

**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)	(Remand)
Amendment to its Corporate Separation)	
Plan; and the Sale or Transfer of Certain)	
Generating Assets.)	

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

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**APPALACHIAN PEACE & JUSTICE NETWORK'S APPLICATION FOR
REVIEW THROUGH AN INTERLOCUTORY APPEAL
OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY
AND REQUEST FOR EXPEDITED CONSIDERATION**

Pursuant to O.A.C. 4901-1-15(A), the Appalachian Peace & Justice Network ("APJN") hereby files this Application for Review by the Commission of the Attorney Examiner's Entry, dated June 16, 2011, in the above-captioned matter (the "Entry").¹ Although APJN satisfied all statutory and regulatory factors for intervention in this proceeding, which is scheduled for an evidentiary hearing commencing July 12, 2011, the Entry wrongfully denies APJN's Motion to Intervene. A Commission decision overruling this erroneous, inappropriate, and unlawful Entry is necessary in order to prevent undue prejudice to APJN. APJN should not be precluded from participating in this unique proceeding on remand because APJN's significant interests will be prejudiced if it is not granted intervention. However, participation by APJN will not prejudice the existing parties or delay the proceeding, and APJN's experience and unique perspectives would be an important component of the development of a full record for the Commission's decisions.

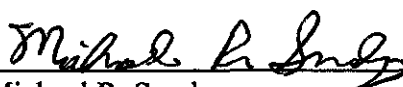
¹ A copy of the Entry is attached hereto as Exhibit A.

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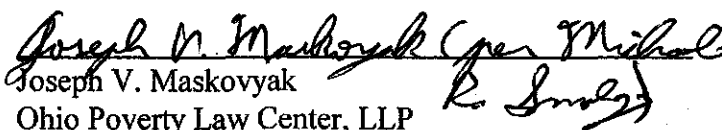
Accordingly, APJN respectfully requests that the Commission review and revise the Entry so as to authorize APJN's intervention. Time is of the essence, as Applicants already have denied APJN the opportunity to cross-examine deposition witnesses. Thus, APJN requests expedited consideration of this Application so that the Commission may issue its decision so as to allow APJN to fully participate in discovery, as intervener testimony is due to be filed on June 23, 2011, which is likely to prompt further depositions.

The grounds for this Application are more fully set forth in the attached Memorandum in Support which is incorporated by reference herein,

Respectfully submitted,



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**BEFORE THE
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In the Matter of the Application of Columbus)	
Southern Power Company for Approval of an)	Case No. 08-917-EL-SSO
Electric Security Plan; an Amendment to Case)	(Remand)
No. 08-917-EL-SSO 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 its Electric Security)	Case No. 08-918-EL-SSO
Plan; and an Amendment to its Corporate)	(Remand)
Separation Plan.)	

**MEMORANDUM IN SUPPORT OF
APPALACHIAN PEACE & JUSTICE NETWORK'S APPLICATION FOR
REVIEW THROUGH AN INTERLOCUTORY APPEAL
OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY
AND REQUEST FOR EXPEDITED CONSIDERATION**

1. INTRODUCTION

The Appalachian Peace & Justice Network ("APJN") seeks review and reversal of the Attorney Examiner's June 16, 2011 Entry denying APJN's Motion to Intervene because it significantly jeopardizes APJN's real and substantial interests in the issues presented in this remand proceeding involving the POLR charges to be assessed for the remainder of 2011, and possibly beyond, by Columbus Southern Power Company and Ohio Power Company (the "Companies").²

The Attorney Examiner clearly erred to APJN's prejudice by carrying forward an inappropriate intervention deadline—it was established in September 2008 for a November 2008 hearing—to

² O.A.C. 4901-1-15(A)(2) provides an automatic right to seek an interlocutory appeal with the Commission from an entry denying a motion to intervene. It provides that "[a]ny party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling" that "[d]enies a motion to intervene [or] terminates a party's right to participate in a proceeding."

bar APJN from participating in the new evidentiary hearing that was only recently announced and now scheduled to commence on July 12, 2011. The Commission's May 25, 2011 Entry fixing that new hearing date did not set an intervention deadline and, thus, APJN's Motion to Intervene filed only eight days later was timely. While APJN will be severely prejudiced by its unjustified exclusion from these proceedings, the Companies would suffer no prejudice from APJN's participation at this early stage in the remand proceeding and, indeed, the Attorney Examiner's Entry does not even suggest any such prejudice. Denying APJN's intervention defeats the goals of developing a full and complete record for the Commission's determination and allowing parties the right to be heard. The Attorney Examiner erred in ignoring APJN's real and substantial interests and the extraordinary circumstances surrounding both APJN's interests and the proceeding itself by concluding that the September 2008 deadline for intervention in the original proceeding should apply in the remand proceeding.

