

FILE

15

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company to)
Update its gridSMART Rider.)

Case No. 10-164-EL-RDR

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

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business
Technician [Signature] Date Processed 3/26/10

PUCO

2010 MAR 26 PM 5:23

RECEIVED-DOCKETING DIV

Samuel C. Randazzo, Counsel of Record
Lisa G. McAlister
Joseph M. Clark
MCNEES WALLACE & NURICK LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

March 26, 2010

Attorneys for Industrial Energy Users-Ohio

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company to)	Case No. 10-164-EL-RDR
Update its gridSMART Rider.)	

MOTION TO INTERVENE

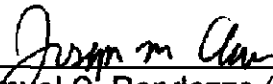
Industrial Energy Users-Ohio ("IEU-Ohio") hereby respectfully moves the Public Utilities Commission of Ohio ("Commission"), pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("O.A.C."), for leave to intervene in the above-captioned matter with the full powers and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

On February 11, 2010, Columbus Southern Power Company ("CSP") filed an Application to adjust its gridSMART Rider.

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 proceeding, and is so situated that the disposition of this proceeding 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 this proceeding and that it will significantly contribute to the full development and equitable resolution of the factual and other issues in this proceeding. The interests of IEU-Ohio will not be adequately represented by other parties to the proceeding 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,



Samuel C. Randazzo (Counsel of Record)

Lisa G. McAlister

Joseph M. Clark

MCNEES WALLACE & NURICK LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

lmcalister@mwncmh.com

jclark@mwncmh.com

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company to)	Case No. 10-164-EL-RDR
Update its gridSMART Rider.)	

MEMORANDUM IN SUPPORT AND COMMENTS

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. IEU-Ohio's members purchase electricity from CSP, 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 CSP and may be affected by CSP's proposed gridSMART rider. CSP'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 CSP. 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 proceeding that will only be protected by its participation in this proceeding. 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 CSP'S APPLICATION

CSP and its other Ohio affiliate, Ohio Power Company ("OP") (collectively, "AEP-Ohio"), are currently collecting standard service offer ("SSO") rates and charges based on the Commission's modification and approval of an electric security plan ("ESP") submitted by AEP-Ohio. AEP-Ohio did not accept the as-modified ESP. The ESP rates and charges are based on, among other things, an odd (and IEU-Ohio believes illegal) assortment of automatic annual increases, a market-based price comparison that overstated any estimate of the then appropriate market price, charges based on hypothetical costs associated with the risk that customers might "shop" in accordance with their statutory rights, hypothetical carrying costs, and deferrals that will land on customers when the current ESP ends. Throughout the ESP process, AEP-Ohio has flip-flopped between market-based and cost-based reasoning and the Commission has, so far, accommodated the flip flops.

The Commission's as-modified and approved ESP is being contested through appeals that are presently pending at the Ohio Supreme Court.¹

In another effort to protect the already relatively large margin that AEP-Ohio makes available to its parent company, CSP filed the Application which is addressed herein. The image below shows the relative gross margin contribution by AEP-Ohio. The image was extracted from a page of a larger presentation which American Electric Power made at the Edison Electric Institute's fall 2009 conference.²

Detailed Ongoing Earnings Guidance

2009E: \$2.90 - \$3.05		American Electric Power 2009 Guidance vs. 2010 Guidance		2010E: \$2.80 - \$3.20	
	Performance Driver	2009 Guidance (\$ millions)	2010 Guidance (\$ millions)	Performance Driver	2010 Guidance (\$ millions)
UTILITY OPERATIONS:					
Gross Margin:					
1	East Regulated Integrated Utilities	66,754 GWh @ \$ 38.4 ARWtr =	2,502	66,249 GWh @ \$ 42.1 ARWtr =	2,870
2	Ohio Companies	47,284 GWh @ \$ 37.6 ARWtr =	2,753	47,622 GWh @ \$ 41.5 ARWtr =	2,969
3	West Regulated Integrated Utilities	36,112 GWh @ \$ 30.8 ARWtr =	1,100	41,495 GWh @ \$ 31.2 ARWtr =	1,298
4	Tecon Wires	27,238 GWh @ \$ 21.1 ARWtr =	575	27,210 GWh @ \$ 21.6 ARWtr =	582
5	Oil System Sales (Net of Sharing)	15,825 GWh @ \$ 18.7 ARWtr =	295	23,662 GWh @ \$ 19.4 ARWtr =	462
6	Transmission Revenue - 3rd Party		266		269
7	Other Operating Revenue		779		604
8	Utility Gross Margin		8,977		8,970
9	Operations & Maintenance		(3,309)		(5,549)
10	Depreciation & Amortization		(1,582)		(1,030)
11	Taxes Other than Income Taxes		(788)		(721)
12	Interest Exp. & Preferred Dividend		(424)		(581)
13	Other Income & Deductions		134		155
14	Income Taxes		(977)		(742)
15	Utility Operations On-Going Earnings		1,341		1,460
16	Transmission Operations On-Going Earnings		4		0
NON-UTILITY OPERATIONS:					
17	AEP River Operations		47		43
18	Generation & Marketing		35		2
19	Non-Utility Operations On-Going Earnings		82		45
20	Parent & Other On-Going Earnings		(64)		(28)
21	ON-GOING EARNINGS		1,364		1,444



NOT A FINANCIAL STATEMENT. CONTACT INVESTOR RELATIONS FOR MORE INFORMATION.

