the electric utilities retain these generating assets, then the Commission should also allow the Companies to recover Ohio customers' jurisdictional share of any costs associated with maintaining and operating such facilities. (Opinion and Order, p. 52).

This ruling resulted from CSP's proposal to acquire authority to sell or transfer these mercantile generating facilities. As CSP's witness, Mr. Baker, explained, the Waterford plant was purchased in 2005 and Darby was purchased in 2007. (Co. Ex. 2 A, p. 42). "Neither of these units have ever been in CSP's rate base and customers' generation rates have not reflected CSP's investment in the plants or the expenses of operating and maintaining the plants." (*Id.*) With no rate recovery, these plants were purchased in anticipation of generation rates being market-based under SB 3. CSP "took the risk on these plants and therefore, ... its appropriate for us to have the authority to, if we choose, to transfer or sell the assets at our discretion." (Tr. XIV, p. 155). In rebuttal testimony, Mr. Baker testified that if CSP is prohibited from selling or transferring these units, any expense not recovered in the Fuel Adjustment Clause (FAC) should be recovered in the non-FAC rate. (Co. Ex. 2 B, p. 21).

In its March 18, 2009, Opinion and Order, the Commission denied CSP the authority it sought under §4928.17 (E), Ohio Rev. Code. However, based on its reasoning quoted above, it authorized cost recovery associated with Waterford and

Darby. The Company viewed the Commission's ruling as a fair balance regarding that issue and did not challenge the ruling on rehearing.

Now, however, the Commission's Entry on Rehearing has completely upset the balance it struck in its Opinion and Order. If the Commission were going to revoke the rate authorization it provided in the Opinion and Order it also should have reconsidered its ruling as it related to authority to sell or transfer the Waterford and Darby facilities and granted CSP the authority it sought under §4928.17 (E), Ohio Rev. Code, regarding Waterford and Darby. Having failed to do so, the Commission's orders are unreasonable and unlawful and should be modified on rehearing to authorize the sale or transfer of Waterford and Darby.

It is unreasonable to force CSP to keep these generating units and not be able to recover any costs associated with these units. The Commission already has recognized this. Therefore, with the cost recovery provision of the Opinion and Order being revoked on rehearing, the fair and reasonable course of action now is to authorize CSP to sell or transfer those units.

Authorization of a sale or transfer also is legally required if the Commission is not allowing cost recovery associated with these merchant plans. The unbundling process required by S.B. 3 resulted in a generation rate that reflected previously-determined cost recovery for CSP's generating facilities. The generation rates under the "rate plan" (the Standard Service Offer in effect on the effective date of S.B. 221) did not include recovery of costs associated with maintaining and operating Waterford or Darby or of a return on CSP's investment in those plants. With the Commission's reversal in its Entry on Rehearing of the Waterford and Darby cost recovery, CSP is unlawfully put in the

position of being required to retain these facilities but not being permitted to make any adjustment to the rate plan rate to recover costs of maintaining and operating those units or recover a return on the investment in those plants. On rehearing the Commission should rectify this unlawful situation by granting CSP the authority it sought in the proceeding to sell or transfer Waterford and Darby.

Respectfully submitted,



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and Ohio Power Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing was served by electronic mail upon the individuals listed below this 31<sup>st</sup> day of July 2009.

  
Marvin I. Resnik

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FILE

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus )  
Southern Power Company for the Approval of ) Case No: 08-917-EL-SSO  
its Electric Security Plan; and Amendment to )  
Its Corporate Separation Plan; and the Sale or )  
Transfer of Certain Generation Assets )

In the Matter of the Application of Ohio Power )  
Company for Approval of its Electric Security ) Case No. 08-918-EL-SSO  
Plan and an Amendment to its Corporate )  
Separation Plan )

COLUMBUS SOUTHERN POWER COMPANY'S  
AND OHIO POWER COMPANY'S  
MEMORANDUM CONTRA  
INTERVENORS'  
APPLICATIONS FOR REHEARING

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Filed: April 27, 2009

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**The Commission's Authorization of Recovery of the Revenue Requirement Associated With Specific Sources of Generation Supply Is Lawful and Reasonable. (IEU 3)**

IEU's application for rehearing asserts that the Commission unlawfully and unjustly modified the proposed ESP by allowing the Companies to recover the jurisdictional share of costs associated with maintaining and operating electric generating facilities which are not included in rate base. IEU characterizes the Commission's modifications as a selective use of traditional cost-based rate making.