The remand proceeding is not simply a continuation of the 2008 hearing—the Companies have filed new testimony from witnesses who did not testify in 2008,³ and that testimony will be tested in a new evidentiary hearing. The standards for intervention balance the interests of the applicant in an efficient processing of its application, the interests of other parties in being heard, and the interests of the Commission in a full and effective consideration and determination of the issues presented. Under such a balancing, there is no question—particularly in light of the Ohio Supreme Court's determination that intervention should be liberally granted—that APJN's Motion to Intervene should be granted. APJN must be allowed to protect its real and substantial

³ Companies witness Anil Makhija provided testimony in 2008, but not on the cost of being a POLR provider. Companies witness Chantalle LaCasse did not provide testimony in 2008. The positions taken by Phillip Nelson have substantially changed precisely because of the Supreme Court opinion prompting this remand proceeding.

interests and to assist the Commission in developing the record in a proceeding especially since there is a fair likelihood that this case will return to the Ohio Supreme Court. Accordingly, pursuant to O.A.C. 4901-1-15(A), APJN respectfully requests that the Commission reverse the Attorney Examiner's Entry and grant APJN's Motion to Intervene.

II. BACKGROUND

The Commission is familiar with the procedural history of this proceeding. APJN will not summarize here the procedural history as FES has already provided such a summary, which in all material aspects is accurate for APJN.⁴

Like FES, in this Application, APJN requests that the Commission overrule the Attorney Examiner's June 16, 2011 Entry and allow APJN to participate in the upcoming Remand Proceeding. The Attorney Examiner's Entry denied APJN's (and all other movants') Motion to Intervene for three reasons:

1. The Motion was "untimely filed" after the September 4, 2008 deadline in the original proceeding.
2. There are no extraordinary circumstances because APJN "mainly point[s]" to the Supreme Court's remand, which was not unforeseeable prior to September 4, 2008.
3. APJNs "primary interest" is the impact of the Commission's decision on the 2012 ESP, in which it has already intervened.

See Entry, ¶ 12. None of these misguided conclusions support a denial of APJN's well-supported request to intervene when its interests will be prejudiced if barred from participation in the Remand Proceeding.

⁴ APJN filed its Motion to Intervene one week later than FES.

III. LAW & ARGUMENT

A. The Attorney Examiner Erred In Denying APJN Intervention.

1. The Attorney Examiner incorrectly denied APJN's Motion as untimely.

O.A.C. 4901:1-11(E) provides that a motion to intervene “will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding.” The Attorney Examiner concluded that because the Motion was filed after the September 4, 2008 deadline for intervention in the original proceeding, the Motion was untimely and should be denied. Entry, ¶ 12. But, the Attorney Examiner's Entry fails to recognize that a new proceeding has been instituted (triggering a new set of deadlines plus a new evidentiary hearing). In addition, it is not uncommon for the Commission to grant “untimely” requests to intervene. Indeed, the Commission has granted motions to intervene filed after a scheduled deadline and within weeks or days of the hearing—based, in part, on the fact that the Ohio Supreme Court has held that requirements for intervention are “generally liberally construed in favor of intervention.”⁵ See, e.g., *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Entry, Feb. 5, 2009, at ¶ 6 (granting untimely motion to intervene because “the Supreme Court of Ohio has held that statutes and rules governing intervention should be ‘generally liberally construed in favor of intervention’” and because “no other party will be prejudiced by allowing intervention at this point”) (quoting *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387 (2006)). **In fact, in the original proceeding in this matter, the Attorney Examiner granted a motion to intervene**

⁵ It is noteworthy that the Attorney Examiner fails to mention this oft-cited maxim anywhere in the Entry.

filed after the same September 2008 deadline based on the significance of the issues presented “and that the intervention standard has been satisfied.” Entry, dated Oct. 29, 2008, at ¶ 4.

