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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
Columbus Southern Power Company and )  
Ohio Power Company to Adjust Their ) Case No. 10-154-EL-RDR  
Economic Development Cost Recovery Rider )  
Pursuant to §4901:1-38-05(A)(5), Ohio Admin. )  
Code. )

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**MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT AND  
COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

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**March 1, 2010**

**Attorneys for Industrial Energy Users-Ohio**

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**MOTION TO INTERVENE**

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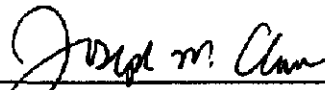
Industrial Energy Users-Ohio ("IEU-Ohio") hereby respectfully moves the Public Utilities Commission of Ohio ("Commission"), pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("O.A.C."), for leave to intervene in the above-captioned matters with the full powers and rights granted by the Commission, specifically by statute or by the provisions of the O.A.C., to intervening parties.

On February 8, 2010, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP-Ohio" or "Companies") filed an Application to adjust their respective economic development cost recovery riders ("Rider EDR"). AEP-Ohio requested the Commission approve its Application in time to coincide with the July 1, 2010 adjustment to the fuel adjustment clause ("FAC") mechanism and extend an opportunity for comments rather than hold a hearing in this matter.

As demonstrated further in the Memorandum in Support, attached hereto and incorporated herein, IEU-Ohio has a direct, real, and substantial interest in the issues and matters involved in the above-captioned proceedings, and is so situated that the disposition of these proceedings may, as a practical matter, impair or impede its ability

to protect that interest. IEU-Ohio believes that its participation will not unduly prolong or delay these proceedings and that it will significantly contribute to the full development and equitable resolution of the factual and other issues in these proceedings. The interests of IEU-Ohio will not be adequately represented by other parties to the proceedings and, as such, IEU-Ohio is entitled to intervene with the full powers and rights granted by the Commission, specifically by statute and by the provisions of the O.A.C., to intervening parties.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT AND COMMENTS**

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**A. MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

In support of this Motion to Intervene, IEU-Ohio states that it is an association of ultimate customers. A current listing of IEU-Ohio member companies is available on IEU-Ohio's website at [http://www.ieu-ohio.org/member\\_list.aspx](http://www.ieu-ohio.org/member_list.aspx). IEU-Ohio's members purchase electricity from AEP-Ohio, which is a public utility subject to the jurisdiction of the Commission.

IEU-Ohio's members work together to address matters that affect the availability and price of utility services. Additionally, IEU-Ohio seeks to promote customer-driven policies that will assure an adequate, reliable, and efficient supply of energy for all consumers at competitive prices. To this end, IEU-Ohio has worked, and will continue to work, to produce legislative, regulatory, and market outcomes that are consistent with the state policy contained in Section 4928.02, Revised Code.

A portion of IEU-Ohio's member companies are served by AEP-Ohio and may be affected by AEP-Ohio's proposed changes to its Rider EDR rates. AEP-Ohio's proposal may result in increases to the rates charged to IEU-Ohio members for electric service as well as impact the quality of service that IEU-Ohio members receive from AEP-Ohio. This potential vests IEU-Ohio with a direct, real, and substantial interest in the issues

and matters involved in the above-captioned proceedings, the disposition of which may impair or impede its ability to protect that interest.

For the aforementioned reasons, IEU-Ohio has a direct, real, and substantial interest in the issues and matters involved in the above-captioned proceedings that will only be protected by its participation in these proceedings. Therefore, IEU-Ohio hereby requests that the Commission grant its intervention with the full powers and rights granted by the Commission, specifically by statute and by the provisions of the O.A.C., to intervening parties.

## **B. COMMENTS ON AEP-OHIO'S APPLICATION**

- 1. AEP-Ohio's Rider EDR Adjustment Application must be dismissed inasmuch as the Commission lacks subject matter jurisdiction over the Application.**

AEP-Ohio filed its initial Electric Security Plan ("ESP") Application with the Commission on July 31, 2008. Under Section 4928.143, Revised Code, the Commission was required to issue an order on AEP-Ohio's proposed ESP within 150 days, or December 28, 2008. The Commission eventually issued its Opinion and Order 80 days late on March 18, 2009. AEP-Ohio relies upon its approved ESP as well as the Commission's recent Finding and Order in Case No. 09-1095-EL-RDR ("Case No. 09-1095") as the basis and the enabling vehicle for its Rider EDR Application.<sup>1</sup>

Section 4928.143(C)(1) states, "The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date." Under Section 4928.141(A), Revised Code, until the Commission issues an

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<sup>1</sup> Application at 1-2 (February 8, 2010).

