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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of a Commission Investigation)
Into the Reliability of the Electric) Case No. 08-1299-EL-UNC
Distribution Service Provided by Ohio's)
Investor-Owned Electric Companies.)

**REPLY TO COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO
POWER COMPANY'S
MEMORANDUM CONTRA CONSUMERS FOR RELIABLE
ELECTRICITY IN OHIO'S REQUEST FOR AN INVESTIGATION
BY
THE CONSUMERS FOR RELIABLE ELECTRICITY IN OHIO**

I. INTRODUCTION

On December 15, 2008, the Office of the Ohio Consumers' Counsel ("OCC"), AARP Ohio, Pro Seniors, Inc., the Edgemont Neighborhood Coalition, Appalachian People's Action Coalition, the May Dugan Center, the Ohio Farm Bureau Federation, the Ohio Farmers Union, the Northwest Ohio Aggregation Coalition, and the Citizens Coalition – comprised of Citizens for Fair Utility Rates, the Neighborhood Environmental Coalition, the Cleveland Housing Network, and the Empowerment Center for Greater Cleveland (collectively "Consumers for Reliable Electricity in Ohio" or "CREO"), on behalf of the 4.5 million residential households of Ohio's electric distribution utilities ("EDUs"), filed a Request for Investigation with the Public Utilities Commission of Ohio ("Commission" or "PUCO"). CREO did ask the Commission to order an investigation and conduct hearings regarding the reliability of the distribution service

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provided to customers by all of Ohio's electric utilities.¹ CREO did not ask the Commission to rewrite any pending rules on reliability.

On January 6, 2009, the Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio" or "Companies") filed a Memorandum Contra CREO's Request for Investigation. CREO hereby replies to AEP Ohio's Memorandum Contra.²

II. AEP OHIO'S MEMORANDUM CONTRA DOES NOT ADDRESS THE MERITS OF CREO'S REQUEST FOR INVESTIGATION.

A. The Magnitude Of The Outages Requires More Than A Business-As-Usual Response.

The scope and duration of the outages experienced by customers (as CREO noted in its Request for Investigation) was excessive by any measure.³ Approximately 700,000 of AEP Ohio's customers lost service as a result of the storm, and service was not restored for all customers for up to a week. Despite the magnitude of the outages and problems arising from the storms, AEP Ohio has responded with a business-as-usual approach that would sweep the problem under the rug, rather than embracing an overall review of the service quality and reliability offered to its customers.

That AEP Ohio does not take the situation seriously is exemplified by the fact that it is critical of the CREO's use of newspaper articles or editorials as a source for many of

¹ Request for an Investigation at 1.

² For purposes of this Reply, CREO consists of the Office of the Ohio Consumers' Counsel ("OCC"), AARP Ohio, Pro Seniors, Inc., the Edgemont Neighborhood Coalition, Appalachian People's Action Coalition, the May Dugan Center, the Ohio Farm Bureau Federation, the Northwest Ohio Aggregation Coalition, and the Citizens Coalition – comprised of Citizens for Fair Utility Rates, the Neighborhood Environmental Coalition, the Cleveland Housing Network, and the Empowerment Center for Greater Cleveland.

³ Request for Investigation at 1.

the concerns spelled out in the Request for an Investigation.⁴ Despite this criticism, it is noteworthy that AEP Ohio does not dispute the accuracy or magnitude of the problems identified in those twenty-one footnotes. Thus, rather than address the underlying issue or problems, AEP Ohio chose to obfuscate.

This pattern of obfuscation is further exemplified by its argument entitled “Failure to Recognize the Active Role of the Commission,” at pages 4-10 of the AEP Ohio Memorandum Contra. CREO does not deny that the Commission has an important active oversight role in ensuring the service quality and reliability of electric utilities. However, whereas AEP Ohio hides behind that role in an attempt to keep the issue in the background and out of the transparency of a Commission Investigation, CREO is requesting an overall and public review of AEP Ohio’s service reliability in order to ensure that reliability does not take a back seat to profits.

