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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 Rule 4901:1-38-05(A)(5), Ohio)
Administrative Code.)

APPLICATION FOR REHEARING AND
MEMORANDUM IN SUPPORT OF
INDUSTRIAL ENERGY USERS-OHIO

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APPLICATION FOR REHEARING OF INDUSTRIAL ENERGY USERS-OHIO

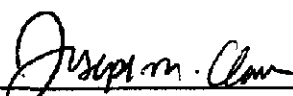
Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing from the March 24, 2010 Finding and Order of the Public Utilities Commission of Ohio ("Commission") in the above-captioned proceeding. As explained in more detail in the attached Memorandum in Support, the Finding and Order approving adjustments for the economic development rider ("EDR") for Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively, "AEP-Ohio" or "Companies") is unlawful and unreasonable for the following reasons:

1. The Finding and Order is unlawful and unreasonable inasmuch as the Commission has no subject matter jurisdiction over the EDR Application. The Commission lost jurisdiction over AEP-Ohio's Electric Security Plan ("ESP") and all proceedings stemming from the ESP, including this proceeding, when the Commission failed to issue an order within 150 days of the filing of AEP-Ohio's ESP Application.
 - a. The Commission's failure to dismiss AEP-Ohio's EDR Application violates Sections 4928.143 and 4928.141, Revised Code.

- b. Basic tenets of statutory construction require the Commission to dismiss the EDR Application and grant IEU-Ohio's requested relief in this case.
 - c. The Commission's determination that IEU-Ohio improperly attempts to re-litigate the 150-day subject matter jurisdiction issue is unlawful and unreasonable.
- 2. The Finding and Order is unlawful and unreasonable inasmuch as the Commission continues to permit AEP-Ohio to take the benefits of the higher rates contained in the ESP, including the EDR, while AEP-Ohio simultaneously challenges the ESP Orders as well as reserves the right to withdraw and terminate its ESP.
 - 3. The Finding and Order is unlawful and unreasonable inasmuch as it continues the illegal exception for the EDR from the maximum percentage increases permitted in the ESP.
 - 4. The Finding and Order is unlawful and unreasonable inasmuch it fails to ensure the carrying cost rate for the EDR is the lowest cost carrying rate.

IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing and grant the relief requested herein.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

On February 8, 2010, AEP-Ohio filed an Application in this docket to adjust its EDR ("EDR Application"), effective with the first billing cycle of April 2010. On March 1, 2010, IEU-Ohio filed a Motion to Intervene and Comments regarding AEP-Ohio's Application and on March 24, 2010, the Commission approved AEP-Ohio's Application over IEU-Ohio's objections. The Commission's Finding and Order is unlawful and unreasonable for the reasons described below.

- 1. The Finding and Order is unlawful and unreasonable inasmuch as the Commission has no subject matter jurisdiction over the EDR Application. The Commission lost jurisdiction over AEP-Ohio's ESP and all proceedings stemming from the ESP, including this proceeding, when the Commission failed to issue an order within 150 days of the filing of AEP-Ohio's ESP Application.**

In its comments, IEU-Ohio established that the Commission was required to dismiss AEP-Ohio's EDR Application inasmuch as the Commission missed the statutory deadline to approve AEP-Ohio's ESP and therefore lost subject matter jurisdiction to issue any Orders in the ESP case. However, in its Finding and Order, the Commission dodged the substantive arguments made by IEU-Ohio. Instead, the Commission rejected IEU-Ohio's claims on the basis that IEU-Ohio unsuccessfully raised its subject

matter jurisdiction argument in its Writ of Prohibition action at the Ohio Supreme Court and explained that IEU-Ohio's claims were an improper re-litigation of the Court's denial of IEU-Ohio's Writ of Prohibition.¹

As a creature of statute, the Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.² For the reasons more thoroughly explained below, the Commission patently lacked jurisdiction to proceed with the ESP case itself as well as any other subsequent proceedings stemming from the ESP proceeding. The Commission must find that its Orders in the ESP case and its Orders in 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 Amended Substitute Senate Bill 221 ("SB 221"). The Commission must therefore *sua sponte* dismiss AEP-Ohio's EDR Application inasmuch as it lacks subject matter jurisdiction over the Application and therefore does not possess the power to approve the Application. As a remedy, SB 221 compels the Commission to 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.

a. The Commission's failure to dismiss AEP-Ohio's EDR Application violates Sections 4928.143 and 4928.141, Revised Code.

