

ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, :  
 Appellant, : Supreme Court Case No. 09-2022  
 :  
 : Appeal From the Public  
 v. : Utilities Commission of Ohio  
 The Public Utilities Commission of Ohio, : Case Nos. 08-917-EL-SSO  
 Appellee, : 08-918-EL-SSO

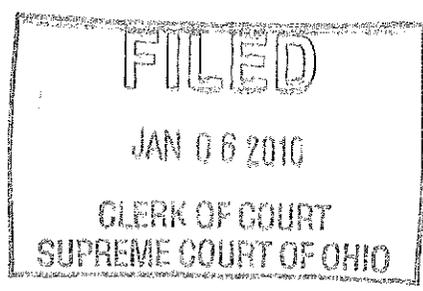
MOTION TO STRIKE  
 INDUSTRIAL ENERGY USERS-OHIO'S  
 ALLEGATION OF ERROR "G" FROM ITS  
 NOTICE OF APPEAL,  
 FILED BY MOVANTS FOR INTERVENTION  
 AS APPELLEES  
 COLUMBUS SOUTHERN POWER COMPANY  
 AND OHIO POWER COMPANY

Richard Cordray (0038034)  
 Attorney General of Ohio  
 Duane W. Luckey (0023557)  
 Chief, Public Utilities Section  
 Werner L. Margard III (0024858)  
 Thomas G. Lindgren (0039210)  
 John H. Jones (0051913)  
 Assistant Attorneys General  
 180 East Broad Street  
 Columbus, Ohio 43215-3793  
 Telephone: (614) 644-8698  
 Facsimile: (614) 644-8764  
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)  
[werner.margard@puc.state.oh.us](mailto:werner.margard@puc.state.oh.us)  
[thomas.lingren@puc.state.oh.us](mailto:thomas.lingren@puc.state.oh.us)  
[john.jones@puc.state.oh.us](mailto:john.jones@puc.state.oh.us)

Attorneys for Appellee  
 Public Utilities Commission of Ohio

Janine L. Migden-Ostander (0002310)  
 Consumers' Counsel  
 Maureen R. Grady (0020847)  
 Counsel of Record  
 Terry L. Etter (00067445)  
 Richard C. Reese (0076211)  
 Assistant Consumers' Counsel  
 10 West Broad Street, Suite 1800  
 Columbus, Ohio 43215-3485  
 Telephone: (614) 466-8574  
 Facsimile: (614) 466-9475  
[grady@occ.state.oh.us](mailto:grady@occ.state.oh.us)  
[etter@occ.state.oh.us](mailto:etter@occ.state.oh.us)  
[reese@occ.state.oh.us](mailto:reese@occ.state.oh.us)

Attorneys for Appellant  
 Office of the Ohio Consumers' Counsel



Marvin I. Resnik (0005695)  
Counsel of Record  
Kevin F. Duffy (0005867)  
Steven T. Nourse (0046705)  
Matthew J. Satterwhite (0071972)  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215-2373  
Telephone: (614) 716-1606  
Facsimile: (614) 716-2950  
[miresnik@aep.com](mailto:miresnik@aep.com)  
[kfduffy@aep.com](mailto:kfduffy@aep.com)  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

Daniel R. Conway (0023058)  
Porter Wright Morris & Arthur LLP  
41 South High Street  
Columbus, Ohio 43215  
Telephone: (614) 227-2270  
Facsimile: (614) 227-2100  
[dconway@porterwright.com](mailto:dconway@porterwright.com)

Attorneys for Movants for Intervention  
Columbus Southern Power Company and  
Ohio Power Company

Samuel C. Randazzo  
(Reg. No. 0016386)  
Counsel of Record  
Lisa G. McAlister  
(Reg. No. 0075043)  
Joseph M. Clark  
(Reg. No. 0080711)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 469-8000  
Facsimile: (614) 469-4653  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[lmcalister@mwncmh.com](mailto:lmcalister@mwncmh.com)  
[jclark@mwncmh.com](mailto:jclark@mwncmh.com)

