

FILE

IN THE SUPREME COURT OF OHIO

10-1073

In the Matter of the Application of Columbus Southern : Case No. 2010-_____
Power Company and Ohio Power Company to Adjust :
Their Economic Development Cost Recovery Rider : Appeal from the Public
Pursuant to Rule 4901:1-38-08(A)(5), Ohio : Utilities Commission of Ohio
Administrative Code. :
: Public Utilities
: Commission of Ohio
: Case No. 10-154-EL-RDR

NOTICE OF APPEAL OF
APPELLANT INDUSTRIAL ENERGY USERS-OHIO

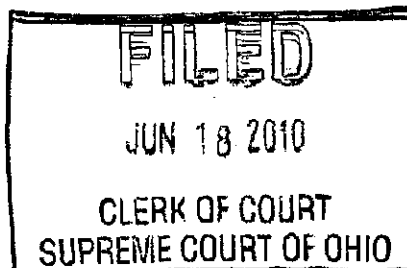
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NOTICE OF APPEAL OF
APPELLANT INDUSTRIAL ENERGY USERS-OHIO

Appellant, Industrial Energy Users-Ohio ("IEU-Ohio" or "Appellant"), hereby gives its notice of appeal, pursuant to R.C. 4903.11, R.C. 4903.13, and Supreme Court Rule of Practice 2, to the Supreme Court of Ohio and Appellee, from a March 24, 2010 Finding and Order (Attachment A) and a May 19, 2010 Entry on Rehearing (Attachment B) of the Public Utilities Commission of Ohio ("Commission or PUCO") in PUCO Case No. 10-154-EL-RDR.

Appellant was and is a party of record in PUCO Case No. 10-154-EL-RDR and timely filed its Application for Rehearing of Appellee's March 24, 2010 Finding and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues on appeal herein by the Appellee's Entry on Rehearing dated May 19, 2010.

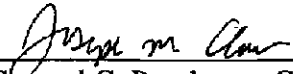
The Appellee's Finding and Order and Entry on Rehearing approving the Application of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP") (collectively referred to as the "Companies" or "AEP-Ohio") is unlawful and unreasonable. Specifically, the Appellee's Finding and Order and Entry on Rehearing are unlawful and unreasonable in the following respects:

- A. The Finding and Order and Entry on Rehearing are unlawful and unreasonable inasmuch as the Commission has no subject matter jurisdiction over PUCO Case No 10-154-EL-RDR. The Commission lost jurisdiction over AEP-Ohio's electric security plan ("ESP") and all proceedings stemming from the ESP, including PUCO Case No. 10-154-EL-RDR, when the Commission failed to issue an order within 150 days of the filing of AEP-Ohio's ESP Application.
- B. The Finding and Order and Entry on Rehearing are unlawful and unreasonable inasmuch as the Commission continues to permit AEP-Ohio to take the benefits of the higher rates contained in the ESP while AEP-Ohio simultaneously challenges the ESP Orders as well as reserves the right to withdraw and terminate its ESP.

- C. The Finding and Order and Entry on Rehearing are unlawful and unreasonable inasmuch as they continue the illegal exception for the economic development rider ("EDR") from the maximum percentage increases permitted in the ESP.
- D. The Finding and Order and Entry on Rehearing are unlawful and unreasonable inasmuch as they fail to ensure the carrying cost rate for the EDR is the lowest cost carrying rate.

WHEREFORE, Appellant respectfully submits that Appellee's March 24, 2010 Finding and Order and May 19, 2010 Entry on Rehearing are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully Submitted,

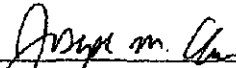


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**COUNSEL FOR APPELLANT,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Notice of Appeal of Appellant Industrial Energy Users-Ohio* was sent by ordinary U.S. mail, postage prepaid, or hand-delivered to all parties to the proceeding before the Public Utilities Commission of Ohio, listed below, and pursuant to Section 4903.13 of the Ohio Revised Code on June 18, 2010.