Order approving, modifying and approving, or denying an ESP Application, and upon expiration of the jurisdictional deadline, the then-current rate plan of an EDU must continue for the purpose of the utility's compliance with Section 4928.141(A), Revised Code. Thus, the Commission lost subject matter jurisdiction over AEP-Ohio's ESP Application when it failed to issue an Order within the 150-day timeframe mandated by Section 4928.143(C)(1), Revised Code.

As a creature of statute, the Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.<sup>2</sup> The Commission patently lacked jurisdiction to proceed with the ESP case. Because the underlying ESP Orders as well as the Commission's Finding and Order in Case No. 09-1095 are unlawful and the authority for this Application is grounded in those Orders, the Commission lacks the subject matter jurisdiction to consider AEP-Ohio's Application.<sup>3</sup> All Commission Orders in the ESP proceeding itself, or any other subsequent proceedings stemming from the ESP proceeding, are illegal.

The Commission should *sua sponte* dismiss AEP-Ohio's Application inasmuch as it lacks subject matter jurisdiction over the Application and therefore does not possess the power to approve the Application. The Commission should find that its Orders in the ESP case and all subsequent AEP-Ohio proceedings stemming from the ESP case were beyond its statutory authority inasmuch as the Commission lost subject matter jurisdiction over AEP-Ohio's ESP when it failed to issue an order within the

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<sup>2</sup> *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1999).

<sup>3</sup> See also *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (February 5, 2010) (hereinafter cited as "AEP-Ohio ESP Proceeding.")

150-day deadline imposed by SB 221. As a remedy, the Commission should require AEP-Ohio to replace its current tariffs with the tariffs that were in effect on July 31, 2008 in accordance with Sections 4928.141 and 4928.143, Revised Code.

2. **Even if the Commission finds it does have subject matter jurisdiction over the instant Application, the Commission cannot approve the Application unless and until AEP-Ohio accepts its ESP and withdraws the appeal of its ESP in Ohio Supreme Court Case No. 2009-2298.**

Section 4928.143(C)(1), Revised Code only permits the Commission to approve an ESP if it finds that the approved ESP, which the Commission may modify before approving, is "more favorable in the aggregate" as compared to the expected results of a market rate option ("MRO") plan. Additionally, Section 4928.143(C)(2)(a), Revised Code, permits an electric distribution utility ("EDU") such as AEP-Ohio to withdraw, and thereby terminate, an ESP application when modifications made by the Commission are not acceptable to the EDU. Upon such withdrawal and termination, the EDU may file a new ESP application or an MRO under Section 4928.142, Revised Code. Further, Section 4928.141, Revised Code, states plainly that:

**Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code.**

Thus, under Section 4928.141, Revised Code, an EDU cannot accept the benefits of the rates approved in an ESP while simultaneously preserving the right to withdraw and terminate the ESP.

As IEU-Ohio has documented previously, AEP-Ohio has taken the benefits of its approved ESP at every turn while continuing to dispute the lawfulness and reasonableness of the very Orders that permit AEP-Ohio to enjoy those benefits.<sup>4</sup> Indeed, AEP-Ohio has never formally accepted its approved ESP, is still taking the benefits of the approved ESP, and has filed an appeal of its ESP at the Ohio Supreme Court.<sup>5</sup> The Commission has never substantively addressed this point of law despite IEU-Ohio raising it multiple times during the ESP proceeding.<sup>6</sup>

Ohio law does not allow AEP-Ohio to take the benefits of the Commission's Orders while reserving judgment to withdraw and terminate its ESP proposal. So long as AEP-Ohio reserves judgment to withdraw and terminate the approved ESP as a result of modifications made by the Commission, Section 4928.141, Revised Code, requires the prior "rate plan" to continue. Thus, even if the Commission finds it has subject matter jurisdiction to entertain AEP-Ohio's Application, the Commission must dismiss the Application unless and until AEP-Ohio accepts its ESP and withdraws its appeal of the ESP in Ohio Supreme Court Case No. 2009-2298.

Further, the Commission's failure to prohibit AEP-Ohio from accepting the benefits of the ESP, while simultaneously reserving judgment on whether to withdraw

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<sup>4</sup> See *AEP ESP Proceeding*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 9-12 (August 17, 2009). See also *AEP ESP Proceeding*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (February 5, 2010).

<sup>5</sup> *Columbus Southern Power Co. v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298.