AEP-Ohio filed its initial ESP Application with the Commission on July 31, 2008. Under Section 4928.143(C)(1), Revised Code, the Commission was required to issue

¹ Finding and Order at 3; see also *State ex rel. Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-1907.

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

an order on AEP-Ohio's proposed ESP within 150 days, or by December 28, 2008. The Commission eventually issued its Opinion and Order 80 days late on March 18, 2009. AEP-Ohio relied 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 vehicles for this instant EDR Application.³

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." Pursuant to 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.

Under Sections 4928.143 and 4928.141, Revised Code, the Commission lost subject matter jurisdiction over the ESP Application once the 150-day statutory deadline expired. The Commission must reverse its Finding and Order, dismiss AEP-Ohio's EDR Application, and require AEP-Ohio to modify its tariffs to the rates and charges in effect on July 31, 2008 (the then-current rate plan for AEP-Ohio) inasmuch as all Commission Orders in the ESP proceeding itself, or any other subsequent proceedings stemming from the ESP proceeding, are illegal.

³ Application at 1-2 (February 8, 2010).

- b. Basic tenets of statutory construction require the Commission to dismiss the EDR Application and grant IEU-Ohio's requested relief in this case.**

In *Dorrian v. Scioto Conservancy Dist.*, the Ohio Supreme Court ("Court") held that "[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage."⁴ The *Dorrian* Court went on to explain that "Although it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion."⁵ The *Dorrian* Court further pointed out that the word "shall" is interpreted to be mandatory when it is frequently repeated in a statute.⁶ Additionally, in *State ex rel Jones v. Farrar*,⁷ the Court further observed:

Whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its effect and the consequences which would result from construing it one way or another. In each instance, it is necessary to look to the subject matter of the statute and consider the importance of the provision which has been disregarded and the relation of that provision to the general object intended to be secured by the act.

If the provision involved relates to some immaterial matter or directs certain actions with view to the proper, orderly and prompt conduct of public business the provision may be regarded as directory; but, where it directs acts or proceedings to be done in a certain way and indicates that

⁴ *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus.

⁵ *Id.* at 107-108.

⁶ *Id.*; see also *In re Davis*, 84 Ohio St.3d 520, 705 N.E.2d 1219 (1999) (Dissenting Opinion of the late Chief Justice Moyer and Justice Pfeiffer).

⁷ *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472-473, 66 N.E.2d 531 (1946).

a compliance with such provision is essential to the validity of the act or proceeding, or where it requires some antecedent and prerequisite conditions to the exercise of a power, the statute may be regarded as mandatory. Hurford v. City of Omaha, 4 Neb. 336. The character of the statute may be determined by the consideration of (1) the words of the statute, (2) the nature, context and object of the statute and (3) the consequences of the various constructions. See Miller v. State, 3 Ohio St. 475.

The Commission's disregard for the 150-day time limit fits neatly within the *Dorrian* and *Farrar* precedent and a finding that the Commission lost jurisdiction over the ESP case when the 150-day period lapsed.

First, the Commission cannot simply ignore the General Assembly's use of the word "shall." As the *Dorrian* Court denoted, the word "shall" must be considered mandatory unless there is a clear and unequivocal legislative intent that the word "shall" receive a construction other than its ordinary usage. There is no clear or unequivocal legislative intent that the word "shall" in Section 4928.143, Revised Code, as it relates to the 150-day timeframe should be interpreted as "may" so that the clear directive from the General Assembly to the Commission can be treated as a suggestion. And, in Section 4928.143, Revised Code, alone, the word "shall" appears 32 times while the word "may" appears 20 times. The General Assembly's frequent use of the word "shall" and its differentiated use of "shall" and "may" throughout Section 4928.143, Revised Code, shows that the General Assembly understood the difference and impact between these words and the Commission must respect the text of Section 4928.143, Revised Code.