This magnitude of this problem is significant and justifies the call for some formal review of AEP Ohio’s reliability and the reasons underlying the problems experienced by customers. It because of this very result that an investigation of AEP Ohio’s overall service reliability is not only appropriate, but necessary. AEP Ohio’s customers have the right to know whether they are receiving the reliable service they pay for and are entitled to.

AEP’s Memorandum Contra does not address the need CREO documented for an investigation of its distribution system reliability in Ohio. While CREO’s Request for Investigation cited the windstorm of September 14, 2008 as a triggering event for the need for an investigation of electric reliability in Ohio, CREO emphasized that an

⁴ AEP Ohio Memorandum Contra at 2.

investigation was overdue.⁵ As clearly pointed out in CREO's Request for Investigation,⁶ Ohio law requires that the Commission "shall review" electric distribution utilities' annual Electric Service and Safety Standards ("ESSS") compliance reports in a "proceeding initiated under division (B) of section 4928.16 of the Revised Code."⁷ The annual reports referenced above are currently filed pursuant to Ohio Adm. Code 4901:1-10-26(A). AEP and Ohio's other electric distribution utilities have not been subject to such a proceeding -- and such a proceeding is long overdue to ensure the protection of consumers. CREO is not alone in its concerns regarding AEP's electric system distribution reliability. AEP Ohio's reliability is also being questioned in a formal complaint filed recently at the PUCO by a large industrial customer of the Companies.⁸

Finally, the Ohio General Assembly charged the PUCO with the responsibility to ensure that electric utilities provide "necessary and adequate" service to Ohio consumers and businesses.⁹ An investigation into the reliability of the electric distribution service of AEP Ohio will assist in ensuring the public that the Company is providing such adequate service.

⁵ Request for an Investigation at 2.

⁶ *Id.* at 7.

⁷ R.C. 4928.11(B).

⁸ In re the Complaint of E.I. DuPont de Nemours and Company v. Columbus Southern Power Company, Case No. 09-0013-EL-CSS, Complaint (January 8, 2009).

⁹ R.C. 4905.22.

B. The Request for An Investigation Does Not Attempt To Displace The Commission's Role As A Regulator Of Public Utilities.

AEP Ohio Claims that the CREO Request for an Investigation is an attempt to displace the PUCO's role as a regulator of public utilities.¹⁰ AEP Ohio could not be more wrong. CREO is emphasizing the PUCO's regulatory role. It is absurd to claim that CREO, by asking the PUCO to investigate AEP Ohio's service reliability, is somehow attempting to displace the Commission's role as a regulator of public utilities. In fact, the Request for an Investigation is premised on the Commission's role as a regulator of public utilities. CREO is simply asking the PUCO to do what AEP Ohio actually acknowledged -- to regulate a public utility -- in this case the electric distribution utilities ("EDU's") including AEP Ohio.

III. THE REQUEST FOR AN INVESTIGATION IS NOT A COLLATERAL ATTACK.

AEP Ohio's protestation aside, the CREO Request for an Investigation is not a collateral attack on Administrative Rules, for a number of reasons. First of all, the rules are a more generic approach to the issue of service reliability for all of the electric utilities in Ohio, and address all aspects of service reliability. CREO's Request for an Investigation is more focused on the specific reliability issues and problems identified by the wind storms and what steps -- if any -- could have and should have been taken to mitigate the impact of the storms on service reliability in the service territories of AEP Ohio and other EDU's.

¹⁰ AEP Ohio Memorandum Contra at 1.

Secondly, CREO's Request for an Investigation does not specifically challenge the rules that resulted from the pending rulemaking in PUCO Case No. 06-653-EL-ORD. Rather, the Request for Investigation questions how the utilities are performing under the ESSS and whether some rules should be amended pending the outcome of a Commission investigation. AEP Ohio alleges that the Request for an Investigation is a collateral attack on those rules. But that is not the case inasmuch as the rulemaking is still pending and no final rules have been issued or implemented.¹¹ In addressing collateral attacks, the Ohio Supreme Court has stated that "In our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that—final."¹² In this instance the Commission granted Rehearing for the purpose of giving itself more time for further consideration.¹³ Thus the rules have not been finalized by the PUCO. Accordingly the rules have not yet undergone review by the Joint Committee on Agency Rule Review ("JCARR"), which is necessary before the rules can become final.¹⁴ Even if the rules were final, it is not unusual for the PUCO to entertain what might be considered collateral issues regarding its orders and rules. For example, in a recent case the PUCO allowed AT&T (and others) to contest the limitations on disconnection of customers' bundled telephone services for nonpayment of those services, which resulted in the PUCO changing its rule in favor of the utilities.¹⁵

¹¹ *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Entry on Rehearing (December 17, 2008).

