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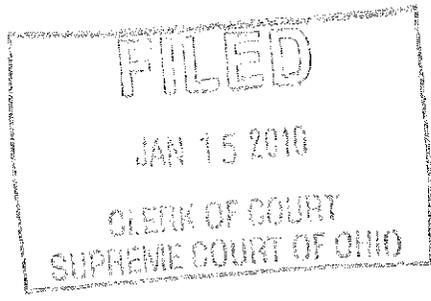
IN THE SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,	: Case No. 2009-2022
	:
Appellant,	: Appeal from the Public
	: Utilities Commission of Ohio
	:
v.	: Public Utilities
	: Commission of Ohio
The Public Utilities Commission of Ohio,	: Case Nos. 08-917-EL-SSO
	: 08-918-EL-SSO
Appellee.	:

MEMORANDUM IN OPPOSITION OF INDUSTRIAL ENERGY USERS-OHIO TO MOTION TO STRIKE BY MOVANTS FOR INTERVENTION AS APPELLEES COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

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## MEMORANDUM IN OPPOSITION

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### I. INTRODUCTION

On November 17, 2009, Industrial Energy Users-Ohio (“IEU-Ohio”) filed a Second Notice of Appeal in this Ohio Supreme Court (“Court”) docket from a Public Utilities Commission of Ohio (“Commission”) proceeding modifying and approving an electric security plan (“ESP”) for Columbus Southern Power Company and Ohio Power Company (collectively, American Electric Power or “AEP-Ohio”). In its Second Notice of Appeal, IEU-Ohio included ten allegations of error, including an allegation as follows: “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.”<sup>1</sup> IEU-Ohio’s Second Notice of Appeal again raised a threshold legal issue first brought to this Court’s attention by an October 21, 2009 IEU-Ohio Complaint for Writ of Prohibition. In the Complaint for a Writ of Prohibition, which is still pending before this Court, IEU-Ohio similarly asked the Court to find that the Commission’s failure to issue an order within

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<sup>1</sup> In September 2009, IEU-Ohio (and the Ohio Consumers’ Counsel [“OCC”]) filed timely appeals from the Commission’s July 23, 2009 Entry on Rehearing in Ohio Supreme Court Case No. 2009-1620. IEU-Ohio included the same allegation of error in its September 2009 Second Notice of Appeal. Both AEP-Ohio and the Commission filed Motions to Dismiss the appeal of IEU-Ohio, but neither raised in their Motions to Dismiss the claim that IEU-Ohio was barred from bringing an appeal of this issue because it was not raised on rehearing. The Court granted AEP-Ohio’s and the Commission’s Motions to Dismiss these appeals on October 29, 2009. *10/29/2009 Case Announcements*, 2009-Ohio-5680.

150 days of the filing of AEP-Ohio's ESP Application divested the Commission of jurisdiction over AEP-Ohio's ESP.<sup>2</sup>

On January 6, 2010, AEP-Ohio filed a Motion to Strike Allegation of Error G in IEU-Ohio's Notice of Appeal. AEP-Ohio asserts that IEU-Ohio should be precluded from arguing the issue in this appeal because IEU-Ohio did not raise this issue in its Applications for Rehearing before the Commission in the case below, as required by R.C. 4903.10.

As a threshold matter, the Court should not consider AEP-Ohio's Motion to Strike inasmuch as it is untimely. Under Ohio Supreme Court Rule of Practice 10.2 governing the procedures that will be followed by this Court, the "Ohio Rules of Civil Procedure shall supplement these rules unless clearly inapplicable." The Court's Rules of Practice do not state a timeframe in which a Motion to Strike must be filed. Thus, Civil Rule 12(F) supplements the Court's rules and states as follows: "Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter."

The Court's Rules of Practice do not require or permit a responsive pleading to a notice of appeal, thus any Motion to Strike was due within 28 days of IEU-Ohio's Second Notice of Appeal. IEU-Ohio filed its Second Notice of Appeal on November 17, 2009, making AEP-Ohio's Motion to Strike due within 28 days, or December 15, 2009. AEP-Ohio did not file

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<sup>2</sup> *State of Ohio, ex Rel. Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-1907. (Hereinafter cited and referred to as "*Writ of Prohibition Case*.").  
{C29946:5 }

its Motion to Strike until January 6, 2010, almost one month past the due date for filing a timely Motion to Strike. Thus, the Court should strike and discard AEP-Ohio's Motion to Strike.<sup>3</sup>

If the Court does not find that AEP-Ohio's Motion to Strike was untimely, AEP-Ohio's Motion to Strike must be denied for the reasons explained herein.