IEU's arguments overlook the unusual circumstances regarding these generating facilities. These facilities were acquired in 2007 (Darby) and 2005 (Waterford), under a regulatory structure that placed the entire cost and risk associated with these facilities on CSP. With the enactment of SB. 221, and the amendment to §4928.17 (E), Ohio Rev. Code, in particular, it was entirely reasonable for the Commission to conclude that if it were "going to require that the electric utilities retain these generating assets, then the Commission should also allow the Companies to recover Ohio customer's jurisdictional share of any costs associated with maintaining and operating such facilities." (Order, p. 52).<sup>8</sup>

The Commission's decision regarding this issue also is lawful. Arguments to the contrary ignore the relatively flexible nature of §4928.143, Ohio Rev. Code, in comparison to traditional rate making. While the Commission did not engage in a dissertation setting forth its legal reasoning, the decision is no less lawful. The adjustment made by the Commission, including the adjustment related to purchases from

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<sup>8</sup> This explanation satisfies IEU's concern that the Commission did not comply with §4903.09, Ohio Rev. Code, regarding its decision on this issue.

Ohio Valley Electric Corporation, is lawful since there are no limits to the components that can be included in an ESP. Moreover, even with the adjustment the ESP is more favorable in the aggregate than the MRO alternative. IEU's application for rehearing of this issue should be denied.

**The Commission's Comparison of the Modified ESP to the Results That Would Otherwise Apply Under a Market Rate Offer Is Lawful and Reasonable. (IEU 6)**

IEU relies upon "common knowledge" of events occurring after the close of the record in this proceeding to argue that the Commission's ESP versus MRO comparison was flawed. IEU's suggestion that the Commission should have considered extra-record "common knowledge" is contrary to sound regulatory and evidentiary practices and must be rejected. Otherwise, there would be no end to an ESP proceeding as parties would have the Commission continuously evaluate the ESP versus MRO comparison as market prices fluctuate over an endless period of time. All parties had the opportunity to submit evidence while the record was open. Based on that evidence the Commission, as noted by IEU, used the market price supported by its Staff. It cannot be said that using Staff's market price was unlawful and IEU's assertion that based on post-hearing events the Commission now should use a lower market price in its analysis is unreasonable and unlawful and, therefore, should be rejected.

IEU attacks the ESP versus MRO comparison on two other fronts. First, IEU argues that the blending percentages for market price that the Commission used in valuing the MRO alternative were unreasonable. IEU alleges that the Commission used the worst case blending assumption and that doing so was unreasonable. As the

**PREVIOUS: SEC. 4928.14.** (A) AFTER ITS MARKET DEVELOPMENT PERIOD, AN ELECTRIC DISTRIBUTION UTILITY IN THIS STATE SHALL PROVIDE CONSUMERS, ON A COMPARABLE AND NONDISCRIMINATORY BASIS WITHIN ITS CERTIFIED TERRITORY, A MARKET-BASED STANDARD SERVICE OFFER OF ALL COMPETITIVE RETAIL ELECTRIC SERVICES NECESSARY TO MAINTAIN ESSENTIAL ELECTRIC SERVICE TO CONSUMERS, INCLUDING A FIRM SUPPLY OF ELECTRIC GENERATION SERVICE. SUCH OFFER SHALL BE FILED WITH THE PUBLIC UTILITIES COMMISSION UNDER SECTION 4909.18 OF THE REVISED CODE.

