ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration	:	Case No. 2010-1533
	:	Appeal from the Public Utilities Commission of Ohio
	:	Public Utilities Commission of Ohio Case No. 09-1089-EL-POR

COLUMBUS SOUTHERN POWER COMPANY'S MERIT BRIEF

Samuel C. Randazzo,
Counsel of Record
(Reg. No. 0016386)
Joseph E. Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
Telephone: (614) 469-8000
Facsimile: (624) 469-4653
sam@mwncmh.com
joliker@mwncmh.com
Counsel for Appellant,
Industrial Energy Users-Ohio

Richard Cordray
(Reg. No. 0038034)
Attorney General of Ohio
William L Wright
(Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee
(Reg. No. 0017352)
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

Counsel for Appellee
Public Utilities Commission
of Ohio

FILED
DEC 08 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Matthew J. Satterwhite (0071972)
Counsel of Record
Steven T. Nourse (0046705)
Anne M. Vogel (0073774)
American Electric Power Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1606
Facsimile: (614) 716-2950
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com

Counsel for Intervening Appellee
Columbus Southern Power Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

STATEMENT OF FACTS.....2

STANDARD OF REVIEW.....4

ARGUMENT.....5

Proposition of Law I:
The Commission's Opinion and Order and Entry on Rehearing authorizing AEP Ohio to recover lost distribution revenue through January 1, 2011 is reasonable, lawful, and supported by record evidence.....5

Proposition of Law II:
The Commission's Opinion and Order and Entry on Rehearing properly finds the Stipulation and Recommendation is in the public interest.....7

Proposition of Law III:
The Commission's Opinion and Order and Entry on Rehearing approving cost recovery for AEP Ohio's peak demand reduction proposal is reasonable, lawful, and supported by record evidence.....9

CONCLUSION.....12

PROOF OF SERVICE

TABLE OF AUTHORITIES

CASES

Consumers' Counsel v. Pub. Util Comm. (1992), 64 Ohio St. 3d 123, 126, 592 N.E.2d 1370.....5

Weiss v. Pub. Util. Comm. (2000), 90 Ohio St. 3d 15, 17-18.....5

PUBLIC UTILITIES COMMISSION OF OHIO CASES

In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration, Case No. 09-1089-EL-POR, May 13, 2010 Opinion and Order, (*"09-1089 Opinion and Order"*).....3

In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration, Case No. 09-1089-EL-POR, July 14, 2010 Entry on Rehearing, (*"09-1089 Entry on Rehearing"*).....4

OHIO REVISED CODE SECTIONS

R.C. 4928.66 (IEU at 350).....6

OHIO ADMINISTRATIVE CODE SECTIONS

O.A.C. 4901:1 -39-05 (IEU at 350).....11

O.A.C. 4901:1-39-07 (IEU at 361).....6

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration	:	**Case No. 2010-1533**
	:	**Appeal from the Public Utilities Commission of Ohio**
	:	**Public Utilities Commission of Ohio Case No. 09-1089-EL-POR**

COLUMBUS SOUTHERN POWER COMPANY'S MERIT BRIEF

INTRODUCTION

The Industrial Energy Users-Ohio (IEU) offers this Court the same arguments on appeal that it raised at hearing, in its post-hearing briefs, and on rehearing before the Public Utilities Commission of Ohio ("Commission"). Those arguments rely on nothing more than IEU's disagreement with the factual findings of Commission's decision – a discretionary matter typically left to the Commission.

The Commission considered a stipulation in the underlying case (hereinafter Stipulation) signed by a wide variety of industry stakeholders including, the Office of the Ohio Consumers' Counsel (OCC), the Ohio Manufacturers' Association (OMA), the Ohio Environmental Council (OEC), Ohio Partners for Affordable Energy (OPAE), the Sierra Club of Ohio (Sierra), the Natural Resources Defense Council (NRDC), the Ohio Energy Group (OEG), the Ohio Poverty Law Center (OPLC), the Ohio Hospital Association (OHA), Ohio Power Company, and Columbus Southern Power (AEP Ohio). AEP Ohio respectfully requests that the Court affirm Commission's modification and adoption of the Stipulation reached by this diverse group.

