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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

2011 MAR 14 PM 5: 22

In the Matter of the Application of Columbus )  
Southern Power Company and Ohio Power )  
Company for Authority to Establish a Standard )  
Service Offer Pursuant to §4928.143, Ohio Rev. )  
Code, in the form of an Electric Security Plan. )

**PUCO**  
Case No. 11-346-EL-SSO  
Case No. 11-348-EL-SSO

In the Matter of the Application of Columbus )  
Southern Power Company and Ohio Power )  
Company for Approval of Certain Accounting )  
Authority. )

Case No. 11-349-EL-AAM  
Case No. 11-350-EL-AAM

In the Matter of the Application of Columbus )  
Southern Power Company to Amend its )  
Emergency Curtailment Service Riders. )

Case No. 10-343-EL-ATA

In the Matter of the Application of Ohio Power )  
Company to Amend its Emergency Curtailment )  
Service Riders. )

Case No. 10-344-EL-ATA

Application Not for an Increase in Rates )  
Pursuant to Section 4909.18, Revised Code, of )  
Ohio Power Co. and Columbus Southern Power )  
Company to Establish New Market Based rate )  
for Returning CRES Customers that Elected to )  
Avoid the POLR Charge. )

Case No. 11-531-EL-ATA

In the Matter of the Application of Ohio Power )  
Company for Approval of the Shutdown of Unit 5 )  
of the Philip Sporn Generating Station and to )  
Establish a Plant Shutdown Rider. )

Case No. 10-1454-EL-RDR

In the Matter of the Commission Review of the )  
Capacity Charges of Ohio Power Company and )  
Columbus Southern Power Company. )

Case No. 10-2929-EL-UNC

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**REPLY MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO**

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Samuel C. Randazzo (Counsel of Record)  
Frank P. Darr  
Joseph E. Olikier  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215-4228  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
sam@mwncmh.com  
fdarr@mwncmh.com  
joliker@mwncmh.com

**March 14, 2011**

**ATTORNEYS FOR INDUSTRIAL ENERGY USERS-  
OHIO**

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THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**REPLY MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO**

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**I. INTRODUCTION**

On January 27, 2011, the Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively "the Companies") filed a joint application seeking to implement new terms under an Electric Security Plan ("ESP") pursuant to Section 4928.143, Revised Code. The application raises questions regarding a variety of matters. Among these are issues that are the subjects of other on-going Commission proceedings. Because of the common factual and legal issues presented by the other proceedings, IEU-Ohio moved on February 18, 2011 for an order consolidating them with the ESP application. Only the Companies filed a memorandum opposing the motion. In its memorandum, the Companies essentially argue that there are not sufficient common issues of law and fact and a lack of identity of parties. They further argue that the Companies would be unduly prejudiced by a joint hearing of the various matters. For the reasons outlined below, the Companies' objections should be rejected, and the motion should be granted.

**II. ARGUMENT**

OP and CSP have sought in piece-meal fashion to restructure their tariffs and cost recovery through a variety of proceedings. Remarkably, the pieces came together in the ESP filing. Thus, the ESP case has become the repository for the Companies' systematic and siloed attempt to define, or in the Companies' words, "restore the regulatory compact" for the twenty nine (29) month period that commences January 1, 2012.

As the Companies correctly point out in the memorandum in opposition, the Commission is to be guided by Civil Rule 42 regarding consolidation. The Rule provides for consolidation when common issues of law and fact are presented.<sup>1</sup> The rule serves particularly well in cases presenting complicated economic issues. For example, in recent price conspiracy cases, a federal trial court concluded that joint hearings were appropriate although only one defendant was common to the three conspiracies. The court ordered joint hearings because there was one common defendant to the three prosecutions, the regulatory and economic issues of the industry were common to all parties, and the expert analysis and testimony were common to the three matters. *State, ex rel. Montgomery, v. Louis Truath Dairy, Inc.*, 163 F.R.D. 500, 503-04 (S.D. Ohio 1995).

In its opposition to the motion, the Companies first assert that there are not common issues of law and fact. The ESP application itself, however, dispels that notion. In the 2011 ESP application, CSP and OP attempt to incorporate the tariff language proposed in Case No. 10-343-EL-ATA and Case No. 10-344-EL-ATA (ECS Application).<sup>2</sup> Further, as the Companies noted in the recent amended ECS Application, the sponsoring testimony for the revised tariffs is now found in the 2011

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<sup>1</sup> Civil Rule 42(A)(1) provides:

When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

<sup>2</sup> See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al. (hereinafter, 2011 ESP Case), Exhibit DMR-5 at 111-23 (proposed CSP ECS rider) and DMR-6 at 120-29 (OP ECS rider).