(B) AFTER THAT MARKET DEVELOPMENT PERIOD, EACH ELECTRIC DISTRIBUTION UTILITY ALSO SHALL OFFER CUSTOMERS WITHIN ITS CERTIFIED TERRITORY AN OPTION TO PURCHASE COMPETITIVE RETAIL ELECTRIC SERVICE THE PRICE OF WHICH IS DETERMINED THROUGH A COMPETITIVE BIDDING PROCESS. PRIOR TO JANUARY 1, 2004, THE COMMISSION SHALL ADOPT RULES CONCERNING THE CONDUCT OF THE COMPETITIVE BIDDING PROCESS, INCLUDING THE INFORMATION REQUIREMENTS NECESSARY FOR CUSTOMERS TO CHOOSE THIS OPTION AND THE REQUIREMENTS TO EVALUATE QUALIFIED BIDDERS. THE COMMISSION MAY REQUIRE THAT THE COMPETITIVE BIDDING PROCESS BE REVIEWED BY AN INDEPENDENT THIRD PARTY. NO GENERATION SUPPLIER SHALL BE PROHIBITED FROM PARTICIPATING IN THE BIDDING PROCESS, PROVIDED THAT ANY WINNING BIDDER SHALL BE CONSIDERED A CERTIFIED SUPPLIER FOR PURPOSES OF OBLIGATIONS TO CUSTOMERS. AT THE ELECTION OF THE ELECTRIC DISTRIBUTION UTILITY, AND APPROVAL OF THE COMMISSION, THE COMPETITIVE BIDDING OPTION UNDER THIS DIVISION MAY BE USED AS THE MARKET-BASED STANDARD OFFER REQUIRED BY DIVISION (A) OF THIS SECTION. THE COMMISSION MAY DETERMINE AT ANY TIME THAT A COMPETITIVE BIDDING PROCESS IS NOT REQUIRED, IF OTHER MEANS TO ACCOMPLISH GENERALLY THE SAME OPTION FOR CUSTOMERS IS READILY AVAILABLE IN THE MARKET AND A REASONABLE MEANS FOR CUSTOMER PARTICIPATION IS DEVELOPED.

(C) AFTER THE MARKET DEVELOPMENT PERIOD, THE FAILURE OF A SUPPLIER TO PROVIDE RETAIL ELECTRIC GENERATION SERVICE TO CUSTOMERS WITHIN THE CERTIFIED TERRITORY OF THE ELECTRIC DISTRIBUTION UTILITY SHALL RESULT IN THE SUPPLIER'S CUSTOMERS, AFTER REASONABLE NOTICE, DEFAULTING TO THE UTILITY'S STANDARD SERVICE OFFER FILED UNDER DIVISION (A) OF THIS SECTION UNTIL THE CUSTOMER CHOOSES AN ALTERNATIVE SUPPLIER. A SUPPLIER IS DEEMED UNDER THIS DIVISION TO HAVE FAILED TO PROVIDE SUCH SERVICE IF THE COMMISSION FINDS, AFTER REASONABLE NOTICE AND OPPORTUNITY FOR HEARING, THAT ANY OF THE FOLLOWING CONDITIONS ARE MET:

(1) THE SUPPLIER HAS DEFAULTED ON ITS CONTRACTS WITH CUSTOMERS, IS IN RECEIVERSHIP, OR HAS FILED FOR BANKRUPTCY.

(2) THE SUPPLIER IS NO LONGER CAPABLE OF PROVIDING THE SERVICE.

(3) THE SUPPLIER IS UNABLE TO PROVIDE DELIVERY TO TRANSMISSION OR DISTRIBUTION FACILITIES FOR SUCH PERIOD OF TIME AS MAY BE REASONABLY SPECIFIED BY COMMISSION RULE ADOPTED UNDER DIVISION (A) OF SECTION 4928.06 OF THE REVISED CODE.

(4) THE SUPPLIER'S CERTIFICATION HAS BEEN SUSPENDED, CONDITIONALLY RESCINDED, OR RESCINDED UNDER DIVISION (D) OF SECTION 4928.08 OF THE REVISED CODE. 148 v S 3. Eff 10-5-99



News Release  
For Immediate Release  
Contact: Shana Eiselstein  
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**Statement from PUCO Chairman in response to Duke Energy Ohio filing at Federal Energy Regulatory Commission**

COLUMBUS, OHIO (April 28, 2008) – Public Utilities Commission of Ohio (PUCO) Chairman Alan R. Schriber issued the following statement today in response to Duke Energy Ohio's request at the Federal Energy Regulatory Commission (FERC) for permission to transfer generating assets to unregulated affiliates owned by parent company Duke Energy Corp.