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COMMISSION OF OHIO**

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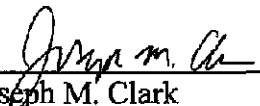
ATTORNEY EXAMINERS

Alan R. Schriber, Chairman
Valerie A. Lemmie, Commissioner
Paul A. Centolella, Commissioner
Cheryl Roberto, Commissioner
Steven Lesser, Commissioner
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

**ON BEHALF OF THE PUBLIC UTILITIES
COMMISSION OF OHIO**

CERTIFICATE OF FILING

I hereby certify that a *Notice of Appeal of Appellant Industrial Energy Users-Ohio* has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code, on June 18, 2010.



Joseph M. Clark
Counsel for Appellant,
Industrial Energy Users-Ohio

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 4901:1-38-08(A)(5),)
Ohio Administrative Code.)

FINDING AND ORDER

The Commission finds:

- (1) On February 8, 2010, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, AEP-Ohio or the Companies) filed an application to adjust their economic development cost recovery rider (EDR) rates. The Companies state that in accordance with the Commission's decision in AEP-Ohio's electric security plan (ESP) cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, the EDR rate for each company was initially set at 0.00 percent.¹ AEP-Ohio's EDR rates were subsequently revised to 10.52701 percent for CSP and 8.33091 percent for OP pursuant to the Commission's order issued on January 7, 2010 in *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, Case No. 09-1095-EL-RDR (09-1095), Order (January 7, 2010).
- (2) By Rules 4901:1-38-08(A)(5) and (C), Ohio Administrative Code (O.A.C.), the Commission requires that the electric utilities' EDR rates be updated and reconciled semiannually and permits affected persons to file a motion to intervene and comments to the application within 20 days of the date that the application is filed. Further, in 09-1095, the Commission directed AEP-Ohio to file its application to adjust its EDR rates to allow the Commission sufficient time to review the filing and perform due diligence with regard to the application in order to facilitate implementing the EDR rates with the first billing cycle of April and October.²

¹ *In re Columbus Southern Power Company and Ohio Power Company*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009) and Entry on Rehearing (July 23, 2009) (ESP cases).

² *In re AEP-Ohio*, Case No. 09-1095-EL-RDR, Finding and Order at 11-12 (January 7, 2010).

- (3) In accordance with the aforementioned Commission directives and Rule 4901:1-38-08(A)(5), O.A.C., AEP-Ohio filed this application to reduce CSP's EDR rate by 0.00246 percent to 10.52455 percent and to increase OP's EDR rate by 0.03602 percent to 8.36693 percent. According to AEP-Ohio, utilizing the same methodology approved by the Commission in 09-1095, the proposed adjustments to the EDR rates reflect a reduction in the recovery due to an over-estimation of recoverable delta revenues for CSP of \$8,017, and recovery of an under-estimation of recoverable delta revenues for OP of \$113,504 for the period September 2009 to December 2009 based on the actual delta revenues associated with the Companies' unique arrangement with Ormet Primary Aluminum Corporation (Ormet) and CSP's reasonable arrangement with Eramet Marietta, Inc. (Eramet). As a part of the application, AEP-Ohio provided the projected bill impact of the proposed EDR rider adjustments on all CSP and OP customers, by customer class.

In its application, AEP-Ohio requests that, at the conclusion of the 20-day comment period, the Commission find the Companies' EDR rates just and reasonable, without the need for a hearing, and approve the application to revise its EDR rates to be effective with the first billing cycle of April 2010.

- (4) On March 1, 2010, the Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene and comments. In its motion to intervene, IEU-Ohio asserts that AEP-Ohio's application may result in increases to the rates charged to IEU-Ohio members for electric service, and impact the quality of service that IEU-Ohio members receive from AEP-Ohio. As such, IEU-Ohio asserts that it has a direct, real, and substantial interest in the issues raised and the matters involved in this EDR proceeding. AEP Ohio stated that it did not oppose IEU-Ohio's motion to intervene.
- (5) The Commission finds that IEU-Ohio has set forth reasonable grounds for intervention and, therefore, its motion to intervene should be granted.
- (6) In its comments, IEU-Ohio raises four issues to which AEP-Ohio filed responses on March 8, 2010. First, IEU-Ohio claims that the Commission lacks subject matter jurisdiction over AEP-Ohio's EDR application. IEU-Ohio explains that the Commission did not issue its opinion and order on AEP-Ohio's ESP application until March 18, 2009, more than the 150 days after the application was filed. Thus, IEU-Ohio reasons that the Commission lost subject matter

jurisdiction over AEP-Ohio's ESP application when it did not issue an order within the 150-day timeframe.

