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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2009 Annual Filing of)
Columbus Southern Power Company and)
Ohio Power Company Required by Rule) Case No. 10-1261-EL-UNC
4901:1-35-10, Ohio Administrative Code.)

In the Matter of the Fuel Adjustment)
Clauses for Columbus Southern Power) Case No. 09-872-EL-FAC
Company and Ohio Power Company.) Case No. 09-873-EL-FAC

**MEMORANDUM CONTRA STIPULATORS' REQUEST FOR EXPEDITED
PROCEDURAL SCHEDULE
AND
MOTION FOR PROCEDURAL SCHEDULE
AND
REQUEST FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
OHIO ENERGY GROUP
APPALACHIAN PEACE AND JUSTICE NETWORK
INDUSTRIAL ENERGY USERS-OHIO
OHIO PARTNERS FOR AFFORDABLE ENERGY**

The Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Energy Group, the Appalachian Peace and Justice Network, the Industrial Energy Users-Ohio ("IEU"), and Ohio Partners for Affordable Energy (collectively "Non-Signatory Parties")¹ move the Public Utilities Commission of Ohio ("PUCO" or "Commission") to establish a fair procedural schedule in these cases where the interests of Ohio customers have been placed at risk as a result of a Stipulation signed by the PUCO Staff, Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio" or "Company"),

¹ This pleading is filed pursuant to Ohio Admin. Code 4901-1-12 and 4901-1-14, among other authority.

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Ohio Manufacturers' Association, Ohio Hospitals Association, The Kroger Company and Ormet Primary Aluminum Corporation (collectively "Signatory Parties" or "Stipulating Parties"). In this regard, the Non-Signatory Parties oppose the unfair procedural schedule that the Stipulating Parties have proposed for limiting public process with regard to their settlement.

The Non-Signatory Parties request a hearing on January 20, 2011, instead of on the date proposed by the stipulating parties, December 6, 2010. Non-Signatory Parties propose that testimony in opposition to the Stipulation be filed on or around January 13, 2011.

Additionally, consistent with the request for a hearing on January 20, the Non-Signatory Parties request that the Attorney Examiners' earlier discovery-related directive in the AEP Ohio SEET case,² requiring shortened response time and electronic service of requests and responses be modified. The modification should be a shortening of the response time for discovery to 5 calendar days, instead of the 10 calendar days previously ordered in the SEET case.

Non-Signatory Parties request that an expedited ruling on this motion be issued by the Commission, the legal director, the deputy legal director, or the attorney examiner, pursuant to Ohio Adm. Code 4901-1-12(F), without the filing of memoranda, on the basis that issuance of such a ruling will not adversely affect a substantial right of any party. In the event that Commission, the legal director, the deputy legal director, or the attorney examiner declines to issue such a ruling, Non-Signatory Parties request an expedited

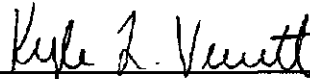
² See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Entry, Case No. 10-1261-EL-UNC (September 21, 2010).

ruling under Ohio Adm. Code 4901-1-12(C). OCC contacted Company Counsel who indicated he objected to an expedited ruling on this motion.

This motion and request should be granted, for the reasons explained in the following memorandum.

Respectfully submitted,

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**MEMORANDUM CONTRA STIPULATORS' PROPOSED SCHEDULE
AND
MEMORANDUM IN SUPPORT OF MOTION AND REQUEST FOR
EXPEDITED RULING**

In this phase of the above-captioned proceedings, the Commission's considerations include the appropriateness of the November 30, 2010 Stipulation entered into between the Staff of the Public Utilities Commission, the Ohio Hospital Association, the Ohio Manufacturers' Association, The Kroger Company, Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio" or "Company") and Ormet Primary Aluminum Corporation (collectively "Signatory Parties" or "Stipulating Parties"). The Stipulation purports to resolve all the issues in both the SEET docket and the fuel adjustment clause cases (Case Nos. 09-872-EL-EFC, 09-873-EL-FAC) and seeks to additionally address issues in the merger case (Case No. 10-2376-EL-UNC). The Non-Signatory parties oppose the Stipulation.

It is a well recognized Commission practice that, pursuant to Ohio Adm. Code 4901-1-30 and other authority, parties entering a stipulation to seek resolution of a PUCO

case must seek the admission of the stipulation into evidence, with an associated process for other parties to analyze and critique the recommendations of the stipulators. This process for allowing parties not signing a stipulation their procedural due process rights related to challenging the stipulation, include the right to conduct discovery, cross-examine witnesses called to support the stipulation, present testimony in opposition to the testimony, and to file briefs.³ Indeed, Signatory Parties recognize the importance of such a process and, in an unusual form of advocacy, propose one in the Stipulation.

