

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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**I. INTRODUCTION**

On August 1, 2012, the Public Utilities Commission of Ohio ("Commission") issued a Finding and Order ("PIRR Order") modifying and approving Ohio Power Company's ("OP") and Columbus Southern Power Company's<sup>1</sup> ("CSP") (collectively, "AEP-Ohio") Application (the "PIRR Application") to increase electric bills. The increase authorized by the Commission is related to an amortization process for the portion of the rate increase authorized in AEP-Ohio's first electric security plan ("ESP I") which was deferred for future collection. As part of the authorized increase and related amortization process, the PIRR Order directed AEP-Ohio to annually accrue carrying charges at a long term debt rate rather than at a weighted average cost of capital ("WACC") rate. Since the WACC carrying charge rate includes a common equity

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<sup>1</sup> OP has merged with CSP. OP and CSP, however, have separately booked deferred balances pursuant to separate ESPs. For purposes of this Memorandum Contra, OP's and CSP's ESP's are referred to as AEP-Ohio's ESP.

component, the use of a debt rate reduces the total dollar amount to be amortized by approximately 600 basis points and \$129 million over the course of the amortization period assuming that the deferred amount is not subsequently reduced through the open and other Commission proceedings which will ultimately determine how much, if any, of the deferred increase is actually recoverable from customers.

The purpose of this Memorandum Contra is to respond to AEP-Ohio's Application for Rehearing filed on August 31, 2012, which seeks to overturn the PIRR Order. In its Application for Rehearing, AEP-Ohio claims that the ESP I Order fully adjudicated all issues pertaining to the calculation of carrying charges and that the PIRR Order's directive that AEP-Ohio annually accrue carrying charges at a debt rate during the amortization period is barred by *res judicata*. AEP-Ohio also claims that the PIRR Order is barred by *estoppel* because it would frustrate AEP-Ohio's right to withdraw from an ESP modified and approved by the Commission. Moreover, AEP-Ohio claims that the PIRR Order undermines securitization efforts. In the alternative and to try to drive electric bills higher than allowed by the PIRR Order, AEP-Ohio requests that it be permitted to use a hypothetical capital structure that ignores the debt-based financing associated with the PIRR.

AEP-Ohio's claimed errors are without merit. AEP-Ohio's arguments misstate legal precedent, the ESP I history and facts associated with the phase-in mechanism approved by the Commission in ESP I. Because AEP-Ohio's arguments lack merit, the Commission should deny AEP-Ohio's Application for Rehearing.

## II. THE PHASE-IN

The Commission authorized AEP-Ohio to increase rates by a total dollar amount in the ESP I Opinion and Order.<sup>2</sup> Because of the size of the overall increase, the Commission authorized AEP-Ohio to collect a portion of the increase during the ESP term, and through Section 4928.144, Revised Code, the remaining allowable balance of the total increase through a non-bypassable mechanism commencing after the term of the ESP. The portion of this total increase subject to collection after the term of the ESP was residually determined relative to the portion of the total lawful increase collected during the term of ESP I. At the time of the ESP I decision, the amount of the total increase authorized individually for OP and CSP that might be recovered through a post-ESP I non-bypassable charge was unknowable.

In the ESP I Order, and for purposes of accumulating the amount of the total increase that might be subject to recovery following the term of ESP I, the Commission authorized AEP-Ohio to add an interest component to the deferred balance. More specifically and over the objections of stakeholders, the Commission permitted AEP-Ohio to add interest to the deferred balance with the interest component calculated based on a WACC rate (approximately 11 percent in this case). The ESP I Order also made it clear that the Commission would, in the future, determine what portion of the amount deferred during the term of the ESP would be subject to future collection through a non-bypassable charge. The ESP I Order made no determination regarding the carrying charge rate that would apply once the amortization process commenced.

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<sup>2</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 22-23 (Mar. 18, 2009) (hereinafter “ESP I”).

