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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

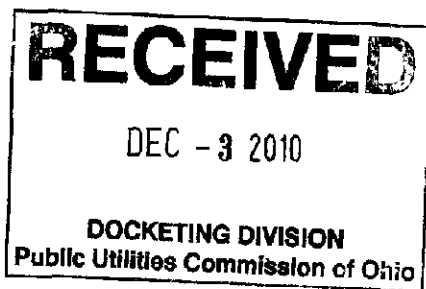
In the Matter of the Application of Columbus )  
Southern Power Company for Approval )  
of its Portfolio Plan and Request for ) Case No. 09-1089-EL-POR  
Expedited Consideration )

In the Matter of the Application of Ohio )  
Power Company for Approval of its )  
Portfolio Plan and Request for Expedited ) Case No. 09-1090-EL-POR  
Consideration )

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MEMORANDUM CONTRA  
COLUMBUS SOUTHERN POWER COMPANY AND  
OHIO POWER COMPANY'S  
MOTION AND MEMORANDUM IN SUPPORT

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Samuel C. Randazzo (Counsel of Record)  
Joseph E. Olikar  
MCNEES WALLACE & NURICK  
Fifth Third Center  
21 East State Street, Suite 1700  
Columbus, OH 43215  
Telephone: (614) 719-2855  
Facsimile: (614) 469-4653  
sam@mwncmh.com  
joliker@mwncmh.com

ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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On November 18, 2010, Columbus Southern Power Company and Ohio Power Company (collectively "AEP-Ohio") filed a Motion and Memorandum in Support (hereinafter "Motion") proposing an extension of the current revenue recovery approved by the Public Utilities Commission of Ohio ("Commission") as part of the Companies' Energy Efficiency and Peak Demand Response ("EE/PDR") Program Portfolio Plan.

The Commission must deny AEP-Ohio's Motion: AEP-Ohio's Motion is an untimely Application for Rehearing, AEP-Ohio failed to comply with the Commission's May 13, 2010, Opinion and Order<sup>1</sup>, and AEP-Ohio has not provided any information that indicates if or how much incremental revenue it should be permitted to collect to provide

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<sup>1</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 09-1089-EL-POR, et al., Opinion and Order (May 13, 2010) (hereinafter "*Portfolio Plan*").

adequate compensation. AEP-Ohio's position was previously rejected by the Commission in its May 13, 2010, Opinion and Order – AEP-Ohio's Motion is an attempt to circumvent that decision.

## **I. Procedural History**

On November 12, 2009, AEP-Ohio filed an Application for approval of AEP-Ohio's EE/PDR Program Portfolio Plans for 2010 through 2012. Along with that plan, AEP-Ohio filed a Stipulation and Recommendation ("Stipulation"). The Stipulation provided much of the structure for the Commission's May 13, 2010, Opinion and Order.

But the Commission explicitly rejected the provisions of the Stipulation pertaining to lost distribution revenue recovery in AEP-Ohio's Portfolio Plan. *Id.* at 26. As submitted, the Stipulation stated that "[t]hree vintage years of net lost distribution revenue recovery will exist or recovery will occur until rates are approved and effective in each Company's next respective distribution base rate case." *Id.* at 13. The Commission rejected this provision because AEP-Ohio failed to establish what revenue is necessary to recover fixed costs and provide a fair and reasonable return. *Id.* at 26. The Commission, however, temporarily allowed AEP-Ohio to recover lost distribution revenue until January 1, 2011.

The Commission was clear that it would not extend the recovery period unless AEP-Ohio proposes a reasonable mechanism for quantifying fixed costs – and the Commission would only extend the recovery period while the mechanism was considered. Specifically, the Commission stated, "if AEP-Ohio proposes a reasonable mechanism, the Commission will consider a request to extend the recovery period while the mechanism is considered." *Id.* at 26. To date, AEP-Ohio has not proposed a

mechanism for quantifying fixed costs. AEP-Ohio stated in its Motion that it does not intend to propose a mechanism until some undetermined time in 2011.<sup>2</sup>

AEP-Ohio did not file an Application for Rehearing after the Commission issued its May 13, 2010, Opinion and Order. Instead, AEP-Ohio waited six months and filed a Motion asking the Commission to extend lost distribution revenue recovery until its next distribution rate case is approved or through December 31, 2011, whichever comes first. The exact same relief was already rejected in the Commission's May 13, 2010, Opinion and Order.