STATEMENT OF FACTS

Amended Substitute Senate Bill 221 ("SB 221") provides mandates related to energy efficiency, peak demand reduction, and alternative energy requirements. R.C. 4928.66 requires all electric distribution utilities to implement energy efficiency and peak demand reduction programs to meet the SB 221 mandates. These mandates have annual reductions in kilowatt hour sales that extend to year 2025. This case deals with the portfolio plan approved by the Commission for Columbus Southern Power Company for 2010 through 2012 to meet those mandates.

The important dates are as follows:

November 12, 2009	AEP Ohio files Application in 10-1089-EL-POR
November 12, 2009	AEP Ohio files a Stipulation and Recommendation ("Stipulation") joined by a broad group of industry stakeholders seeking to have the program in place by January 1, 2010.
December 11, 2009	IEU filed objections and suggested modifications to the portfolio plan in the Stipulation.
February 25, 2010	Commission evidentiary hearing on Stipulation.
March 19, 2010	Final post-hearing briefs filed before the Commission.
May 13, 2010	Commission issues Opinion and Order (*"09-1089 Opinion and Order"*) approving the Stipulation with modifications. The Opinion and Order and Stipulation detail the evidence justifying the Commission's decision and highlights, the quarterly updates to signatory parties on the process, the

	rider mechanism for the program, certain future filings agreed to be offered, the application of the Ohio Revised Code and efforts to reach the General Assembly's mandates.
May 21, 2010	AEP Ohio submits compliance tariffs in accordance with the Opinion and Order.
May 26, 2010	The Commission finds the AEP Ohio filed tariffs in accordance with the Opinion and Order.
June 14, 2010	IEU files an Application for Rehearing at the Commission.
June 23, 2010	AEP Ohio files Memorandum Contra IEU's Application for Rehearing
July 14, 2010	Commission issues an Entry on Rehearing ("*09-1089 Entry on Rehearing* ") denying IEU's application.
August 31, 2010	IEU files a Notice of Appeal with the Supreme Court of Ohio.
September 3, 2010	IEU files an amended Notice of Appeal with the Supreme Court of Ohio.

The Commission's decision in the underlying review is lawful, reasonable, and supported by the evidentiary record. IEU's appellate arguments amount to a discretionary appeal.

STANDARD OF REVIEW

IEU sets forth the standards employed by the Court in considering issues of fact and issues of law. However, IEU did not mention that "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub.Util. Comm.* (2000), 90 Ohio St. 3d 15, 17-18. This aspect of the standard of review is important to the extent IEU is raising any arguments concerning the Commission's application of a statutory provision.

IEU also properly identifies the three-prong test used by the Commission to evaluate a stipulation before the Commission. IEU asserts that AEP Ohio failed to meet its burden of proving the Stipulation was lawful, reasonable, and met the PUCO's criteria to approve settlements. (IEU Merit Brief at 6.) However, a review of the case law cited by IEU shows that to succeed in its appeal, IEU must show that the Commission's order weighing was against the manifest weight of the evidence. *Consumers' Counsel v. Pub. Util Comm.* (1992), 64 Ohio St. 3d 123, 126, 592 N.E.2d 1370. In fact, the Court held that "[w]here conflicting evidence is presented to the commission with regard to a matter at issue, the commission's determination will not be disturbed unless the party who challenges that finding demonstrates that it is manifestly against the weight of the evidence and so clearly unsupported by the record in the cause as to demonstrate misapprehension, mistake, or willful disregard of duty." *Id.* at 127.

As will be discussed in the Argument portion of this Brief, the Appellants' arguments in this regard amount to nothing more than their disagreement with the Commission's reasoning and ultimate decisions in other cases. The Court should deny

IEU's arguments as an improper request to review the Commission's discretionary decisions *de novo* by the Court.

ARGUMENT

Proposition of Law I:
The Commission's Opinion and Order and Entry on Rehearing authorizing AEP Ohio to recover lost distribution revenue through January 1, 2011 is reasonable, lawful, and supported by record evidence.