- (7) Next, IEU-Ohio argues that AEP-Ohio cannot take the benefits of the Commission's ESP Order and simultaneously reserve judgment on whether to withdraw and terminate its ESP. IEU-Ohio opines that even if the Commission concludes that it has subject matter jurisdiction over the EDR application, the Commission must dismiss the EDR application unless and until AEP-Ohio accepts the ESP, as modified by the Commission, and withdraws its appeal of the ESP at the Ohio Supreme Court.
- (8) AEP-Ohio responds that IEU-Ohio failed to raise either of these arguments in regards to the Companies' ESP cases or to the previous EDR proceeding in which the current EDR rates were established, 09-1095. For this reason, AEP-Ohio contends that IEU-Ohio has waived these objections. Nonetheless, AEP-Ohio notes that the Commission, in its Merit Brief to the Supreme Court on the ESP cases, argues that a statute providing a time for the performance of an official duty is directory and not an expressed intent to restrict the Commission's jurisdiction.
- (9) As we state in the entry on rehearing issued today in 09-1095, the Commission finds that IEU-Ohio unsuccessfully raised the subject matter jurisdiction argument in its Writ of Prohibition action (Case No. 2009-1907) before the Supreme Court of Ohio. We find IEU-Ohio's attempt to raise this argument in this case to be an improper attempt to relitigate the Court's decision on this issue.
- (10) We also find IEU-Ohio's assertion that the Commission must prohibit AEP-Ohio from accepting the benefits of the rates approved in the ESP while simultaneously preserving its right to withdraw and terminate the modified and approved ESP, to be without merit. The Commission, in our entry on rehearing to the ESP cases, declined to address this argument noting that the Companies had not filed a notice of intent to withdraw its ESP and, therefore, it is unnecessary to address the issue. *In re AEP-Ohio*, Case No. 08-917-EL-SSO, et al., Second Entry on Rehearing at 7 (November 4, 2009). The Commission finds that IEU-Ohio's attempt to raise this argument in the context of the current proceeding is an attempt to relitigate the Commission's decision on this issue. The Commission affirms its decision in the ESP case, as also stated in the entry on rehearing issued today in 09-1095, this

issue is not ripe for review, given that AEP-Ohio has not withdrawn or attempted to withdraw its ESP.

- (11) Next, IEU-Ohio argues that it is unreasonable and unlawful for the EDR rates not to be subject to the maximum rate increase cap imposed in the approved ESP. AEP-Ohio points out that IEU-Ohio previously raised the same argument in 09-1095 and the Commission confirmed that the EDR is not subject to the rate cap set forth in the ESP.
- (12) The Commission affirms its decision that the EDR is not subject to the percentage increase cap set forth in the approved ESP, as previously explained in 09-1095, and as affirmed in the entry on rehearing issued this same day in 09-1095.
- (13) Finally, IEU-Ohio reiterates its claim that the carrying cost rate should not be each company's weighted average cost of long-term debt. IEU-Ohio asserts that the Commission should explore whether a lower cost carrying rate methodology would be more appropriate. AEP-Ohio states that this argument has previously been raised and rejected by the Commission. AEP-Ohio argues that IEU-Ohio has not presented any new arguments concerning this issue which would warrant any conclusion other than that already reached by the Commission.
- (14) As AEP-Ohio notes, the Commission has previously considered the arguments of IEU-Ohio regarding the carrying cost rate. The Commission affirms its decision that the long-term debt rate is the appropriate mechanism for calculating carrying charges, as previously explained in 09-1095, and affirmed in the entry on rehearing issued this same day in 09-1095.
- (15) The Commission finds that AEP-Ohio's application to adjust its EDR rates to 10.52455 percent for CSP and to 8.36693 percent for OP, including POLR credits, is reasonable. As we previously recognized in 09-1095, we also find that the levelized approach proposed by AEP-Ohio for the collection of EDR costs is a just and reasonable means of collection, as it will operate to avoid the extreme swings in EDR costs linked to the structure of the Ormet unique arrangement. We find it reasonable for AEP-Ohio to accrue carrying costs on the under-recovery of delta revenues due to levelized rates and, to the extent that there is an over-recovery of delta revenues, customers shall be afforded symmetrical treatment. Therefore, if the over-recovery of delta revenues occurs, AEP-Ohio

shall credit customers with the value of the equivalent carrying costs, calculated according to the weighted average costs of long-term debt.