However, Signatory Parties have proposed a “schedule” which is unworkable for anyone but the Signatory Parties. When counsel for IEU contacted AEP Ohio to discuss a more workable procedural schedule, Company Counsel’s response was that the schedule has been set in the Stipulation, and now is a matter for the Commission to decide.⁴ Accordingly, Non-Signatory Parties are unable to resolve with the Stipulating Parties a schedule to propose and, therefore, formally file this motion.

The Stipulating Parties’ proposed procedural schedule, if adopted, will deny Non-Signatory Parties the basic due process that they deserve and that is provided for under the Revised Code and the Ohio Administrative Code.⁵ This proposed schedule is

³ See Ohio Adm. Code 4901-1-30; see also, *Ohio Consumers’ Counsel v. Public Utilities Comm.* (2006), 111 Ohio St.3d. 300, at ¶ 83, where the Supreme Court of Ohio recently noted OCC’s discovery rights that are codified for parties under the PUCO’s rule in Ohio Admin. Code 4901-1-16 and elsewhere. The General Assembly codified discovery rights in R.C. 4903.082.

⁴ See Attachment X, a November 30, 2010 email correspondence from Steve Nourse to Sam Randazzo, et al.

⁵ See R.C. 4903.082; Ohio Adm. Code 4901-1-16 et seq.

unreasonable and unfair, and as a practical matter denies Non-Signatories' the right to be heard. There has been no time to conduct discovery on the Stipulation. There will be no time to conduct discovery on testimony supporting the stipulation and little time to present an affirmative case against the Stipulation and in favor of a reasonable result for more than a million Ohioans whose interests are at risk by the Stipulation. A mere week to examine filed testimony, file testimony, conduct discovery, and proceed to hearing is on its face unreasonable and should be rejected outright.

Under Ohio Admin. Code 4901-1-14 an Examiner may rule upon a procedural motion. To assure that the rights to conduct pre-hearing discovery, the right to present written testimony in opposition to the Stipulation and the right to cross examine witnesses called to support the Stipulation, a fair procedural schedule is needed.⁶ An additional six weeks should give minimally adequate time to the Non-Signatory Parties to fully pursue their rights, especially considering that there may be procedural motions and discovery issues.

The Stipulation establishes an unreasonably short time frame for intervenors who did not sign the Stipulation to respond to the Company's testimony and to prepare for an evidentiary hearing on the Stipulation. Among other things, if the proposed procedural schedule is adopted, it will preclude such intervenors from having ample rights of discovery, in violation of R.C. 4903.082 and Ohio Admin. Code 4901-1-16 et seq.

The Stipulating Parties' proposed schedule establishes an unnecessarily hasty procedural schedule for the hearing on the Stipulation, for reasons that are unexplained

⁶ The Supreme Court of Ohio recently noted OCC's discovery rights that are codified for parties under the PUCO's rule in Ohio Admin. Code 4901-1-16 and elsewhere. *Ohio Consumers' Counsel v. Public Utilities Comm.* (2006), 111 Ohio St.3d. 300, at ¶ 83. The General Assembly codified discovery rights in R.C. 4903.082.

and that cannot be justified in any event. As such, Non-Signatory Parties were given approximately one week's notice of a proposed hearing that will determine far reaching issues that involve three or more separate proceedings before the PUCO and that will affect more than one million customers.

The Stipulation purports to resolve all of the SEET issues for 2009 *and potential SEET issues of 2010 and 2011*. The Stipulation resolves all outstanding SEET issues for 2010, concluding that CSP and OP did not have significantly excessive earnings in 2009. For 2010 and 2011, the Stipulation also seeks to resolve issues, including how the Commission should treat off-system sales. For example, in the Stipulation, the Stipulating Parties agree to recommend to the Commission that off-system sales be excluded from the 2010 and 2011 SEET cases, which violates the law and financial accounting principles.⁷

The Stipulation also disposes of the fuel adjustment clause case by establishing the parameters under which customers' fuel costs will be reduced, parameters that are inconsistent with the filed testimony of IEU and OCC, and the position of the PUCO Staff, expressed on brief. Currently, this case has been fully briefed and is awaiting PUCO decision. Thus, the Stipulation essentially is a request to reopen the record in the fuel case, without filing the proper motion, and complying with the standards that must be met in order to reopen a proceeding.⁸

The Signatory Parties also commit to support the approval of the merger between CSP and OP, which may affect whether or not the merger filing will be approved by the

⁷ See Customer Parties Initial Brief at 23-29; Customer Parties Reply Brief at 17-21.

⁸ See Ohio Admin. Code 4901-1-34.

PUCO. There has been no procedural schedule issued for the merger case, though a number of parties have filed comments opposing the merger.⁹

Given the numerous cases that are to be resolved by the Stipulation, it is extremely important that the PUCO fully understand the far reaching implications of the settlement before them. It is also crucially important that those whose rights are being affected be allowed to fully participate in the process. This is impossible under the procedural schedule proposed.