8

From a bigger picture perspective, IEU-Ohio believes the Commission should revisit its modification and approval of an ESP (which has yet to be accepted by AEP-Ohio) for the purpose of testing it against the goals in Section 4928.02, Revised Code.

¹ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022; *Columbus Southern Power Co v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298.

² The presentation is available via the Internet at:
http://www.aep.com/investors/present/documents/FallEEIAdditionalHandout_FINAL.pdf (last checked March 21, 2010).

The modified and approved ESP is unfairly tilted against AEP-Ohio's customers and has features that will further stack the deck against such customers beginning in 2012. From this bigger picture perspective, IEU-Ohio will now address CSP's gridSMART rider Application.

- 1. The Commission should require CSP to provide more details about its gridSMART enhancements before approving the collection of additional revenues to compensate AEP-Ohio for the gridSMART enhancements.**

In its ESP Orders approving a gridSMART program for CSP, the Commission required CSP to apply for federal stimulus monies from the American Recovery and Reinvestment Act ("ARRA") to help fund its approved gridSMART program. CSP explains in the instant Application that it did apply for federal stimulus monies, as required by the ESP Orders, but that its approved gridSMART plan had to be "enhanced" in order to successfully obtain stimulus monies. CSP then lists the additional elements required to obtain stimulus monies, provides a two-page attachment with brief descriptions of the enhancements, and notes that these enhancements increase the cost of the gridSMART program by \$41 million.

CSP asserts that in-kind contributions were obtained from non-affiliated corporate partners in support of the enhanced gridSMART program and that American Electric Power Service Corporation will perform additional work in support of the enhanced gridSMART program that will not be recovered through the gridSMART rider during the ESP period. CSP explains that it anticipates being able to avoid increasing the expected 2009-2011 revenue requirement for gridSMART due to the additional stimulus funding and in-kind contributions. Finally, CSP observes that while it expects to maintain approximately the same level of ratepayer funding through the ESP period,

additional investment will need to be recovered from ratepayers as part of CSP's next standard service offer ("SSO") or through a general distribution rate case.

It appears that CSP is only asking the Commission to modify its gridSMART rider rate and is not asking the Commission to review and approve of the gridSMART enhancements. However, the Commission should ensure any Order it issues in this proceeding cannot be interpreted as an approval of the gridSMART enhancements. The Commission should also indicate that it will investigate and rule upon whether CSP may collect the costs associated with the enhancements in a future CSP case. CSP has only provided a cursory, two-page summary of the 38% increase in gridSMART costs. There is no itemization of how much each individual enhancement contributes to the overall increase and whether any less costly options were available to meet the stimulus funding requirements. Nor has CSP provided any witness testimony supporting the gridSMART enhancements. A much more detailed examination of the gridSMART enhancements as well as any additional cost recovery associated with the gridSMART enhancements is warranted and the Commission should clearly express this in any Order it issues regarding the Application.

2. CSP's Application must be dismissed inasmuch as the Commission lacks subject matter jurisdiction over the Application.

CSP filed its initial ESP Application with the Commission on July 31, 2008. Under Section 4928.143, Revised Code, the Commission was required to issue an order on CSP'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.

CSP relies upon its approved ESP as the basis and the enabling vehicle for its Application.³

Section 4928.143(C)(1), Revised Code, 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 Order approving, modifying and approving, or denying an ESP Application, and upon expiration of the jurisdictional deadline, the then-current rate plan of an electric distribution utility ("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 CSP'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.⁴ The Commission patently lacked jurisdiction to proceed with the ESP case after December 28, 2008. Because the underlying ESP Orders are unlawful and the authority for this Application is grounded in those Orders, the Commission lacks subject matter jurisdiction to consider CSP's Application.⁵ All Commission Orders in the ESP proceeding itself, or any other subsequent proceedings stemming from the ESP proceeding, are illegal.

³ Application at 1-3 (February 11, 2010).

⁴ *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1999).

⁵ See also *In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company*, PUCO Case Nos. 09-872-EL-FAC, *et al.*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 7-9 (February 5, 2010) (hereinafter cited as "2010 Initial Rate Increase Cases").