The post-ESP amount eligible for recovery from customers and the carrying charge rate were subject to Commission determinations to be made following a separate application at the end of ESP I.<sup>3</sup>

Since its authorization, the Commission has maintained ongoing supervision and jurisdiction over the ESP I phase-in, frequently modifying its terms and the deferred balance through subsequent Entries on Rehearing and in separate proceedings. In a July 23, 2009 Entry on Rehearing, for example, the Commission determined that certain riders were exempt from the bill increase limits that determined the portion of the total ESP I increase subject to collection during the term of ESP I.<sup>4</sup> In another Entry on Rehearing, on July 29, 2009, the Commission granted Industrial Energy Users-Ohio's ("IEU-Ohio") Application for Rehearing and revoked authorization for AEP-Ohio to recover the cost of maintenance of the Waterford and Darby generating facilities. The Commission directed AEP-Ohio to credit the \$22 million already collected for such maintenance cost so as to reduce the amount of the total rate increase which AEP-Ohio's accounting had placed in the deferred increase balance.<sup>5</sup>

In other proceedings, the Commission, directed AEP-Ohio to make additional reductions to the deferred portion of the total ESP I increase to remedy the significantly excessive earnings caused by ESP I,<sup>6</sup> unlawfully authorized provider of last resort

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<sup>3</sup> *ESP I* at 22-23.

<sup>4</sup> *ESP I*, Entry on Rehearing at 8-9 (Jul. 23, 2009). IEU-Ohio objected to the modification, arguing that no rider should be exempt from the bill limits.

<sup>5</sup> *ESP I*, Entry on Rehearing at 2 (Jul. 29, 2009).

<sup>6</sup> *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.*, Case No. 10-1261-EL-UNC, Opinion and Order at 36-37 (Jan. 11, 2011).

charges,<sup>7</sup> and a portion of AEP-Ohio's defective accounting that significantly overstated the amount of fuel expense recoverable through the fuel adjustment clause ("FAC").<sup>8</sup> As AEP-Ohio identified in its Reply Comments, future FAC proceedings may further alter the deferred balances.<sup>9</sup> Indeed, AEP-Ohio's Application for Rehearing of the Opinion and Order approving AEP-Ohio's Modified ESP states that "[t]he Commission has authority to provide for final reconciliation of riders that will expire during the term of an ESP."<sup>10</sup>

At AEP-Ohio's request, the Commission further modified the terms of the phase-in authorized in the ESP I Order when it approved AEP-Ohio's Economic Development Cost Recovery Rider ("Rider EDR"), exempting Rider EDR from the bill increase limits established in the ESP I Order.<sup>11</sup> As mentioned above, the Commission previously identified specific riders that were not subject to the bill increase limits and Rider EDR was not such a rider.<sup>12</sup> Despite this fact, again over IEU-Ohio's objections, the Commission determined that the bill limits did not apply to Rider EDR.<sup>13</sup> IEU-Ohio appealed the Commission's decision to the Supreme Court of Ohio, claiming that the

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<sup>7</sup> *ESP I*, Order on Remand at 39 (Oct. 3, 2009).

<sup>8</sup> *In the Matter of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order at 12-13,19 (Jan. 23, 2012).

<sup>9</sup> Reply Comments of AEP-Ohio at 18-19 (Apr. 17, 2012).

<sup>10</sup> *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Application for Rehearing at 27 (Sep. 7, 2012).

<sup>11</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, Case No. 09-1095-EL-RDR, Application (Nov. 13, 2009) (hereinafter "*EDR Case*").

<sup>12</sup> *ESP I*, Entry on Rehearing at 8-9 (Jul. 23, 2009).

<sup>13</sup> *EDR Case*, Finding and Order at 10 (Jan. 7, 2010).

Commission violated the ESP I Order precedent.<sup>14</sup> AEP-Ohio opposed IEU-Ohio's claim. In the section of the decision titled "IEU Has Not Shown that the Commission Erred in Modifying the Phase-in of AEP's Rates," the Supreme Court of Ohio agreed with the Commission and AEP-Ohio, stating:

[T]he order below did not violate the earlier, electric-security-plan order. It is true, as IEU argues, that the earlier order did not exempt the rider from the rate-increase limits. But the commission did not rule out further exemptions, and as a general rule, the commission has discretion to revisit earlier regulatory decisions and modify them prospectively.<sup>15</sup>

On September 1, 2011, consistent with the ESP I Order, AEP-Ohio filed a separate application seeking approval to increase rates so as to commence the authorization of the portion of the ESP I increase that AEP-Ohio had, from an accounting perspective, deferred. This application asked the Commission to permit the amortization process to proceed even though there were and are several open Commission proceedings that will affect the ultimate amount of the ESP I increase that is properly recoverable.