## II. BACKGROUND

On May 1, 2008, Governor Ted Strickland ("Governor") signed into law Amended Substitute Senate Bill 221 ("SB 221"). SB 221 is the Ohio General Assembly's response to the failure of the competitive marketplace to develop as anticipated by Amended Substitute Senate Bill 3 ("SB 3").<sup>4</sup> SB 221, among many other things, revised Ohio law related to the regulation of electric distribution utilities' ("EDU") standard service offers ("SSO"). SB 221 provides two avenues by which an EDU may set the generation rate for its SSO – an ESP or a market rate offer ("MRO"). R.C. 4928.143 governs the establishment of an ESP and R.C. 4928.142 establishes the parameters for considering and approving an MRO.

Among the provisions governing the substantive items that may be included in an ESP, R.C. 4928.143 also procedurally requires as follows: "The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date." Under R.C. 4928.141(A), until the Commission issues an order approving, modifying and approving, or denying an ESP application, and upon expiration of the jurisdictional deadline, the

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<sup>3</sup> See *In the Matter of Dial*, 1984 WL 7182 (Ohio App 8. Dist.); *Grenga v. Bank One, N.A.*, 2005 WL 2065117 (Ohio App. 7 Dist.).

<sup>4</sup> See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, at ¶41.

then-current rate plan of an EDU must continue for the utility's compliance with R.C. 4928.141(A) until an SSO is first lawfully authorized under R.C. 4928.143.

On July 31, 2008, the effective date of SB 221, AEP-Ohio filed its initial Application to establish an ESP. In Section V.E. of its ESP Application, AEP-Ohio observed that R.C. 4928.143(C)(1) "requires the Commission to issue an order for an initial ESP application not later than one hundred fifty days after the application is filed."<sup>5</sup> AEP-Ohio's proposal in Section V.E. addressed the possibility that the Commission might miss its statutory deadline, suggesting a temporary rider to retroactively recover any increase in rates to make AEP-Ohio whole (back to January 1, 2009) should the Commission miss its statutory deadline. On September 24, 2008, AEP-Ohio filed a Motion requesting that the Commission approve Section V.E. of its Application, arguing that the procedural schedule that had been adopted rendered it unlikely that the Commission would act upon its ESP Application within the required 150-day time frame. IEU-Ohio alone filed a Memorandum Contra AEP-Ohio's Motion, pointing out that the Commission was required to consider the entire ESP Application as a package and could not approve a single piece of the ESP Application on its own. AEP-Ohio filed a Reply to IEU-Ohio's Memorandum Contra on October 6, 2008.

The Attorney Examiners then isolated Section V.E. of the ESP Application and dedicated approximately two days of the evidentiary hearing to hear the testimony of six witnesses on this single issue. Further, this issue was briefed by IEU-Ohio and nine other parties separately from

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<sup>5</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Columbus Southern Power Company's and Ohio Power Company's Application at 17-18 (July 31, 2008) (hereinafter "*AEP ESP Proceeding*").

the remainder of the other ESP proposal components.<sup>6</sup> However, as explained below, the Commission never substantively addressed this question even though a portion of the hearing and entirely separate briefs were devoted solely to this issue.

In recognition of the fact that it was going to miss the statutory deadline, on December 19, 2008 the Commission extended the effective date of AEP-Ohio's then current SSO tariffs through the last billing cycle of February 2009, consistent with R.C. 4928.141.<sup>7</sup> The Commission did not address AEP-Ohio's Section V.E. proposal in its December 19, 2008 Finding and Order. When the Commission failed to issue an order by the end of February 2009, the Commission once again extended the effective date of AEP-Ohio's then current SSO tariffs until new SSO tariff schedules were filed pursuant to an approved ESP, or the last billing cycle of March 2009, whichever date came first.

The Commission finally issued its Opinion and Order in this case on March 18, 2009, 80 days after the statutorily-required time frame passed. In its Opinion and Order, in light of its previous Orders extending AEP-Ohio's then-current tariffs when the Commission failed to issue a timely order within the 150-day timeframe, the Commission found Section V.E. of AEP-Ohio's ESP proposal to be moot and did not further substantively address the consequences of the

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<sup>6</sup> Briefs on Section V.E. of AEP-Ohio's ESP Application were filed on December 3, 2008.

<sup>7</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders*, PUCO Case No. 08-1302-EL-ATA, Finding and Order (December 19, 2008). AEP-Ohio noted in its Application in PUCO Case No. 08-1302-EL-ATA that "Therefore, by making this filing, the Companies in no way waive the arguments they have made in the SSO cases regarding the Commission's statutory obligation to issue its order in the SSO cases by December 28, 2008 and regarding the issue in those cases that has been designated the '1/1/09 Plan' i.e. determining the appropriate rates to be implemented with the December 30, 2008 start of the Companies' January 2009 billing cycle, if the Commission has not resolved the SSO cases by that date." Application at 3 (December 15, 2008).