Additionally, the context surrounding the passage of SB 221 demonstrates that the General Assembly intended the 150-day timeframe to be mandatory, not directory. The 150-day requirement was not fixed merely for convenience or orderly conduct of public business; it had a very specific purpose responding to the situation at hand. While SB 221 was being debated by the General Assembly, each of Ohio's four EDUs were operating under rate stabilization plans ("RSP"). The RSPs approved for three of the four Ohio EDUs extended only through the end of calendar year 2008. It was against this timing backdrop that the General Assembly worked to pass SB 221, which became effective on July 31, 2008 or 153 days before expiration of the RSPs. All of the EDUs with RSPs expiring on December 31, 2008 filed their respective ESP Applications on the same day the law became effective in order to have their approved ESP plans in place before January 1, 2009. Thus, the object and purpose, as well as the importance of the 150-day timeframe is evident: the Commission was mandated to follow the General Assembly's timing edict.

The remaining provisions of Section 4928.143, Revised Code, further demonstrate that the General Assembly required and intended for the 150-day time limit to be mandatory.⁸ The 150-day timeframe was essential to the validity of the proceeding. Not only does Section 4928.143(C)(1), Revised Code, contain a 150-day

⁸ While Ohio does not have official legislative history documents, some of the General Assembly's intent can be gleaned from the bill analyses and fiscal notes and local impact statements provided to members of the General Assembly and the public by the Legislative Service Commission ("LSC"). The bill analysis for the as-enacted version of SB 221 notes that "The PUCO must issue an order approving, modifying and approving, or disapproving an initial ESP application not later than 150 days after the application's filing date and within 275 days for later applications." (emphasis added). See http://www.legislature.state.oh.us/analysis.cfm?ID=127_SB_221&ACT=As%20Enrolled&hf=analyses127/08-sb221-127.htm (last accessed on April 23, 2010). Additionally, the fiscal note for as-enacted version of SB 221 states the "PUCO would be required to schedule a hearing on the application, and to issue an order within 150 days of the application filing indicating whether it approves the application, modifies and approves it, or disapproves the application." See <http://www.lbo.state.oh.us/fiscal/fiscalnotes/127ga/SB0221EN.htm> (last accessed on April 23, 2010).

requirement for the initial ESP Application, it also sets a 275-day timeframe on Commission action on subsequent ESP plans. The inclusion of differing timing requirements demonstrates that the General Assembly was very cognizant of the timing necessary for the initial ESP cases.⁹ Indeed, the Commission's own Merit Brief in IEU-Ohio's pending appeal of AEP-Ohio's ESP admits the Commission was "compelled to act within a compressed time to adopt a first authorized rate plan, the only time it would adopt such a plan for the Companies."¹⁰

Further, the General Assembly provided the Commission in Section 4928.141(A), Revised Code, with the rates that should be charged if it could not authorize an ESP within the 150-day timeframe.¹¹ On the 151st day after the ESP Application was filed, the Commission was required to comply with the statutory default provision of Section 4928.141(A), Revised Code. Section 4928.141(A), Revised Code, mandates that "... 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, 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 EDU (i.e., AEP-Ohio's RSP) must continue until a standard service offer ("SSO") is first timely and lawfully authorized under Section 4928.143, Revised Code. This provision provides customers the continuity, predictability, and stability that were touted by the Governor and members of the

⁹ See also Section 4909.42, Revised Code, for an additional example of the General Assembly obligating the Commission to act within a stated period of time.

¹⁰ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022, Commission Merit Brief at 15 (March 5, 2010).

¹¹ Section 4928.141(A), Revised Code.

