

**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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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA  
COLUMBUS SOUTHERN POWER COMPANY'S AND  
OHIO POWER COMPANY'S  
APPLICATION FOR REHEARING**

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March 7, 2011

ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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On February 25, 2011, Columbus Southern Power Company and Ohio Power Company (collectively "AEP-Ohio") filed an Application for Rehearing<sup>1</sup> ("Application") of the Public Utilities Commission of Ohio's (the "Commission") January 27, 2011, Entry,<sup>2</sup> which denied AEP-Ohio's November 18, 2010, Motion and Memorandum in Support<sup>3</sup> (hereinafter "Motion") proposing an extension of the recovery of lost distribution revenue until the approval of AEP-Ohio's next distribution rate case or the end of 2011. The

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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 No. 09-1089-EL-POR, et al., Application for Rehearing, (February 25, 2011) (hereinafter "Portfolio Plan").*

<sup>2</sup> *Portfolio Plan, Case No. 09-1089-EL-POR, et al., Entry (January 27, 2011).*

<sup>3</sup> *Portfolio Plan, Case No. 09-1089-EL-POR, et al., Motion and Memorandum in Support (November 18, 2010).*

Commission rightly denied AEP-Ohio's Motion and AEP-Ohio's Application raises no new issues for the Commission to address.

Several reasons support the Commission's refusal to grant AEP-Ohio's request: AEP-Ohio's Motion is still an untimely application for rehearing and AEP-Ohio does not dispute that it failed to comply with the Commission's May 13, 2010, Opinion and Order.<sup>4</sup> AEP-Ohio's Motion and Application seek to advance the same position that was previously rejected by the Commission in its May 13, 2010, Opinion and Order. AEP-Ohio should not be rewarded for failing to comply with the Commission's Opinion and Order.

#### I. PROCEDURAL HISTORY

On November 12, 2009, AEP-Ohio filed an Application for approval of AEP-Ohio's energy efficiency and peak demand reduction ("EE/PDR") Program Portfolio Plans for 2010 through 2012.<sup>5</sup> Along with the plans, AEP-Ohio filed a Stipulation and Recommendation ("Stipulation").<sup>6</sup> In the Commission's May 13, 2010, Opinion and Order, the Commission explicitly rejected the provisions of the Stipulation pertaining to lost distribution revenue recovery in AEP-Ohio's Portfolio Plan. *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Opinion and Order at 26 (May 13, 2010). Specifically, the Commission rejected a provision of the Stipulation that stated "[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

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<sup>4</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Opinion and Order (May 13, 2010).

<sup>5</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Application (November 12, 2009).

<sup>6</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Stipulation (November 12, 2009).

base rate case.<sup>7</sup> The Commission rejected this provision because AEP-Ohio failed to establish what revenue was necessary to recover fixed costs and provide a fair and reasonable return. *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Opinion and Order at 26 (May 13, 2010). The Commission, however, temporarily allowed AEP-Ohio to recover lost distribution revenue until January 1, 2011. *Id.*

The Commission was clear that it would not extend the recovery period beyond January 1, 2011, unless AEP-Ohio proposed 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, “[i]f 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 (emphasis added). AEP-Ohio did not file an application for rehearing.

Despite the clear direction provided by the Commission’s May 13, 2010, Opinion and Order, AEP-Ohio did not propose a mechanism for quantifying fixed costs before the end of 2010.<sup>8</sup> Instead, it filed a Motion requesting that the Commission extend lost distribution revenue recovery until its next distribution rate case is approved or through December 31, 2011, whichever comes first.<sup>9</sup>

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<sup>7</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Opinion and Order at 13 (May 13, 2010) (emphasis added); *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Stipulation at 13 (November 12, 2009).

<sup>8</sup> AEP-Ohio also did not comply with the Commission’s Opinion and Order prior to the issuance of the January 27, 2011, Entry that AEP-Ohio is now appealing.

<sup>9</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Motion and Memorandum in Support at 4 (November 18, 2010).

On January 27, 2011, the Commission issued an Entry denying AEP-Ohio's request to extend collection of lost distribution revenue incurred in 2011.<sup>10</sup> The Commission clarified its May 13, 2010, Opinion and Order and explained that AEP-Ohio may continue to collect lost distribution revenue incurred in 2010.