Counsel for Appellant,  
Industrial Energy Users-Ohio

**IN THE SUPREME COURT OF OHIO**

|   |          |                                       |
|---|----------|---------------------------------------|
| <b>The Office of the Ohio Consumers' Counsel,</b> | <b>:</b> |                                       |
| <b>Appellant,</b>                                 | <b>:</b> | <b>Supreme Court Case No. 09-2022</b> |
|   | <b>:</b> |                                       |
|   | <b>:</b> | <b>Appeal From the Public</b>         |
| <b>v.</b>   | <b>:</b> | <b>Utilities Commission of Ohio</b>   |
| <b>The Public Utilities Commission of Ohio,</b>   | <b>:</b> | <b>Case Nos. 08-917-EL-SSO</b>        |
| <b>Appellee,</b>                                  | <b>:</b> | <b>08-918-EL-SSO</b>                  |

---

**MOTION TO STRIKE  
INDUSTRIAL ENERGY USERS-OHIO'S  
ALLEGATION OF ERROR "G" FROM ITS  
NOTICE OF APPEAL,  
FILED BY MOVANTS FOR INTERVENTION  
AS APPELLEES  
COLUMBUS SOUTHERN POWER COMPANY  
AND OHIO POWER COMPANY**

---

In its November 17, 2009, Notice of Appeal in this docket, Appellant Industrial Energy Users-Ohio (IEU) asserted the following alleged error by the Public Utilities Commission of Ohio (Commission):

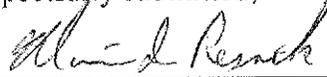
- G. The Commission's Opinion and Order and Entries on Rehearing are unlawful inasmuch as the Commission lost jurisdiction over AEP-Ohio's July 31, 2008 ESP Application filed in PUCO Case Nos. 08-917-EL-SSO and 08- 918-EL-SSO when it failed to authorize an ESP within the 150-day time frame required by R.C. 4928.143.

IEU did not set forth this alleged error in either of the two applications for rehearing it filed in the proceeding before the Commission. Therefore, this alleged error cannot be urged or relied upon as a ground for reversal of the Commission's orders being challenged in this appeal.

Columbus Southern Power Company and Ohio Power Company (AEP Ohio - - Movants for Intervention) request that the Court issue an order precluding IEU from

arguing the issue raised in its Allegation of Error "G" in this appeal. A memorandum in support of this motion is attached to this motion.

Respectfully submitted,



---

Marvin I. Resnik (0005695)  
Counsel of Record  
Kevin F. Duffy (0005867)  
Steven T. Nourse (0046705)  
Matthew J. Satterwhite (0071972)  
American Electric Power Service Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215-2373  
Telephone: (614) 716-1606  
Facsimile: (614) 716-2950  
[miresnik@aep.com](mailto:miresnik@aep.com)  
[kfduffy@aep.com](mailto:kfduffy@aep.com)  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

Daniel R. Conway (0023058)  
Porter Wright Morris & Arthur LLP  
41 South High Street  
Columbus, Ohio 43215  
Telephone: (614) 227-2270  
Facsimile: (614) 227-2100  
[dconway@porterwright.com](mailto:dconway@porterwright.com)

Attorneys for Movants for Intervention  
Columbus Southern Power Company and  
Ohio Power Company

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, :  
Appellant, : Supreme Court Case No. 09-2022  
: :  
: Appeal From the Public  
v. : Utilities Commission of Ohio  
The Public Utilities Commission of Ohio, : Case Nos. 08-917-EL-SSO  
Appellee, : 08-918-EL-SSO

---

MEMORANDUM IN SUPPORT  
OF MOTION TO STRIKE  
INDUSTRIAL ENERGY USERS-OHIO'S  
ALLEGATION OF ERROR "G" FROM ITS  
NOTICE OF APPEAL

---

"No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application [for rehearing]." (§4903.10, Ohio Rev. Code).

There is a dual relationship between applications for rehearing of an order of the Public Utilities Commission of Ohio (Commission) and the direct appeal to the Supreme Court of Ohio of such an order. Broadly speaking, a timely application for rehearing is a prerequisite to a review of a Commission order by the Court. (*Warner v. Ohio Edison Co.*) (1949), 152 Ohio St. 30).

The filing of an application for rehearing, however, does not give an appellant before this Court *carte blanche* to argue any issue that might come to mind. Instead, the second, more specific relationship between an application for rehearing before the Commission and the appeal to this Court, comes into play. As set out in §4903.10, Ohio

Rev. Code, only those specific issues brought before the Commission on rehearing can be brought before the Court on appeal.

The rationale supporting this restriction is that the Commission must have an opportunity to consider the errors alleged on rehearing and, if it determines that it has committed an error, to correct that error. This is not a new concept. As far back as 1949 this Court considered the significance of §543, General Code, the predecessor to §4903.10, Ohio Rev. Code. In addressing an issue an appellant did not “set forth specifically” in its application for rehearing, the Court held:

Instead, the city has waited until the record is no longer before the commission and now makes the point for the first time. Such tactics have been recognized by the General Assembly to be unfair and in Section 543 it has specifically guarded against them. This court must disregard this belated argument on the part of the city and refuse to consider it. See Travis v. Public Utilities Commission, 123 Ohio St., 355, 175 N.E., 586. Any other course would only encourage others to withhold claimed errors that could be corrected by the commission until the case had been filed in court and thus removed from the commission’s control. This would destroy the very purpose of an application for rehearing and make it an entirely meaningless procedural step.

...

We realize that, in its application for rehearing, the city did set forth as grounds on which the city considered the commission’s order to be unreasonable or unlawful that (a) “the commission erred in that its opinion, findings and order of May 25, 1948, are not supported or sustained by the evidence, are manifestly against the weight of the evidence, are in clear and direct conflict therewith, are unreasonable and contrary to law,” and (b) “there are other errors apparent on the face of the record, prejudicial to the rights of the city of Cincinnati, to which it has duly excepted.”

In our opinion, such general grounds do not “set forth specifically” this ground now relied upon by the city, as the General Assembly intended that it should be set forth in order to receive consideration from this court on appeal. Where a right to appeal is conferred by statute, the exercise of that right is conditioned upon compliance with the accompanying mandatory requirements. Zier v. Bureau of Unemployment Compensation, 151 Ohio St., 123; Kinsman Square Drug Co. v. Evatt, Tax Commr. 145 Ohio St.,

52, 60 N.E. (2d), 668. It may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question. (*City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 376-378).

Based on these well-established legal principles, the test to be applied to determine whether IEU's Allegation of Error "G" is properly before the Court is easily applied. IEU filed two applications for rehearing in the proceeding before the Commission which now is before the Court on appeal. In its first application for rehearing, filed on April 16, 2009, IEU raised ten alleged errors. Those ten alleged errors were:

- I. The Commission erred by granting stunning rate Increases while failing to issue a written decision in this contested proceeding that sets forth, in sufficient detail and based on the facts and law, the reasons prompting the decision.
- II. The Commission's rate increase for ninety percent of AEP-Ohio's requested POLR revenue requirement is unjust, unreasonable and unlawful.
- III. The Commission's authorization of a rate increase for recovery of costs of ownership and other interests in generating assets is unjust, unreasonable, unlawful and unsupported by the evidence.
- IV. The Commission's selective distribution rate increases, for gridSMART and a service reliability plan are unjust, unreasonable and unlawful.
- V. The Commission's failure to require AEP-Ohio to limit the total bill increases to the percentage amounts specified in the Order is unjust, unlawful and unreasonable and the Commission must immediately require AEP-Ohio to comply with the Order and to refund amounts billed and collected in excess of such caps.
- VI. The Commission's conclusion that the ESP is more beneficial in the aggregate than the alternative under Section 4928.142, Revised Code, is unjust, unreasonable, unlawful and unsupported by the evidence.
- VII. The Commission's unbundling of the non-fuel and fuel component of the generation rate based on something other than 2008 actual fuel costs is unjust and unreasonable.

- VIII. The scope of the fuel and other cost recovery mechanism authorized by the Commission is unreasonable, unlawful and unjust both because of the types of costs that are subject to recovery through the mechanism and the substantial negative effect that the kWh-based mechanism has upon larger, high load factor customers.
- IX. The Commission's determination that interruptible load may not be counted towards OP's and CSP's determination of their peak demand response compliance requirements is unjust, unreasonable and unlawful.
- X. The combined effect of the unexplained conclusions in the Commission's Order is unreasonable, unjust and unlawful because the Commission arbitrarily and capriciously exercised its discretion to allow CSP and OP to bill and collect excessive rates.

IEU's second application for rehearing was filed on August 17, 2009. In that application, IEU raised two alleged errors made by the Commission in its July 23, 2009 Entry on Rehearing. The first alleged error related to the Commission's prohibition against AEP Ohio customers who are taking service under reasonable arrangements pursuant to §4905.31, Ohio Rev. Code, from participating in demand response programs offered by PJM Interconnection LLC. This issue is included in IEU's Notice of Appeal as Allegation of Error "H."

The other issue raised by IEU in its second application for rehearing is that AEP Ohio should have been prohibited from accepting the benefits of the rates approved by the Commission while simultaneously preserving its right, under §4928.143 (C)(2)(a), Ohio Rev. Code, to withdraw its application. This issue corresponds to IEU's Allegation of Error "I" in its Notice of Appeal.

These twelve allegations of error in IEU's applications for rehearing fail to raise the issue of whether the Commission lost its jurisdiction over the applications in the proceeding that had been filed with the Commission pursuant to the requirement of

§4928.141 (A), Ohio Rev. Code. Moreover, there is nothing in either of IEU's applications for rehearing that even hints at such an argument. On the contrary, IEU's applications for rehearing and other IEU pleadings filed at the Commission strongly suggest that IEU did not believe that the Commission had lost jurisdiction over the AEP Ohio proceedings.

Consequently, this Court should issue an order which strikes Allegation of Error "G" from this appeal. Issuing such an order at this time will relieve parties to this appeal from the unnecessary task of briefing an issue which so clearly is not properly before the Court and perhaps having to devote a portion of limited time on oral argument to that issue. As a matter of appellate efficiency and consistent with long-standing principles of appellate procedure applicable to appeals of Commission orders, AEP Ohio requests that its motion be granted.

Respectfully submitted,



---

Marvin I. Resnik (0005695)

Counsel of Record

Kevin F. Duffy (0005867)

Steven T. Nourse (0046705)

Matthew J. Satterwhite (0071972)

American Electric Power Corporation

1 Riverside Plaza, 29<sup>th</sup> Floor

Columbus, Ohio 43215-2373

Telephone: (614) 716-1606

Facsimile: (614) 716-2950

[miresnik@aep.com](mailto:miresnik@aep.com)

[kfduffy@aep.com](mailto:kfduffy@aep.com)

[stnourse@aep.com](mailto:stnourse@aep.com)

[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

Daniel R. Conway (0023058)  
Porter Wright Morris & Arthur LLP  
41 South High Street  
Columbus, Ohio 43215  
Telephone: (614) 227-2270  
Facsimile: (614) 227-2100  
[dconway@porterwright.com](mailto:dconway@porterwright.com)

Attorneys for Movants for Intervention  
Columbus Southern Power Company and  
Ohio Power Company

## PROOF OF SERVICE

I certify that Columbus Southern Power Company's and Ohio Power Company's Motion to Strike and Memorandum in Support was served by First Class U.S. Mail upon counsel identified below for all parties of record this 6<sup>th</sup> day of January, 2010.



Marvin I. Resnik, Counsel of Record

Janine L. Migden-Ostander  
Consumers' Counsel  
Maureen R. Grady, Counsel of Record  
Terry L. Etter  
Richard C. Reese  
Assistant Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485

Samuel C. Randazzo  
Lisa G. McAlister  
Joseph M. Clark  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 32115

Richard Cordray  
Attorney General of Ohio  
Duane W. Luckey  
Chief, Public Utilities Section  
Werner L. Margard III  
Thomas G. Lindgren  
John H. Jones  
Assistant Attorneys General  
180 East Broad Street  
Columbus, Ohio 43215-3793