

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Columbus Southern Power Company For) Case No. 08-917-EL-SSO
Approval of an Electric Security Plan; an)
Amendment to its Corporate Separation)
Plan; and the Sale or Transfer of Certain)
Generating Assets)

In the Matter of the Application of Ohio)
Power Company for Approval of an) Case No. 08-918-EL-SSO
Electric Security Plan; an Amendment to)
its Corporate Separation Plan)

**REPLY OF APPALACHIAN PEACE AND JUSTICE NETWORK TO THE
MEMORANDUM CONTRA ITS INTERVENTION IN THE REMAND HEARING
AND REQUEST FOR APPROVAL OUT-OF-TIME IF REQUIRED**

On May 25, 2011, the Public Utilities Commission of Ohio ("Commission") issued an order in which it established a procedural schedule in the above-captioned dockets ("Remand Proceeding"), setting for hearing issues relating to the Provider of Last Resort ("POLR") charge and Environmental Investment Carrying Charge Rider ("EICC") imbedded in Columbus Southern Power Company's and the Ohio Power Company's (collectively, "AEP Ohio") present Electric Security Plan ("ESP"). Specifically, the Commission's order presents AEP Ohio with the opportunity to present new evidence of actual costs sufficient to justify its current POLR, or in the alternative, develop a non-cost-based POLR authorized by specific rate provisions of Section 4928.143, Revised Code.¹ The hearing is also intended to provide AEP Ohio with an opportunity to make a legal argument that its EICC is a charge permitted as part of an ESP. Because the Ohio Supreme Court found that the lack of evidence of a cost basis for the POLR charge in AEP

¹ *In the Matter of Columbus Southern Power, et al.*, Case No. 08-917-EL-SSO, Entry dated May 25, 2011, par. 11 ("May 25th Entry").

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Ohio's ESP amounted to reversible error and that there was no legal justification presented for the EICC charge,² the issues set for hearing in this proceeding will consist of facts and legal theories that are new and that which were not part of the original proceeding in which AEP's current ESP was first considered by this Commission. Among other things, the outcome of this Remand Proceeding will decide whether there will be a POLR charge during the last half year of the current AEP Ohio ESP and, if so, the amount of that charge and whether the charge will be bypassable.

On June 2, 2011, the Appalachian Peace and Justice Network (APJN) filed a petition to intervene in this case. On June 3, 2011, AEP Ohio filed a memorandum contra³ to APJN's intervention raising three objections: 1) the May 25th Entry prohibited interventions; 2) APJN's intervention is out of time; and 3) APJN's interests will be adequately represented by other parties already in the proceeding. As a nonprofit membership organization representing low-income rural consumers in Appalachian Ohio, APJN's members are directly affected by the outcome of this case: namely, whether AEP Ohio will have a POLR charge and the design and amount of such a charge. As such, APJN respectfully requests that the Commission permit it to intervene in this case.

In its Memorandum Contra, AEP Ohio states that the May 25th Entry "pointedly does not include an opportunity for further intervention" (emphasis added).⁴ This statement is misleading. For the Commission Entry to "pointedly" exclude intervention, it would have had to expressly state in the Entry that additional interventions would not be permitted. A review of the May 25th

² *In Re Application of Columbus S. Power Co.*, 2011-Ohio-1788 (April 19, 2011).

³ Although AEP Ohio properly filed its Motion with the Commission on this date, AEP Ohio never served APJN with a copy of said Motion, as evidenced by the fact that counsel for APJN does not appear on the Certificate of Service.

⁴ June 2, 2011 Memorandum Contra p. 2.

Entry reveals that the Commission was silent on the subject of new interventions. Further, in paragraph 11, where the Commission discusses authorizing "intervenor" to file new testimony, the term "intervenor" was not capitalized. To be grammatically correct, if the Commission was indeed electing to close off new interventions, the only persons who could file testimony would be the existing Intervenors. Since the existing parties granted intervention are known, a reference to the existing parties would be to the "Intervenors" and should have been capitalized.

