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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application for )  
Approval of a Pilot Program Regarding )  
Mercantile Applications for Special ) Case No. 10-834-EL-EEC  
Arrangements with Electric Utilities and )  
Exemptions from Energy Efficiency and )  
Peak Demand Reduction Riders. )

MOTION TO INTERVENE AND APPLICATION FOR REHEARING OF  
COLUMBUS SOUTHERN POWER COMPANY AND  
OHIO POWER COMPANY

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## **Table of Contents**

I.	BACKGROUND .....	1
II.	INTERVENTION .....	1
III.	APPLICATION FOR REHEARING .....	3
	A. The Commission erred allowing a requirement that all confidential information related to the applications be subject to the protective order process at the beginning of the process.	
	B. The Commission erred to the extent it allows a requirement that a signed affidavit notarized by the mercantile customer is a prerequisite to completion of an application.	
	C. The Commission should address certain conflicts between the September 15 Entry and the September 24 Template.	
	D. The September 15 Entry is unreasonable and unlawful because it precludes mercantile customers seeking an exemption from the applicable cost recovery mechanism from participating fully in the pilot program.	
	E. The September 15 Entry is unreasonable because it fails to state that customer-sited capabilities that are the subject of an application filed with the Commission during the pilot program shall not be removed from the compliance count should the Commission subsequently modify or terminate the pilot program.	
	F. The September 15 Entry is unreasonable because it fails to extend the pilot program to customer-sited mercantile capabilities that are compliance-eligible for purposes of O.R.C. §4928.64.	
IV.	MEMORANDUM IN SUPPORT OF REHEARING .....	4
	A. The Commission erred allowing a requirement that all confidential information related to the applications be subject to the protective order process at the beginning of the process.....	4
	B. The Commission erred to the extent it allows a requirement that a signed affidavit notarized by the mercantile customer is a prerequisite to completion of an application.....	6
	C. The Commission should address certain conflicts between the September 15 Entry and the September 24 Template.....	7

D. The September 15 Entry is unreasonable and unlawful because it precludes mercantile customers seeking an exemption from the applicable cost recovery mechanism from participating fully in the pilot program.....	10
E. The September 15 Entry is unreasonable because it fails to state that customer-sited capabilities that are the subject of an application filed with the Commission during the pilot program shall not be removed from the compliance count should the Commission subsequently modify or terminate the pilot program.....	11
F. The September 15 Entry is unreasonable because it fails to extend the pilot program to customer-sited mercantile capabilities that are compliance-eligible for purposes of O.R.C. §4928.64.....	11
V. CONCLUSION.....	11

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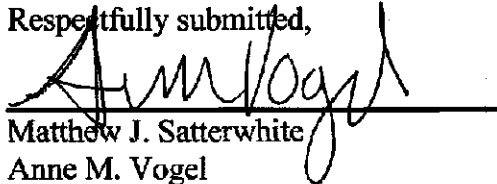
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**MOTION TO INTERVENE AND APPLICATION FOR REHEARING OF  
COLUMBUS SOUTHERN POWER COMPANY AND  
OHIO POWER COMPANY**

Columbus Southern Power Company and Ohio Power Company (collectively, "AEP Ohio") hereby moves to intervene in this proceeding, pursuant to Ohio Revised Code § 4903.221 and O.A.C. 4901-1-11. AEP Ohio has real and substantial interests in this proceeding and its interests, which may be prejudiced by the results of this proceeding, are not adequately represented by the existing parties. Additionally, under Ohio Revised Code § 4903.10 and O.A.C. 4901-1-35, AEP Ohio requests leave to file for rehearing on the Entry issued by this Commission on September 15, 2010.

