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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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 No. 09-1089-EL-POR

In the Matter of the Application of Ohio)
Power Company for Approval of its)
Program Portfolio Plan and Request for)
Expedited Consideration.)

Case No. 09-1090-EL-POR

REPLY OF INDUSTRIAL ENERGY USERS-OHIO TO
AEP-OHIO'S MEMO IN PARTIAL OPPOSITION

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July 6, 2010

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**REPLY OF INDUSTRIAL ENERGY USERS-OHIO TO
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I. INTRODUCTION

On November 12, 2009, Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP", collectively "AEP-Ohio") submitted an energy efficiency and peak demand reduction ("EE/PDR") portfolio plan combined for both companies by filing a single application for approval of a single portfolio plan. Although there is only one application and only one proceeding, there are two case numbers applied to the single portfolio plan. On June 14, 2010, Industrial Energy Users-Ohio ("IEU-Ohio") filed its Application for Rehearing of the Opinion and Order of the Public Utilities Commission of Ohio ("Commission") on the EE/PDR portfolio plan. On June 23, 2010, AEP-Ohio filed "AEP Ohio's Memo in Opposition to Application for Rehearing of Industrial Energy Users-Ohio" (hereinafter "Memo Contra"), which objected to IEU-Ohio's electronic filing of its Application for Rehearing, among other things. On June 24, 2010, IEU-Ohio filed

a Motion for Leave to Reply, Memorandum in Support and Reply to AEP-Ohio's objection to electronic filing ("Motion for Leave"). On June 29, 2010, AEP-Ohio filed "AEP Ohio's Memo in Partial Opposition to Motion for Leave of Industrial Energy Users-Ohio" ("Memo in Partial Opposition"). Pursuant to Rule 4901-1-12(B)(2), Ohio Administrative Code ("O.A.C."), IEU-Ohio respectfully submits this reply to AEP-Ohio's Memo in Partial Opposition for the reasons set forth below.

II. REPLY

AEP-Ohio objected only to IEU-Ohio's filing in Case No. 09-1090-EL-POR. AEP-Ohio also acknowledged that it "believes this matter is an issue of first impression for the Commission to directly and clearly address." Memo in Partial Opposition at 3. Thus, clearly and even at AEP-Ohio's admission, at best, this is not a clear cut case in which the Commission should penalize IEU-Ohio by rejecting its Application for Rehearing as originally suggested by AEP-Ohio.

Moreover, such a conclusion is contrary to the plain letter of the Commission's rules. Specifically, in arguing that electronic filing of applications for rehearing is prohibited, AEP-Ohio reads the words "hand-delivered" into Rule 4901-1-02(A), O.A.C., where they do not exist. As referenced by AEP-Ohio, Rule 4901-1-02(A), O.A.C., states that all pleadings "shall be mailed or delivered" to the Commission's docketing division. It does not require "hand-delivery" and does not prohibit "electronic-delivery."

In fact, part B of the same rule specifically identifies the delivery methods that are prohibited. For applications for rehearing, only fax delivery is prohibited. Rule 4901-1-

02(B)(1)(b), O.A.C. As AEP-Ohio has argued in other cases,¹ the legislative canon *expressio unius est exclusio alterius* applies; meaning the inclusion of one thing implies exclusion of the other. See *Crawford-Cole v. Lucas Co. Dept. of Jobs & Family Services*, (2009), 121 Ohio St.3d 560, 566; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163,168 (1993); *Burgin v. Forbes*, 293 Ky. 456 (1943), 169 S.W.2d 321, 325 (1948) ("*Expressio unius est exclusio alterius*"). In other words, where the Commission's rules list several specific delivery prohibitions, the reasonable implication is that other delivery methods are permitted. This deliberate language also confirms IEU-Ohio's reading of the rules and undermines AEP-Ohio's strained interpretation.

Even if electronic delivery of applications for rehearing was prohibited (which it is not), Rule 4901-1-38, O.A.C., permits the Commission to waive "any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case" upon its own motion or for good cause shown. Assuming for the sake of argument that electronic delivery is prohibited (which it is not), IEU-Ohio believes that there is good cause for the Commission to waive any requirement in this case that hand delivery of IEU-Ohio's Application for Rehearing was required, particularly since AEP-Ohio has acknowledged that this may be a case of first impression and AEP-Ohio was not harmed or prejudiced in any way by electronic delivery.

¹ See, for example, *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case 09-119-EL-AEC, Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing at 7 (August 14, 2009); appealed in Case No. 2009-2060, Appellant's Brief at 17.

III. CONCLUSION

For the reasons set forth above, IEU-Ohio respectfully requests that the Commission find that IEU-Ohio's Application for Rehearing was properly filed. In the alternative, IEU-Ohio requests that the Commission waive any Commission requirement that applications for rehearing not be electronically filed and proceed on the merits of IEU-Ohio's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply of Industrial Energy Users-Ohio to AEP-Ohio's Memo in Partial Opposition* was served upon the following parties of record this 6th day of July, 2010, electronic service, via first class mail, postage prepaid.

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