<sup>6</sup> See *AEP ESP Proceeding*, Entry on Rehearing at 2 (July 23, 2009). IEU-Ohio filed a Motion for Immediate Relief from Electric Rate Increases on April 20, 2009, raising this legal issue for the Commission's consideration. Despite the Commission indicating it would address IEU-Ohio's Motion (and all other pending motions) in its Entry on Rehearing, the Commission never mentioned or ruled on IEU-Ohio's Motion (or any of the other pending motions) in the remainder of its Entry on Rehearing. See also *AEP ESP Proceeding*, Second Entry on Rehearing at 7 (November 4, 2009) (finding that it was unnecessary to address this issue on rehearing because AEP-Ohio has not filed notice with the Commission indicating it would withdraw and terminate its approved ESP). Additionally, IEU-Ohio raised this point of law in its February 5, 2010 Application for Rehearing in Case No. 09-1095 and other inter-related cases.



and terminate the ESP, undermines the very threshold ESP versus MRO comparison that Section 4928.143, Revised Code, requires be met for the Commission to approve an ESP and, by extension, to entertain the instant Application. The ESP versus MRO comparison conducted in the ESP proceeding by the Commission necessarily assumes that each of the components of the ESP will go unchallenged and not be disturbed. Modifying any portion of the approved ESP would necessarily affect the "more favorable in the aggregate" test. The Commission's failure to prohibit AEP-Ohio from taking the benefits of the ESP while reserving judgment on whether to accept the ESP leaves open the question of the ultimate costs to customers from the ESP, thereby calling into question the necessary assumption that the ESP construct in which this Application is proposed is in fact more favorable in the aggregate than the expected results of an MRO.

Thus, even if the Commission finds it has subject matter jurisdiction to approve the instant Application, the Commission must condition its approval on AEP-Ohio accepting its ESP and withdrawing the appeal of its ESP. Failing to include this condition in an order approving AEP-Ohio's Application would violate Sections 4928.141 and 4928.143, Revised Code, as well as continue to permit AEP-Ohio to accept the benefits of its ESP while AEP-Ohio's own actions undermine the assumptions necessary for finding the approved ESP construct is in fact more favorable than the expected results of an MRO.

**3. AEP-Ohio's Application seeks to continue the illegal exception for Rider EDR from the maximum rate increase limitations included in the ESP case.**

The Commission's Entry on Rehearing in the ESP case explained that certain riders are exempt from the annual maximum rate increases set by the Commission in its

ESP Opinion and Order. Specifically, the Entry on Rehearing enumerated the exempted charges, saying "Additionally, the Commission clarifies that the Transmission Cost Recovery (TCR) rider should not impact the allowable total percentage increase. ... Similarly, any future adjustments to the EE/PDR Rider are excluded from the allowable total percentage increases. ... We further clarify that the phase-in/deferral structure does not include revenue increases associated with any distribution base rate case that may occur in the future."<sup>7</sup> Even more succinctly, the Commission again listed the riders that would be exempt from the maximum rate increase limitations, stating "As discussed in findings (27) and (28) above in regard to the TCR, we clarify that the percentage cap increase on total customer bills does not include the EE/PDR rider or future distribution base rates established pursuant to a separate proceeding."<sup>8</sup>

In its Finding and Order in Case No. 09-1095, the Commission (for the first time) found that Rider EDR is not subject to the maximum rate increase limitations. The Commission explained that its list of riders and other mechanisms exempt from the rate increase limitations was not "exhaustive" and that the recovery of delta revenues is permitted by statute and the Commission's rules.<sup>9</sup> The instant Application relies upon this illegal and erroneous Finding and Order and is therefore, by extension, illegal as well.

The Commission's precedent (before the illegal Finding and Order in Case No. 09-1095-EL-RDR) is completely devoid of any indication that Rider EDR is excluded from the maximum revenue increase limitations. Nor did the Commission indicate or give any hint that the list of exemptions (which it recited twice in the Entry on Rehearing)

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<sup>7</sup> *AEP ESP Proceeding*, Entry on Rehearing at 9.

<sup>8</sup> *AEP ESP Proceeding*, Entry on Rehearing at 31.

<sup>9</sup> *Case No. 09-1095*, Finding and Order at 10.

was not exhaustive. The Commission's Entry on Rehearing made it clear that only the EE/PDR Rider and the TCRR, as well as any increase from a distribution rate case, are exempt from the maximum rate increase limitations.