- (16) Upon review of the application and the comments filed by IEU-Ohio, the Commission finds that AEP-Ohio's application to adjust its EDR rates does not appear to be unjust or unreasonable, and should be approved. Therefore, the Commission finds that it is unnecessary to hold a hearing in this matter. The Commission additionally authorizes AEP-Ohio to implement its adjusted EDR rates of 10.52455 percent for CSP and 8.36693 percent for OP, effective with bills rendered in the first billing cycle of April 2010.

It is, therefore,

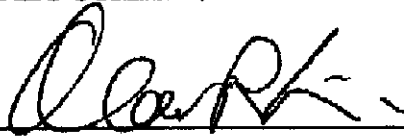
ORDERED, That IEU-Ohio's motion to intervene be granted. It is, further,

ORDERED, That AEP-Ohio's application to adjust its EDR rates be approved as discussed herein. It is, further,

ORDERED, That AEP-Ohio implement its adjusted EDR rates of 10.52455 percent for CSP and 8.36693 percent for OP, effective with bills rendered in the first billing cycle of April 2010. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO



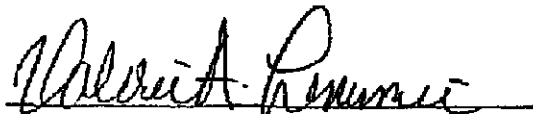
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

RLH/GNS/dah

Entered in the Journal

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Renee J. Jenkins
Secretary

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 4901:1-38-08(A)(5),)
Ohio Administrative Code.)

ENTRY ON REHEARING

The Commission finds:

- (1) On February 8, 2010, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, AEP-Ohio or the Companies) filed an application to adjust their economic development cost recovery rider (EDR) rates. In accordance with the Commission's decision in AEP-Ohio's electric security plan (ESP) cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, the EDR rate for each company was initially set at 0.00 percent.¹ AEP-Ohio's EDR rates were subsequently revised to 10.52701 percent for CSP and 8.33091 percent for OP, pursuant to the Commission's order issued in In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates, Case No. 09-1095-EL-RDR, Finding and Order (January 7, 2010) (09-1095).
- (2) Paragraphs (A)(5) and (C) of Rule 4901:1-38-08, Ohio Administrative Code (O.A.C.), require that the electric utilities' EDR rates be updated and reconciled semiannually and permit any affected person to file a motion to intervene and comments to the application within 20 days of the date that the application is filed. In 09-1095, the Commission directed AEP-Ohio to file its application to adjust its EDR

¹ In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, and In the Matter of the Application of Ohio Power Company for Approval of an Electric Security Plan; and an Amendment to its Corporate Separation Plan, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009) and Entry on Rehearing (July 23, 2009) (ESP cases).

rates in such a way as to allow the Commission sufficient time to review the filing and perform due diligence in order to facilitate implementation of the EDR rates with the first billing cycles of April and October.²

- (3) In accordance with the aforementioned Commission directives and Rule 4901:1-38-08(A)(5), O.A.C., on February 8, 2010, AEP-Ohio filed an application in this case to reduce CSP's EDR rate by 0.00246 percent to 10.52455 percent, and to increase OP's EDR rate by 0.03602 percent to 8.36693 percent. According to AEP-Ohio, the proposed adjustments to the EDR rates, which utilized the same methodology approved by the Commission in 09-1095, reflect a reduction in recovery due to an over-estimation of recoverable delta revenues for CSP of \$8,017, and recovery of an under-estimation of recoverable delta revenues for OP of \$113,504 for the period from September 2009 to December 2009, based on the actual delta revenues associated with the Companies' unique arrangement with Ormet Primary Aluminum Corporation and CSP's reasonable arrangement with Eramet Marietta, Inc. As a part of its application, AEP-Ohio provided the projected bill impacts of the proposed EDR rider adjustments on CSP and OP customers, by customer class.
- (4) On March 1, 2010, the Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene and comments. The Commission subsequently granted IEU-Ohio's intervention on March 24, 2010. In its comments, IEU-Ohio raised four distinct issues, to which AEP-Ohio responded to on March 8, 2010.
- (5) On March 24, 2010, the Commission issued a Finding and Order (March 24 Order) approving AEP-Ohio's application. In the March 24 Order, the Commission addressed, with specificity, the four issues IEU-Ohio raised in its March 1, 2010 comments, denying each of IEU-Ohio's arguments.
- (6) On April 23, 2010, IEU-Ohio filed an application for rehearing, asserting the following assignments of error:
 - (a) The March 24 Order is unlawful and unreasonable inasmuch as the Commission has no subject matter jurisdiction over the EDR application. The