Therefore, as set forth more fully in the attached memorandum in support, AEP Ohio respectfully requests that the Commission grant this timely request to intervene and application for rehearing.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

**I. BACKGROUND**

In this proceeding, the Commission initiated a docket to establish a Pilot Program in order to facilitate the prompt review of applications for the commitment of the energy savings realized by a mercantile customer's energy efficiency projects to an electric utility for purposes of the electric utility's compliance with the statutory benchmarks in O.R.C. § 4928.66. AEP Ohio has filed a 321 of such applications for the 2009 and 2010 program years. To date the Commission has approved or conditionally approved 274 of those applications; 47 remain pending. AEP Ohio has 143 projects in the final stages of preparation for filing, and have obtained a significant number of customer signatures, committing the customer to all of the requirements of the rules, including the selection of the energy efficiency credit or an exemption period, when the PUCO issued the Order in this matter on September 15, 2010, establishing the guidelines for the Pilot Program (the "September 15 Entry"). On September 24, 2010, the Commission published an application template for participants in the program, which, while commendable in intent, imposes significant challenges on AEP Ohio and customers as the end of the filing year approaches.

**II. INTERVENTION**

In the September 15 Entry, the Commission granted the motion to intervene of the Ohio Environmental Council. Subsequently, the Office of the Ohio Consumers' Council and the

Industrial Energy Users-Ohio also filed motions to intervene. On October 1, 2010, the OEC filed a Motion to Stay the implementation of the Pilot Program and requested an expedited ruling from the Commission. O.R.C. § 4903.221 provides that any “person who may be adversely affected by a public utilities commission proceeding” may intervene in a Commission proceeding. The Commission’s own rules reinforce the right to intervene and provide that:

Upon timely motion, any person *shall be* permitted to intervene in a proceeding upon a showing that . . . [t]he person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties.

O.A.C. 4901-1-11(A) (emphasis added). “The regulation’s text is very similar to Civ. R. 24 – the rule governing intervention in civil cases in Ohio – which is generally liberally construed in favor of intervention.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 387 (2006) (internal quotations omitted).

In addition to the establishment of a substantial interest, the factors that the Commission considers in implementing the above rule are the nature of the intervenor’s interest, the relationship of the intervenor’s legal position to the merits of the case, the extent that interest is represented by existing parties, the intervenor’s potential contribution to a just and expeditious resolution of the issues involved, and whether intervention would result in an undue delay of the proceeding. *See* O.A.C. 4901-1-11(B)(1)-(5); *see also* R.C. § 4903.221(B)(1)-(4). A review of the factors in light of the following facts supports granting AEP Ohio’s intervention. As electric distribution utilities with mercantile applications currently pending before the Commission and with plans to file more of such applications in the future, AEP Ohio has a direct and substantial interest in this proceeding. AEP Ohio has a great interest in the prompt approval of their mercantile applications, since their compliance with R.C. § 4928.66’s statutory benchmarks depends, in part, on the commitment of the energy savings realized by mercantile customer

projects. AEP Ohio' interests cannot be represented by any of the parties that have moved to intervene, or any parties that might move to intervene in the future. Moreover, it would be unjust to deny intervention to the AEP Ohio after granting intervention to the OEC, which has not filed any mercantile applications with this Commission. Finally, allowing AEP Ohio to intervene will not unduly prolong or delay this proceeding.

### **III. APPLICATION FOR REHEARING**

AEP Ohio offers the following as an application for rehearing and clarification of the Commission's September 15, 2010 Entry in this docket and the subsequent actions taken by the Commission as a result of the Entry in the sample application noticed in the docket by the attorney examiner on September 24, 2010 (the "September 24 Template"), for the following reasons:

- A. The Commission erred allowing a requirement that all confidential information related to the applications be subject to the protective order process at the beginning of the process.
- B. The Commission erred to the extent it allows a requirement that a signed affidavit notarized by the mercantile customer is a prerequisite to completion of an application.
- C. The Commission should address certain conflicts between the September 15 Entry and the September 24 Template.
- D. The September 15 Entry is unreasonable and unlawful because it precludes mercantile customers seeking an exemption from the applicable cost recovery mechanism from participating fully in the pilot program.
- E. The September 15 Entry is unreasonable because it fails to state that customer-sited capabilities that are the subject of an application filed with the Commission during the pilot program shall not be removed from the compliance count should the Commission subsequently modify or terminate the pilot program.
- F. The September 15 Entry is unreasonable because it fails to extend the pilot program to customer-sited mercantile capabilities that are compliance-eligible for purposes of O.R.C. §4928.64.

#### IV. MEMORANDUM IN SUPPORT OF REHEARING

Each of the errors described above is discussed below.