IEU incorrectly argues that the Commission's findings in this case are inconsistent with its granting of AEP Ohio's right to recover lost distribution revenues. (IEU Merit Brief at 6-9.) As pointed out by the Commission on rehearing, IEU simply misinterprets the Commission's order. (*09-1089 Entry on Rehearing* at ¶ 15; IEU App. at 55.) The Commission pointed out that while it could have required more information if AEP Ohio had not reached a stipulation, it did reach an agreement in this case. The Commission relied upon that meeting of the minds of that wide array of interests as support for its interim order to allow AEP Ohio to recover lost distribution revenues because it was a key provision of the Stipulation. (*Id.*) Specifically, the Commission found, "***we recognize that all of the Signatory Parties, which represent a broad base of interests, entered into the Stipulation accepting the distribution based lost revenue calculation. As with any stipulation, it is reasonable, for the Commission to assume that the Signatory Parties herein negotiated provisions of the Stipulation in exchange for AEP Ohio's recovery of lost distribution revenue." (*09-1089 Opinion and Order* at 26; IEU App at 91.) As discussed in the standard of review above, the Commission typically reviews settlements in a different manner than fully litigated cases without settlement.

The settlement in this case satisfied the three-part test and IEU's preferences to the contrary do not provide adequate grounds for overturning the valid Commission decision.

In addition to the fact that the Commission's interim approval was approved as an important element of the Stipulation, the Commission also found that R.C. 4928.66 and O.A.C. 4901:1-39-07 support the Commission's findings. Specifically, the Commission's Opinion and Order states in pertinent part (bracketed numbers added):

> With regard to the recovery of lost distribution revenue, [1] the Commission agrees with AEP-Ohio that Section 4928.66, Revised Code, authorizes the Commission to approve a revenue decoupling mechanism which provides for the recovery of revenue that may otherwise be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs. [2] AEP-Ohio is also correct that in adopting Rule 4901:1-39-07(A), O.A.C, the Commission established an opportunity for an electric distribution utility to include, in its portfolio filing, a proposal for such a revenue decoupling mechanism. The need for a revenue decoupling mechanism arises from traditional rate designs that recover fixed distribution costs through volumetric charges. These designs leave utilities at risk of not collecting enough revenue to cover their fixed distribution costs when sales fall, and may provide an opportunity for utilities to collect revenue in excess of expenses if sales increase. The Commission believes that it is important to break or weaken the link between sales volume and the recovery of fixed distribution costs.

09-1089 Opinion and Order at 26; IEU App at 91. The Revised Code provides the Commission the authority to approve a revenue decoupling mechanism which provides for the recovery of revenue that may otherwise be foregone by the utility; and the Ohio Administrative Code established the opportunity to include a proposal for a revenue decoupling mechanism. The shape and structure of the mechanism and treatment of that proposal is left to the discretion of the Commission. IEU may not agree with the decisions of the Commission in this case, but that does not make them unlawful or unreasonable.

The Commission lawfully approved the interim plan for AEP Ohio to recover lost distribution revenues. IEU provided no evidence of record to show the Commission's finding was unreasonable. Absent such a showing the Court has traditionally deferred to the Commission's findings and interpretations and this appeal should be no different. The Commission's decision should be affirmed.

Proposition of Law II:
The Commission's Opinion and Order and Entry on Rehearing properly finds the Stipulation and Recommendation is in the public interest.

The General Assembly provided the Commission with the authority to make factual determinations and rulings over public utility disputes under Chapter 49 of the Ohio Revised Code, not IEU. Yet in its second proposition of law, IEU asserts its own criteria, and independently assigns evidentiary weight to that criteria that IEU maintains is necessary for an adequate Commission finding on the public interest prong to judge stipulations.

IEU asserts that the Stipulation was not in the public interest because the rate increase resulting from approval of the Stipulation was not considered in context of the other rate increases impacting AEP Ohio customers. (IEU Merit Brief at 10-13.) In support of this argument IEU provides the Court with citations to and arguments based on the evidence that it provided in this case as well as cases related to AEP Ohio's Electric Security Plan, a separate and distinct case on appeal before the Court. (IEU Merit Brief at 11-13.) IEU asserts that all the cases must be considered together in order to adequately make a finding in this case. This position is incorrect as explained below. IEU also raises an issue with the shortening of the ultimate recovery period under the stipulation; it was shorter than the Stipulation outlined because of the delay in a

Commission approval due to the time taken by IEU's challenge to the Stipulation. The Commission approved the recovery period. Again, IEU asserts that this shorter recovery period was not considered in the context of the rate impact of other decisions. Ultimately, IEU seeks to re-litigate the unrelated ESP proceedings and take another bite at the apple on the evidence in this case.