Approval of the Application would continue and worsen (in the case of OP customers) the additional illegal increases for AEP-Ohio customers at a most precarious time for Ohio's economy. In the ESP Opinion and Order, the Commission determined that customers could not absorb the annual 15% increases proposed by AEP-Ohio.<sup>10</sup> However, the Commission's unlawful and unreasonable decision in Case No. 09-1095 placed some larger customers on the same path the Commission found unacceptable only 11 months ago. The FAC and non-FAC maximum revenue adjustments approved by the Commission in January 2010, combined with the rate increases approved in Case No. 09-1095, as well as AEP-Ohio's proposed increase to its energy efficiency/peak demand reduction ("EE/PDR") Rider, would raise some larger customers' bills by over 10% for 2010.<sup>11</sup> Further, this percentage increase does not include any increase that may be approved this year in the annual update of AEP-Ohio's TCRR or in a distribution rate case for AEP-Ohio.<sup>12</sup> Thus, the Application

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<sup>10</sup> *AEP ESP Proceeding*, Opinion and Order at 22 ("Nonetheless, given the current economic climate, we believe that the 15 percent cap proposed by the Companies is too high.") The Commission noted in a footnote that its belief was confirmed by various letters filed in the AEP ESP docket.

<sup>11</sup> The Stipulation and Recommendation in AEP-Ohio's EE/PDR portfolio plan proceeding shows some larger customers would experience up to 4% total bill increases solely attributable to the proposed EE/PDR Rider. See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, PUCO Case Nos. 09-1089-EL-POR, *et al.*, Stipulation and Recommendation at Attachment A (November 12, 2009).

<sup>12</sup> AEP-Ohio is required to file its TCRR update Application by April 16, 2010 for rates effective on July 1, 2010. See *In the Matter for the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as Amended by Amended Substitute Senate Bill 221*, PUCO Case No. 08-777-EL-ORD, Entry at 1 (April 15, 2009). Of note, Dayton Power and Light's recent TCRR and reliability pricing model ("RPM") rider update filing filed on February 16, 2010 requests significantly higher revenue requirements for PJM Interconnection, LLC ("PJM")-related

would only bring us even closer (at least for OP customers) to the condition that the Commission found untenable when it approved AEP-Ohio's ESP in March 2009.

The continued exception from the maximum rate increases for Rider EDR are unlawful and unreasonable and the Commission should reverse course and subject the collection of Rider EDR to the maximum rate increase provisions of the approved ESP.

**4. The Commission must ensure the Rider EDR carrying cost rate is the lowest cost carrying rate.**

In Case No. 09-1095, the Commission approved a carrying cost rate equal to each Company's weighted average of cost long-term debt. The Commission reasoned that it is a more appropriate mechanism under the semiannual reconciliation process prescribed for EDR rates under Rule 4901:1-38-08, O.A.C.<sup>13</sup> The Commission also directed AEP-Ohio to use, on a going-forward basis, the interest rates from its latest-approved filing for the calculation of carrying costs. In accordance with the Case No. 09-1095 Finding and Order, AEP-Ohio proposes to continue to use a weighted average cost of long-term debt as the carrying cost.<sup>14</sup>

IEU-Ohio filed an Application for Rehearing in Case No. 09-1095 contesting the Commission's decision to adopt the weighted average cost of long-term debt carrying cost methodology inasmuch as the Commission made no effort to explore whether a lower cost carrying rate methodology would be more appropriate. IEU-Ohio again encourages the Commission to inquire as to whether a lower carrying cost rate could be

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charges. See *In the Matter of the Dayton Power and Light Company to Update its Transmission Cost Recovery Rider and PJM RPM Rider*, PUCO Case No. 10-88-EL-RDR, Application (February 16, 2010).

<sup>13</sup> Case No. 09-1095, Finding and Order at 9.

<sup>14</sup> Application at Schedules 4-9 (February 8, 2010).

utilized for Rider EDR. The "current economic climate"<sup>15</sup> previously acknowledged by the Commission during the AEP-Ohio ESP proceeding has not improved and customers of all shapes and sizes need every break they can get on their bills.

Respectfully submitted,



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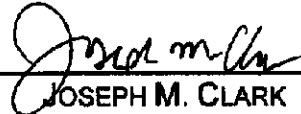
**Attorneys for Industrial Energy Users-Ohio**

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<sup>15</sup> *AEP ESP Proceeding*, Opinion and Order at 22. Ohio's unemployment rate jumped to 10.9% in December 2009 (the last month with reported unemployment numbers from the Ohio Department of Job and Family Services). Ohio's unemployment rate in March 2009, the month that the Commission issued the Opinion and Order in the ESP case, was 9.7%.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Intervene and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 1st day of March 2010, via first class mail, postage prepaid.



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**ON BEHALF OF COLUMBUS SOUTHERN  
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