ESP application.<sup>3</sup> Similarly, the issue of the appropriate level of the capacity charge is raised in the ESP case and two other proceedings.<sup>4</sup> Finally, the regulatory fate of the Companies effort to obtain stranded cost recovery for Sporn Unit 5 is presented both by the application to establish a shutdown rider<sup>5</sup> and in the request for a similar recovery mechanism in the 2011 ESP application.<sup>6</sup>

As in the *Truath* price conspiracy cases noted above, there are sufficient reasons to conduct a joint hearing presented by the cases that the Companies themselves identify as affected by their ESP application. Several issues are common; a common regulatory structure is the centerpiece for resolving these matters; and the need for expert testimony and consistent interpretation of that testimony is obvious. Thus, the conditions that typically result in consolidation and a joint hearing exist in the present circumstances.

The Companies next argue that there is no commonality of parties as a reason for denying the motion to consolidate. As noted in *Truath*, however, commonality of

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<sup>3</sup> *In the Matter of the Application of Columbus Southern Power to Amend its Emergency Curtailment Service Riders*, Case No. 10-343-EL-ATA at 2 (filed Feb. 2, 2011). The relevant testimony is found in the 2011 ESP Case, Direct Testimony of David Roush at 6.

<sup>4</sup> The ESP application uses the cost based calculation throughout the filing; see, e.g., 2011 ESP Case, Testimony of Laura Thomas at 7. The same approach to valuing capacity is used in *Application Not for an Increase in Rates Pursuant to Section 4909.18, Revised Code, of Ohio Power Co. and Columbus Southern Power Co. to Establish New Market Based Rate for Returning CRES Customers that Elected to Avoid the POLR Charge*, Case No. 11-531-EL-ATA, and is at issue *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC.

<sup>5</sup> *In the Matter of the Application of the Ohio Power Company for Approval of the Shutdown of Unit 5 of the Phillip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR. Since the motion to consolidate was filed, the Commission has issued an order setting a schedule for comments. *Id.*, Entry (filed Mar. 9, 2011).

<sup>6</sup> 2011 ESP Case, Testimony of Laura Thomas at 23-25; Testimony of Joseph Hamrock at 19-20 (questioning the delay in the 10-1454 proceeding).

parties is not necessary for consolidation or a joint hearing of the common issues of law and fact.<sup>7</sup>

Finally, the Companies argue in various ways that the joint hearing would be inconvenient and inefficient.<sup>8</sup> The argument is difficult to understand when the Companies have availed themselves through repeated filings to the resources of the Commission and then placed the same issues in play through the ESP application. More importantly, however, consolidation is precisely the way of handling complicated and related regulatory matters so as to avoid redundant hearings and inconsistent results.<sup>9</sup> Moreover, it is at least suggested by the lack of opposition from the other intervening parties that consolidation would operate to the benefit of those other parties as well. Like IEU-Ohio and the Commission, they also are absorbing the cost of the piece-meal approach used by the Companies; a coherent hearing schedule would benefit them and the Companies.

The Companies' habit of parading interrelated proposals through the Commission's doorway and then presenting them in individual cases makes it harder for the Commission and stakeholders to connect the dots and accelerates the burn rate of the stakeholders' limited resources. This bad habit should not be enabled by the Commission. It is within the Commission's discretion to structure the appropriate procedural approach to resolve the complicated issues presented by the Companies'

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<sup>7</sup> For a general discussion, see 9A Charles Wright & Arthur Miller, *Federal Practice and Procedure* §2384 at 57 (3d ed. 2008). The Companies' argument confuses joinder with consolidation.

<sup>8</sup> The Companies point to the statutory deadline as a basis for their concern as well. Given that the hearing in the *2011 ESP Case* is currently scheduled for July 2011 and the 275<sup>th</sup> day for completion of the matter is in October, this concern would appear to be misplaced or overstated.

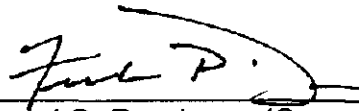
<sup>9</sup> *Kokus v. Toys "R" Us, Inc.*, 2006 WL 1476209 (S.D. Ohio 2006).

multiple filings. Consolidation for hearing so as to avoid unnecessary and inefficient consumption of resources is one apparent way of managing a difficult situation.

III. **CONCLUSION**

For the reasons stated above, IEU-Ohio requests that the identified matters currently before the Commission be consolidated for hearing.

