

ORIGINAL

In The
SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,	:
	:
and	: Case No. 2012-0187
	:
Office of the Ohio Consumers'	: On appeal from the Public Utilities
Counsel,	: Commission of Ohio, Case Nos. 08-917-
	: EL-SSO, et al, <i>In the Matter of the</i>
Appellants,	: <i>Application of Columbus Southern Power</i>
	: <i>Company for Approval of an Electric</i>
v.	: <i>Security Plan; an Amendment to its</i>
	: <i>Corporate Separation Plan; and the Sale or</i>
The Public Utilities Commission of	: <i>Transfer of Certain Generating Assets, et</i>
Ohio,	: <i>al.</i>
	:
Appellee.	:

MEMORANDUM IN RESPONSE
TO
MOTION FOR RECONSIDERATION
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**MEMORANDUM IN RESPONSE
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MOTION FOR RECONSIDERATION
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

On February 13, 2014, this Court issued its decision in this case affirming the decision of the Public Utilities Commission of Ohio (“Commission”) denying a request to recover the amounts of the Provider of last Resort (POLR) charge and carrying costs that the American Electric Power operating companies, Columbus Southern Power Company and Ohio Power Company (collectively, “AEP”) had collected from April 2009 through May 2011. The Court correctly found that the proposed remedy would violate the rule against retroactive ratemaking since there was no basis to claim that the POLR charges

collected were “unlawful.” *In re Application of Columbus Southern Power Company et al.*, Slip Opinion No. 2014-Ohio-462 at ¶51 (Feb. 13, 2014) (“Slip Opinion”).

Industrial Energy Users-Ohio (“IEU”) motion for reconsideration is improper because it simply reargues the case. It should be denied under the criteria of S. Ct. Prac. R. 18.02(B).

In its motion, IEU renews its earlier argument that the Commission was required to reduce the deferred Fuel Adjustment Clause (“FAC”) costs (*i.e.*, fuel costs) balance in an equal amount to the Provider of Last Resort (“POLR”) charges previously found to be lawful at the time that they were collected in rates. IEU posits that a prospective phase-in of the FAC deferral will then be just and reasonable under R.C. 4928.144. IEU claims the Court failed to consider its argument that the prohibition on retroactive ratemaking in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957) (“*Keco*”) does not extend to the phase-in function of R.C. 4928.144 because the offset of POLR costs from revenues deferred for future collection is prospective. IEU continues to argue that the POLR charges collected in rates between 2009 and 2011 are “unlawful.” Unfortunately for IEU, the Court fully considered and rejected this argument in its decision:¹

OCC and IEU argue that the phase-in of rates in the ESP was not “just and reasonable,” as required by R.C. 4928.144, because the deferred FAC balance was calculated in part on the unlawful POLR revenues collected by AEP...And the remedy, according to appellants, is to deduct the unlawful

¹ Slip Opinion at 15-21.

POLR revenues from the deferred FAC balance that would otherwise be charged to customers.²

The Court found at ¶51 of its decision that there was no basis for appellant’s claim that the POLR charges that were collected from April 2009 to May 2011 were “unlawful” under the well-established rule in *Keco*.³ The Court noted in ¶52 of its decision that it reversed the POLR charge on April 19, 2011. *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.⁴ And, on remand, the Commission ordered that POLR charges *not yet collected* would be subject to refund as of the first billing cycle of June 2011.⁵ *In re Application of Columbus S. Power Co.*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO (Order on Remand at 39) (Oct. 3, 2011) (“*Remand Order*”) (emphasis added). When the Commission issued its remand order, it directed AEP-Ohio (“AEP”) to refund the POLR charges collected during the remand proceedings. *Remand Order* at 34 (see Slip Opinion at ¶52). The Court stated:

Thus, the deferred FAC balance-which was calculated during the ESP term (2009-2011) was not derived from “unlawful” POLR charges, as the appellants contend***Appellants contend that the existence of the deferred FAC balance creates a mechanism that allows for prospective rate adjustments to fully remedy the POLR overcharges, without running afoul of the prohibition against retroactive ratemaking. We disagree. The fact that the deferred fuel costs may provide a mechanism to adjust rates prospectively does not alter the nature of appellants’ requested remedy. The appellants are seeking to

² Slip Opinion at t 18-19.