"The motive behind the timing of Duke's announcement is, at best, suspect. Therefore, we believe that it is important to intervene at the FERC on behalf of the electric ratepayers of Ohio and to ensure that Duke's filing is not an attempt to skirt our recently passed legislation, Substitute Senate Bill 221."

"The Commission's Order on Remand affirming Duke's Rate Stabilization Plan prohibits the company from divesting its generating assets through Dec. 31, 2008. The General Assembly, in passing Substitute Senate Bill 221, has extended this prohibition into 2009 and beyond. The bill specifically states that no electric distribution utility can sell or transfer generating assets without obtaining prior PUCO approval."

-30-

*The Public Utilities Commission of Ohio (PUCO) is the sole agency charged with regulating public utility service. The role of the PUCO is to assure all residential, business, and industrial consumers have access to adequate, safe, and reliable utility services at fair prices while facilitating an environment that provides competitive choices. Consumers with utility-related questions or concerns can call the PUCO hotline at (800) 686-PUCO (7826) and speak with a representative.*

*Subscribe and Unsubscribe to the PUCO Media Release e-mail service*

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Columbus-Southern Power Company for )  
Approval of its Electric Security Plan; an ) Case No. 08- 917-EL-UNC  
Amendment to its Corporate Separation )  
Plan; and the Sale or Transfer of Certain )  
Generating Assets )

and )

In the Matter of the Application of )  
Ohio Power Company for Approval of )  
its Electric Security Plan; and an ) Case No. 08- 918-EL-UNC  
Amendment to its Corporate Separation )  
Plan )

DIRECT TESTIMONY  
OF  
J. CRAIG BAKER  
ON BEHALF OF  
COLUMBUS SOUTHERN POWER COMPANY  
AND  
OHIO POWER COMPANY

Filed: July 31, 2008

1 transfer is required. Many argued during the legislative debates over S.B. 221  
2 that this represents an appropriate change in public policy with respect to  
3 generating assets that had been the basis for rates that customers have been  
4 paying, i.e., used and useful for rate base purposes. While I do not agree with  
5 these arguments that same argument cannot be made regarding the Darby and  
6 Waterford facilities. Therefore, I believe it is appropriate for the Commission to  
7 grant CSP, as part of the ESP, the authority to sell or transfer those generating  
8 assets.

9 **Q. IF PRIOR TO JULY 31, 2008, CSP COULD HAVE SOLD THOSE**  
10 **PLANTS WITHOUT HAVING TO OBTAIN COMMISSION AUTHORITY**  
11 **WHY DID IT NOT DO SO?**

12 A. There are two parts to the answer to that question – a practical part and a  
13 philosophical part. As a practical matter transactions of this nature do not happen  
14 over night. It is not clear to me that the transaction could be completed in time.  
15 More important, however, is the philosophical part. The implementation of S.B.  
16 221 should occur in a fair and responsible manner. Since rushing to sell these  
17 plants might be perceived by some as trying to avoid the General Assembly's  
18 intent in this regard, we chose to bring this issue before the Commission.

19 **Q. DO CSP AND/OR OPCO HAVE GENERATION ENTITLEMENTS**  
20 **RESULTING FROM ARRANGEMENTS OTHER THAN THE WHOLE**  
21 **OR PARTIAL OWNERSHIP OF GENERATING ASSETS?**

22 A. Yes they do. On May 16, 2007 AEP Generating Company, an affiliate of CSP  
23 purchased the Lawrenceburg Generation Station located in Lawrenceburg.

## PROOF OF SERVICE

I certify that Columbus Southern Power Company's Reply Brief and Additional Appendix was served by First Class U.S. Mail upon counsel identified below for all parties of record this 7<sup>th</sup> day of May, 2010.



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