Respectfully submitted,



Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Oliker

MCNEES WALLACE & NURICK LLC

21 East State Street, 17th Floor

Columbus, OH 43215-4228

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

Attorneys for Industrial Energy Users-Ohio



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Reply Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 14th day of March 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.

  
\_\_\_\_\_  
Frank P. Darr

Matthew J. Satterwhite  
Steven T. Nourse  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
mjsatterwhite@aep.com  
stnourse@aep.com

Daniel R. Conway  
Porter Wright Morris & Arthur  
Huntington Center  
41 S. High Street  
Columbus, OH 43215  
dconway@porterwright.com

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

Amy B. Spiller (Counsel of Record)  
Deputy General Counsel  
Dorothy K. Corbett  
Associate General Counsel  
139 East Fourth Street  
1303-Main  
Cincinnati, OH 45202  
Amy.Spiller@duke-energy.com

**ON BEHALF OF DUKE ENERGY RETAIL SALES,  
LLC**

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street Suite 1510

Cincinnati, OH 45202  
dboehm@BKLawfirm.com  
mkurtz@BKLawfirm.com

**ON BEHALF OF THE OHIO ENERGY GROUP**

Janine L. Migden-Ostrander  
Consumers' Counsel  
Terry L. Etter (Counsel of Record)  
Michael E. Idzkowski  
Maureen R. Grady  
Christopher J. Allwein  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 W. Broad Street, 18<sup>th</sup> Floor  
Columbus, OH 43215-3485  
etter@occ.state.oh.us  
idzkowski@occ.state.oh.us  
grady@occ.state.oh.us  
allwein@occ.state.oh.us

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

Richard L. Sites  
General Counsel & Senior Director of  
Health Policy  
Ohio Hospital Association  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215-3620  
ricks@ohanet.org

Thomas J. O'Brien  
Bricker & Eckler, LLP  
100 South Third Street  
Columbus, OH 43215-4291

tobrien@bricker.com

**OH BEHALF OF OHIO HOSPITAL ASSOCIATION**

John W. Bentine  
Mark S. Yurick  
Chester Willcox & Saxbe, LLP  
65 East State Street, Suite 1000  
Columbus, OH 43215  
jbentine@cwslaw.com  
myurick@cwslaw.com

**ON BEHALF OF THE KROGER CO.**

Terrence O'Donnell  
Christopher Montgomery  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215-4291  
todonnell@bricker.com  
cmontgomery@bricker.com

**ON BEHALF OF PAULDING WIND FARM II LLC**

Mark A. Hayden  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
haydenm@firstenergycorp.com

James F Lang  
Laura C. McBride  
N. Trevor Alexander  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
jlang@calfee.com  
lmcbride@calfee.com  
talexander@calfee.com

John N. Estes III  
Paul F. Wight  
Skadden, Arps, Slate, Meagher  
& Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005  
John.Estes@skadden.com  
Paul.Wight@skadden.com

**ON BEHALF OF FIRSTENERGY SOLUTIONS  
CORP.**

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

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

Meena Sinfelt, Esq.  
Andrews Kurth LLP  
1350 I Street, N.W.  
Suite 1100  
Washington, D.C. 20005  
msinfelt@akllp.com

**ON BEHALF OF ENERNOC, INC.**

Jacqueline Lake Roberts,  
Counsel of Record  
101 Federal Street, Suite 1100  
Boston, MA 02110  
jroberts@enemoc.com

**ON BEHALF OF CPOWER, INC., VIRIDITY  
ENERGY, INC., ENERGYCONNECT, INC.,  
CONVERGE INC., ENERWISE GLOBAL  
TECHNOLOGIES, INC.  
ENERGY CURTAILMENT SPECIALISTS, INC.**

Allen Freifeld  
Samuel A. Wolfe  
Viridity Energy, Inc.  
100 West Elm Street, Suite 410  
Conshohocken, PA 19428  
afreifeld@viridityenergy.com  
swolfe@viridityenergy.com

**On Behalf of Viridity Energy, Inc.**

M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour and Pease, LLP  
52 East Gay Street  
Columbus, OH 43216-1008  
mhpetricoff@vorys.com  
smhoward@vorys.com

**COUNSEL FOR DIRECT ENERGY SERVICES,  
LLC AND DIRECT ENERGY BUSINESS, LLC  
AND CONSTELLATION NEWENERGY, INC. ,  
HESS CORPORATION AND CONSTELLATION  
ENERGY COMMODITIES GROUP, INC.**

Jay L. Kooper  
Katherine Guerry  
Hess Corporation  
One Hess Plaza  
Woodbridge, NJ 07095  
jkooper@hess.com  
kguerry@hess.com

**ON BEHALF OF HESS CORPORATION**

David I. Fein  
Cynthia Fonner Brady  
Constellation Energy Group, Inc.  
550 West Washington, Blvd., Suite 300  
Chicago, IL 60661  
david.fein@constellation.com  
cynthia.brady@constellation.com

**ON BEHALF OF CONSTELLATION  
NEWENERGY, INC.**

William Wright  
Chief, Public Utilities Service  
Werner Margard  
Thomas Lindgren  
Stephen A. Reilly  
Assistant Attorneys' General  
Public Utilities Section  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215  
william.wright@puc.state.oh.us  
stephen.reilly@puc.state.oh.us  
werner.margard@puc.state.oh.us

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

Clinton A. Vince  
Douglas G. Bonner  
Daniel D. Bamowski  
Emma F. Hand  
Sonnenschein Nath & Rosenthal LLP  
1301 K Street NW, Suite 600, East Tower  
Washington DC 20005  
cvince@sonnenschein.com  
dbonner@sonnenschein.com

dbamowski@sonnenschein.com  
ehand@sonnenschein.com

**ON BEHALF OF ORMET PRIMARY ALUMINUM  
CORP.**

Robert Korandovich  
KOREnergy  
P.O. Box 148  
Sunbury, Ohio 43074  
korenergy@insight.rr.com

**ON BEHALF OF KOREENERGY**

Lisa McAlister  
Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215  
lmcaster@bricker.com  
tobrien@bricker.com

**COUNSEL FOR THE OHIO MANUFACTURERS'  
ASSOCIATION**

Sandy I-ru Grace  
Assistant General Counsel  
Exelon Business Services Company  
101 Constitution Avenue N.W.  
Suite 400 East  
Washington, DC 20001  
sandy.grace@exeloncorp.com

Jesse A. Rodriguez  
Public Policy & Affairs Manager  
Exelon Generation Company, LLC  
300 Exelon Way  
Kennett Square, PA 19348  
jesse.rodriquez@exeloncorp.com

Constance Whyte Reinhard  
Assistant General Counsel  
Exelon Business Services Company  
10 S. Dearborn Street  
Chicago, IL 60603  
constance.reinhard@exeloncorp.com

**COUNSEL FOR EXELON GENERATION  
COMPANY, LLC**

Kenneth P. Kreider  
KEATING MUETHING & KLEKAMP PLL

One East Fourth Street, Suite 1400  
Cincinnati, OH 45202  
kpkreider@krmklaw.com

Holly Rachel Smith  
Holly Rachel Smith, PLLC  
Hitt Business Center  
3803 Rectortown Road  
Marshall, VA 20115  
holly@raysmithlaw.com

Steve W. Chriss  
Manager, State Rate Proceedings  
Wal-Mart Stores, Inc.  
2001 SE 10<sup>th</sup> Street  
Bentonville, AR 72716-0550  
Stephen.Chriss@wal-mart.com

**ON BEHALF OF WAL-MART STORES EAST, LP  
AND SAM'S EAST, INC.**

Henry W. Eckhart, Counsel of Record  
For the Sierra Club of Ohio  
50 West Broad Street, #2117  
Columbus, OH 43212  
henryeckhart@aol.com

**ON BEHALF OF THE SIERRA CLUB OF OHIO**

*William T. Reisinger, Counsel of Record*  
Nolan Moser  
Trent A. Dougherty  
Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449  
will@theoec.org  
nolan@theoec.org  
trent@theoec.org

**ON BEHALF OF OHIO ENVIRONMENTAL  
COUNCIL**

Greta See  
Jeff Jones  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 East Broad Street, 12<sup>th</sup> Floor  
Columbus, OH 43215  
Greta.See@puc.state.oh.us  
Jeff.jones@puc.state.oh.us

Michael R. Smalz  
Joseph V. Maskovyak  
Ohio Poverty Law Center  
555 Buttles Avenue  
Columbus, OH 43215  
msmalz@ohiopoverlylaw.org  
jmaskovyak@ohiopoverlylaw.org

**ON BEHALF OF THE APPALACHIAN PEACE  
AND JUSTICE NETWORK**

Lisa G. McAlister  
Matthew W. Warnock  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
lmcAlister@bricker.com  
mwarnock@bricker.com

**ON BEHALF OF OMA ENERGY GROUP**

Jay E. Jadwin  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
jejadwin@aep.com

**ON BEHALF OF AEP RETAIL ENERGY  
PARTNERS LLC**