The proposed procedural schedule violates R.C. 4903.082, and the PUCO's discovery rules, by foreclosing intervenors from having ample rights of discovery. Although this SEET proceeding began on September 1, 2010, with the filing of AEP Ohio's application, it was a straight forward single proceeding aimed at fulfilling the requirements of the annual SEET review, under R.C. 4928.143(F). Discovery and testimony proceeded, with the focus on the 2009 earnings of CSP. Notably, discovery was expedited by Commission order which shortened the response time to 10 calendar days, and required electronic service of requests and replies.¹⁰ That same Entry directed AEP Ohio to file any applicable stipulation, by 9:00 a.m., on October 22, 2010. Parties proceeded to conduct discovery, filed testimony, went to hearing, and filed briefs that focused on the single issue presented—whether CSP's 2009 earnings were significantly excessive under R.C. 4928.143(F).

⁹ See *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company For Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

¹⁰ See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Entry, Case No. 10-1261-EL-UNC (September 21, 2010).

But now, by the filing of the Stipulation, outside of the Attorney Examiner's deadline for stipulations, the whole course of the proceeding has changed and now represents not a single case but a multiple case focus. The focus has changed to whether the stipulation fulfills the three-prong Stipulation standard and extends way beyond whether the earnings of CSP during 2009 were significantly excessive. It extends to the fuel case and the merger case, adding many more layers of complexity.

Discovery is essential to determining, among other things, what the Stipulation really means, whether side agreements exist,¹¹ and whether the three-prong standard is indeed met. This discovery would be denied under the procedural schedule proposed under the Stipulation. This flies in the face of R.C. 4903.082 which provides that "all parties and intervenors shall be granted ample rights of discovery" and Supreme Court precedent. There is simply not enough time in the proposed schedule for reasonable discovery and incorporation of that discovery into positions (including testimony and cross-examination) in the case.

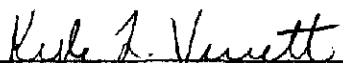
The Stipulating Parties, through their proposal to limit or eliminate a public process at the PUCO, would effectively foreclose non-Signatory parties and the great many Ohioans they represent from having ample rights of discovery and a fair hearing, contrary to the requirement of Ohio law and PUCO rule. The Commission should reject the schedule proposed, and set a fair hearing schedule in order to protect the interests of

¹¹ See *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio* (2006), 111 Ohio St.3d 300, at 320, 856 N.E. 2d 213, at 234 (In finding that the Commission erred in denying the OCC discovery of side agreements relevant to whether a settlement was the product of serious bargaining among capable, knowledgeable parties, the Ohio Supreme Court stated, "Civ.R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.).

AEP Ohio's customers, including residential, commercial, and industrial customers. The PUCO should grant this Motion.

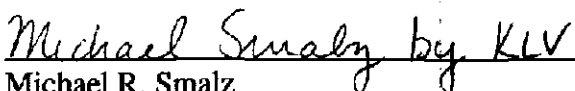
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra and Motion was served via regular U.S. Mail service, postage prepaid, and via electronic transmission to the persons listed below, on this day 1st of December, 2010.



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Date: 11/30/2010 6:23 PM
Subject: Re: Final AEP Ohio SEET and FAC Stipulation

I understand your position, Sam. But we negotiated the recommended procedural schedule as part of the Stipulation and it was in the last three versions I sent out to all parties, starting with the version sent out last Friday afternoon -- which transmission also included a message soliciting questions or discussion about the Stipulation provisions and inviting parties to make a final counter-offer on any aspect of the Stipulation. Because it is part of the Stipulation, I agree it is best to take up concerns about the proposed schedule with the Commission.

Thanks,
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11/30/2010 06:07 PM

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Subject
Re: Final AEP Ohio SEET and FAC Stipulation

Steve, the subject of a procedural schedule was never discussed in any of the few settlement meetings we were allowed to attend. In the interest of fairness, I thought my suggestion might allow something sensible to be worked on the procedural schedule. As I understand your response, we will need to take up concerns about the proposed procedural schedule with the Commission.

Thanks,

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On Nov 30, 2010, at 5:21 PM, "stnourse@aep.com<mailto:stnourse@aep.com>"
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Sam:

Thanks for the response. Regarding the procedural schedule, Paragraph X.1 recommends a procedural schedule as part of the Stipulation. If the Attorney Examiner needs to get together and further discuss, we of course will be available.

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11/30/2010 04:41 PM

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Subject

RE: Final AEP Ohio SEET and FAC Stipulation

Steve, thanks for sending us a copy. The structure of the settlement negotiations, the current content of the document which has been filed with the Commission and the requested procedural schedule mean that IEU-Ohio cannot be a signatory.

We are interested in working out a procedural schedule that gives us adequate time to prepare for the hearing. I suggest that it would be beneficial for the parties in these proceedings to meet to see if we work out a procedural schedule.

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Subject: Final AEP Ohio SEET and FAC Stipulation
Importance: High

Attached is the final Stipulation that will be filed -- please let me know immediately if you have any interest in signing on to the Stipulation.

Thanks,
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