## **II. Argument**

### **A. AEP-Ohio's Motion Is An Untimely Application For Rehearing**

AEP-Ohio's Motion is an untimely Application for Rehearing. The Commission previously rejected the relief that AEP-Ohio is seeking in the May 13, 2010, Opinion and Order.

Any party may file an application for rehearing within thirty days (30) after the issuance of a Commission order. Section 4903.10, Revised Code; Rule 4901-1-35, Ohio Administrative Code. A party cannot make a collateral attack on a final order after this time elapses. See *Greer v. Public Utilities Commission*, 172 Ohio St. 361, 362 (1961) (holding that the Commission has no power to hear an application for rehearing after the expiration of the thirty-day period); *In the Matter Of The Authorization of Norfolk Southern Railway To Install An Active Grade Crossing Warning Device At The Marconi Boulevard Pedestrian Crossing In Franklin County*, Case No.05-297-RR-FED, Entry on Rehearing at 2 (January 18, 2006); see also, *In The Matter of The*

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<sup>2</sup> Motion at 4-5 (November 18, 2010).

*Commission's Investigation Into The Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at 4 (February 20, 2003) (holding "The four assignments of error listed above are nothing more than a collateral attack on those prior decisions.").

AEP-Ohio's Motion is merely a collateral attack on the Commission's May 13, 2010, Opinion and Order. The Commission previously rejected AEP-Ohio's Stipulation, which asks for the same relief requested in this Motion. That Stipulation requested continued recovery of lost distribution revenue for three years or until approval of its next distribution base rate case, whichever comes first. In its Motion, AEP-Ohio requests continued collection of lost distribution revenue through the implementation of a new program – which will be revealed in AEP-Ohio's next rate case – or until December 31, 2011, whichever occurs first.

AEP-Ohio cannot save its untimely Application by styling it as a motion. The Commission has seen through such tactics in the past. *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No.95-845-TP-COI, Entry on Rehearing at 2 (November 7, 1996). In similar circumstances, the Commission stated "[a]lthough styled as 'comments', ETI's August 1996 pleading actually constitutes an application for rehearing of the Commission's June 12, 1996 Order." *Id.* AEP-Ohio's Motion is no different.

AEP-Ohio should have filed an application for rehearing prior to the expiration of the thirty-day statutory period. Instead, AEP-Ohio filed its Application more than six months after the Commission's May 13, 2010, Opinion and Order. Thus, the

Commission has no jurisdiction to hear AEP-Ohio's untimely Application for Rehearing. *Greer v. Public Utilities Commission*, 172 Ohio St. 361, 362 (1961).

**B. AEP-Ohio Failed to Comply with the Commission's Prior Opinion and Order**

AEP-Ohio failed to comply with the Commission's May 13, 2010, Opinion and Order. The Commission stated, "[i]f AEP-Ohio proposes a reasonable mechanism, the Commission will consider a request to extend the recovery period while the mechanism is considered." *Portfolio Plan*, Opinion and Order at 26 (May 13, 2010). AEP-Ohio did not propose a mechanism. Instead, AEP-Ohio proposed that it would propose a mechanism at a later date. *Motion* at 4. AEP-Ohio's weak attempt fails to satisfy the condition of the Commission's Opinion and Order: The Commission cannot consider a request to extend the recovery period because AEP-Ohio failed to propose a mechanism.

AEP-Ohio had more than enough time to formulate a mechanism for quantifying fixed costs and a mechanism to achieve revenue decoupling. Six months have passed since the Commission's May 13, 2010, Opinion and Order. AEP-Ohio should not be rewarded for completely disregarding the Commission's Opinion and Order.

**C. AEP-Ohio Has Not Alleged that Current Revenue is Providing Inadequate Compensation**

The Commission refused to grant AEP-Ohio lost distribution revenue beyond January 1, 2011 because the Commission could not determine what amount of revenue would allow AEP-Ohio to recover its costs and earn a fair return. The Commission stated:

However, in this instance, the Commission agrees with IEU-Ohio that the

record fails to establish what revenue is necessary to provide AEP-Ohio with the opportunity to recover its costs and to earn a fair and reasonable return. Without this information, the Commission cannot determine whether the Signatory Parties' proposal included in Section F of the Stipulation is reasonable.<sup>3</sup>

Since the Commission made this determination, nothing has changed. AEP-Ohio fails to demonstrate whether it has "lost" any distribution revenue.

