Before

**The Public Utilities Commission of Ohio**

In the Matter of the Application of Columbus )

Southern Power Company for Approval ) Case No. 09-1089-EL-POR

of its Program Portfolio Plan and Request )

for Expedited Consideration. )

In the Matter of the Application of Ohio )

Power Company for Approval of its ) Case No. 09-1090-EL-POR

Program Portfolio Plan and Request for )

Expedited Consideration. )

# Motion for Leave to File a Reply, Memorandum in Support and Reply oF INDUSTRIAL ENERGY USERS-OHIO

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# Motion for Leave to File a Reply

# oF INDUSTRIAL ENERGY USERS-OHIO

Industrial Energy Users-Ohio (“IEU-Ohio”) respectfully submits this motion requesting leave to respond to a portion of “AEP Ohio’s Memo in Opposition to Application for Rehearing of Industrial Energy Users-Ohio” (hereinafter “Memo Contra”) filed yesterday, June 23, 2010, by Ohio Power Company (“OP”) and Columbus Southern Power Company (“CSP,” collectively “AEP-Ohio”). As explained in the following Memorandum in Support, AEP-Ohio has presented arguments in its Memo Contra that misstate Ohio law and the Commission’s rules in effect in order to support its argument that IEU-Ohio’s Application for Rehearing should be summarily dismissed on procedural grounds.

For the reasons set forth in the attached Memorandum in Support, IEU-Ohio respectfully requests that the Commission grant IEU-Ohio’s request to reply to AEP-Ohio’s procedural arguments and consider the reply attached hereto.

Respectfully submitted,

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# memorandum in support of Motion for Leave to File a reply and reply oF INDUSTRIAL ENERGY USERS-OHIO

**I. Memorandum in Support of motion for leave to file a reply**

On November 12, 2009, AEP-Ohio filed its Application for approval of a Portfolio Plan to comply with the requirements of SB 221. Contemporaneously, AEP-Ohio submitted a Stipulation and Recommendation (“Stipulation”) entered into by some parties in support of AEP-Ohio’s Portfolio Plan.

On December 11, 2009, IEU-Ohio submitted objections and recommended modifications to AEP-Ohio’s Portfolio Plan. An evidentiary hearing was conducted on February 25, 2010 and initial and reply briefs were filed on March 10 and 19, 2010, respectively. On May 13, 2010, the Commission issued its Order approving the Stipulation, with modifications. On May 21, 2010, AEP-Ohio filed tariffs to comply with the Commission’s Order, which the Commission approved on May 26, 2010, making the energy efficiency and peak demand reduction (“EE/PDR”) riders effective, on a bill rendered basis, commencing with AEP-Ohio’s June 2010 billing cycle.

On June 14, 2010, IEU-Ohio electronically filed its Application for Rehearing of the Commission’s May 13, 2010 Order. The same day, IEU-Ohio electronically served its Application for Rehearing and also sent hard copies by regular mail to all parties in the case and the Attorney Examiners.

IEU-Ohio is the only party that opposed AEP-Ohio’s Portfolio Plan and the Stipulation.

In its Memo Contra, AEP-Ohio argues that “electronically filing an application for rehearing is not permitted under R.C. 4903.10 or the Commission's rules and was not otherwise authorized by the Legal Director or Attorney Examiners presiding over these cases.” AEP-Ohio concludes IEU-Ohio’s Application for Rehearing was not properly filed and thus, the Commission has no jurisdiction to modify its Order. AEP-Ohio also concludes that as a result of improper filing, IEU-Ohio has lost its ability to appeal the Commission’s decision on its Portfolio Plan.

AEP-Ohio does not argue that IEU-Ohio’s Application for Rehearing (if properly filed) was untimely. AEP-Ohio also does not argue that it failed to receive timely and proper service of IEU-Ohio’s Application for Rehearing. AEP-Ohio does not argue that it was in any way harmed or prejudiced by IEU-Ohio’s electronic filing of its Application for Rehearing. Rather, AEP-Ohio seeks to knock out the only opposition to its Portfolio Plan on a procedural argument that is incorrect, or weak at best.