In any event, the September 2008 deadline is not the proper deadline for intervention in the Remand Proceeding. On May 25, 2011, the Commission established an entirely new procedural schedule for the “remand proceedings” (Entry, May 25, 2011), and included no deadline for intervention “for purposes of [this] particular proceeding” (O.A.C. 4901-1-11(E)). As this is a new evidentiary proceeding, the use of the default deadline for intervention in O.A.C. 4901:1-11(E) is the most appropriate guide. O.A.C. 4901:1-11(E); *see also, In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company*, Case Nos. 09-580-EL-POR *et al.*, Entry, Jan. 14, 2010 (granting motions to intervene after proceedings were re-opened). Indeed, use of a 2008 deadline to bar participation in a new proceeding commenced in 2011, where the movant seeks to participate in a new evidentiary hearing never contemplated in the 2008 procedural schedule, borders on incredulity. Therefore, in accordance with O.A.C. 4901-1-11(E), APJN timely satisfied the applicable deadline for intervention of five days before the evidentiary hearing set for July 12, 2011.

The Commission’s May 25, 2011 Entry provides the parties with approximately one month to prepare testimony and conduct discovery in preparation for the hearing commencing on July 12, 2011. APJN’s Motion was filed just eight days after the May 25, 2011 Entry establishing the new procedural schedule, and more than one month before the hearing. APJN has clearly met that deadline and its Motion is timely.⁶ The Attorney Examiner’s denial of APJN’s Motion to Intervene as “untimely” is plain error.

⁶ To the extent a “motion for leave” to file the Motion to Intervene is deemed necessary, this Application for Review constitutes APJN’s request for such leave.

2. Extraordinary circumstances exist for which the Commission's Rules allow for "untimely" intervention.

Regardless of whether the Motion is deemed timely, the Commission's rules allow for intervention where, as here, "extraordinary circumstances" exist. O.A.C. 4901-1-11(F). The Attorney Examiner erroneously concludes that APJN failed to establish extraordinary circumstances because APJN "mainly point[s] to the remand of these cases by the Ohio Supreme Court," Entry, ¶ 12. But that conclusion is simply untrue (indeed, it propagates a falsehood advanced by the Companies' in their brief opposing APJN's intervention). The Attorney Examiner ignored the obviously unique circumstances regarding the timing of the Remand Proceeding as well as unique interests APJN brings in the Companies' SSO described in APJN's briefing on the Motion. As set forth in APJN's Motion, there are numerous factors that establish extraordinary circumstances that justify APJN's request to intervene in the Remand Proceeding at this stage:

- The Commission has instituted a wholly new evidentiary proceeding for the Remand Proceeding, with new discovery deadlines, new testimony, and a new hearing;
- The issues that are the subject of the Remand Proceeding are significant issues, the resolution of which could affect bills of low-income customers in the Current ESP, as well as the Pending ESP;
- The testimony on the POLR design and cost issues presented in the Remand Proceeding is likely to predetermine this issue for purposes of the Pending ESP.

It is not simply that the Supreme Court has remanded an issue for the Commission's determination. Because the issues in the Remand Proceeding almost certainly will be determinative upon the same issues in the Pending ESP, APJN will be prejudiced by the likelihood of being barred on those issues in the Pending ESP in which APJN has been granted intervention.

3. **The Attorney Examiner acknowledged only one of APJN's interests, but inappropriately disregarded all of them.**

APJN has real and substantial interests in the Companies' SSO that will be affected by the results of the Remand Proceeding and prejudiced by APJN's inability to participate in the Remand Proceeding. The Attorney Examiner essentially recognized that APJN has such real and substantial interests by noting that APJN was granted the right to intervene in the Pending ESP. Entry, ¶ 12. APJN's request to intervene in the Pending ESP was granted under the same standard applicable here and can only be distinguished based on timing, which, as discussed above, is an unreasonable and inappropriate basis on which to deny APJN's Motion.⁷ The Attorney Examiner inappropriately disregarded APJN's interests in the Remand Proceeding in her conclusion that APJN's capacity to participate in the Pending ESP hearing somehow adequately and fully protects its interests. Entry, ¶ 12. In fact the opposite conclusion is more logical; these and other of APJN's interests will certainly be prejudiced if APJN is unable to participate in the Remand Proceeding. Precisely, because APJN is a party in the Pending ESP, its capacity to attack POLR charges may be significantly diminished by being barred in this proceeding. Recognition of APJN's interests in the Pending ESP offer a compelling reason to permit intervention.

As set forth in APJN's Motion, APJN's real and substantial interests include that:

- APJN has a direct and substantial interest in ensuring that the Companies do not inappropriately recover their competitive generation costs through an improperly designed, nonbypassable POLR charge, which would disproportionately adversely affect APJN's low-income members and other low-income consumers, who face greater energy burdens than other residential consumers.