In sum, a reasonable review of the May 25th Entry reveals no language which supports AEP Ohio's view that the Commission affirmatively limited the hearing to the existing Intervenors only. Since the Entry is silent as to intervention, the criteria for intervention shall be determined in accordance with the Commission's rules.

AEP Ohio's second objection to APJN's intervention is that it violates the Commission's intervention rule in that the petition was filed out-of-time. The Commission's rule on timely intervention indicates that unless otherwise provided for by order, an intervention is timely so long as it is filed more than five days before hearing.⁵ Since the hearing is set for July 12, 2011,⁶ a timely intervention is one that is petitioned for by July 8, 2011; this date is more than a month beyond the time that APJN's actual intervention petition was filed. Notwithstanding the Commission's rule on timely interventions, AEP Ohio argues that the Attorney Examiner's August 5, 2008 Entry set an intervention deadline of September 4, 2008, and that the Attorney Examiner's subsequent September 4, 2008 Entry not only closed off intervention for the November 3, 2008 hearing, but barred all intervention in any subsequent hearings, even if the new hearings are instituted by a Commission order.⁷ There is no legal precedent for the view that

⁵ O.A.C. 4901-1-11.

⁶ May 25th Entry, p. 11.

⁷ AEP Ohio Memorandum Contra, p. 4.

an Attorney Examiner's Entry could bar intervention **in future proceedings called for by the Commission**. Moreover, the three-year-old Attorney Examiner's Entry does not contain any language that anticipates any hearing after the one it set for November 3, 2008.

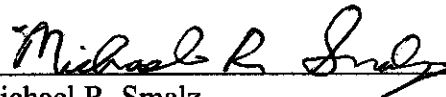
Furthermore, the April 19, 2011 remand decision by the Ohio Supreme Court, which found that the Commission's approval of POLR fees in AEP's current ESP constituted an abuse of discretion but that a POLR could be non-cost-based, was both unforeseen and unforeseeable in September 2008. Thus, APJN should be excused from not filing for intervention prior to September 4, 2008, in order to participate in a Remand Proceeding occurring in 2011. Rule 4901-1-11(F) of the O.A.C. permits an untimely intervention for extraordinary circumstances. A Supreme Court remand three years later presents such an extraordinary circumstance.

AEP Ohio also claims that other parties can and will represent APJN's interests adequately so that intervention is not required. APJN represents nonprofit, low-income, and rural consumers in southeastern (Appalachian) Ohio. Its interests are not identical to other intervenors. Other intervenors—e.g., OCC and OPAE—may have overlapping interests, but may not be of like mind when it comes to accessing AEP Ohio's POLR charge and other charges at issue in this proceeding.⁸ In addition, there is no doubt that the issues under consideration in this Remand Proceeding are inextricably interrelated to the issues to be considered in AEP's proposed ESP (Docket Nos. 11-346-EL-SSO and 11-348-EL-SSO), in which APJN is an intervenor.

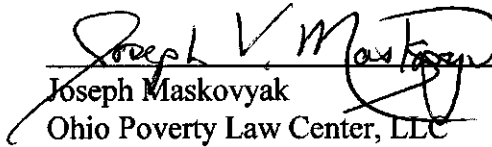
⁸ APJN is similar in geography, constituency and interests to the now-defunct Appalachian People Action Coalition (APAC). Either APAC and APJN have been granted intervention in numerous cases before this Commission, and, as noted in APJN's Motion to Intervene, APAC (with the same legal counsel now retained by APJN) was granted intervention in this proceeding (along with OCC and OPAE).

WHEREFORE, APJN requests that it be permitted to intervene in the Remand Proceeding scheduled for July 12, 2011, as a party of record. Alternately, if the Commission finds that the time for intervention has passed, APJN respectfully seeks leave to intervene out of time. APJN states that it will work in cooperation with the other intervenors to avoid duplicative arguments or pleadings.

Respectfully submitted,



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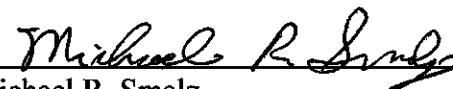


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply was served this 9th day of June, 2011, by electronic mail, upon the persons listed below.



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