Commission's failure to meet the mandates of R.C. 4928.143(C)(1).<sup>8</sup> However, the Commission in effect granted AEP-Ohio the retroactive rate increase it sought in Section V.E., permitting AEP-Ohio to collect 12 months worth of ESP-approved revenue over the remaining nine months of 2009.

### III. ARGUMENT

AEP-Ohio's Motion to Strike should be denied inasmuch as questions of subject matter jurisdiction cannot be waived. IEU-Ohio's Allegation of Error G should be heard by this Court. While IEU-Ohio did not raise this issue in its Applications for Rehearing, the issue was extensively addressed in the proceeding below and the Court has a duty to address this issue on appeal to ensure that the Commission is not permitted to overstep the statutory authority granted by the Ohio Revised Code and to safeguard the underpinnings of the subject matter jurisdiction concept.

Subject matter jurisdiction is a court's power to hear and decide a case on the merits.<sup>9</sup> Subject matter jurisdiction is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void."<sup>10</sup> Indeed, subject matter jurisdiction is so fundamental to a court's power to make a decision that issues related to subject matter jurisdiction cannot be waived or forfeited.<sup>11</sup> Further, a court has an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a

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<sup>8</sup> *AEP ESP Proceeding*, Opinion and Order at 64 (March 18, 2009).

<sup>9</sup> *State ex. rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, at ¶8.

<sup>10</sup> *Id.*, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 11, quoting *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998).

<sup>11</sup> *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235 (2006). See also *State ex rel. Sugardale Foods, Inc. v. Indus. Comm.*, 90 Ohio St.3d 383, 385-386, 738 N.E.2d 1238 (2000).

challenge from any party.<sup>12</sup> “[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised.”<sup>13</sup> Finally, issues of subject matter jurisdiction can be raised at any time, including for the first time on appeal at any level of the appellate process.<sup>14</sup>

While R.C. 4903.10 and this Court’s precedent indicate that an issue should be raised in an application for rehearing in order to raise such an issue on appeal, issues of subject matter jurisdiction are not subject to this limitation. AEP-Ohio cites *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), to support its Motion to Strike.<sup>15</sup> However, *Cincinnati* is not applicable in this instance inasmuch as the issue that was not raised by the City of Cincinnati in its application for rehearing implicated the Commission’s discretion as to the level of costs recognized for administrative and general expense in a rate case.<sup>16</sup> The issue on appeal in *Cincinnati* was not a subject matter jurisdiction argument that went to the very heart of whether the Commission could even entertain the underlying case at issue in *Cincinnati*.

This Court’s own precedent recognizes that the Commission’s subject matter jurisdiction, as determined by the General Assembly, is an issue that can be raised even if such issue was not raised to the Commission itself in an application for rehearing in the underlying case. In *Time Warner AxS v. Pub. Util. Comm.*, this Court specifically rejected the notion that the Court could not entertain its own *sua sponte* subject matter jurisdiction review of the Commission’s authority

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<sup>12</sup> *Arbaugh*, 546 U.S. at 516.

<sup>13</sup> *Polster v. Webb*, 160 Ohio App.3d 511, 2005-Ohio-1857, at ¶22 (Ohio App. 8 Dist.), quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781 (2002).

<sup>14</sup> *Int’l Lottery, Inc. v. Kerouac*, 102 Ohio App. 3d 660, 670, 657 N.E.2d 320 (1<sup>st</sup> Dist. Ham. Cty. 1995), citing *Jenkins v. Keller*, 6 Ohio St.2d 122, 126, 216 N.E.2d 379 (1966). (“Furthermore, it is well settled that, where a court has no jurisdiction over the subject matter of an action, a challenge to jurisdiction on such ground may effectively be made for the first time on appeal in a reviewing court.”); see also *Kontrick v. Ryan*, 440 U.S. 443, 455, 124 S. Ct. 906 (2004).

<sup>15</sup> Motion to Strike at 4-5.

<sup>16</sup> *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 376, 86 N.E.2d 10 (1949).

to set rates using the method utilized by the Commission because such issue was not raised to the Commission on rehearing. The Court explicitly held that subject matter jurisdiction arguments cannot be waived and then proceeded to invalidate the Commission's orders for exceeding its statutory authority.<sup>17</sup> Thus, the Commission's lack of subject matter jurisdiction may be raised on appeal by any party or by the Court *sua sponte*, regardless of whether such issue was brought before the Commission on rehearing.