- A. The Commission erred in allowing a requirement that all confidential information related to the applications be subject to the protective order process at the beginning of the process.**

AEP Ohio seeks rehearing or clarification on the provision in the September 24 Template as it relates to confidential information. According to the sample application any utility filing confidential information must file a copy of the application under seal and file a motion for a protective order pertaining to the material believed to be confidential. That process was first raised in the sample application not the Commission Order. AEP Ohio represents that it is an administrative nightmare that the Commission should reconsider or clarify.

A wholesale confidential filing requirement will act as a barrier to filing these arrangements. If the language in the sample application remains then utilities will have to file motions, the Commission will have to rule on motions, and all parties will have to monitor the expiration of any confidential award at later dates. O.A.C. §4901-1-24 governs motions for protective orders. The process involves the filing of a motion and memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon (see Rule B-1 and C). All documents still must be reviewed and redacted so that the public version can still be filed (see Rule C-1). Three unredacted copies are required to be filed with the Commission and the pages confidential so marked (see Rule C-2). The Commission docketing department must maintain the confidential information as confidential pending Commission consideration of the motion. Any document deemed confidential loses its confidential distinction after 18 months and any entity wishing to extend confidential treatment must file a motion to extend that treatment 45 days before expiration of the order (see Rule F). That is a lot of process for the number of dockets open in these proceedings.



As stated above AEP Ohio has filed over 300 applications under the mercantile program and has another almost 150 to file. All of those filing include confidential information. In the past AEP Ohio has worked cooperatively with Staff to provide the confidential information to Staff to review as part of its investigation of the filing pursuant to both rule and statute. The administrative code rule that governs protective orders already includes the exception for documents provided to Staff. O.A.C. 4901-1-24 (G) states in pertinent part that "[T]he requirements of this rule do not apply to information submitted to the commission staff." The Commission rule is grounded in the General Assembly's understanding that the Commission Staff needs the ability to review confidential information without making every review into a filed proceeding in need of a legal ruling. O.R.C. §4901.16 calls for the protection of information obtained by a Commission employee while acting on behalf of the Commission, in this case to process mercantile filings.

This practice has worked well over the years for the Commission Staff and utilities. If an entity later requests the confidential information from Staff, the statute protects the Commission and, as done in other cases, Staff informs the utility of the request. The utility can then move for a protective order and the legal department only has to deal with declaration of confidential information when there is an actual dispute or request. The alternative is to flood the legal department with requests for confidentiality and then renewal requests every 18 months. That is likely an unintended consequence of this provision that will more than likely result in confidential information being shared and could risk participation in the program. There does not appear to be any justification for moving from the manner the Commission has operated under in the past in this case.

**B. The Commission erred to the extent it allows a requirement that a signed affidavit notarized by the mercantile customer is a prerequisite to completion of an application.**

The September 24 Template requires a notarized affirmation of the validity of the items included in the filing (Template, at page 8). AEP Ohio seeks clarification on whether the document is required to be completed by the mercantile customer or if it can be affirmed by the joint applicant, the utility, after gathering the information.

If the document must be completed by the mercantile customer it could serve as a barrier to participation. The language indicating significant penalties including fine and imprisonment could cause certain customers to avoid filing out of fear that something within the numerous pages could be inaccurate. The sheer number of documents needed to review the applications could cause a risk adverse company to err on the side of caution and not get involved. The process used by AEP Ohio provides the best information available at the time of filing to the Commission and the Staff. If updates are needed they are provided in good faith. The existing process for mercantile self-direct projects already requires an upfront signature, and a final overview and commitment signature with the customer's selection of the appropriate option, and agreement with the energy efficiency credit amount or exemption terms. The new requirement is redundant.

AEP Ohio has another concern with the 140+ applications ready to file that do not have the customer signing this type of affidavit. Can the Commission clarify if AEP Ohio must re-engage those customers and seek further signatures to comply with this order? Every interaction frustrates the efficiency of participation. The Companies application form which has been in use for almost 18 months addresses each of the items in the template. To ask the customer to again agree to the same items and to also prepare an evaluation plan is detrimental to the program and burdensome to the customer. Most customers that have participated in our program to date do

not have the capability to perform such analyses. AEP Ohio, through its evaluation plans, assumes the burden of this analysis for the customer. Thrusting such a requirement on customers three months prior to the end of the filing year puts AEP Ohio in the untenable position of possibly not being able to meet its 2010 benchmark targets. This requirement results in frustrating the Commission's efforts in the order by increasing obstacles and making compliance more difficult.