The Commission should *sua sponte* dismiss CSP's Application inasmuch as the Commission 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 CSP proceedings stemming from the ESP case, were beyond its statutory authority inasmuch as the Commission lost subject matter jurisdiction over CSP's ESP when it failed to issue an Order within the 150-day deadline imposed by SB 221. As a remedy, the Commission should require CSP 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.

3. **Even if the Commission finds it does have subject matter jurisdiction over the instant Application, the Commission cannot approve the Application unless and until CSP 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 EDU such as CSP 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, CSP 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 CSP to enjoy those benefits.⁶ Indeed, CSP 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.⁷ The Commission has never substantively addressed this point of law despite IEU-Ohio raising it multiple times during the ESP proceeding.⁸

Ohio law does not allow CSP to take the benefits of the Commission's Orders while reserving judgment to withdraw and terminate its ESP proposal. So long as CSP 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

⁶ See *In the Matter of the Application of Columbus Southern 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 at 9-12 (August 17, 2009) (hereinafter cited as "AEP-Ohio ESP Proceeding"). See also *2010 Initial Rate Increases Cases*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 9-11 (February 5, 2010).

⁷ *Columbus Southern Power Co. v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298.

⁸ See *AE-OhioP 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-Ohio 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).

jurisdiction to entertain CSP's Application, the Commission must dismiss the Application unless and until CSP 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 CSP from accepting the benefits of the ESP, while simultaneously reserving judgment on whether to withdraw 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 CSP 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 CSP accepting its ESP and withdrawing the appeal of its ESP. Failing to include this condition in an order approving CSP's Application would violate Sections 4928.141 and 4928.143, Revised Code, as well as continue to permit CSP to accept the benefits of its ESP while CSP's own actions undermine the assumptions necessary for finding the approved ESP

construct is in fact more favorable in the aggregate than the expected results of an MRO.

4. **The Commission should find that CSP's proposal may be unlawful and unreasonable, establish a schedule for the filing of initial and reply comments, and set the matter for hearing.**

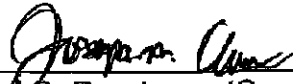
CSP requests that the Commission forgo a hearing in this matter and instead only permit the filing of initial and reply comments before approving the Application. CSP reasons that a hearing is not necessary inasmuch as the Application is the result of the Commission's Orders in the ESP proceeding and the Staff can verify the schedules supporting the Application. On February 23, 2010, the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene and Motion for Procedural Ruling. OCC opposes CSP's request to decide this matter through a paper hearing. On March 3, 2010, CSP filed a Memorandum Contra OCC's Motion for Procedural Ruling; OCC filed its Reply to CSP's Memorandum Contra on March 15, 2010.

As evidenced by the comments offered above, there are multiple issues that need to be resolved in this case and CSP's proposal appears to be unlawful and unreasonable. IEU-Ohio respectfully submits that the Commission should establish an initial and reply comment period for stakeholders, find that CSP's proposal may be unlawful and unreasonable, and set the matter for a hearing with a scope defined by the Commission based its review of any filed comments.⁹ Given that the timing of the Application coincides with the July 1, 2010 fuel adjustment clause ("FAC") adjustment,

⁹ IEU-Ohio is submitting comments with its Motion to Intervene because the Commission has, on occasion, issued an order approving proposals by AEP-Ohio without establishing a formal comment period, hearing, or other opportunity to be heard. IEU-Ohio reserves the right to submit further comments and to otherwise fully participate in any process the Commission may establish in this proceeding.

the Commission has ample time to receive comments as well as hold a hearing before the planned July 1, 2010 FAC rate adjustment.

Respectfully submitted,



Samuel C. Randazzo (Counsel of Record)

Lisa G. McAlister

Joseph M. Clark

McNEES WALLACE & NURICK LLC

Fifth Third Center

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

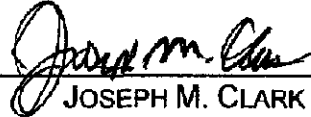
lmcaster@mwncmh.com

jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Intervene* and *Memorandum in Support and Comments of Industrial Energy Users-Ohio* was served upon the following parties of record this 26th day of March 2010, via first class mail, postage prepaid.


JOSEPH M. CLARK

Steven T. Nourse (Counsel of Record)
Martin I. Resnik
American Electric Power Service Company
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
miresnik@aep.com
stnourse@aep.com

**ON BEHALF OF COLUMBUS SOUTHERN
POWER COMPANY**

Janine L. Migden-Ostrander
Terry Etter
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
etter@occ.state.oh.us

ON BEHALF OF OFFICE CONSUMERS' COUNSEL

David Rinebolt
Colleen Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839

ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE ENERGY