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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 10-163-EL-RDR
Ohio Power Company to Update Their)
Enhanced Service Reliability Riders.)

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

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March 26, 2010

Attorneys for Industrial Energy Users-Ohio

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MOTION TO INTERVENE

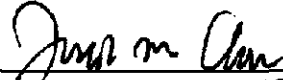
Industrial Energy Users-Ohio ("IEU-Ohio") hereby respectfully moves the Public Utilities Commission of Ohio ("Commission"), pursuant to Section 4903.221, Revised Code, and Rule 4901-1-11, Ohio Administrative Code ("O.A.C."), for leave to intervene in the above-captioned matters with the full powers and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

On February 11, 2010, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP-Ohio" or "Companies") filed an Application to adjust their respective enhanced service reliability ("ESR") riders.

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

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 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 ESR riders. 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 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 AEP-OHIO'S APPLICATION

AEP-Ohio is 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

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.

In another effort to further increase the already relatively large margin that AEP-Ohio makes available to its parent company, AEP-Ohio 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)	Performance Driver	2010 Guidance (\$ millions)
UTILITY OPERATIONS:				
Gross Margin:				
1	East Regulated Integrated Utilities	68,754 kWh @ \$ 35.4 /MWh =	68,249 kWh @ \$ 42.1 /MWh =	2,873
2	Ohio Companies	47,294 kWh @ \$ 57.8 /MWh =	47,922 kWh @ \$ 61.6 /MWh =	2,958
3	West Regulated Integrated Utilities	38,112 kWh @ \$ 29.8 /MWh =	41,465 kWh @ \$ 31.3 /MWh =	1,298
4	Telec. Yrks	27,286 kWh @ \$ 21.3 /MWh =	27,210 kWh @ \$ 23.6 /MWh =	822
5	OE-System Sales (Net of Sharing)	13,826 kWh @ \$ 18.7 /MWh =	28,992 kWh @ \$ 17.4 /MWh =	922
6	Transmission Revenue - 3rd Party		395	383
7	Other Operating Revenue		770	884
8	Utility Gross Margin	8,987		8,970
9	Operations & Maintenance	(3,309)		(3,048)
10	Depreciation & Amortization	(1,582)		(1,825)
11	Taxes Other than Income Taxes	(780)		(791)
12	Interest Exp. & Preferred Dividends	(524)		(588)
13	Other Income & Deductions	124		188
14	Income Taxes	(927)		(721)
15	Utility Operations On-Going Earnings	1,891		1,448
16	Transmission Operations On-Going Earnings	4		0
NONUTILITY OPERATIONS:				
17	AEP River Operations	47		42
18	Generation & Marketing	38		2
19	Non-Utility Operations On-Going Earnings	85		44
20	Parent & Other On-Going Earnings	(84)		(88)
21	ON-GOING EARNINGS	1,984		1,406



NOTE: If all financial positions and/or financial statement amounts have been disclosed for the period on earnings presentation.

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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. 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.

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

From this bigger picture perspective, IEU-Ohio will now address AEP-Ohio's ESR Rider Application.

In its ESP Application, AEP-Ohio asked the Commission to approve an enhanced service reliability plan, which included four elements, one of which was an enhanced vegetation management plan ("ESRP").³ In response to AEP-Ohio's proposal, the Commission's Staff ("Staff") and several other parties suggested, instead, that the Commission defer the ESRP to a future distribution rate case.⁴ Ultimately, the Commission generally denied AEP-Ohio's ESRP proposal, but the Commission did permit AEP-Ohio to implement its proposed enhanced vegetation management initiative to support an incremental level of reliability activities.⁵ AEP-Ohio's ESR Application seeks to increase AEP-Ohio's ESR Rider rates for both CSP and OP.

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

AEP-Ohio 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 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 the basis and the enabling vehicle for its Application.⁶

³ See *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.*, Opinion and Order at 30 (March 18, 2009) (hereinafter cited as "AEP-Ohio ESP Proceeding").

⁴ *Id.* at 32.

⁵ *Id.* at 32-33.

⁶ Application at 1-2 (February 11, 2010).

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 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.⁷ The Commission patently lacked jurisdiction to proceed with the ESP case once the 150-day deadline passed on 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 AEP-Ohio's instant Application.⁸ All Commission Orders in the ESP proceeding itself, or any other subsequent proceedings stemming from the ESP proceeding, are illegal.

⁷ *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234 (1999).

⁸ 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 AEP-Ohio'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 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 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 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 challenging the lawfulness and reasonableness of the approved ESP and 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.⁹ 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.¹⁰ The Commission has never substantively addressed this point of law despite IEU-Ohio raising it multiple times during the ESP proceeding and in other AEP-Ohio proceedings.¹¹

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

⁹ See *AEP-Ohio ESP Proceeding*, 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).

¹⁰ *Columbus Southern Power Co. v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298.

¹¹ See *AEP-Ohio 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). See also *2010 Initial Rate Increases Cases*, Entry on Rehearing at 6 (March 24, 2010).

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 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 in the aggregate than the expected results of an MRO.

- 3. The Commission should not make a decision on whether a hearing is necessary until initial and reply comments have been permitted from interested stakeholders.**

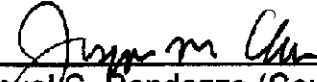
AEP-Ohio requests that the Commission forgo a hearing in this matter and instead only permit the filing of initial and reply comments before approving the Application. AEP-Ohio reasons that a hearing is not necessary inasmuch as the Application is the result of the Commission's Orders in the ESP proceeding 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 that opposes AEP-Ohio's request to decide this matter through a paper hearing. On March 3, 2010, AEP-Ohio filed a Memorandum Contra OCC's Motion for Procedural Ruling; OCC filed its Reply to AEP-Ohio'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. IEU-Ohio respectfully submits that the Commission should establish an initial and reply comment period for stakeholders to express their concerns and objections and then make a decision as to whether a hearing is needed.¹²

¹² IEU-Ohio submits comments with its Motion to Intervene in case the Commission issues an order in this proceeding without a formal comment period, hearing, or other opportunity to provide IEU-Ohio's position on CSP's Application. IEU-Ohio reserves the right to fully participate in any procedural process ordered in this case, including but not limited to the filing of comments or hearing.

Given that the timing of the Application coincides with the July 1, 2010 fuel adjustment clause ("FAC") adjustment, the Commission has ample time to receive comments as well as hold a hearing (should one be necessary) before the planned July 1, 2010 FAC rate adjustment.

Respectfully submitted,



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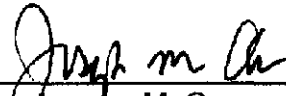
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CERTIFICATE OF SERVICE

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.



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