² 09-1095 at 11-12.

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.

1. The Commission's failure to dismiss AEP-Ohio's EDR application violates Sections 4928.143 and 4928.141, Revised Code.
 2. Basic tenets of statutory construction require the Commission to dismiss the EDR application and grant IEU-Ohio's requested relief in this case.
 3. The Commission's determination that IEU-Ohio improperly attempts to relitigate the 150-day subject matter jurisdiction issue is unlawful and unreasonable.
- (b) The March 24 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 and reserves the right to withdraw and terminate its ESP.
- (c) The March 24 Order is unlawful and unreasonable inasmuch as it continues the illegal exception for the EDR from the maximum percentage increases permitted in the ESP.
- (d) The March 24 Order is unlawful and unreasonable inasmuch as it fails to ensure the carrying cost rate for the EDR is the lowest cost rate.
- (7) The Commission addressed each of IEU-Ohio's assignments of error in its March 24 Order. Therefore, the Commission finds that IEU-Ohio has raised no new arguments to support its application for rehearing, and, thus, the application for rehearing should be denied. However, the Commission will provide further explanation as to why IEU-Ohio's first ground for rehearing is without merit.

The Commission did not lose jurisdiction over the ESP application after 150 days. The 150-day period specified in Section 4928.143(C)(1), Revised Code, does not limit the Commission's jurisdiction. The general rule is that "a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Hardy v. Delaware Cty. Bd. Of Revision*, 106 Ohio St. 3d 359, 363, 835 N.E.2d 348, 353 (2005), quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 66 N.E.2d 531, ¶ 3 of the syllabus (1946). As the Court has explained:

Statutes which relate to the manner or time in which power or jurisdiction vested in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, may be construed to be directory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated.

Schick v. Cincinnati, 116 Ohio St. 16, 155 N.E. 555, ¶ 1 of the syllabus (1927).

The Court has repeatedly held that a tribunal does not lose jurisdiction for failing to act within a prescribed time absent an express intent to restrict jurisdiction for untimeliness. *See, e.g. In re Davis*, 84 Ohio St. 3d 520, 705 N.E.2d 1219 (1999); *State v. Bellman*, 86 Ohio St. 3d 208, 714 N.E.2d 381 (1999). There is no such expression of intent in Section 4928.143(C)(1), Revised Code, or elsewhere in S.B. 221. The statute expresses no purpose for the requirement that an application be approved within 150 days. Absent a discernable purpose in the text of the statute, the time for performance is viewed as directory, not mandatory, *State ex rel. Smith v. Barnell*, 109 Ohio St. 246, 142 N.E.2d 611 (1924). The Commission, thus, retained jurisdiction to act on the ESP application.

It is, therefore,

ORDERED, That IEU-Ohio's application for rehearing be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in this proceeding.

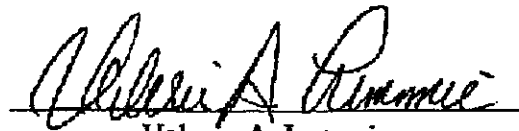
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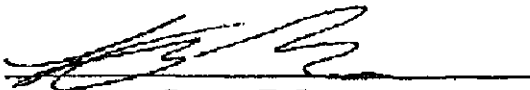
Alan R. Schriber, Chairman



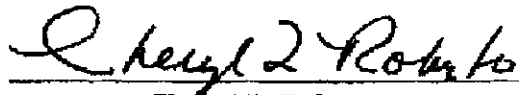
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RLH/GNS/sc

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Renee J. Jenkins
Secretary