If the Commission clarifies that the utility company may attest to the information that would provide AEP Ohio the leeway it needs to deal with this new requirement. The Company can attest to the best of its knowledge and, as always, update the Commission if changes are discovered.

**C. The Commission should address certain conflicts between the September 15 Entry and the September 24 Template that need to be addressed.**

As indicated in the September 15 Entry, a large part of any opportunity created by the pilot program requires use of the September 24 Template. But there are conflicts between the September 15 Entry and the September 24 Template, and the September 24 Template raises questions that render it unfit for the purpose identified in the September 15 Entry.

For example, Section 3.B of the September 24 Template indicates the math that is to be used for purposes of measuring the amount of energy efficiency available from the customer-sited capability. While the language in the September 15 Entry states that the "as found" method shall be used to measure the customer-sited capability, the form indicates that only an incremental hypothetical amount will be counted towards compliance in certain cases involving replaced equipment.<sup>1</sup>

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<sup>1</sup> The September 15 Entry states (emphasis added):

Likewise, unless the mercantile customer can demonstrate that it has installed more efficient equipment than was otherwise available, no incentive should be paid for replacement of failed equipment, but, for purposes of the pilot program, the electric utility is permitted to count any measurable and verifiable savings that result from such equipment replacement.

The "Additional Information" section (Section 7) of the September 24 Template requires (among other things) that an applicant "identify and explain all deviations from the program measurement and verification guidelines that may be published by the Commission". But, the September 15 Entry states that anything inconsistent with the September 15 Entry shall be waived. As the Commission knows, its effort to develop measurement and verification guidelines has progressed only to the point of a draft Technical Reference Manual ("TRM") which is now the subject of a formal process recently initiated in Case No. 09-512-GE-UNC. As things presently stand, it is impossible for an applicant to know what the Commission might adopt in the way of measurement and verification guidelines or when the Commission might complete this effort.

The September 15 Entry states that the benchmark comparison approach shall be used to determine eligibility for exemption from the cost recovery mechanism.<sup>2</sup> But, the September 24 Template (Section 5.B, Option 2) states that any rider exemption must be limited to 24 months or less, regardless of the level of customer-sited capability that the mercantile customer may be willing to contribute towards compliance. If a mercantile customer seeks an exemption beyond the 24-month period, the September 24 Template indicates that an additional application must be submitted but it does not identify what the applicant must do to move in this direction. AEP

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Further, for purposes of counting savings toward utility compliance and providing available incentives under the pilot program, all equipment replacements will be considered using the "as found" method of establishing the baseline for all energy efficiency calculations. Under the "as found" method, the baseline for energy savings is the efficiency rating of the existing equipment at the time of replacement. This will allow the Commission to review the impact of considering equipment on an "as found" basis upon the ability of the electric utilities to meet their benchmarks and upon the costs of compliance with the benchmarks. Entry at 4-5 (emphasis added).

<sup>2</sup> As discussed above, the September 15 Entry does not extend the automatic approval option to AEP Ohio seeking an exemption from the cost recovery mechanism.

Ohio respectfully suggests that these mismatched provisions will create confusion and work against the Commission's goal of fostering a continuous improvement environment.

The September 24 Template introduces new cost-effectiveness parameters (Section 6) that leave potential AEP Ohio to guess about how they might provide the requested information. There is a Total Resource Cost ("TRC") and Utility Cost Test ("UCT") and conceptual descriptions of numerators and denominators that are different between the two. In the UCT, incentives and rider exemptions are treated as part of the cost of the customer-sited capability that is contributed to help with compliance. In other words, incentives and rider exemptions that are supposed to encourage customer-sited activity are treated as a cost of the activity thereby reducing the cost-effectiveness of any compliance. The denominator in both the TRC and UCT is "avoided supply costs," but the September 24 Template fails to identify how to derive the "avoided supply costs."