AEP-Ohio filed an Application for Rehearing on February 25, 2011. In its Application, AEP-Ohio seeks to advance the same position that the Commission rejected when AEP-Ohio filed the Stipulation and its Motion—that the Commission extend recovery of lost distribution revenue until AEP-Ohio's next distribution rate case is approved, which is likely to occur at the end of 2011.<sup>11</sup> AEP-Ohio did not allege in its Application that it complied with the May 13, 2010, Opinion and Order.

AEP-Ohio is attempting to rewrite the conditions for recovery. Given the failure of AEP-Ohio to comply with the May 13, 2010, Opinion and Order, or file a timely application for rehearing, the Commission should reject AEP-Ohio's Application.

## **II. ARGUMENT**

### **A. AEP-Ohio Failed to File a Timely Application For Rehearing.**

AEP-Ohio's November 18, 2010, Motion was, in fact, an untimely application for rehearing. The Commission previously rejected the relief that AEP-Ohio sought in its Motion in the May 13, 2010, Opinion and Order. *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Opinion and Order at 26 (May 13, 2010). At that time, AEP-Ohio did not seek rehearing. Instead, AEP-Ohio's November 18, 2010, Motion sought to collaterally

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<sup>10</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Entry at 3 (January 27, 2011).

<sup>11</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Stipulation at 9 (November 12, 2009); *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Application for Rehearing at 3 (February 25, 2011).

attack the Commission's May 13, 2010, Opinion and Order. Because AEP-Ohio's Application raises no new arguments for the Commission to address, it must be denied.

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 collaterally attack an order after the time for rehearing has passed. 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) (holding that the motions are actually untimely applications for rehearing); see also *In the Matter of the 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 "[t]he four assignments of error listed above are nothing more than a collateral attack on those prior decisions.").

Under the rules denying collateral attacks on final orders, AEP-Ohio's Motion was properly denied. The Commission's May 13, 2010, Opinion and Order rejected the portion of the Stipulation whereby AEP-Ohio sought to recover lost distribution revenue until the approval of its next distribution rate case.<sup>12</sup> By its November 18, 2010, Motion, AEP-Ohio sought the same relief. Given that AEP-Ohio failed to file an application for rehearing of the May 13, 2010, Opinion and Order prior to the expiration of the thirty-day statutory period, the Commission had no jurisdiction to hear AEP-Ohio's untimely

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<sup>12</sup> *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Opinion and Order at 26 (May 13, 2011).

Application for Rehearing. *Greer v. Public Utilities Commission*, 172 Ohio St. 361, 362 (1961). By law, AEP-Ohio cannot continue their argument indefinitely.

**B. AEP-Ohio's Failure to Comply with the Commission's Prior Opinion and Order Prevents AEP-Ohio From Seeking Recovery for 2011.**

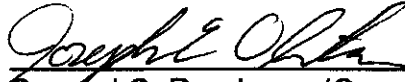
AEP-Ohio has failed to comply with the Commission's May 13, 2010, Opinion and Order. The Commission stated, "[i]f AEP-Ohio proposes a reasonable mechanism, the Commission will consider a request to extend the recovery period while the mechanism is considered." *Portfolio Plan*, Opinion and Order at 26 (May 13, 2010).

AEP-Ohio's Application fails to address this fundamental defect—AEP-Ohio failed to propose a mechanism prior to the end of 2010 or even prior to the Commission's January 27, 2011, Entry. Instead, AEP-Ohio merely claimed that it would propose a mechanism at a later date. *Portfolio Plan*, Case No. 09-1089-EL-POR, *et al.*, Motion and Memorandum at 4 (November 18, 2010). That does not constitute compliance with the Commission's May 13, 2010, Opinion and Order. Thus, the Commission rightly denied AEP-Ohio's Motion because AEP-Ohio failed to comply with the Commission's May 13, 2010, Opinion and Order.

**III. CONCLUSION**

The Commission must deny AEP-Ohio's Application because AEP-Ohio raises no new issues for the Commission to address. AEP-Ohio's Motion was an untimely application for rehearing, and AEP-Ohio failed to comply with the Commission's Opinion and Order. The Commission must deny AEP-Ohio's Application.

Respectfully Submitted,



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**ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**



## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing* was served upon the following parties of record this 7<sup>th</sup> day of March, 2011, via first class mail, postage prepaid.

  
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