On August 1, 2012, the Commission, without holding a hearing and responding to many of the contested issues raised in comments, modified and approved AEP-Ohio's PIRR Application. Among other things, the Commission determined that due to the decreased risk associated with commencing amortization of the deferred balances though a non-bypassable charge, and consistent with longstanding Commission precedent,<sup>16</sup> AEP-Ohio must accrue carrying charges during the amortization period at

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<sup>14</sup> Notice of Appeal of IEU-Ohio, Case No. 2010-722 (Apr. 27, 2010).

<sup>15</sup> *In re Application of Columbus Southern Power Co.*, 129 Ohio St. 3d 568, 569 (2011).

<sup>16</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Each Company's Transmission Cost Recovery Rider*, Case No. 08-1202-EL-UNC, Finding and Order (Dec. 17, 2008); *In the Matter of the Application of Columbus Southern Power Company and Ohio* [C38600: }

AEP-Ohio's long term debt rate.<sup>17</sup> For similar reasons, the Commission directed AEP-Ohio to compound interest annually rather than monthly.

Like the EDR proceeding where the Commission determined that it had not ruled out modifying the structure and content of the phase-in, the Commission determined that the terms of the amortization period were not set in stone; rather, they were to be the subjects of a later application (the PIRR Application). Particularly, the Commission, stated that it:

[D]oes not agree with AEP-Ohio that the ESP 1 Order cannot be modified in any way by the Commission. On the contrary, AEP-Ohio's ESP, including the phase-in plan, is subject to the ongoing supervision and jurisdiction of the Commission. Although the Commission generally approved AEP-Ohio's proposed phase-in plan and authorized recovery of its deferred fuel expenses in the ESP 1 Order, the order also contemplated that the Company would file a separate application to establish a recovery mechanism, which the Company in fact filed in these cases on September 1, 2011, and is presently the subject of our review.<sup>18</sup>

Accordingly, the Commission determined that “[o]nce collection begins, the risk of non-collection is significantly reduced and, as such, it is more appropriate to use the long term cost of debt rate, which is consistent with sound regulatory practice and longstanding Commission precedent.”<sup>19</sup>

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*Power Company for Authority to Modify Their Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1301-EL-AAM, Finding and Order (Dec. 19, 2008); *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, Opinion and Order (Jul. 1, 2012).

<sup>17</sup> The effect of using a long term debt rate during the amortization period allows interest to be charged to customers on the deferred balance including the WACC-based interest accumulated in that balance. Thus, the use of a debt-based interest rate during the amortization period works to finance the common equity return embedded in the accumulated deferred balance. AEP-Ohio's long term debt rate is the embedded long term debt rate which is significantly above a reasonable current long term debt rate. Thus, even the use of a long term debt rate in this circumstance leads to significantly overstated financing costs.

<sup>18</sup> PIRR Order at 17-18.

<sup>19</sup> PIRR Order at 18.





### III. ARGUMENT

AEP-Ohio's Application for Rehearing asserts three arguments against the Commission's directive that AEP-Ohio annually calculate carrying charges at a debt rate: (1) the PIRR Order modified a matter previously adjudicated in the ESP I Order; thus, the PIRR Order is barred by *res judicata*;<sup>20</sup> (2) the PIRR Order would frustrate AEP-Ohio's statutory ability to withdraw from a modified and approved ESP; thus, the PIRR Order is barred by *estoppel*;<sup>21</sup> and (3) the PIRR Order undermines securitization efforts.<sup>22</sup> In the alternative, AEP-Ohio claimed that if it is required to amortize the deferred balances at a debt rate "[t]he long term debt in the cost of capital schedule should be adjusted to remove the regulatory asset balances plus equity carrying charges as of August 31, 2010,"<sup>23</sup> which would decrease AEP-Ohio's debt to equity ratio thereby increasing any interest charge computed using a WACC rate. Each of AEP-Ohio's assignments of error is without merit.

#### A. *Res Judicata* Does Not Bar the Commission

AEP-Ohio's claim that *res judicata* prevents the Commission from establishing a debt carrying charge rate is without merit. AEP-Ohio raised this argument in its Reply Comments,<sup>24</sup> and the Commission appropriately addressed it in the PIRR Order. AEP-Ohio's Application raises no new issues to warrant rehearing. Regardless of that fact, AEP-Ohio's claimed error is addressed below.

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<sup>20</sup> Application for Rehearing and Memorandum in Support of AEP-Ohio at 5-11 (hereinafter "AEP-Ohio App. Rehearing")

<sup>21</sup> AEP-Ohio App. Rehearing at 19-21.

<sup>22</sup> AEP-Ohio App. Rehearing at 21-23.

