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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

2011 MAR 14 PM 5: 22

In the Matter of the Application of Columbus )  
Southern Power Company and Ohio Power )  
Company for Authority to Establish a Standard )  
Service Offer Pursuant to §4928.143, Ohio Rev. )  
Code, in the form of an Electric Security Plan. )

**PUCO**  
Case No. 11-346-EL-SSO  
Case No. 11-348-EL-SSO

In the Matter of the Application of Columbus )  
Southern Power Company and Ohio Power )  
Company for Approval of Certain Accounting )  
Authority. )

Case No. 11-349-EL-AAM  
Case No. 11-350-EL-AAM

In the Matter of the Application of Columbus )  
Southern Power Company to Amend its )  
Emergency Curtailment Service Riders. )

Case No. 10-343-EL-ATA

In the Matter of the Application of Ohio Power )  
Company to Amend its Emergency Curtailment )  
Service Riders. )

Case No. 10-344-EL-ATA

Application Not for an Increase in Rates )  
Pursuant to Section 4909.18, Revised Code, of )  
Ohio Power Co. and Columbus Southern Power )  
Company to Establish New Market Based rate )  
for Returning CRES Customers that Elected to )  
Avoid the POLR Charge. )

Case No. 11-531-EL-ATA

In the Matter of the Application of Ohio Power )  
Company for Approval of the Shutdown of Unit 5 )  
of the Philip Sporn Generating Station and to )  
Establish a Plant Shutdown Rider. )

Case No. 10-1454-EL-RDR

In the Matter of the Commission Review of the )  
Capacity Charges of Ohio Power Company and )  
Columbus Southern Power Company. )

Case No. 10-2929-EL-UNC

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**REPLY MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO**

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**March 14, 2011**

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OHIO**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Columbus ) Southern Power Company and Ohio Power ) Company for Authority to Establish a Standard ) Service Offer Pursuant to §4928.143, Ohio Rev. ) Code, in the form of an Electric Security Plan. )	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
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**REPLY MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO**

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## **I. INTRODUCTION**

On January 27, 2011, the Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively "the Companies") filed a joint application seeking to implement new terms under an Electric Security Plan ("ESP") pursuant to Section 4928.143, Revised Code. The application raises questions regarding a variety of matters. Among these are issues that are the subjects of other on-going Commission proceedings. Because of the common factual and legal issues presented by the other proceedings, IEU-Ohio moved on February 18, 2011 for an order consolidating them with the ESP application. Only the Companies filed a memorandum opposing the motion. In its memorandum, the Companies essentially argue that there are not sufficient common issues of law and fact and a lack of identity of parties. They further argue that the Companies would be unduly prejudiced by a joint hearing of the various matters. For the reasons outlined below, the Companies' objections should be rejected, and the motion should be granted.

## **II. ARGUMENT**

OP and CSP have sought in piece-meal fashion to restructure their tariffs and cost recovery through a variety of proceedings. Remarkably, the pieces came together in the ESP filing. Thus, the ESP case has become the repository for the Companies' systematic and siloed attempt to define, or in the Companies' words, "restore the regulatory compact" for the twenty nine (29) month period that commences January 1, 2012.

As the Companies correctly point out in the memorandum in opposition, the Commission is to be guided by Civil Rule 42 regarding consolidation. The Rule provides for consolidation when common issues of law and fact are presented.<sup>1</sup> The rule serves particularly well in cases presenting complicated economic issues. For example, in recent price conspiracy cases, a federal trial court concluded that joint hearings were appropriate although only one defendant was common to the three conspiracies. The court ordered joint hearings because there was one common defendant to the three prosecutions, the regulatory and economic issues of the industry were common to all parties, and the expert analysis and testimony were common to the three matters. *State, ex rel. Montgomery, v. Louis Truath Dairy, Inc.*, 163 F.R.D. 500, 503-04 (S.D. Ohio 1995).

In its opposition to the motion, the Companies first assert that there are not common issues of law and fact. The ESP application itself, however, dispels that notion. In the 2011 ESP application, CSP and OP attempt to incorporate the tariff language proposed in Case No. 10-343-EL-ATA and Case No. 10-344-EL-ATA (ECS Application).<sup>2</sup> Further, as the Companies noted in the recent amended ECS Application, the sponsoring testimony for the revised tariffs is now found in the 2011

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<sup>1</sup> Civil Rule 42(A)(1) provides:

When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

<sup>2</sup> See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al. (hereinafter, 2011 ESP Case), Exhibit DMR-5 at 111-23 (proposed CSP ECS rider) and DMR-6 at 120-29 (OP ECS rider).