### III. Conclusion

The Commission must deny AEP-Ohio's Motion. AEP-Ohio's Motion is an untimely Application for Rehearing: The relief AEP-Ohio seeks was previously rejected in the Commission's May 13, 2010, Opinion and Order and AEP-Ohio did not file an application for rehearing within thirty days of that decision. AEP-Ohio failed to comply with the Commission's May 13, 2010, Opinion and Order – since AEP-Ohio failed to propose a mechanism for quantifying fixed costs and achieving revenue decoupling, the Commission must not extend the recovery period. AEP-Ohio's Motion is disingenuous. It is apparent that AEP-Ohio cannot legitimately claim that it has "lost" any of its distribution revenue.

Respectfully Submitted,



Samuel C. Randazzo (Counsel of Record)

Joseph E. Olikier

McNEES WALLACE & NURICK

Fifth Third Center

21 East State Street, Suite 1700

Columbus, OH 43215

sam@mwncmh.com

joliker@mwncmh.com

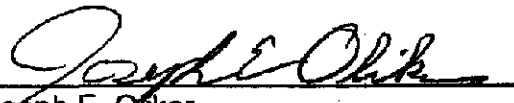
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<sup>3</sup> Portfolio Plan, Opinion and Order at 26 (May 13, 2010).

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Columbus Southern Power Company and Ohio Power Company's Motion and Memorandum in Support* was served upon the following parties of record this 3<sup>rd</sup> day of December, via first class mail, postage prepaid.

  
Joseph E. Olick

Steven T. Nourse  
Matthew J. Satterwhite  
American Electric Power Service  
Company  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

**ON BEHALF OF COLUMBUS SOUTHERN  
POWER AND OHIO POWER COMPANY**

Clinton A. Vince  
Douglas G. Bonner  
Emma F. Hand  
Keith C. Nusbaum  
Sonnenschein Noth & Rosenthal LLP  
1301 K Street, NW  
Suite 600, East Tower  
Washington, DC 20005  
[cvince@sonnenschein.com](mailto:cvince@sonnenschein.com)  
[dbonner@sonnenschein.com](mailto:dbonner@sonnenschein.com)  
[ehand@sonnenschein.com](mailto:ehand@sonnenschein.com)  
[knusbaum@sonnenschein.com](mailto:knusbaum@sonnenschein.com)

**ON BEHALF OF ORMET PRIMARY  
ALUMINUM CORPORATION**

David C. Rinebolt  
Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, OH 45839-1793  
[drinebolt@ohiopartners.org](mailto:drinebolt@ohiopartners.org)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

**ON BEHALF OF OHIO PARTNERS FOR  
AFFORDABLE ENERGY**

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mikurtz@BKLawfirm.com](mailto:mikurtz@BKLawfirm.com)

**ON BEHALF OF OHIO ENERGY GROUP**

Henry W. Eckhart  
50 W. Broad Street #2117  
Columbus, OH 43215  
[henryeckhart@aol.com](mailto:henryeckhart@aol.com)

**ON BEHALF OF THE SIERRA CLUB OF OHIO  
AND THE NATURAL RESOURCES DEFENSE  
COUNCIL**



Thomas O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

**ON BEHALF OF THE OHIO  
MANUFACTURERS' ASSOCIATION AND THE  
OHIO HOSPITAL ASSOCIATION**

Nolan Moser  
Will Reisinger  
The Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
[nmoser@theOEC.org](mailto:nmoser@theOEC.org)  
[will@theOEC.org](mailto:will@theOEC.org)

**ON BEHALF OF THE OHIO ENVIRONMENTAL  
COUNCIL**

Janine L. Migden-Ostrander  
Ohio Consumers' Counsel  
Christopher J. Allwein  
Terry L. Etter  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215  
[allwein@occ.state.oh.us](mailto:allwein@occ.state.oh.us)  
[etter@occ.state.oh.us](mailto:etter@occ.state.oh.us)

**ON BEHALF OF THE OFFICE OF THE OHIO  
CONSUMERS COUNSEL**

Michael Smalz  
Ohio Poverty Law Center  
555 Buttles Avenue  
Columbus, OH 43215  
[msmalz@ohiopovertylaw.org](mailto:msmalz@ohiopovertylaw.org)

**ON BEHALF OF THE OHIO POVERTY LAW  
CENTER**

Richard Sites  
Ohio Hospital Association  
155 E. Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215-3620  
[ricks@ohanet.org](mailto:ricks@ohanet.org)

**ON BEHALF OF THE OHIO HOSPITAL  
ASSOCIATION**

Thomas McNamee  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street  
Columbus, OH 43215

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

Rebecca Hussey  
Greta See  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215

**ATTORNEY EXAMINERS**