The affidavit that was supplied as part of the September 24 Template includes the following language:

The program included in this application is not required for compliance with energy performance standards set by law or regulation, including, but not limited to, those embodied in the Energy Independence and Security Act of 2007, or an applicable building code.

September 24 Template at 8. Based on prior actions of the Commission, the above-quoted language appears to be designed to gather information that will allow the Commission to exclude actual customer-sited capabilities from the compliance count. This language conflicts with the September 15 Entry requirements that the "as found" method be used to measure customer-sited capabilities and otherwise works against the letter and spirit of said Entry. And, as a practical matter, leaving this language in will effectively require all AEP Ohio to search through laws and building codes before initiating any effort to use the pilot program for the purposes intended by the Commission.

**D. The September 15 Entry is unreasonable and unlawful because it precludes mercantile customers seeking an exemption from the applicable cost recovery mechanism from participating fully in the pilot program.**

The September 15 Entry establishes an opportunity for mercantile customer reasonable arrangement applications to be approved on the sixty-first calendar day after filing but only if the mercantile customer foregoes the customer's right to seek an exemption from the cost recovery mechanism in favor of receiving a cash rebate. As explained above, Section 4928.66(A)(2)(c), Revised Code, states that the Commission may exempt a mercantile customer from any Section 4928.66(A)(1)(a) and (b), Revised Code, compliance cost recovery mechanism when the mercantile customer commits its demand response or other new or existing customer-sited capabilities for integration into the EDU's demand response, energy efficiency or peak demand reduction programs if the Commission reasonably determines that the exemption will reasonably encourage such customers to commit those capabilities to those programs. The September 15 Entry offers no explanation for the favorable treatment of a cash payment option over an exemption period option. It is the position of AEP Ohio that customers should have the right to choose which option best suits their business and operational needs, valuing the options similarly such that overall rate impacts are essentially the same. In AEP Ohio's program, the cash rebate option requires the customer to continue paying the energy efficiency rider. By design, the two options remain essentially equal in value.

AEP Ohio respectfully submits that it is unreasonable and unlawful for the Commission to subject mercantile customers to an undue prejudice of not being able to fully participate in the pilot program as a result of exercising their statutory right to seek an exemption from the cost recovery mechanism. This discrimination will also negatively affect the quality of the information produced by the pilot program and any conclusions that might be drawn based on such information. Applicants request the Commission to modify the September 15 Entry so that

customers seeking an exemption from the cost recovery mechanism can fully participate in the pilot program to the same extent as a customer that may prefer the cash rebate option.

- E. The September 15 Entry is unreasonable because it fails to state that customer-sited capabilities that are the subject of an application filed with the Commission during the pilot program shall not be removed from the compliance count should the Commission subsequently modify or terminate the pilot program.**

AEP Ohio respectfully submits that the September 15 Entry is unreasonable because it fails to state that customer-sited capabilities that are recognized by the Commission for compliance purposes during the pilot program shall not be removed from the compliance count should the Commission subsequently modify or terminate the pilot program. Without such assurance, Applicants cannot effectively plan future programs or spending for compliance.

- F. The September 15 Entry is unreasonable because it fails to extend the pilot program to customer-sited mercantile capabilities that are compliance-eligible for purposes of Revised Code Section 4928.64.**

AEP Ohio concurs with and supports this argument of the Industrial Energy Users – Ohio, in its application for rehearing filed in this docket on October 13, 2010.

## **V. CONCLUSION**

WHEREFORE, AEP Ohio respectfully request that the Commission grant this Motion to Intervene and Application for Rehearing, and provide the relief requested herein.

Respectfully submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Intervene Columbus Southern Power Company and Ohio Power Company, Application for Rehearing and Memorandum in Support* was filed this 15th day of October, 2010 with the Public Utilities Commission of Ohio Docketing Information System, and served upon the following parties of record this 15th day of October 2010, *via* hand-delivery, electronic transmission or first class U.S. mail, postage prepaid.

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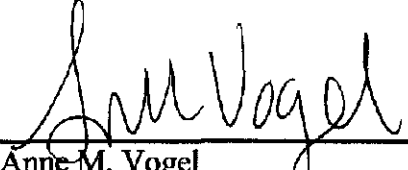
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