ESP application.<sup>3</sup> Similarly, the issue of the appropriate level of the capacity charge is raised in the ESP case and two other proceedings.<sup>4</sup> Finally, the regulatory fate of the Companies effort to obtain stranded cost recovery for Sporn Unit 5 is presented both by the application to establish a shutdown rider<sup>5</sup> and in the request for a similar recovery mechanism in the 2011 ESP application.<sup>6</sup>

As in the *Truath* price conspiracy cases noted above, there are sufficient reasons to conduct a joint hearing presented by the cases that the Companies themselves identify as affected by their ESP application. Several issues are common; a common regulatory structure is the centerpiece for resolving these matters; and the need for expert testimony and consistent interpretation of that testimony is obvious. Thus, the conditions that typically result in consolidation and a joint hearing exist in the present circumstances.

The Companies next argue that there is no commonality of parties as a reason for denying the motion to consolidate. As noted in *Truath*, however, commonality of

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<sup>3</sup> *In the Matter of the Application of Columbus Southern Power to Amend its Emergency Curtailment Service Riders*, Case No. 10-343-EL-ATA at 2 (filed Feb. 2, 2011). The relevant testimony is found in the 2011 ESP Case, Direct Testimony of David Roush at 6.

<sup>4</sup> The ESP application uses the cost based calculation throughout the filing; see, e.g., 2011 ESP Case, Testimony of Laura Thomas at 7. The same approach to valuing capacity is used in *Application Not for an Increase in Rates Pursuant to Section 4909.18, Revised Code, of Ohio Power Co. and Columbus Southern Power Co. to Establish New Market Based Rate for Returning CRES Customers that Elected to Avoid the POLR Charge*, Case No. 11-531-EL-ATA, and is at issue *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC.

<sup>5</sup> *In the Matter of the Application of the Ohio Power Company for Approval of the Shutdown of Unit 5 of the Phillip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR. Since the motion to consolidate was filed, the Commission has issued an order setting a schedule for comments. *Id.*, Entry (filed Mar. 9, 2011).

<sup>6</sup> 2011 ESP Case, Testimony of Laura Thomas at 23-25; Testimony of Joseph Hamrock at 19-20 (questioning the delay in the 10-1454 proceeding).

parties is not necessary for consolidation or a joint hearing of the common issues of law and fact.<sup>7</sup>

Finally, the Companies argue in various ways that the joint hearing would be inconvenient and inefficient.<sup>8</sup> The argument is difficult to understand when the Companies have availed themselves through repeated filings to the resources of the Commission and then placed the same issues in play through the ESP application. More importantly, however, consolidation is precisely the way of handling complicated and related regulatory matters so as to avoid redundant hearings and inconsistent results.<sup>9</sup> Moreover, it is at least suggested by the lack of opposition from the other intervening parties that consolidation would operate to the benefit of those other parties as well. Like IEU-Ohio and the Commission, they also are absorbing the cost of the piece-meal approach used by the Companies; a coherent hearing schedule would benefit them and the Companies.

The Companies' habit of parading interrelated proposals through the Commission's doorway and then presenting them in individual cases makes it harder for the Commission and stakeholders to connect the dots and accelerates the burn rate of the stakeholders' limited resources. This bad habit should not be enabled by the Commission. It is within the Commission's discretion to structure the appropriate procedural approach to resolve the complicated issues presented by the Companies'

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<sup>7</sup> For a general discussion, see 9A Charles Wright & Arthur Miller, *Federal Practice and Procedure* §2384 at 57 (3d ed. 2008). The Companies' argument confuses joinder with consolidation.

<sup>8</sup> The Companies point to the statutory deadline as a basis for their concern as well. Given that the hearing in the *2011 ESP Case* is currently scheduled for July 2011 and the 275<sup>th</sup> day for completion of the matter is in October, this concern would appear to be misplaced or overstated.

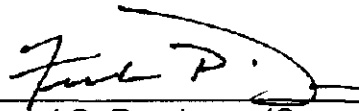
<sup>9</sup> *Kokus v. Toys "R" Us, Inc.*, 2006 WL 1476209 (S.D. Ohio 2006).

multiple filings. Consolidation for hearing so as to avoid unnecessary and inefficient consumption of resources is one apparent way of managing a difficult situation.

III. **CONCLUSION**

For the reasons stated above, IEU-Ohio requests that the identified matters currently before the Commission be consolidated for hearing.

Respectfully submitted,



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I hereby certify that a copy of the foregoing *Reply Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 14th day of March 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.

  
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