Nonetheless, AEP-Ohio makes substantive arguments against the merits of IEU-Ohio’s Application for Rehearing upon which it seeks a Commission decision.

Given the significance of the impact sought by AEP-Ohio of a Commission decision that IEU-Ohio’s Application for Rehearing was improperly filed, and the dubious arguments supporting its claims, IEU-Ohio respectfully requests that the Commission grant IEU-Ohio leave to file a reply to the limited issue raised in AEP-Ohio’s Memo Contra.

**II. Reply**

AEP-Ohio argues that Section 4903.10, Revised Code, and the Commission’s rules prohibit electronic filing of applications for rehearing. While it is common practice for applications for rehearing to be filed in paper format, IEU-Ohio finds no such prohibition in Ohio law.

Section 4903.10, Revised Code, sets forth the statutory requirements for applications for rehearing. It requires: 1) a party to have entered an appearance in the proceeding;[[1]](#footnote-1) 2) the application for rehearing to be filed within thirty days after the order of the Commission; 3) every applicant for rehearing must give due notice of the filing of such to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the Commission; 4) the application must be in writing; 5) the application must set forth specifically the grounds on which the applicant considers the order to be unreasonable or unlawful; and, 6) notice of such rehearing shall be given by regular mail to all parties.

Rule 4901-1-35, O.A.C., sets forth additional requirements for applications for rehearing, including: 1) an application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing; 2) a party may only file one application for rehearing to a Commission order within thirty days following the entry of the order upon the journal of the Commission; and, 3) an application for rehearing or a memorandum contra an application for rehearing may not be delivered via facsimile transmission.

AEP-Ohio has not argued that IEU-Ohio has failed to comply with any of the above described requirements.

Contrary to AEP-Ohio’s claim, IEU-Ohio cannot find any prohibition identified by Ohio law against electronic filing of applications for rehearing. In fact, in the Commission’s rulemaking proceeding regarding, among other things, the process in energy efficiency and peak demand reduction portfolio plan cases under the “POR” case caption, the Commission stated:

To better manage the review of all of the filings created under the new rules, including the receipt of comments by interested persons, the legal director finds it necessary to establish the following purpose codes for the following proceedings and filings:

\* \* \*

POR -- Program Portfolio Plans, including related assessments and applications for recovery of program costs filed pursuant to Rules 4901:1-39-03, 4901:1-39-04, and 4901:1-39-07.

\* \* \*

(4) All applications, reports, and filings made pursuant to the new rules using these purpose codes should be filed electronically in accordance with the procedures established in Case No. 06-900-AU-WVR, posted at www.puco.ohio.gov/puco/docketing/ under "Electronic Filing Information & Links."

It is, therefore, ORDERED, That all electric utilities and interested persons comply with the findings above.[[2]](#footnote-2)

Moreover, AEP-Ohio has not identified any harm or prejudice as a result of IEU-Ohio’s electronic filing. In fact, the reality is quite the contrary. AEP-Ohio responded to the substantive arguments raised in IEU-Ohio’s Application for Rehearing within the timeframe set forth in Rule 4901-1-35, O.A.C.

**III. CONCLUSION**

For these reasons, IEU-Ohio respectfully requests that the Commission find that IEU-Ohio’s Application for Rehearing was properly filed. In the alternative, and in accordance with Rule 4901-1-38, O.A.C., IEU-Ohio requests that the Commission waive any Commission requirement that applications for rehearing not be electronically filed and proceed on the merits of IEU-Ohio’s Application for Rehearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

# I hereby certify that a copy of the foregoing *Motion for Leave to File a Reply Memorandum in Support and Reply of Industrial Energy Users-Ohio* was served upon the following parties of record this 24th day of June, 2010, via first class mail, postage prepaid.

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1. There are opportunities for parties who did not enter an appearance to properly file applications for rehearing which are not pertinent here. [↑](#footnote-ref-1)
2. *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221*, Case No. 08-888-EL-ORD, Entry at 1-2 (November 12, 2009). [↑](#footnote-ref-2)