General Assembly as the main virtues of the legislation when SB 221 was signed into law.¹²

The Commission must dismiss the EDR Application and grant the relief requested by IEU-Ohio inasmuch as the Court's precedent dictates that the use of the word "shall" in Section 4928.143, Revised Code, required the Commission to act within 150 days on AEP-Ohio's ESP Application and the Commission's failure to do so divested the Commission of subject matter jurisdiction over the ESP case as well as all proceedings stemming from the illegal and unreasonable Orders in the ESP case.

c. The Commission's determination that IEU-Ohio improperly attempts to re-litigate the 150-day subject matter jurisdiction issue is unlawful and unreasonable.

The Commission's determination that IEU-Ohio's arguments should be rejected as an improper attempt to re-litigate the Writ of Prohibition dismissed by the Court is illegal and unreasonable. First, the Court's dismissal of the Writ of Prohibition only stands for the proposition that the Court determined that IEU-Ohio did not meet the burden of proof associated with the extraordinary remedy of the Writ of Prohibition. The Court's determination cannot be considered a determination of the merits of IEU-Ohio's 150-day argument.

Further, the 150-day argument must be freshly considered in this specific case regardless of the Writ of Prohibition case.¹³ As IEU-Ohio demonstrated previously,

¹² See Section 4928.143(D), Revised Code; Section 4928.144, Revised Code. In his press release accompanying the signing of SB 221, Governor Strickland stated "This bill, Senate Bill 221, will ensure predictability of affordable energy prices and maintain state controls necessary to protect Ohio's jobs and businesses." <http://www.governor.ohio.gov/Default.aspx?tabid=622> (last accessed on April 23, 2010).

¹³ The Commission's Finding and Order completely ignores the fact that this issue is still very much alive and being considered by the Court in IEU-Ohio's pending appeal of AEP-Ohio's ESP as well as the fact that the Court denied an AEP-Ohio Motion to Strike this argument from IEU-Ohio's Notice of Appeal in that case.

subject matter jurisdiction is so fundamental to a court's or administrative agency's authority that it can never be waived or forfeited.¹⁴ Further, a court has an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.¹⁵ "[D]efeats in subject-matter jurisdiction require correction regardless of whether the error was raised."¹⁶ Additionally, issues of subject matter jurisdiction can be raised at any time, including for the first time on appeal at any level of the appellate process.¹⁷

The Commission's determination that IEU-Ohio improperly attempts to re-litigate the Writ of Prohibition proceeding misinterprets the Court's decision to dismiss IEU-Ohio's Writ of Prohibition. Further, the Commission's determination illegally ignores Ohio Supreme Court precedent dictating that issues of subject matter jurisdiction arguments must be considered at any stage of any proceeding by the decision-maker. The Commission is required to address IEU-Ohio's subject matter jurisdiction claim in this proceeding regardless of the Writ of Prohibition case. The Commission must find that the Commission lost subject matter jurisdiction over the ESP Application when it missed the 150-day statutory deadline and grant the relief requested by IEU-Ohio.

¹⁴ See *IEU-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022, Memorandum in Opposition of Industrial Energy Users-Ohio to Motion to Strike by Movants for Intervention as Appellees Columbus Southern Power Company and Ohio Power Company (January 15, 2010). See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235 (2006). See also *State ex rel. Sugardale Foods, Inc. v. Indus. Comm.*, 90 Ohio St.3d 383, 385-386, 738 N.E.2d 1238 (2000).

¹⁵ *Arbaugh*, 546 U.S. at 516.

¹⁶ *Polster v. Webb*, 160 Ohio App.3d 511, 2005-Ohio-1857 at ¶22 (Ohio App. 8 Dist.), quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002).

¹⁷ *Int'l Lottery, Inc. v. Kerouac*, 102 Ohio App. 3d 660, 670, 657 N.E.2d 320 (1st Dist. Ham. Cty. 1995), citing *Jenkins v. Keller*, 6 Ohio St.2d 122, 126, 216 N.E.2d 379 (1966). See also *Kontrick v. Ryan*, 440 U.S. 443, 455, 124 S. Ct. 906 (2004).