¹² *Ohio Pyro v. Ohio Dept. of Commerce* (2007), 115 Ohio St. 3d 375, 380-381.

¹³ Case No. 06-653-EL-ORD, Entry on Rehearing at 1.

¹⁴ Joint Committee on Agency Rules Review Procedures Manual (Revised January 8, 2008) at 17.

¹⁵ *In re the Commission's Review of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 00-1265-TP-ORD et al., Finding and Order (November 5, 2008) at 2.

Third, the Request for an Investigation is not a collateral attack because it addresses the specific question of whether the damages caused by the wind storm were sufficiently mitigated by proper maintenance or whether AEP Ohio improperly cut back on necessary maintenance including vegetation management in order to maximize shareholders profits. The Request for an Investigation requests only that the PUCO consider amending certain of the pending the outcome of its investigation. The Request for an Investigation presents the Commission with an opportunity to address certain issues based on real world examples and implications rather than simple hypotheticals.

Moreover to the extent that AEP Ohio alleges that CREO is collaterally attacking the existing PUCO rules,¹⁶ AEP Ohio is mischaracterizing the Request for an Investigation. For example on page 6 of the Request for an Investigation, CREO asked the PUCO to ensure that AEP Ohio has complied with the rules and not to review or rewrite them. On page 26 of the Request for an investigation, CREO asked the PUCO to ensure that AEP Ohio was in compliance with the rules and that the rules were able to address the type of damages and fallout actually experienced from the wind storm.

Fourth, AEP Ohio seems to ignore the distinction between a Commission Ordered Investigation and a Complaint pursuant to R.C. 4905.26.¹⁷ The CREO Request for an Investigation is not an R.C. 4905.26 Complaint, although CREO does retain the right to file such a Complaint in the future if one is deemed to be appropriate. Moreover the Request for an Investigation is not asking the Commission to rewrite its rules. CREO is requesting the Commission to investigate the actions taken -- or perhaps more

¹⁶ AEP Ohio Memorandum Contra at 3.

¹⁷ AEP Ohio Memorandum Contra at 1.

appropriately -- the actions not taken by AEP Ohio to ensure service quality and reliability for customers as required by R.C. 4928.02(A).¹⁸

AEP Ohio further argues that because CREO in this case is a subset of the Ohio Consumer and Environmental Advocates (“OCEA”), the Request for an Investigation is a collateral attack.¹⁹ AEP Ohio goes on to argue that the makeup of CREO is crucial because the group is similar to the coalition requesting changes to the structure of the rules in Case No. 06-653-EL-ORD.²⁰ Whether there is any overlapping membership among the groups that comprise OCEA and CREO is wholly irrelevant to the question of whether this proceeding is a collateral attack and such misdirection only seeks to obscure the true issue in dispute that forms the foundation of this filing.

IV. THE REQUEST FOR AN INVESTIGATION IS NOT BARRED BY *RES JUDICATA*.

AEP Ohio alleges that the Request for Investigation is barred by the doctrine of *res judicata*. However, AEP Ohio fails to list the elements of *res judicata* for the Commission’s consideration and provide any discussion of how the filing of the Request for Investigation meets the elements under Ohio law. AEP Ohio’s argument, and the lack of case law supporting the argument, does not support the Companies’ claim of *res judicata*. A review of the doctrine of *res judicata*, as established in Ohio case law and outlined below, clearly shows that the Request for Investigation is not barred.

The practical effect of *res judicata* is to prevent a plaintiff from suing the defendant a second time on any theory which is based on the same nucleus of facts. In

¹⁸ Request for an Investigation at 5.

¹⁹ AEP Ohio Memorandum Contra at 2.

²⁰ AEP Ohio Memorandum Contra at 2.