⁷ 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 Nos. 11-346-EL-SSO, 11-348-EL-SSO, Motion to Intervene of APJN, filed February 22, 2011.

- If the Pending ESP is not approved or is withdrawn, the Current ESP will continue to serve as the Companies' SSO going forward after December 31, 2011. *See* R.C. § 4928.143(C)(2)(b). Therefore, APJN has a significant interest in the outcome of this Remand Proceeding and its potential impact on the Companies' future SSO.
- The issues of the Remand Proceeding overlap significantly with those of the Pending ESP. The POLR Charge Rider at issue in the Remand Proceeding is based on the same formula and argument the Companies use to support the Rider in the Pending ESP. The Companies also seek to continue their recovery of environmental carrying costs, which will be the other focus of the Remand Proceeding, in the Pending ESP. Moreover, the pricing of the Companies' Current ESP is directly related to the statutory test for the Companies' Pending ESP. *See* R.C. §§ 4928.143(C)(1), 4928.142(D). Once those issues are determined by the Commission it seems mostly unlikely that parties will be able to relitigate those issues in the pending ESP.

Each of these interests will be prejudiced if APJN is denied the right to participate in the Remand Proceeding.

Not only did the Attorney Examiner address only one of these interests in her Entry, but her decision inappropriately glosses over the prejudice to that interest that will result if APJN's Motion is denied. It is naive to conclude that APJN's participation in and development of the issues in the Pending ESP with regards to the POLR Charge Rider and environmental carrying costs will be unaffected by the results of the Remand Proceeding. *See* Entry, ¶ 12. Almost all of the parties to the Pending ESP will have a seat at the (new) table in the Remand Proceeding in order to submit testimony and/or develop arguments regarding whether the POLR Charge Rider is supported and appropriate under Ohio law and whether any provision of R.C. § 4928.143(B)(2) allows for the recovery of environmental carrying costs. The Commission will decide those issues based on the testimony and briefing compiled in the Remand Proceeding. Having been provided a record for consideration and taking the time to make a reasoned decision based on that record, there will be little to no room to affect the Commission's decision on those issues in the later Pending ESP proceeding. The Commission's decision on the record in the Remand Proceeding will necessarily shape, if not likely be determinative of, the Commission's

position on the propriety of the POLR Charge Rider and the environmental carrying costs. Indeed, that is the stated goal of the proceeding. As those issues will be re-presented in the pending ESP, APJN will be prejudiced if APJN is not granted intervention.

It is simply inappropriate and unprecedented to deny APJN the right to intervene when its interests are unquestionably real and substantial, those interests will be significantly affected by the results of this proceeding, and APJN's intervention will not prejudice the existing parties,

B. APJN's Motion Also Satisfies The Other Criteria For Intervention.

Ohio law and the Commission's Rules establish that the Commission should consider a number of factors in determining a request to intervene—which, again, are “liberally construed in favor of intervention.” *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387 (2006) (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995)), *See also* R.C. § 4903.221; O.A.C. 4901-1-11(A) (requiring approval of a timely motion to intervene that satisfies the standards for intervention). APJN's Motion established each of those factors, as its Motion in the Pending ESP did. The factors include, and are discussed *seriatim*.⁸

- *The nature and extent of the intervenor's interest.*

As set forth above, APJN has real and substantial interests in the Remand Proceeding. APJN seeks refunds and/or mitigation of the Companies' rate increases through December 31, 2011, and such action will disproportionately benefit APJN, low-income members and other low-income consumers in Appalachian Ohio. The continuation of the Companies' unnecessary and unlawful rate increases will disproportionately harm these low-income consumers because of their relatively high “energy burden” (ratio of energy costs to income). The Remand Proceeding's

⁸ *See* O.A.C. 4901-1-11(B)(1)–(5); *see also* R.C. § 4903.221(B)(1)–(4).

resolution of certain provisions of the Companies' Current ESP will affect monthly billing rates through the term of the Current ESP, and perhaps beyond if a new SSO is not approved. *See* R.C. § 4928.143(C)(2)(b) (if a new SSO is not approved or is withdrawn, the Companies' Current ESP will continue to serve as the Companies' SSO going forward). A reduction in the POLR charge will provide rate relief to low-income customers throughout southeastern Ohio at a time when it is most needed, as the recession has hit the Appalachian region the hardest.