The Commission properly weighed the public interest in this case despite IEU's efforts to dictate the scope of the Commission's review. The Commission stated that it "evaluates the benefits of the Stipulation to ratepayers on a variety of factors, not just rates." (*09-1089 Opinion and Order* at 22-23; IEU App. at 87-88.) The Commission also explained its rationale in finding the Stipulation was in the public interest by stating it is mindful of the rate impact of this case on AEP Ohio's customers. We recognize the fact that most of the parties were able to reach an agreement to avoid extensive litigation and the associated additional expense thereof. We are also mindful that limiting AEP Ohio's ability to pursue cost-effective energy efficiency and peak demand reduction would necessitate the Companies' relying on more costly programs." (*09-1089 Entry on Rehearing* at ¶ 18; IEU App. at 57.)

The Commission also made clear that the scope of its review in this case was outside of the decisions reached in the ESP proceeding. The Commission found the rider rates established in this case outside of the ESP rate caps. (*09-1089 Entry on Rehearing* at ¶ 18; IEU App. at 57.) The Commission provided that the issue before it is whether to approve the Energy Efficiency/Peak Demand Reduction rider and associated programs not the level of ESP charges. Ultimately, the Commission found that "[a]pproving these

cost-effective programs ensures the lowest costs for Ohio industrial energy users and consumers. (*Id.*)

The Commission found the Stipulation in the public interest and provided its rationale. IEU's efforts to define the scope of the Commission's review and draw the Court into a re-litigation of this and other cases should be avoided. The Court should affirm the Commission and find it properly found the Stipulation in the public interest.

Proposition of Law III:
The Commission's Opinion and Order and Entry on Rehearing approving cost recovery for AEP Ohio's peak demand reduction proposal is reasonable, lawful, and supported by record evidence.

In an attempt to attack the Commission's decision below, IEU argues that the program approved by the Commission was not designed to achieve the necessary result, and that the program ignored lower cost compliance options (*i.e.* PJM capacity resource options). (IEU Merit Brief at 14-18.) Both arguments second guess factual findings made by the Commission and improperly seek to substitute IEU's judgment for that of the Commission's. Both arguments should be denied and the Commission affirmed.

First, IEU provides its opinion that the program approved by the Commission was not designed to achieve the required reductions in peak demand. In support of this contention, IEU argues that AEP Ohio's representation that it intends to meet the reductions by depending on its existing and future interruptible customers (served under its Schedule IRP-D) is problematic due to the low number of customers presently under that specific tariff and AEP Ohio's acknowledgement that the program is not attractive in

comparison to PJM Interconnection LLC's (PJM) demand response programs. (IEU Merit Brief at 14-15.)[1]

IEU's argument is a nothing more than an opinion on the adequacy of AEP's program and the argument ignores the evidence of record. AEP Ohio witness Jon Williams testified at hearing that AEP Ohio intends to propose a tariff program for the Commission's approval that will offer a PJM equivalent demand response program. (Hearing Transcript at 38-40, AEP Ohio Supp. at 3) The Commission approved the totality of AEP Ohio's program and not the limited view provided by IEU. The speculative argument provided by IEU is not proper grounds to overturn a Commission factual finding. The Court should deny IEU's invitation for second guessing on this matter and affirm the Commission.

Second, IEU provides another opinion, arguing that the peak demand reduction program approved by the Commission ignored lower cost options and therefore is not in the public interest in violation of the settlement evaluation criteria. IEU argues that the Commission's rules allow "a customer's peak demand reduction capability to count towards an EDU's portfolio obligation if the customer's peak demand reduction capability is recognized as a capacity resource under the FERC-approved tariff of a regional transmission organization ("RTO"), and if the peak demand reduction capability is committed to the EDU for purposes of meeting its portfolio requirements." (IEU Merit

---

[1] During the evidentiary hearing, AEP Ohio witness Williams also testified that the Companies are continually thinking of ways to improve their existing programs and plan to propose such improvements for the Commission's approval. (Hearing Transcript at 45-46, 54-55, AEP Ohio Supp. at 6-8.) In fact, AEP Ohio has since filed those proposals in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA. IEU is actively participating in these pending cases and IEU will have another opportunity to pursue its positions there.