Grava v. Parkman Township (1995), 73 Ohio St. 3d 379, 382 the Supreme Court of Ohio held that “a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” The four elements of claim preclusion in Ohio are: “(1) A prior, valid judgment rendered on the merits; (2) a second cause of action involving the same parties, or their privies, as the first; (3) a second cause of action raising claims that could have or were litigated in the first action; and (4) a second action arising out of the same transaction or occurrence as the first action.”²¹

In the Request for Investigation CREO asks the PUCO to conduct a “thorough review of the utilities’ response to the windstorm of September 14, 2008, that resulted in over 2.6 million electric customers enduring protracted outages in Ohio.”²² *Res judicata* is inapplicable to this request because there has never been a prior decision rendered on the utilities’ response to the windstorm of September 14, 2008.

CREO also requests that the PUCO “conduct an investigation into the reliability of Ohio’s electric distribution companies over the last five years, including how their management decisions impacted both the ice storms in the winter of 2004-2005 and the recent wind storm in terms of the breadth and duration of these outages.”²³ Even though this request includes a review of the reliability of Ohio’s electric distribution companies over the last five years, this request is also not barred by *res judicata*.

The formal proceedings that AEP Ohio relies upon for its assertion that *res judicata* applies do not satisfy the elements that must be met for *res judicata* to apply.

²¹ See *Felder, et al. v. Community Mut. Ins. Co.* (1997), 110 F.3d 63, 1997 WL 160373 [C.A.6(Ohio)].

²² Request for an Investigation at 2.

²³ Request for an Investigation at 2.

First, AEP Ohio relies upon Case No. 03-2570-EL-UNC as a formal action concerning reliability that allegedly bars CREO's Request.²⁴ However, as AEP Ohio states in their Memorandum Contra, that case was resolved because of a settlement agreement between AEP Ohio and the Commission's staff.²⁵ AEP Ohio, in fact, failed to meet the terms of the Stipulation with the PUCO Staff in that case and its service performance declined in many of its circuits.²⁶ The claim of *res judicata* fails the test because it was never actually litigated. Moreover, the other case cited by AEP Ohio (Case No. 05-46-EL-UNC) was, as AEP Ohio states in its Memorandum Contra, dismissed by the Commission. This attempt by AEP Ohio to argue that CREO's Request is barred fails once again because AEP Ohio cites to a case that was never litigated. Accordingly, CREO's Request should not be dismissed because it is not barred by the doctrine of *res judicata* as outlined above.

V. CONCLUSION

On behalf of residential customers in Ohio, CREO respectfully requests that the Commission reject the arguments put forth in the Company's Memorandum in Opposition. The Commission should ensure that the residential customers in 4.5 million

²⁴ AEP Ohio Memorandum Contra at 11.

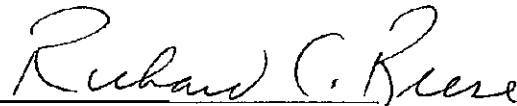
²⁵ Request for an Investigation at 1. "The Stipulation was the result of Staff discussions with the Companies to address concerns of the Staff regarding the Companies' provision of electric distribution service to certain rural areas within their service territories." No other parties participated in these "discussions" or in the settlement.

²⁶ *In the Matter of the Commission Consideration of a Settlement Agreement between the Staff of the PUCO and Columbus Southern Power and Ohio Power Company*, Case No. 03-2570-EL-UNC, Commission Ordered Investigative Report (April 17, 2006) ("*AEP Service Quality Case*") at 2.

Ohio households are receiving the reliable electric service they pay for and are entitled to,
by granting CREO's Request for an Investigation.

Respectfully submitted,

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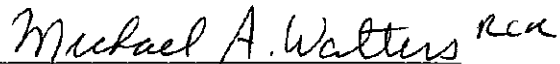


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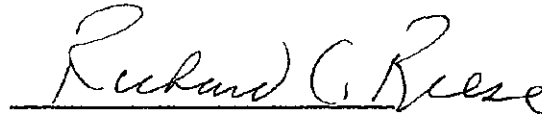
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply was served on the persons stated below via regular U.S. Mail Service, postage prepaid, this 20th day of January, 2009.



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