As a creature of statute, the Commission may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.<sup>18</sup> The Commission patently lacked subject matter jurisdiction to proceed with the ESP case because it failed to act within the 150-day jurisdictional window. Unlike other statutes that explicitly provide for continued subject matter jurisdiction if the Commission misses a statutory deadline, R.C. 4928.143 contains no such continued grant of authority.<sup>19</sup> The General Assembly gave the Commission a clear timeframe to act within and the Commission cannot grant to itself authority or subject matter jurisdiction beyond that conferred by the General Assembly. IEU-Ohio properly and timely raises an issue of the Commission's continuing subject matter jurisdiction to act upon AEP-Ohio's ESP Application when the 150-day deadline passed.

Finally, the Motion to Strike should be denied inasmuch as it contradicts AEP-Ohio's own position in the Writ of Prohibition Case. AEP-Ohio filed a Motion to Dismiss IEU-Ohio's Complaint for a Writ of Prohibition, arguing that IEU-Ohio had not demonstrated that it was

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<sup>17</sup> *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 233, 661 N.E.2d 1097 (1996).

<sup>18</sup> *Id.* at 234.

<sup>19</sup> *See, for example*, R.C. 4909.42.

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entitled to a Writ of Prohibition.<sup>20</sup> As this Court knows, a Writ of Prohibition will only be issued if: (1) a lower tribunal is about to exercise judicial or quasi-judicial power; (2) the exercise is unauthorized by law; and (3) *denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists.*<sup>21</sup> AEP-Ohio stated in its Motion to Dismiss the Writ of Prohibition case that “the appropriate remedy is to pursue an appeal after issuance of a final order (i.e. completion of the rehearing process) and presentation of a full record to the Court for an appropriate review.”<sup>22</sup> IEU-Ohio seeks through this appeal to pursue the remedy at law that AEP-Ohio acknowledges and relies upon in its Motion to Dismiss in the Writ of Prohibition Case.<sup>23</sup> AEP-Ohio’s advocacy amounts to an unfair and unlawful “heads I win, tails you lose” proposition for IEU-Ohio. AEP-Ohio’s Motion to Strike should be denied.

#### IV. CONCLUSION

R.C. 4928.143 required the Commission to issue an Order within 150-days of the filing of AEP-Ohio’s ESP Application. The Commission missed this deadline by 80 days. The Commission’s failure to timely issue an Order within the 150-day timeframe divested the

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<sup>20</sup> *Writ of Prohibition Case*, Motion to Intervene as Respondents of Movants Columbus Southern Power Company and Ohio Power Company and Motion to Dismiss at 7-9 (November 12, 2009).

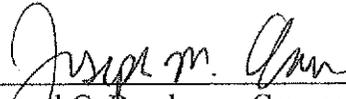
<sup>21</sup> *Id.* at 7 (emphasis added), citing *State ex Rel. Consumers’ Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 310, 2004-Ohio-2894, at ¶14.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> While IEU-Ohio through this appeal pursues the remedy at law that AEP-Ohio relied upon in its Motion to Dismiss the Writ of Prohibition Case, IEU-Ohio’s advocacy in this appeal should not be construed to mean that IEU-Ohio believes the remedy available in this case is an adequate remedy or that IEU-Ohio has not met the burden of proof to demonstrate that a Writ of Prohibition should be issued. IEU-Ohio brought Allegation of Error G to preserve this argument, and possibly gain some relief, however inadequate, should the Court deny IEU-Ohio’s Complaint for Writ of Prohibition. IEU-Ohio reasserts, as it explained in the Memorandum in Support of its Complaint for Writ of Prohibition, that the appeal process in this case is not an adequate remedy and that the Court should grant IEU-Ohio’s Writ of Prohibition. See *Writ of Prohibition Case*, Memorandum in Support of Complaint for a Writ of Prohibition at 18-21 (October 21, 2009).

Commission of subject matter jurisdiction over the ESP Application at issue in this appeal. Allegation of Error G goes directly to the heart of the Commission's subject matter jurisdiction over this case and thus Allegation of Error G is properly before the Court. AEP-Ohio's Motion to Strike should be denied.

Respectfully Submitted,



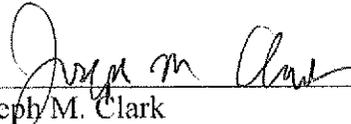
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Memorandum in Opposition of Industrial Energy Users-Ohio to Motion to Strike by Movants for Intervention as Appellees Columbus Southern Power Company and Ohio Power Company* was sent by ordinary U.S. mail, postage prepaid, to the following parties of record on January 15, 2010.

  
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