Brief at 16.) IEU argues that achieving peak demand reduction compliance through a strategy leveraging PJM options could lower the overall cost by $7 million. (Id.)

IEU's assertions do not impact the Commission's finding that the Stipulation is in the public interest. The Commission already established that the Stipulation is in the public interest and is supported by a diverse class of stakeholders (see above). However, in response to IEU's opinion that a PJM focused program would save $7 million dollars, AEP Ohio asserts that IEU's logic is misplaced. The Ohio Administrative Code rule IEU cites as providing the authority to run the PJM program is not as advertised. O.A.C. 4901:1 -39-05(E)(2) does not automatically result in commitment of customer-sited resources toward an electric utility's compliance efforts, regardless of whether the customer's underlying resource satisfies the applicable standard. Any assertion that a simple designation would satisfy all peak reduction needs fails to consider reality.

There is no guarantee that a participant in PJM's program would qualify for AEP Ohio's program. Likewise, on cross-examination at the hearing, IEU witness Murray could not say whether there would or would not be a cost with a mercantile customer's commitment of demand response resources. (Hearing Transcript at 85-86, AEP Ohio Supp. at 10) He did not know. Regardless, AEP Ohio witness Williams testified that AEP Ohio's Plan is flexible and that the Companies plan to offer a PJM-equivalent program (which plan was subsequently filed by the Companies in Case Nos. 10-343-EL-ATA and 10-344-ELATA), and that the Companies are positioned to take advantage of such opportunities as they develop. (Hearing Transcript at 45-46, 54-55; AEP Ohio Supp. at 6.) As AEP Ohio witness Williams testified at the hearing if AEP Ohio is able to take advantage of programs that provide resources at no additional costs then a substantial

portion of the $7 million would be reduced, minus the administrative costs. (Id.) Thus, IEU's claim that $7 million would be saved is a "red herring" because AEP Ohio is already positioned to reduce the plan's cost if and when possible.

IEU's third proposition of law, like its others, revolves around its second guessing of the Commission's factual findings. The Commission found the Stipulation in the public interest. In spite of IEU's criticisms and arguments on how it would have issued a different decision, nothing is offered in IEU's Merit Brief to find the Commission's factual findings unreasonable or unlawful. The Court should deny IEU's arguments and affirm the Commission.

CONCLUSION

IEU's propositions of law amount to a substitution of its judgment for that of the Commission. Appeals based on an appellant's preferences should not prevail. Accordingly, AEP Ohio respectfully requests that the Court affirm the Commission's underlying Order in this case.

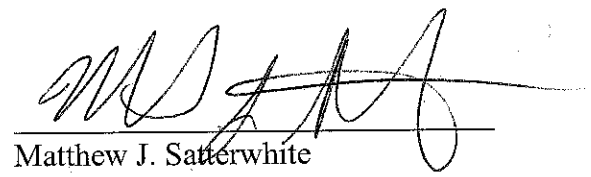
Respectfully submitted,

Matthew J. Satterwhite (0071972)
Counsel of Record
Steven T. Nourse (0046705)
Anne M. Vogel (0073774)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1606
Facsimile: (614) 716-2950
mjsatterwhite@aep.com
stnourse@aep.com
amvogel@aep.com

Counsel for Intervening Appellee
Columbus Southern Power Company

PROOF OF SERVICE

I certify that Columbus Southern Power Company's Merit Brief was served by First-Class U.S. Mail upon counsel identified below for all parties of record this 8th day of December 2010.



Matthew J. Satterwhite

Samuel C. Randazzo
Counsel of Record
Joseph E. Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

Richard Cordray
Attorney General of Ohio
William L Wright
Section Chief, Public Utilities Section
Thomas McNamee
Assistant Attorney General
180 East Broad Street
Columbus, Ohio 43215-3793