³ *Id.* at 19.

⁴ *Id.*

⁵ *Id.*

recover-through an adjustment to current rates-POLR charges that already have been collected from customers and later were found to be unjustified. The rule against retroactive ratemaking, however, is clear: present rates may not make up for revenues lost due to regulatory delay.⁶

IEU raises nothing new in its motion for reconsideration that the Court has not already fully considered. IEU's renewed argument is fundamentally flawed and springs from a faulty premise – that is that the POLR charges AEP had already collected from customers were “unlawful” and not properly collected under AEP Electric Security Plan (“ESP”) rates. The POLR charges were lawful at the time of collection, and were only later found to be unlawful. The Court cited *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976) and stated “a remand order of this court does not automatically render the existing rates unlawful, as ‘the rate schedule filed with the commission remains in effect until the commission executes this court’s mandate by an appropriate order.’” See Slip Opinion at ¶51. The faulty premise that IEU relies upon is contrary to the Court’s ultimate finding and holding below. That IEU may disagree with or not accept the Court’s decision is certainly not grounds for granting a motion for reconsideration.

In addition, IEU attempts to re-argue that it did not forfeit its ratemaking and accounting arguments. IEU claims it is not seeking restitution, but, instead, a proper accounting of the deferred balance so that the phase-in of the ESP rates is just and reasonable as required by R.C. 4928.144. But Intervenor AEP argued in its brief that the

⁶ Slip Opinion at 19-20.

Ohio Consumers' Counsel ("OCC") and IEU's remedy theory was an impermissible collateral attack on the reasonableness of the FAC cost deferral itself.⁷ The fuel cost deferral was approved in the Commission's March 18, 2009 ESP Order.⁸ IEU *did not challenge* that portion of the order on rehearing. As a result, neither the validity of the FAC deferrals nor the amount of the deferral balance was preserved or attacked in this second appeal. That the FAC deferral is just and reasonable as required by R.C. 4928.144, and that the amount of that balance is appropriate, is the law of the case. As IEU itself argued in this case, the doctrine of the law of the case provides "that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3(1984).

The Court also correctly held that it lacked jurisdiction over appellants' ratemaking and accounting arguments because they failed to present them to the Commission on rehearing. See Slip Opinion at ¶55. Citing R.C. 4903.10 and its decision in *Consumers Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994), the Court stated that "failure jurisdictionally bars the court from considering them." *Id.* Again, IEU's ground for "reconsideration," was both addressed and rejected by the Court.

Even, assuming *arguendo*, if IEU did not forfeit the accounting argument, the outcome of the Court's Decision would remain the same, since the POLR rates were still

⁷ See Merit Brief of Intervening Appellee Ohio Power Company, Case No. 2012-0187, at 25-26 (May 30, 2012).

⁸ *In re Application of Columbus S. power Co.*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO (Opinion and Order) (Mar. 18, 2009) (the "ESP Order").

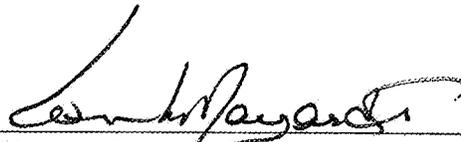
“lawful” when collected from AEP’s customers. The prohibition of retroactive ratemaking established in *Keco* still applies, and the result, again, is that there can be no refund of the POLR charges.

IEU’s motion for reconsideration inappropriately re-argues the case and should be denied for that reason.

Respectfully submitted,

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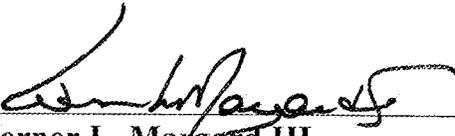
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Response to Motion for Reconsideration submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 6th day of March, 2014.



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