

IN THE SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

: Case No. 06-1594

:

: Appeal from the Public

: Utilities Commission of Ohio

:

: Public Utilities

: Commission of Ohio

: Case No. 05-376-EL-UNC

:

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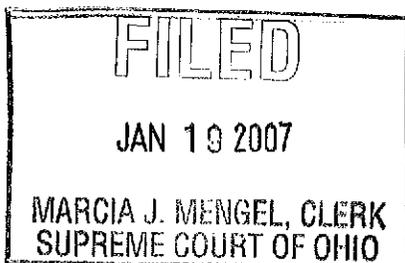
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## INTRODUCTION

The initial briefs of the Appellees in this proceeding, the Public Utilities Commission of Ohio's ("PUCO" or "Commission") and the Ohio operating companies of American Electric Power ("AEP"), Ohio Power Company ("OPCo") and Columbus Southern Power ("CSP") (collectively referred to as "AEP" or "Companies"), are filled with attempts to shift the Court's focus from the real issue in this appeal.<sup>1</sup> At the most fundamental level, Industrial Energy Users-Ohio ("IEU-Ohio" or "Appellant") contests the PUCO's rate increase authorization tied to AEP's hypothetical integrated gasification combined cycle ("IGCC") generation facility because the rate increase is inescapably illegal no matter what functional label the PUCO attaches to the hypothetical IGCC facility. Regardless of the label assigned to the hypothetical IGCC plant, it will provide either a competitive or noncompetitive service. If it is a competitive function or service, the PUCO's rate increase was unlawful. If it is noncompetitive, the PUCO's rate increase was unlawful. The illegality in this case is the same by any other name.

Because Appellees cannot cure the illegal rate increase authorization by relabeling the hypothetical IGCC package, their briefs attempt to distract the Court by characterizing the case

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<sup>1</sup> For example, without citation to the record, without knowing virtually anything about the actual role of the hypothetical integrated gasification combined cycle ("IGCC") plant, and without a single shovel in the dirt, the PUCO boldly states that the hypothetical IGCC generation facility **"benefits AEP's customers in the long-term with cheaper rates and reliable service...."** Merit Brief Submitted on Behalf of Appellee, Public Utilities Commission of Ohio at 5 (hereinafter "PUCO Brief"). The arguments of Murray Energy Corporation and International Brotherhood of Electrical Workers Local #972 et al., who filed amici curiae briefs in support of Appellees, seek to make this case about Ohio coal and jobs. But the Commission specifically reserved questions about customer benefits and the role of Ohio's goal for some future proceeding since the record was devoid of anything more than speculation about both of these questions as well as others. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility* (hereinafter "*IGCC Proceeding*"), PUCO Case No. 05-376-EL-UNC, Opinion and Order at 21 (April 10, 2006) (hereinafter "*April 10, 2006 Order*"). (IEU-Ohio App. at 30). In the meantime, AEP's customers are paying higher electric rates.

as having significance for various reasons while wrongfully attributing unconstructive attitudes and motives to IEU-Ohio.<sup>2</sup> But stripped of their distractions and distortions, neither of the Appellees' briefs contests IEU-Ohio's description of what actually happened during the case below. For example, neither contests the fact that, in response to IEU-Ohio's objections to AEP's proposed legal notice, the PUCO agreed with AEP's assertion that it is "... required to make a standard service offer available to all customers within the companies' service territory after the end of the market development periods"<sup>3</sup> and held that the IGCC application did not involve traditional cost-based regulation that applies to noncompetitive services.<sup>4</sup> Despite this PUCO determination, Appellees now argue that the output of the hypothetical IGCC facility is a noncompetitive service subject to traditional regulation. AEP Brief at 26, 28; PUCO Brief at 5-6.<sup>5</sup>

The Court should not be diverted from identifying and correcting the fundamental illegality of the PUCO's authorization of Phase I cost recovery. For the reasons specified in the merit brief of Appellant, Industrial Energy Users-Ohio (hereinafter "IEU-Ohio Brief") and

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<sup>2</sup> For example, AEP opines that IEU-Ohio's arguments in this proceeding are driven by a "short-term focus on avoiding increases in their electric bills." Intervening Appellees' Columbus Southern Power Company's and Ohio Power Company's Merit Brief at 2 (hereinafter "AEP Brief").

<sup>3</sup> *IGCC Proceeding*, Entry at 2-3 (June 30, 2005). (IEU-Ohio App. at 79-80).

<sup>4</sup> *Id.* at 3.

<sup>5</sup> The PUCO confirms its legal "flip flop" as follows:

The Application, the Commission concluded, is about providing distribution ancillary services to support the Companies distribution function. It is the Commission's obligation to assure reliable distribution service under R.C. 4928.02(A), and noncompetitive retail electric services are subject to the regulation of this Commission under R.C. 4928.05(A)(2).

PUCO Brief at 5-6 (citations omitted).

herein, this Court should reverse the PUCO's *April 10, 2006 Order* and June 28, 2006 Entry on Rehearing and otherwise grant the relief requested by IEU-Ohio.

## ARGUMENT

### PROPOSITION OF LAW I:

**ACTIONABLE PREJUDICE EXISTS WHERE THE PUCO AUTHORIZES AN ELECTRIC RATE INCREASE WITHOUT COMPLYING WITH R.C. 4903.09, AND WITHOUT SATISFYING THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS THAT APPLY TO COMPETITIVE AND NONCOMPETITIVE SERVICES.**

As noted above and as explained in IEU-Ohio's Brief, the functional role of AEP's hypothetical IGCC facility must be either to provide a competitive or noncompetitive service. If it is competitive, the price established for the output of the hypothetical facility must be "market-based" and the legal process by which the PUCO must establish the price is different than that which attaches to applications to increase prices for noncompetitive services. R.C. 4928.03, 4928.05 and 4928.14. (IEU Reply App. at 59; IEU-Ohio App. at 403, 406, respectively). If it is noncompetitive, a proposal to increase prices must be evaluated and processed by the PUCO in accordance with R.C. 4909.15, 4909.18, and 4909.19. (IEU-Ohio App. at 394, 398, 400, respectively). *See* IEU-Ohio Brief at 15-20. However, the PUCO authorized a rate increase for what it now labels a noncompetitive service without following the process or conducting the evaluation that is mandatory in the case of noncompetitive services.

In their briefs, Appellees argue that the PUCO's failure to follow the law should be overlooked by the Court because a hearing was held and the PUCO "provided the parties with sufficient process that they were not harmed by the difference." PUCO Brief at 10. The PUCO's Brief also oddly claims that it is difficult to identify the differences between this case and a traditional rate case proceeding and that any differences are not important anyway. *Id.* Appellees are wrong. The failure of due process prejudiced IEU-Ohio.

The Court “will not reverse an order of the Public Utilities Commission unless the party seeking reversal demonstrates the prejudicial effect of the order.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 at ¶48 (2006) (hereinafter “*CG&E RSP Appeal*”) (citations omitted). In *CG&E RSP Appeal*, the Court rejected OCC’s proposition of law with respect to the Commission’s changes on rehearing to the price to compare component of CG&E’s rate stabilization plan (“RSP”) because OCC had not demonstrated harm or prejudice. Similarly, in *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 337 (1980), the Court held that it did not need to consider the standards included in the provisions of the Revised Code that the appellant argued had been violated because the appellant had not demonstrated that the alleged violation resulted in higher electric bills or that appellant had otherwise been prejudiced. *Id.* (citing *Ohio Edison Co. v. Pub. Util. Comm.*, 173 Ohio St. 478 at syllabus ¶10 (1962)).

Finally, in *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 92-93 (1999), while the Court noted that it would not reverse a PUCO order unless the party seeking reversal demonstrates the prejudicial effect of the order, the Court held that where the PUCO failed to provide a record, the complaining party is effectively foreclosed from demonstrating the prejudicial effect of the order. “Therefore, where the Public Utilities Commission fails to meet the requirements of R.C. 4903.09 by not disclosing the sources of its information to those who most require it, thereby preventing the complaining party from demonstrating prejudice, the matter must be remanded for development of an appropriate record, to leave open the potential demonstration of prejudice by a party based upon that record in a subsequent appeal.” *Id.*

IEU-Ohio’s Brief discussed the significant procedural and substantive requirements that attach to applications to increase rates for noncompetitive services. IEU-Ohio Brief at 16-18. These requirements preclude a rate increase tied to plant or property unless and until there is a

demonstration that the plant or property is “used and useful” as of a date certain during the test year. R.C. 4909.17. (IEU Reply App. at 58). These requirements include a mandatory evaluation of the proposed rate increase by the PUCO and the issuance of a staff report of investigation that provides findings and recommendations. The staff report of investigation must be published and served by the PUCO on local officials. The rate increase authorized by the Commission came without any opportunity to file objections to the staff report of investigation. R.C. 4909.19. (IEU-Ohio App. at 400). These rate increase application requirements dictate that the utility seeking the rate increase must submit specified information that forms the basis of the required staff investigation. Rule 4901-7-01, Appendix A, Ohio Administrative Code; R.C. 4909.156. (IEU Reply App. at 62, 57, respectively). These requirements compel the PUCO to consider the utility’s management policies and practices and to disallow the recovery of expenses that the Commission deems imprudent. R.C. 4909.154. (IEU Reply App. at 56). These requirements condition any rate increase on a specified demonstration that the utility’s existing rates are inadequate to provide a reasonable rate of return or profit and a PUCO determination of the amount of revenue which the utility should have an opportunity to collect.

In the proceeding below, the PUCO authorized a rate increase for what it now calls a noncompetitive service that might someday be provided from a plant that does not exist, without satisfying any of the requirements which the PUCO must follow to increase rates for a noncompetitive service. AEP’s customers – including the AEP customers that are members of IEU-Ohio – are paying higher electric rates as a result. The prejudice that arises from the PUCO’s disregard of its statutory duties was immediate, direct and substantial at a time when Ohio’s economy has little ability to absorb extra shocks. In addition and as discussed below, the

PUCO is also urging the Court to let AEP keep the benefit of the illegal rate increase thereby perpetuating the customers' prejudice.

Actionable prejudice also exists in this appeal because the PUCO failed to meet the requirements of R.C. 4903.09. (IEU-Ohio App. at 390). The PUCO did not disclose the sources of its information or otherwise explain how a rate increase was justified both legally and factually by the record in the proceeding below, thereby preventing IEU-Ohio from further demonstrating prejudice. IEU-Ohio Brief at 23-25. Appellees cite to portions of the *April 10, 2006 Order* as the basis for their claim that the Commission met the requirements of R.C. 4903.09. AEP Brief at 22-25; PUCO Brief at 21-24. But notably absent from each and every portion of the *April 10, 2006 Order* referenced by Appellees is a single citation to evidence in the record or any display of how the Commission lawfully reasoned to the rate increase result. *Id.*; see also *CG&E RSP Appeal* at ¶¶ 27-36. The *April 10, 2006 Order* also fails to make any of the findings required of the Commission in the exercise of its authority to increase rates for a noncompetitive service. On a more practical and revolting level, the PUCO's *April 10, 2006 Order* also does not explain how a generating plant that does not now exist and, thus, cannot provide any function or service can serve to legitimize a utility's claim for more compensation.

After citing portions of the *April 10, 2006 Order* that do not contain the bases for the PUCO's conclusions, the PUCO's Brief resorts to a distraction rooted in a claim that its decision was made necessary to ensure reliability. It also observes that newly constructed plants must be environmentally sound. The PUCO's Brief asserts that the *April 10, 2006 Order* addresses a real problem in a reasonable way. PUCO Brief at 24-30. However, these claims and assertions are either contradicted by record evidence or incapable of providing the PUCO with an excuse for neglecting its statutory obligations.

First, the PUCO's Brief states that "AEP claims it needs to build new capacity to continue to meet its obligations to provide provider of last resort service to its customers in Ohio. *In re AEP* (Application at 1-2) (March 18, 2005)." PUCO Brief at 24. AEP's application is completely void of any such claim, even at the citation given by the PUCO. In fact, IEU-Ohio pointed out that the only need that has been identified is a need for AEP East, or the seven-state area served by AEP. *IGCC Proceeding*, Initial Brief of Industrial Energy Users-Ohio at 15 (September 20, 2005) (citing Tr. Vol. I at 278-279). (IEU-Ohio Supp. at 142).<sup>6</sup>

Next, the Commission discusses the fact that existing generation in Ohio may become obsolete sometime in the future. PUCO Brief at 24-26. Through some circular reasoning, the PUCO's Brief attempts to use the hypothetical future obsolescence of existing generating plants as present justification for a rate increase tied to a generating plant that does not exist and if it did exist would provide a distribution service.<sup>7</sup> In short, the PUCO's Brief claims that if there is no generation, we will need new distribution plant. Similarly, the Commission describes the "dire

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<sup>6</sup> AEP attempts to spin an exhibit into a demonstration that it needs capacity to meet its Ohio provider of last resort ("POLR") load by saying that its estimated peak demand will increase from roughly 9,000 MW in 2006 to nearly 12,000 MW by 2024. AEP Brief at 13. However, the exhibit referenced does not support AEP's claim for a number of reasons. First, although AEP's projected peak demand may increase according to the estimates in the exhibit, there is no evidence that it cannot meet the increased demand with generation owned by the Companies or an affiliate or purchased from others. Second, as PUCO Staff acknowledged, unless modifications to AEP's Interconnection Agreement, which has been in place since 1951, are made, the cost and output of any new power plant built will be socialized to each AEP operating company in a seven-state region. Staff Exhibit 1 at 10. (IEU-Ohio Supp. at 118). Thus and assuming the hypothetical IGCC plant becomes a reality, there is presently no means of ensuring that the output of the plant will be utilized to serve the Ohio customers saddled with the PUCO's illegal rate increase. Tr. Vol. II at 20-24. (IEU Reply App. at 69-73).

<sup>7</sup> Of course, if existing generating plants – the plants which must currently be providing the essential noncompetitive functions that the PUCO attributes to the IGCC plant – were retired, then these existing plants would no longer be "used and useful." Upon retirement, these existing plants would cease to be "used and useful" and the cost of these existing plants would be removed from AEP's rates. Ohio's ratemaking formula would require the PUCO to net the cost of any retired plants against the cost of any added plants to determine if and to what extent the PUCO might, through the application of Ohio's ratemaking formula, authorize a rate increase.

possibility” that environmental restrictions will be imposed over the life of existing or new generation assets and that the hypothetical IGCC facility may operate such that it would meet new environmental regulations. PUCO Brief at 26-28.<sup>8</sup> Finally, the PUCO states that the Commission identified a problem and “ordered AEP to develop a plan to address this concern and to justify that plan.” PUCO Brief at 29.<sup>9</sup> Regardless of whether these assertions are true, they are completely irrelevant to the question of how and when the PUCO must satisfy its statutory duties before it can authorize a rate increase. Similarly, none of the PUCO’s assertions are responsive to the claim that the Commission failed to meet the requirements of R.C. 4903.09.

Finally, while the PUCO’s Brief ignores IEU-Ohio’s claim that the PUCO acted illegally by relying on theories and claims that first appeared in the PUCO’s Brief, AEP’s Brief does address this claim – at least sort of. AEP’s Brief asserts that IEU-Ohio’s due process arguments should be rejected because a hearing on its application is not statutorily required and Staff does not have “fewer rights than intervenors.” AEP Brief at 42. While it is true that the Court has held that there is no constitutional right to a hearing in a rate-related case if there is no statutory

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<sup>8</sup> While the PUCO asserts this as fact, it is far from certain if and whether the hypothetical IGCC facility would ever be capable of operating in a manner that would meet hypothetical environmental regulations. In fact, AEP does not plan to include carbon dioxide capture and sequestration in its initial plans and may never retrofit the plant to include carbon dioxide capture and sequestration capability. Tr. Vol. I at 84, 219-220. (IEU Reply App. at 64, 66-67). If carbon dioxide capture and sequestration is implemented at the IGCC plant, it will require additional capital investment and reduce the operating efficiency of the IGCC plant. Tr. Vol. III at 76-77. (IEU Reply App. at 75-76). Nonetheless, the PUCO acknowledges that “IGCC may not be the answer. For example, there are other, non-IGCC technologies which anticipate removal of carbon dioxide.” PUCO Brief at 29.

<sup>9</sup> IEU-Ohio is not aware of any Commission report identifying the problem that “[a]ge and environmental regulation are conspiring to strangle our generation system” or an order for AEP to develop a plan to address the concerns (other than the *April 10, 2006 Order* and Entry on Rehearing, which only directs AEP to provide additional information on its IGCC ambitions). Moreover, if the Commission is “charged to assure there is sufficient reliability to maintain the distribution system integrity,” it is unclear to IEU-Ohio why it has not directed other Ohio electric distribution utilities (“EDUs”) to develop similar plans. *Id.*

right to a hearing, the holding has no applicability here. First, AEP's application relied on statutory procedures that attach to the process by which the Commission must establish prices for competitive services.<sup>10</sup> Even if the PUCO's decision below was preceded by following the law that applies to a competitive service, IEU-Ohio believes that a hearing was nonetheless required.<sup>11</sup> But, the PUCO's decision below authorized a rate increase for a noncompetitive service and a hearing is mandatory. R.C. 4909.19. (IEU-Ohio App. at 400).

As discussed above, the report of investigation is also mandatory in the case of an application for a rate increase and it is through this report that the staff communicates the results of its investigation. If there are objections to the report of investigation, the Commission is obligated to consider testimony offered with respect to the utility's rate increase application and the objections to the report of investigation. R.C. 4909.19. (IEU-Ohio App. at 400). Whatever other parties – particularly parties not having governmental duties to conduct themselves so that they do not offend the due process rights of private parties – may be permitted to do in a PUCO rate increase proceeding, neither the PUCO nor its staff is permitted to reveal the results of an investigation at the briefing stage. IEU-Ohio Brief at 33-35. Also, the PUCO's Staff did submit testimony during the hearing stating that the Staff did not have a position on AEP's application

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<sup>10</sup> AEP's application states that R.C. 4928.14 and 4928.35(D) provide the legal predicate for the relief requested. *IGCC Proceeding*, Application at 1 (March 18, 2005). (IEU-Ohio Supp. at 1).

<sup>11</sup> R.C. 4928.14 and 4928.35(D) govern the establishment of pricing applicable to standard service offers ("SSO") after the market development period ("MDP"). R.C. 4928.14 commands the PUCO to look to R.C. 4909.18 to implement its market-based pricing authority for POLR service and requires that even market-based rates be reasonable. (IEU-Ohio App. at 406). If the Commission determines that the application is for a rate increase, it must be set for hearing. *Id.* Even if the Commission determines that the application is not for a rate increase, if proposals in the application may be unjust or unreasonable, the Commission must set the matter for hearing. *Id.* If this was not an increase in rates, but an application to establish rates for a new POLR distribution ancillary service, because a hearing was held, the Commission must have determined that the proposals may have been unjust or unreasonable. If it was an application to increase rates, a hearing was required.

because of the lack of information provided by AEP in conjunction with its application.<sup>12</sup> It was in this context and with this background that the brief submitted by the PUCO's Staff revealed support for a rate increase with all sorts of extra-record claims about why the rate increase was appropriate. By first revealing positions and claims at the briefing stage, no party was able to object to the positions or claims prior to the hearing, the PUCO bypassed the obligation to take testimony on the objections to the Staff findings and claims, and all parties were denied the opportunity to cross-examine and rebut the Staff's affirmative support for a rate increase or the Staff's claims about why a rate increase was appropriate.

In conclusion, IEU-Ohio was prejudiced by the unlawful rate increase. The prejudice was immediate, direct and substantial. IEU-Ohio was also prejudiced by the PUCO's failure to comply with R.C. 4903.09. Finally, IEU-Ohio's ability to protect its interest was fundamentally prejudiced by the Staff's conduct during the proceeding below.

**PROPOSITION OF LAW II:**

**WHERE THE PUCO DOES NOT SATISFY THE PROCEDURAL AND SUBSTANTIVE RATEMAKING REQUIREMENTS THAT APPLY TO COMPETITIVE AND NONCOMPETITIVE ELECTRIC SERVICES, THE PUCO'S RATE INCREASE IS UNREASONABLE AND UNLAWFUL REGARDLESS OF HOW THE PUCO LABELS THE SERVICE.**

AEP and the PUCO describe their efforts to increase electric rates by nearly \$24 million in a number of inherently conflicting ways.<sup>13</sup> But, regardless of the label that AEP and the

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<sup>12</sup> See *IGCC Proceeding*, Staff Exhibit 1 at 2; Staff Exhibit 2 at 2; Staff Exhibit 3 at 1-2; Tr. Vol. V at 241; Tr. Vol. VI at 29, 78-79. (IEU-Ohio Supp. at 110, 123, 132-133, 149, 152, and 155-156, respectively.)

<sup>13</sup> See, for example, AEP Brief at 34, where AEP states that the Phase I cost recovery recovers expenses related to its statutory obligation to provide POLR service. Then, on page 44 of its Brief, AEP drops the bomb that whether an IGCC plant is ever built is beside the point:

The point IEU misses is that Phase I recovery is **not dependent on the eventual construction and operation of the Companies' proposed IGCC facility.**

PUCO attempt to attach to the hypothetical IGCC facility, it will (if constructed and operated) provide either competitive or noncompetitive services. If the hypothetical IGCC facility is judged to provide a service which is competitive pursuant to R.C. 4928.03, then the Commission must establish prices in accordance with a “market-based” standard and cannot entertain a request for cost recovery assurances. If the hypothetical IGCC facility is judged to provide a service which is noncompetitive, then the Commission must establish prices in accordance with its traditional ratemaking authority. The Commission has no authority to authorize an increase in electric rates for a noncompetitive service unless and until it meets the ratemaking requirements that attach to noncompetitive services.

The briefs of AEP and the PUCO rely on the Court’s recent decisions in *CG&E RSP Appeal* and *Constellation NewEnergy v. Pub. Util. Comm.*, 104 Ohio St.3d 530 (2004) (hereinafter “*Constellation*”) to support their claim that the PUCO has authority to grant cost recovery of a distribution-related POLR charge.<sup>14</sup> However, the Appellees’ reliance on *Constellation* and *CG&E RSP Appeal* is misplaced.

In both *Constellation* and *CG&E RSP Appeal*, the questions before the Court were connected to the PUCO’s establishment of prices for the SSO as a competitive generation-related service. See *Constellation* at ¶36 and *CG&E RSP Appeal* at ¶24. Neither case involved any distinction between a generation and distribution-related service component or addressed the

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Instead, as the Commission correctly noted, Phase I cost recovery is linked to the investigation, analysis, evaluation and development of a realistic plan to address the Companies’ POLR obligation in a manner which considers concerns raised in this case by IEU and other parties.

AEP Brief at 44 (emphasis added). See also, PUCO Brief where the PUCO describes the Phase I cost recovery authorization a rate “increase to repay the utility for the costs to study an additional generation-related regulatory requirement, specifically how best to provide the **generation-related ancillary distribution services.**” PUCO Brief at 18-19 (emphasis added).

<sup>14</sup> AEP Brief at 17; PUCO Brief at 7-8.

authority of the Commission to raise rates for a noncompetitive service without following the statutory requirements.

In *Constellation* and *CG&E RSP Appeal*, the Court refused to overturn the Commission's decision to authorize collection of a portion of the established charge for the competitive service from all customers and to permit such portion to be included as part of the bill for distribution service. This result was based on the notion that the service available from the mandatory SSO offering is available to all customers and that the utility carries a standby capability to serve. In this context, the Court accepted the Commission's reasoning that it is reasonable for all customers – shoppers and non-shoppers – to provide the utility with compensation for fulfilling this standby role. The inclusion of a portion of the SSO charges in the portion of the electric bill paid by all customers did not transform such portion of the competitive SSO service into a noncompetitive service and there is nothing in either *Constellation* or *CG&E RSP Appeal* that suggests that the Court has either addressed or approved such transformation.

In *Constellation*, the Court described the Rate Stabilization Surcharge (“RSS”), which is the charge that AEP compares to the IGCC rate increase, as “a mechanism by which the frozen [generation] rates can be adjusted during the three-year period (2006 through 2008) following the end of the MDP. The RSS would be added to the stabilized base rate for **generation service** and would reflect such items as increased fuel cost, purchased power, environmental costs, and the like.” *Constellation* at ¶36 (emphasis added).

In *CG&E RSP Appeal*, the Court clearly affirmed the PUCO's determination that all of the components that make up CG&E's (now Duke Energy Ohio, Inc.) SSO, including the POLR components, are “competitive electric generation charges and were not charges on distribution or transmission services under R.C. 4928.15.” *CG&E RSP Appeal* at ¶69. Moreover, the Court

found that R.C. 4928.15(A) is irrelevant to CG&E's RSP proceeding inasmuch as the statute "concerns noncompetitive retail electric distribution service as opposed to competitive retail electric generation service." *Id.* at n. 2.

In its brief, AEP states that "The Companies' proposal for recovering the costs of the IGCC plant and the Commission's orders authorizing cost recovery **do not involve the regulation of competitive retail electric service.** They involve the regulation of the Companies' distribution-based POLR responsibilities, including the provision of ancillary services. **The orders do not affect the price or terms and conditions of competitive generation services.**" AEP Brief at 26 (emphasis added). The PUCO's Brief echoes AEP's Brief. PUCO Brief at 5-6. If the PUCO and AEP are correct, then *Constellation* and *CG&E RSP Appeal* have no application to the issues raised in this appeal. If AEP and the PUCO are correct in their assertion that the PUCO-authorized rate increase is for a noncompetitive service, then IEU-Ohio's assertion that the rate increase was illegally obtained and implemented must be sustained by the Court.

It should be noted that the rate increase that was authorized by the PUCO and implemented by AEP for an alleged noncompetitive service is avoidable (for Phase I) and is, thus, also different from the situation presented in *Constellation* and *CG&E RSP Appeal*. At first blush, the ability for customers to avoid the rate increase may seem attractive. But this appearance is an illusion since the PUCO has also determined that there is no market to provide a practical means of avoiding the increase.<sup>15</sup> But the illegality of the PUCO rate increase is also

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<sup>15</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan* (hereinafter "*AEP RSP*"), Case No. 04-169-EL-UNC, Opinion and Order at 10 (January 26, 2005). (IEU-Ohio App. at 228).

illustrated in this pretend avoidance that the PUCO and AEP point to so that they may obscure the practical reality or to muddy the clarity provided by the law.

If the hypothetical IGCC provides – remarkably in its nonexistent state – a noncompetitive service,<sup>16</sup> then AEP has an obligation to furnish the service separate and apart from any POLR obligation. If this is so, then AEP also has the statutory right to be the supplier of this service within AEP’s certified service area. It would be unlawful for another supplier to provide this noncompetitive service pursuant to R.C. 4933.81 through 4933.83 irrespective of Ohio’s restructuring law. IEU-Ohio Brief at 27-28.

If there was good reason for the PUCO to believe that AEP’s customers were not going to obtain reliable noncompetitive services from AEP,<sup>17</sup> then the Commission could initiate a

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<sup>16</sup> The Commission, again, states that “distribution reliability is vital not only for the provision of POLR service but any service at all.... A distribution system works for everyone or no one.” PUCO Brief at 16, 1. *See also* AEP Brief at 2. Appellees also state that if AEP constructs an IGCC plant at all and/or in Ohio, AEP will use the output from the hypothetical IGCC plant for distribution ancillary services. PUCO Brief at 5; AEP Brief at 34.

<sup>17</sup> Irrespective of the obligations of Ohio law on AEP to provide noncompetitive services, AEP has an affirmative obligation to ensure that it has adequate generating capacity to reliably meet the needs of its customers. This affirmative obligation attaches as a result of AEP’s membership in PJM Interconnection LLC (“PJM”) and the regulation of the Federal Energy Regulatory Commission (“FERC”). IEU-Ohio Brief at 29, n. 73. R.C. 4928.12 requires all entities that own or control transmission facilities in Ohio to join a regional transmission organization (“RTO”) that is “capable of maintaining real-time reliability of the electric transmission system, ensuring comparable and nondiscriminatory transmission access and necessary services, minimizing system congestion, and further addressing real or potential transmission constraints.” R.C. 4928.12. (IEU Reply App. at 60). PJM is such an RTO and AEP joined PJM as a load serving entity (“LSE”) on October 1, 2004. FERC recently described PJM’s responsibility for maintaining system reliability in an order adopting a stipulation that made changes to PJM’s reliability protocols as they apply to ensuring sufficient generating supply to reliably meet the needs of customers:

...PJM operates the largest competitive wholesale electricity market in the country, covering 14 states, that provides for efficient sharing of resources and enables parties to access the cheapest sources of supply from within the PJM footprint. **PJM is responsible for ensuring the reliability of the system it operates and currently oversees capacity obligations of its Load Serving**

complaint against AEP. R.C. 4905.26. (IEU Reply App. at 55). After a hearing, the PUCO could direct AEP to furnish such plant and facilities required to ensure adequate service. Of course, AEP customers would be obligated to compensate AEP for the noncompetitive services and to do so in accordance with the statutory requirements that include provisions specifying obligations the PUCO must meet before increasing rates and charges.

If the PUCO was really interested in protecting customers against the risk of inadequate service, perhaps it might make better use of the statutory authority it possesses to require utilities to furnish facilities and service that is adequate in all respects. R.C. 4933.83. (IEU-Ohio App. at 410).

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**Entities to ensure that it has sufficient generating capacity to satisfy its reliability responsibilities.**

*PJM Interconnection, L.L.C.*, FERC Case No. ER05-1410-001, *et. al*, Order Denying Rehearing and Approving Settlement Subject to Conditions at 5-6 (December 22, 2006) (emphasis added). FERC further described the obligations of LSEs under PJM:

Each Load Serving Entity in PJM is required to demonstrate that it can supply, or has under contract, sufficient generation capacity to meet its projected peak load and to procure its share of PJM's Installed Reserve Margin. For each Load Serving Entity, that share of Installed Reserve Margin is equal to a specified amount (currently 15 percent) of capacity above its forecasted peak load. This requirement is intended to ensure the availability of sufficient capacity to guarantee the reliability of the PJM system.

*Id.* at n. 8. Moreover, PUCO Staff acknowledged that PJM, acting in compliance with its obligation to keep the system in balance, will dispatch all available generation underneath PJM's control to satisfy load as that load presents itself on the system. Tr. Vol. V at 226. (IEU-Ohio Supp. at 146). Thus, because AEP is an LSE under PJM's reliability protocols, AEP has FERC-imposed obligations to ensure that reliability is maintained. In a case where the PUCO finds that more information is required to determine if the output of the hypothetical IGCC plant will benefit Ohio customers, it is wrong and misleading for the PUCO to suggest that the hypothetical IGCC plant will enhance reliability. AEP's status as a PJM LSE means that it is subject to PJM's and FERC's requirements with regard to ancillary services and leaves no room for further conjecture about the controlling requirements regarding any ancillary services that may be required to keep wires energized.

**PROPOSITION OF LAW III:**

**WHERE THE PUCO FAILS TO PROVIDE A RATIONAL BASIS FOR REACHING A DIFFERENT CONCLUSION FROM ONE CASE TO ANOTHER WHEN THE CASES INVOLVE SUBSTANTIALLY SIMILAR ISSUES, ITS ACTIONS ARE ARBITRARY AND CAPRICIOUS.**

Appellees completely disregarded one of IEU-Ohio's claims. IEU-Ohio has attacked the inconsistency of the PUCO's decision below. IEU-Ohio Brief at 26-31. IEU-Ohio has asserted that if the PUCO is correct that it must treat some portion of the output of an electric generating plant as a noncompetitive service, then it must do so for that portion of the generating plants that are presently providing the noncompetitive service. In addition to the PUCO's fundamental failure to follow the law that applies to rate increases for noncompetitive services, the inconsistency revealed by the PUCO's decision in the proceeding below, as contrasted with the PUCO's decision in AEP's RSP proceeding, renders it arbitrary and capricious. Accordingly, the PUCO's decision should be vacated.

**PROPOSITION OF LAW IV:**

**WHERE THE PUCO AUTHORIZES A RATE INCREASE AFTER COMPLETELY DISREGARDING MANDATORY RATEMAKING REQUIREMENTS, A REFUND OF AN ILLEGAL RATE INCREASE IS AN APPROPRIATE REMEDY.**

AEP argues that IEU-Ohio's requested relief is not properly before this Court because IEU-Ohio did not raise the issue on rehearing. AEP Brief at 43. AEP's defense is without merit.

Throughout the proceeding below, IEU-Ohio maintained that the PUCO lacked authority to increase rates for recovery of the costs of the hypothetical IGCC facility without first complying with the ratemaking requirements.<sup>18</sup> Moreover, IEU-Ohio sought a refund condition

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<sup>18</sup> Among other reasons, IEU-Ohio argued that the Commission unreasonably and unlawfully erred by authorizing AEP to increase rates by \$23.7 million (as estimated by AEP) without adhering to R.C. 4909.15, 4909.18, and 4909.19, and in violation of the distribution rate freeze approved by the Commission in AEP's RSP proceeding and that the Commission's Order was

at the tariff approval stage.<sup>19</sup> Finally, the Commission itself imposed a refund obligation on AEP if it does not display “a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing....”<sup>20</sup> Thus, it is disingenuous for AEP to suggest that IEU-Ohio’s appeal has raised the refund question for the first time or without having raised the question below.

More importantly, IEU-Ohio has asked the Court for relief that includes a refund of a rate increase that was illegal from beginning to end. There was neither the opportunity nor the necessity for IEU-Ohio to bring the relief that it seeks on appeal to the attention of the PUCO. The nature and extent of relief on appeal is a matter for the Court, not the Commission.<sup>21</sup>

Furthermore, IEU-Ohio is not asking the Court to create new law<sup>22</sup> but, rather, to address the applicability of *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957) (hereinafter “*Keco*”) in the present context. The Court, and not the General Assembly, created the principle in *Keco*. IEU-Ohio urges the Court to find that, based on the facts and circumstances presented in this appeal, the *Keco* principle does not apply and a refund

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unreasonable, unlawful, arbitrary and capricious as it disregarded prior holdings and the necessary implications of the Order as it must comprehensively and symmetrically apply to the Commission’s ratemaking obligations. *IGCC Proceeding*, Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio at 1 (May 8, 2006). (IEU-Ohio App. at 38).

<sup>19</sup> *IGCC Proceeding*, Objections of Industrial Energy Users-Ohio to the Tariff Filing by Columbus Southern Power Company and Ohio Power Company at 2 (April 21, 2006). (IEU-Ohio Supp. at 72).

<sup>20</sup> *IGCC Proceeding*, Entry on Rehearing at 16, 17 (June 28, 2006); *see also IGCC Proceeding*, Finding and Order at 2 (June 28, 2006). (IEU-Ohio App. at 73, 74 and 76, respectively.).

<sup>21</sup> The Court has considered issues that all of the parties to the appeal have addressed and assumed for the sake of argument that the issues were properly before the Court for its consideration. *Constellation* at ¶32. Thus, even if the Court finds that IEU-Ohio did not properly raise this issue in its Application for Rehearing, the Court may consider the issue, at the very least, for the sake of argument.

<sup>22</sup> PUCO Brief at 32; AEP Brief at 45.

of the illegal increase is an appropriate remedy. Unlike in *Keco*, neither AEP nor the Commission made an attempt to follow the statutory process laid down by the General Assembly for either establishing prices for competitive services or raising rates for a noncompetitive service. It is also worth noting that the distribution-related rate increase authorized by the PUCO and implemented by AEP violates the distribution rate freeze previously sought by AEP and approved by the PUCO. The motivation and rationale for the balance struck by the Court in *Keco* is completely missing in the present appeal.

In response to IEU-Ohio's Complaint for Writ of Prohibition, both Appellees asserted that IEU-Ohio had an adequate remedy at law.<sup>23</sup> However, in their briefs, they now seem to be saying that the remedy does not include refunding customers' money if the Court agrees that the rate increase was illegally concocted by the PUCO. AEP's desire to keep the money obtained illegally is perhaps understandable. But, it is hard to understand the PUCO's motivation to support such a result. In any event, the *Keco*-based arguments of the Appellees render meaningless the Constitutional mandate that every person shall have remedy by due course of law for an injury done<sup>24</sup> and elevate *Keco* into an absolute rule rather than a principle that the Court may apply to properly balance the relief that is available in light of the nature of the offenses.

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<sup>23</sup> *State of Ohio ex. Rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Docket No. 2006-1257, Motion to Dismiss of Columbus Southern Power Company and Ohio Power Company at 11-12 (July 21, 2006) and Motion to Dismiss Submitted on Behalf of Respondent, Public Utilities Commission of Ohio at 8-10 (July 21, 2006). (IEU Reply App. at 1, 17, respectively).

<sup>24</sup> OHIO CONST. art. I, §16. (IEU-Ohio App. at 386). Moreover, if this Court finds that the Commission did not adhere to the necessary statutory requirements, then Ohio customers did not have the benefit of the balance struck in *Keco* and, thus, limiting customers to a stay of execution is not an adequate remedy at law as required by the Ohio Constitution. OHIO CONST. art. I, §16. (IEU-Ohio App. at 386). In other words, because the PUCO struck a new balance that is different from that of the *Keco* doctrine, a stay without a refund of the rate increase illegally authorized by the PUCO is not an appropriate, fair or reasonable remedy.

Appellees' assertions<sup>25</sup> that IEU-Ohio could have prevented collection of the rates approved by the PUCO by filing a stay pursuant to R.C. 4903.16 presents its own practical problems. Had IEU-Ohio requested a stay, unlike the Office of the Ohio Consumers' Counsel, IEU-Ohio would have had to post a bond in an amount equal to the cumulative total for all claims covered.<sup>26</sup> Appellees' suggestion that the Court apply the *Keco* principle in this case because IEU-Ohio did not seek a stay is simply a device to allow them to prevail on the money in circumstances where there is no good reason to let them prevail on the merits. The cost of the bond coupled with the cost of litigation inspired by AEP's request for up-front payments to support its hypothetical IGCC ambitions, the cost of repeatedly raising the illegality of the actions below to the PUCO and the cost of the illegal increase itself are tools that the PUCO and AEP can apply to suppress opposition in whatever form it is presented.

If the *Keco* principle does not rightly apply here, then the fact that IEU-Ohio did not seek a stay is irrelevant to the question of whether a refund is an appropriate form of relief. If a refund is ordered by the Court based on the facts and circumstances presented by this appeal, AEP and the PUCO are free to establish rates to properly compensate AEP for any service it may be providing in accordance with Ohio law. There is no prejudice to AEP or the PUCO as a result of a refund of an illegal rate increase where neither AEP nor the PUCO had any good reason to believe that the rate increase and the process by which it was achieved were anything other than unlawful, unreasonable, arbitrary and capricious.

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<sup>25</sup> AEP Brief at 45; PUCO Brief at 30.

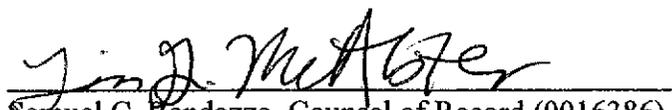
<sup>26</sup> See R.C. 2505.09. (IEU Reply App. at 54).

Based on the reasons provided in IEU-Ohio's Brief and above, IEU-Ohio urges the Court to find that the PUCO did not even attempt to satisfy the procedural or substantive requirements that have been established by the General Assembly and that apply to rate increase requests and, thus, illegally authorized AEP to increase rates. In this circumstance, IEU-Ohio urges the Court to hold that the *Keco* principle does not apply. To remedy the illegal action of the PUCO, IEU-Ohio urges the Court to direct the PUCO to order AEP to refund the illegal rate increase or provide equivalent relief as an offset to increases that AEP's Ohio customers might otherwise be required to pay.

### **CONCLUSION**

WHEREFORE, Appellant respectfully submits that Appellee's April 10, 2006 Opinion and Order and Appellee's June 28, 2006 Entry on Rehearing are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to Appellee with instructions to correct the errors complained of by granting the relief requested by IEU-Ohio.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply Brief of Appellant, Industrial Energy Users-Ohio, was sent by ordinary U.S. mail, postage prepaid, or hand-delivered to the parties listed below, and pursuant to Section 4903.13 of the Ohio Revised Code on January 19, 2007.



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IN THE SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,

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v.

The Public Utilities Commission of Ohio,

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: Case No. 06-1594  
:  
: Appeal from the Public  
: Utilities Commission of Ohio  
:  
: Public Utilities  
: Commission of Ohio  
: Case No. 05-376-EL-UNC  
:

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INDUSTRIAL ENERGY USERS-OHIO  
REPLY BRIEF  
APPENDIX

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I hereby certify that a copy of this Reply Brief Appendix of Industrial Energy Users-Ohio, was sent by ordinary U.S. mail, postage prepaid, or hand-delivered to the parties listed below, and pursuant to Section 4903.13 of the Ohio Revised Code on January 19, 2007.



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IN THE SUPREME COURT OF OHIO

State of Ohio, ex. Rel. Industrial Energy Users-Ohio  
Relator,  
v.  
The Public Utilities Commission of Ohio  
Alan R. Schriber, Chairman  
Ronda Hartman Fergus, Commissioner  
Judith A. Jones, Commissioner  
Donald L. Mason, Commissioner, and  
Valerie A. Lemmie, Commissioner,  
Respondents.

: Complaint for Writ of Prohibition  
: to Prevent the Public Utilities  
: Commission of Ohio from Enabling  
: Electric Rate Increases Pursuant to  
: its Order dated April 10, 2006, its  
: Finding and Order  
: dated June 28, 2006  
: and its Entry on Rehearing dated  
: June 28, 2006 in PUCO Case No.  
: 05-376-EL-UNC Without Meeting  
: Applicable Procedural and  
: Substantive  
: Requirements of Ohio Law  
:  
: Case No. 06-1257

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MOTION TO DISMISS OF MOVANT INTERVENORS,  
COLUMBUS SOUTHERN POWER COMPANY  
AND OHIO POWER COMPANY

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State of Ohio, ex. Rel. Industrial Energy Users-Ohio	:	Complaint for Writ of Prohibition to Prevent the Public Utilities Commission of Ohio from Enabling Electric Rate Increases Pursuant to its Order dated April 10, 2006, its Finding and Order dated June 28, 2006
Relator,	:	
v.	:	
The Public Utilities Commission of Ohio	:	and its Entry on Rehearing dated June 28, 2006 in PUCO Case No. 05-376-EL-UNC Without Meeting
Alan R. Schriber, Chairman	:	Applicable Procedural and Substantive Requirements of Ohio Law
Ronda Hartman Fergus, Commissioner	:	
Judith A. Jones, Commissioner	:	
Donald L. Mason, Commissioner, and	:	
Valerie A. Lemmie, Commissioner,	:	
Respondents.	:	Case No. 06-1257

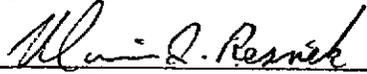
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MOTION TO DISMISS OF MOVANT INTERVENORS,  
COLUMBUS SOUTHERN POWER COMPANY  
AND OHIO POWER COMPANY

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Pursuant to S. Ct. Prac. R. X, Section 5, Proposed Intervening Respondents, Columbus Southern Power Company and Ohio Power Company (AEP Ohio), move this Court to dismiss the complaint for writ of prohibition filed by Relator, the Industrial Energy Users- Ohio against Respondents, The Public Utilities Commission of Ohio and Commissioners (collectively referred to as the Commission). A memorandum in support of this motion is attached.

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**IN THE SUPREME COURT OF OHIO**

State of Ohio, ex. Rel. Industrial Energy Users-Ohio	:	Complaint for Writ of Prohibition to Prevent the Public Utilities Commission of Ohio from Enabling Electric Rate Increases Pursuant to its Order dated April 10, 2006, its Finding and Order dated June 28, 2006
Relator,	:	
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**MEMORANDUM IN SUPPORT OF  
COLUMBUS SOUTHERN POWER COMPANY'S  
AND OHIO POWER COMPANY'S  
MOTION TO DISMISS**

**BACKGROUND**

The enactment in 1999 of electric utility industry restructuring legislation<sup>1</sup> resulted in many changes to the electric utilities' responsibilities to its customers. Complementary changes to the authority of the Public Utilities Commission of Ohio (Commission) also were enacted. