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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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
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 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
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
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	)	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	)	Case No. 11-4921-EL-RDR

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Technician JD Date Processed 10-31-11

**INTERSTATE GAS SUPPLY, INC.'S  
APPLICATION FOR INTERLOCUTORY APPEAL**

Interstate Gas Supply, Inc. ("IGS") submits this Application for Interlocutory Appeal to seek review of the Attorney Examiner's October 26, 2011 ruling denying IGS's Motion to Intervene. The Attorney Examiner denied the Motion because it was filed during the second week of hearing. (See Tr. 1968, attached as Exhibit A.) Because the ruling at issue denies intervention, interlocutory review is sought as a matter of right under OAC 4901-1-15(A)(2).

**ARGUMENT**

R.C. 4903.221 confers a right of intervention to any person "who may be adversely affected by a commission proceeding." Unless the Commission orders otherwise, a motion to intervene may be filed up to five days prior to hearing. R.C. 4903.221(A)(2). This deadline, however, may be waived "for good cause shown." Id. The Commission's rules provide that intervention "shall" be granted where the moving party "has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties." OAC 4901-1-11(A)(2) (emphasis added). The Commission's rules retain discretion to grant an untimely motion to intervene under "extraordinary circumstances." OAC 4901-1-11(F). The intervention statute and rule should be "liberally construed in favor of intervention." Ohio Consumers' Counsel v. Pub. Util. Comm. (2006), 111 Ohio St.3d 384 (quoting State ex rel. Polo v. Cuyahoga Cty. Bd. Of Elections (1995), 74 Ohio St.3d. 143, 144).

As discussed below, the ruling being appealed is inconsistent with these standards and Commission precedent and should be reversed.

**A. Extraordinary circumstances exist that justify late intervention.**

The sole basis for denying intervention is "[t]hat motion was filed after the hearing had begun second week." (Tr. 1968, Exhibit A.) No finding has been made that IGS does not otherwise meet the standard for intervention. Thus, the only issue in this appeal is whether late intervention should be allowed because of extraordinary circumstances.

The extraordinary circumstances that warrant IGS's intervention are largely a function of timing; timing over which IGS had no control. AEP filed its SSO application in January 2011. The original procedural schedule, issued in a February 9 Entry, established a March 14 deadline for motions to intervene. Although the procedural schedule was modified seven more times before the hearing finally began, none of the subsequent procedural entries addressed a new deadline for intervention.<sup>1</sup>

On September 7 -- a full six months after the deadline for intervention had lapsed -- various parties filed a Stipulation and Recommendation. The Stipulation recommends implementing a number of provisions that were not originally contemplated in AEP's original filing. In particular, the Stipulation proposes to establish stakeholder and collaborative groups that will meet periodically during the term of the ESP to address various matters, such as the design and details of a competitive bid process that will satisfy AEP's SSO obligation, the status of various FERC proceedings that AEP will file and the status of efforts to securitize RPM priced capacity. (Stipulation, ¶¶ 1r, 1s and 3.) The Stipulation also contemplates "an advisory group of interested Signatory Parties to discuss and explore a rate decoupling mechanism, including rate design changes for non-demand metered customers." (*Id.* at 9.) Notably, each of these

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<sup>1</sup> See, CSP & OPC SSO, Case No. 11-346-EL-SSO, et al., Entry (Aug. 30, 2011) at Findings (3), (8); OPC & CSP Merger Approvals, Case No. 10-2376-EL-UNC, et al., Entry (Sept. 16, 2011) at Findings (4), (7); OPC & CSP Merger Approvals, Case No. 10-2376-EL-UNC, et al., Entry (Oct. 7, 2011) at Findings (5), (6).

provisions of the Stipulation limits participation in stakeholder and collaborative groups to Signatory Parties. (See id.)

The Stipulation was filed while IGS was in the midst of preparing its application for certification as a competitive retail electric ("CRES") supplier. That application was filed on September 29, three days after an Entry was issued re-scheduling the hearing (for the eighth time). Hearings were held October 4 -7. IGS filed its Motion to Intervene on October 11. The hearing concluded on October 27. But it makes no difference whether IGS filed its Motion on the first day of hearing, the last or somewhere in the middle. As IGS made clear in its Motion and Reply, if granted intervention it will accept the record as it stands. No extension of deadlines has been sought; no motions for leave to submit testimony have been filed; no discovery has been served. IGS simply wishes to have a seat at the table during the stakeholder and collaborative processes contemplated by the Stipulation. Given that IGS is seeking intervention at this late stage, it does not contemplate having input into the specifics of the stakeholder process.

As a practical matter, IGS could not have sought intervention by the March 14 deadline. It had no interest in the proceeding until the stakeholder and collaborative process was unveiled in the Stipulation filed six months later. Moreover, to the extent the Commission deems the five-days-before-hearing deadline in R.C. 4903.221(A)(2) applicable, that deadline may be waived "for good cause shown." Id. As explained above, because IGS has agreed to accept the record as it stands, no party is prejudiced by allowing intervention after the start of hearing.

**B. The ruling denying intervention is inconsistent with the Commission's policy of encouraging broad participation in its proceedings.**

The Commission's long-standing policy has been "to encourage the broadest possible participation in its proceedings." Cleveland Electric Illuminating Co. Application to Increase

Rates, Case No. 85-675-EL-AIR, Entry (Jan. 14, 1986). This policy was observed in five other instances in this case where parties sought leave to intervene out of time. It has not been observed with respect to IGS.

The decision to deny intervention to IGS cannot be squared with the decision to allow other parties in this case to intervene out of time. Dominion Retail sought intervention on March 21, stating it was unaware of the March 14 deadline. Environmental Law and Policy Center sought late intervention on April 7, stating that it wasn't aware of the deadline, either. Ohio Environmental Council sought late intervention on April 13, nowhere in its motion mentioning anything about extraordinary circumstances, or even acknowledging that its motion was out of time. Ormet Primary Aluminum waited until April 22 to seek intervention because it was otherwise occupied with "the press of other litigation." EnerNOC showed up to intervene on May 27, explaining that it held back doing so earlier in order to "conserve resources."<sup>2</sup>

The Attorney Examiner granted each of these motions, without even considering whether extraordinary circumstances justified their late filing. In a July 8 Entry, it was determined that each of these parties met the standard for intervention, and that allowing late intervention "will not unduly delay the proceedings, particularly due to their representations that they are each willing to accept the current posture of the proceedings." Entry, at Finding (8); see also id. at Finding (9). If being unaware of a deadline or too busy with other litigation is an "extraordinary circumstance," IGS's circumstances are even more so. As with the other parties that filed out of time, IGS has also represented that it is willing to accept the current posture of the proceeding.

That IGS sought intervention after the hearing began does not justify disparate treatment. The Commission has granted motions to intervene after the conclusion of a hearing. In Case No.

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<sup>2</sup>EnerNOC was granted late intervention in AEP's last ESP case as well. CSP & OPC ESP, Case No. 08-917-EL-SSO, et al., Entry (Oct. 29, 2008) at Finding (4).

89-105-EL-EFC (Entry, December 28, 1989), the Montgomery County Board of Commissioners sought intervention in a DP&L electric fuel component proceeding -- and filed a reply brief -- more than a month after the conclusion of the hearing, and two weeks after the parties filed initial briefs. Intervention was granted based on the County's explanation that it did not realize it had an interest in the proceeding until the parties filed initial briefs. Because the reply brief was filed under the existing schedule, "granting County's requested intervention will not delay this proceeding." *Id.* at Finding (7). See also CSP Fuel Adjustment Clauses Review, Case No. 09-872-EL-UNC, et al., Entry (Dec. 1, 2010) at Finding (14) (in fuel adjustment clause proceeding, granting limited intervention to Kroger, who claimed it was unaware of the intervention deadline, after the conclusion of hearing).

The fact that a Stipulation is pending also does not justify disparate treatment. In Case No. 05-1057-EL-CSS (Supp. Opinion & Order, Nov. 8, 2006), the parties to a complaint case entered a stipulation a few weeks after the evidentiary hearing. On the day a subsequent hearing was held to receive evidence in support of the stipulation, OCC showed up to request intervention. The Commission agreed that because OCC did not oppose the stipulation and "its interest in this proceeding lies in the implementation of the Stipulation in subsequent proceedings," no party would be prejudiced by allowing intervention. *Id.* at 6. The same can be said here for IGS. Its interest is in participating in the stakeholder and collaborative process set forth in the Stipulation. No party has or can claim prejudice by IGS's intervention for this limited purpose.

The Commission may dismiss an interlocutory appeal where (a) the issues are moot, (b) the party taking the appeal lacks standing, (c) there is no prejudice, or (d) the issue presented should be deferred or raised at some later point in the proceeding. OAC 4901-1-15(E)(2). None

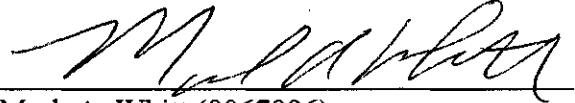
of these circumstances are present. Intervention is not moot because it is being sought for purposes of advocating a right to participate in future processes contemplated by the stipulation. Standing is not at issue; IGS has an automatic right to seek interlocutory review of a ruling denying intervention. The prejudicial effect of the ruling has already been explained. And considering that the hearing will probably be over by the time the Commission rules on this application, the issue being raised cannot be delayed to some later point in this proceeding.

### **CONCLUSION**

IGS's interests are real, substantial and cannot be adequately represented by other parties. That these interests did not arise until after the Stipulation was filed is an extraordinary circumstance justifying late intervention. Granting intervention will not unduly delay these proceedings or otherwise prejudice any party. The Commission should reverse the Attorney Examiner's ruling and grant IGS's Motion to Intervene.

Dated: October 31, 2011

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Interstate Gas Supply, Inc.'s Application for Interlocutory Appeal* was served this 31<sup>st</sup> day of October, 2011 via electronic mail upon the following:

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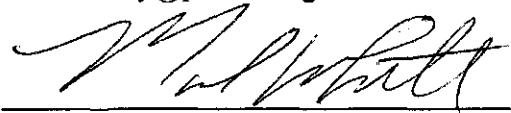
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# **EXHIBIT A**

**Case No. 10-2376-EL-UNC, et al.**

**Transcript Excerpt**

**Hearing on October 26, 2011**

**CSP-OPC Vol. XII, pages 1950, 1968**

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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1	In the Matter of the	:	
2	Application of Ohio Power	:	
3	Company and Columbus	:	
4	Southern Power Company	:	
5	for Authority to Merge and:		Case No. 10-2376-EL-UNC
6	Related Approvals.	:	
7	In the Matter of the	:	
8	Application of Columbus	:	
9	Southern Power Company	:	
10	and Ohio Power Company	:	
11	for Authority to Establish:		
12	a Standard Service Offer	:	Case No. 11-346-EL-SSO
13	Pursuant to \$4928.143,	:	Case No. 11-348-EL-SSO
14	Ohio Rev. Code, in the	:	
15	Form of an Electric	:	
16	Security Plan.	:	
17	In the Matter of the	:	
18	Application of Columbus	:	
19	Southern Power Company	:	Case No. 11-349-EL-AAM
20	and Ohio Power Company	:	Case No. 11-350-EL-AAM
21	for Approval of Certain	:	
22	Accounting Authority.	:	
23	In the Matter of the	:	
24	Application of Columbus	:	
25	Southern Power Company to	:	Case No. 10-343-EL-ATA
	Amend its Emergency	:	
	Curtailment Service	:	
	Riders.	:	
	In the Matter of the	:	
	Application of Ohio Power	:	
	Company to Amend its	:	Case No. 10-344-EL-ATA
	Emergency Curtailment	:	
	Service Riders.	:	
	In the Matter of the	:	
	Commission Review of the	:	
	Capacity Charges of Ohio	:	Case No. 10-2929-EL-UNC
	Power Company and Columbus:		
	Southern Power Company.	:	

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1 will, however, proceed with the other procedural  
2 issues that have come to our attention.

3 First, we'll start with there is a motion  
4 to intervene in this matter by IGS. That motion was  
5 filed after the hearing had begun second week. The  
6 hearing -- the motion to intervene is denied.

7 We note that AEP Ohio has a motion for a  
8 protective order in regards to AEP Witness Allen's  
9 testimony. In light of our ruling on similar  
10 information submitted in this case, the motion to  
11 protect -- for protective treatment shall be granted.

12 And FES's motion to strike the testimony  
13 of AEP Witness Hamrock and Staff Witness Baker after  
14 considering FES's motion, as well as the -- the  
15 memorandums contra filed, we are going to deny the  
16 motion to strike the testimony of Mr. Hamrock and  
17 Mr. Baker.

18 MR. KUTIK: Your Honor, just so I can be  
19 clear with respect to the first thing you said, there  
20 were actually two motions before you with respect to  
21 Ms. Thomas. One was my motion to have her update,  
22 and the other was Mr. Darr's motion to strike. And  
23 is it our understanding that you will rule on both of  
24 those later today?

25 EXAMINER SEE: Yes.