<sup>23</sup> AEP-Ohio App. Rehearing at 16.

<sup>24</sup> Reply Comments of AEP-Ohio at 6-12 (Apr. 17, 2012).

*Res judicata* precludes the “relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction.”<sup>25</sup> It requires “an identity of parties and issues in the proceedings.”<sup>26</sup>

*Res judicata* simply does not apply in this circumstance because the ESP I Order did not address the carrying charge rate to be applied during the amortization period or the amount of the deferred balances that would be eligible for recovery. As AEP-Ohio concedes, it was required to submit an application for approval to amortize the deferred balances and to obtain a Commission determination on the amount of the deferred balance eligible for recovery from customers.<sup>27</sup> Thus, the issues in the ESP I Order were not the same as the PIRR Application.

AEP-Ohio was required to file an application for approval of a phase-in recovery mechanism to commence amortization of the deferred balances, and that is the issue the Commission has addressed in this proceeding. Due to the decreased risk of non-recovery in the period at issue and past Commission precedent, the Commission determined that it was necessary to require AEP-Ohio to accrue carrying charges at a long-term debt rate and compound interest annually.

The Supreme Court of Ohio previously addressed a very similar issue with respect to the phase-in in the appeal of AEP-Ohio’s *EDR Case*, where the Commission modified the terms of the phase-in at AEP-Ohio’s request. Specifically, over IEU-Ohio’s

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<sup>25</sup> *State, Ex Rel. B.O.C. Group, General Motors Corp., v. Indus. Comm.*, 58 Ohio St. 3d 199, 200-201 (1991).

<sup>26</sup> *Id.*

<sup>27</sup> AEP-Ohio App. Rehearing at 3 (emphasis added).

objections, the Commission permitted AEP-Ohio to collect Rider EDR outside of the bill increase limits established as part of ESP I. On appeal to the Supreme Court of Ohio, AEP-Ohio and the Commission successfully argued that the phase-in can be modified because, although the Commission identified certain riders that were exempt from the bill limits — and Rider EDR was not such a rider — the Commission did not explicitly rule out future exemptions.<sup>28</sup>

Even assuming that the issues in this proceeding and in the ESP I Order are the same, the Court has closed the door on AEP-Ohio's *res judicata* argument. In addition to determining that the terms of ESP I could be modified to alter the portion of the total increase deferred for future collection because the Commission had not exhaustively determined what riders were exempt from the bill increase limits, the Court determined "the commission has discretion to revisit earlier regulatory decisions and modify them prospectively."<sup>29</sup> Thus, even a prior determination regarding which riders were exempt from the application of the bill increase limitations was not a bar to a prospective modification. Pursuant to Section 4928.144, Revised Code, and once the amount to be phased-in is found to be lawful, the Commission may authorize any just and reasonable phase-in of a rate or priced established under Sections 4928.141 through 4928.143, Revised Code, *as the Commission considers necessary*. The Commission has broad discretion to determine the details of any ordered phase-in of rates, so long as it is just and reasonable and the amount to be phased-in is otherwise lawful.<sup>30</sup>

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<sup>28</sup> *In re Application of Columbus Southern Power Co.*, 129 Ohio St. 3d 568, 569-570 (2011).

<sup>29</sup> *Id.* at 569.

<sup>30</sup> *In re Application of Columbus Southern Power Co.*, 129 Ohio St. 3d 568, 569-570 (2011).

Moreover, because the Commission has ongoing jurisdiction over the phase-in, *res judicata* only has limited application. The Supreme Court of Ohio has determined in cases where an administrative agency maintains ongoing jurisdiction, *res judicata* does not apply to determinations in different time periods and different audit periods.<sup>31</sup>

## **B. Estoppel Does Not Bar the Commission**

AEP-Ohio claims that the Commission is “estopped by R.C. 4928.143 from unilaterally modifying a provision of ESP I due to the Company’s statutory right to withdraw from the ESP based on Commission modifications.” AEP-Ohio’s claim is meritless.

First, as stated above, the Commission did not modify the ESP I Order because such order did not determine the carrying charge rate to be applied to the deferred balances during the amortization period or the deferred amount subject to amortization through a phase-in mechanism. Moreover, as a practical matter, the ESP I Order contemplated that the PIRR Application would be filed at the end of the ESP; thus, the order approving or modifying and approving the PIRR Application could not have occurred at a time when AEP-Ohio’s right to withdraw still existed.