APJN also has an interest in being heard in the new Remand Proceeding—scheduled just four weeks before the same issues may be discussed in the Pending ESP—and in developing the issues for the Commission's decision, which could effectively close the door on certain arguments regarding this provision and environmental cost recovery in the Pending ESP. Moreover, the Commission's decisions in the Remand Proceeding could guide subsequent interpretations of the allowable provisions in other EDUs' SSO proceedings. APJN's ability to protect all of these real and substantial interests would be significantly impaired if APJN was not allowed to intervene in the Remand Proceeding.

- *The legal position advanced by the intervenor and its probable relation to the merits of the case.*
- *Whether the intervenor will significantly contribute to the full development and equitable resolution of the factual issues.*

No party has questioned the relevance of APJN's legal position on the issues in the Remand Proceeding or APJN's ability to contribute to the resolution of those issues. APJN's primary purpose is to protect low-income customers from the deleterious consequences of unreasonable rate increases. As noted above, APJN has invested significant time and resources over the past several months as an intervenor in the Companies' Pending ESP proceeding, analyzing the legal and factual issues surrounding the Companies' POLR Charge Rider and attempts to recover environmental costs, including the purported bases for the POLR Charge

Rider and the Companies' use of the Black-Scholes model. Therefore, APJN is well-positioned to contribute to the record for the Commission's consideration of the issues in the Remand Proceeding.

- *Whether intervention will unduly prolong or delay the proceedings.*

As set forth above, APJN's intervention will not prolong or delay the Remand Proceeding at all. APJN's Motion was filed eight days after the new procedural schedule was issued, weeks before the deadlines for discovery and testimony, and over a month before the hearing. Neither the Companies nor the Attorney Examiner have suggested (or could suggest) that APJN's participation would delay the proceedings.

- *The extent to which the intervenor's interest is represented by existing parties.*

APJN is uniquely situated to assist the Commission in the development of the record for its consideration of the important issues in the Remand Proceeding. APJN is the only intervenor whose primary purpose is to protect the interests of low-income customers in the economically distressed counties of Appalachian Ohio.⁹ Although OCC represents residential customers, it does not focus its attention on the protection of low-income customers (nor can OCC do so under its statutory mandate to protect all residential ratepayers). APJN stands alone in primarily analyzing issues in this case from the perspective of what impact it will have on low-income ratepayers. Their voice should not be excluded. APJN respectfully submits that the denial of its right to participate in this proceeding will leave an important gap in the development of the issues for the Commission's consideration.

⁹ Although APJN did not participate in the original ESP proceeding, its former sister organization in southeast Ohio, Appalachian People's Action Coalition (APAC) did participate and counsel for APAC is identical to counsel for APJN. In fact, it is arguably duplicative for APJN to have participated, since its interests were substantially aligned with APAC. However, with the demise of APAC, forcing withdrawal of APAC, APJN could no longer count on APAC to protect the interests of low-income customers in southeast Ohio.

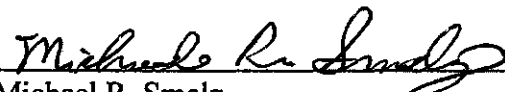
IV. REQUEST FOR EXPEDITED CONSIDERATION


Given the compressed time frame of the Remand Proceeding, which includes a deadline for intervenor testimony of June 23, 2011, APJN respectfully asks that the Commission consider this Application expeditiously in order to prevent APJN from being barred from participating in further discovery, as APJN expects the filing of intervenor testimony to facilitate a new round of depositions.

V. CONCLUSION

Ohio law allows any person who may be adversely affected by a public utilities commission proceeding to intervene in the proceeding. As set forth herein and in APJN's Motion, APJN has numerous real and substantial interests that would be adversely affected by the Remand Proceeding. The potential prejudice to APJN, particularly when compared to the lack of prejudice to any of the existing parties in this new proceeding, necessitates that APJN be granted the right to intervene. Accordingly, pursuant to Ohio Revised Code § 4903.221, O.A.C. 4901-1-11, and O.A.C 4901-1-15(A), APJN respectfully requests an expedited decision from the Commission to overrule the Attorney Examiner's June 16, 2011 Entry, grant APJN's Motion to Intervene and thereby allow APJN to participate in the Remand Proceeding to avoid the prejudice that would otherwise result.

Respectfully submitted,

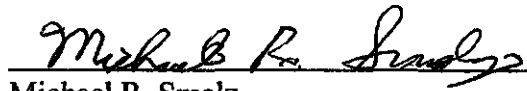

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Interlocutory Appeal was served this 21st day of June, 2011, by electronic mail, upon the persons listed below.


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