2. **The Finding and Order is unlawful and unreasonable inasmuch as the Commission continues to permit AEP-Ohio to take the benefits of the higher rates contained in the ESP, including the EDR, while AEP-Ohio simultaneously challenges the ESP Orders as well as reserves the right to withdraw and terminate its ESP.**

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 preserving the right to withdraw and terminate the ESP as well as filing its own challenges to the lawfulness and reasonableness of the very ESP orders that authorize higher rates for the EDU.

As IEU-Ohio 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.¹⁸ 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.¹⁹ The Commission has never substantively addressed this point of law despite IEU-Ohio raising it multiple times during the ESP proceeding and elsewhere.²⁰

In its Finding and Order, the Commission determined (again) that this issue is not ripe for review inasmuch as AEP-Ohio has not filed a notice of intent to withdraw its ESP Application.²¹ The Commission also found that IEU-Ohio improperly attempts to re-litigate this issue as it was resolved in the AEP-Ohio ESP Proceeding. The Commission is wrong and should revise its Finding and Order on rehearing. IEU-Ohio raised a valid legal issue, the resolution of which would not be premature and which would have an instant and material effect on this case. IEU-Ohio's claim is merely asking the Commission to determine, now, that AEP-Ohio cannot take the benefits of the very Orders that it claimed were illegal in its Applications for Rehearing and that it

¹⁸ 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.*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 9-12 (August 17, 2009) (hereinafter "*AEP-Ohio ESP Proceeding*"). See also *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (February 5, 2010).

¹⁹ *Columbus Southern Power Co. v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298.

²⁰ Finding and Order at 3-4; see also *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 in the AEP-Ohio ESP Proceeding, 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 in the AEP-Ohio ESP Proceeding, 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). 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.

²¹ Finding and Order at 3.

still claims are illegal in its pending appeal to the Court. AEP-Ohio cannot withhold its decision on withdrawal and termination, contest the lawfulness of the Commission's Orders in the AEP-Ohio ESP Proceeding itself AND, at the same time, treat the Orders modifying its ESP as lawful for purposes of billing and collecting rate increases that can only be lawful if the Orders are lawful. If the approved ESP was accepted by AEP-Ohio and then the Commission on rehearing changed the ESP in ways that AEP-Ohio did not agree with, then AEP-Ohio could exercise its veto power, but AEP-Ohio cannot be one of those parties asking for rehearing or appealing the Commission's Orders.

Finally, 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 and approve 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 challenging the Commission's decisions and 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 the instant Application is proposed is in fact more favorable in the aggregate than the expected results of an MRO.

Ohio law mandates 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 violates Sections 4928.141 and 4928.143, Revised Code, as well as continues 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 Finding and Order is unlawful and unreasonable inasmuch as it continues the illegal exception for the EDR from the maximum percentage increases permitted in the ESP.

The Commission's Entry on Rehearing in the AEP-Ohio ESP Proceeding 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."²² 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

²² *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 9 (July 23, 2009).

include the EE/PDR rider or future distribution base rates established pursuant to a separate proceeding."²³

In its Finding and Order in Case No. 09-1095, the Commission (for the first time) found that the 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.²⁴ In its Entry on Rehearing in Case No. 09-1095, the Commission declined IEU-Ohio's request to reverse course and find that the EDR is subject to the maximum rate increase limitations. IEU-Ohio again raised this issue in the instant proceeding and the Commission reaffirmed its previous holdings in Case No. 09-1095 in its Finding and Order.²⁵

The Commission's ESP precedent is completely devoid of any indication that the 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 in the AEP-Ohio ESP Proceeding) was not exhaustive. The Commission's Entry on Rehearing in the AEP-Ohio ESP Proceeding made it clear that only the energy efficiency/peak demand reduction ("EE/PDR") Rider and the Transmission Cost Recovery Rider ("TCRR), as well as any increase from a distribution rate case, are exempt from the maximum rate increase limitations. The Finding and Order in this case wrongly reaffirms and furthers the illegal Orders in Case No. 09-1095.

²³ *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 31 (July 23, 2009).

²⁴ *Case No. 09-1095*, Finding and Order at 10.

²⁵ Finding and Order at 4.

Approval of the Application continues and worsens (in the case of OP customers) the additional illegal increases for AEP-Ohio customers at a most precarious time for Ohio's economy.²⁶ In the ESP Opinion and Order, the Commission determined that customers could not absorb the annual 15% increases proposed by AEP-Ohio.²⁷ However, the Commission's unlawful and unreasonable decision in Case No. 09-1095, as affirmed in the Commission's Finding and Order in this case, placed some larger customers on the same path the Commission found unacceptable only 13 months ago. The fuel adjustment clause ("FAC") and non-FAC maximum revenue adjustments approved by the Commission in January 2010, combined with the EDR increases approved in Case No. 09-1095 and this proceeding, as well as AEP-Ohio's proposed increase to its EE/PDR Rider, would raise some larger customers' bills by over 10% for 2010.²⁸ Further, this percentage increase does not include any increase associated with the annual update of AEP-Ohio's TCRR or in a distribution rate case for AEP-Ohio.²⁹ Thus, the Commission's Finding and Order only brings us even closer (at least for OP customers) to the condition that the Commission found untenable when it approved AEP-Ohio's ESP just over a year ago.

²⁶ Ohio's unemployment rate jumped again to 11.0% percent in March 2010. See <http://ifs.ohio.gov/releases/unemp/201004/UnempPressRelease.asp> (last accessed on April 23, 2010).

²⁷ *AEP-Ohio 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."). (March 18, 2009). The Commission noted in a footnote that its belief was confirmed by various letters filed in the AEP-Ohio ESP docket.

²⁸ 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).

²⁹ AEP-Ohio filed its TCRR update on April 14, 2010 and proposes significant increases for GS-4 customers. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, Case No. 10-477-EL-RDR, Application at Schedule B-2 (April 14, 2010).

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

4. The Finding and Order is unlawful and unreasonable inasmuch it fails to ensure the carrying cost rate for the EDR is the lowest cost carrying rate.

In Case No. 09-1095, the Commission approved a carrying cost rate for the EDR 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.³⁰ The Commission rejected IEU-Ohio's points regarding the EDR carrying costs in its Orders in Case No. 09-1095. In accordance with the Case No. 09-1095 Finding and Order, AEP-Ohio's Application in this case proposed to continue to use a weighted average cost of long-term debt as the carrying cost rate.³¹ In this proceeding, the Commission reaffirmed its previous determination in Case No. 09-1095 over IEU-Ohio's continued objections.³²

The Commission's repeated failure to at least inquire as to whether a lower carrying cost rate could be utilized for the EDR is unlawful and unreasonable. The "current economic climate"³³ previously acknowledged by the Commission during the AEP-Ohio ESP proceeding has not improved but has in fact worsened and customers of all shapes and sizes need every break they can get on their bills. Customers deserve at least some analysis or other review by the Commission to demonstrate that the

³⁰ Case No. 09-1095, Finding and Order at 9 (January 7, 2010).

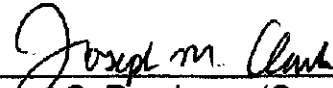
³¹ Application at Schedules 4-9 (February 8, 2010).

³² Finding and Order at 4.

³³ AEP-Ohio ESP Proceeding, Opinion and Order at 22. Ohio's unemployment rate in March 2009, the month that the Commission issued the Opinion and Order in the ESP case, was 9.7% and now stands at 11%.

Commission is attempting to utilize the tools within its toolbox to help customers mitigate the impacts of escalating electricity prices under AEP-Ohio's approved ESP.

Respectfully submitted,



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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 23rd day of April 2010, via hand-delivery, electronic transmission or first class U.S. mail, postage prepaid.



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**ON BEHALF OF COLUMBUS SOUTHERN
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