Second, AEP-Ohio cites to no precedent to support its position.

Third, AEP-Ohio’s *estoppel* position is disingenuous. AEP-Ohio’s view of Section 4928.141(C)(1), Revised Code (as demonstrated in its tariff submission letter), is that the EDU never has to say “yes” to the Commission’s version of the Modified ESP, but

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<sup>31</sup> *State, Ex Rel. B.O.C. Group, General Motors Corp., v. Indus. Comm.*, 58 Ohio St. 3d 199, 200-201 (1991).

can say “no” and withdraw compliance with the ESP II Order at any time.<sup>32</sup> If AEP-Ohio is not estopped from rejecting a modified ESP after it receives the benefit of rate increases, then the Commission should not be estopped from altering the phase-in.

Fourth, AEP-Ohio has not claimed that it would have exercised its right to withdraw from the ESP based on the PIRR Order’s directive that AEP-Ohio accrue carrying charges at a debt rate.

### **C. The Commission Must Not Permit AEP-Ohio to Adjust Its Capital Structure**

AEP-Ohio’s argument that its actual capital structure should be adjusted by the Commission because the carrying cost rate on the PIRR regulatory asset will be debt-based has no basis in reality or past Commission practice. The Commission does not make adjustments to a utility’s capital structure to reflect item-by item treatment of regulatory assets. AEP-Ohio’s capital structure is what it is — the debt and equity balances are based on balances recorded on the Company’s balance sheet at a particular point in time, in accordance with long-standing Commission practice and generally accepted accounting principles. To assert that these balances be adjusted, as AEP-Ohio is suggesting works to invent a hypothetical capital structure and is otherwise nonsensical.

Moreover, the Commission should give no weight to AEP-Ohio’s claim that it received a \$550 equity infusion from AEP Inc. “when it became clear that there would

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<sup>32</sup> Letter of Steven T. Nourse to Greta See at 2 (Aug. 16, 2012). In *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, et al. (“ESP I Case”), AEP-Ohio took the position that “[t]he right to withdraw an ESP application under §4928.143(C) (2), Ohio Rev. Code, contains no time restriction.” *ESP I Case*, Columbus Southern Power Company’s and Ohio Power Company’s Memorandum Contra IEU-Ohio’s Motion for Immediate Relief from Electric Rate Increases at 4 (Apr. 23, 2010).

be fuel deferrals that would be recovered over a number of years.”<sup>33</sup> Witness Hawkins described this infusion as a cash contribution and an investment, but did not attribute any specific purpose for the contribution, contrary to AEP-Ohio’s assertion.<sup>34</sup> Whatever equity infusion was made by its parent was and will be reflected in the actual capital structure.

#### **D. The PIRR Order Does Not Undermine Securitization Efforts**

AEP-Ohio claims that the PIRR Order undermines the ability to securitize any regulatory asset. Again, AEP-Ohio hangs its hat on the belief that all issues pertaining to the amortization of the PIRR were determined in the ESP I Order. As stated above, that is simply not true and it is not even possible due to several ongoing proceedings which impact the amount of the ESP I increase that will ultimately be recoverable from customers once the proceedings and the contested issues identified therein are finally resolved. These issues must be completely resolved at both the Commission and Supreme Court of Ohio before securitization may move forward.<sup>35</sup>

#### **IV. CONCLUSION**

AEP-Ohio’s Application for Rehearing is without merit and should be denied. For the reasons stated herein and previously, IEU-Ohio urges the Commission to reject AEP-Ohio’s rehearing application. For the reasons stated in IEU-Ohio’s Application for Rehearing, IEU-Ohio again urges the Commission to grant IEU-Ohio’s Application and

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<sup>33</sup> AEP-Ohio App. Rehearing at 17 footnote 2.

<sup>34</sup> *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Tr. Vol. II at 470.

<sup>35</sup> Several outstanding proceedings will impact the amounts of the deferred balances that are eligible for recovery through rates. Reply Comments of AEP-Ohio at 18-19 (Apr. 17, 2012). Until there are final non-appellable orders in each of those proceedings and all appeals have been exhausted, the PIRR cannot be securitized.

lift a portion of the unreasonable PIRR charges from the backs of AEP-Ohio's customers.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's Application for Rehearing*, was served upon the following parties of record this 10th day of September, 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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Summary: Memorandum Contra Ohio Power Company's Application for Rehearing  
electronically filed by Mr. Joseph E. Olikier on behalf of Industrial Energy Users-Ohio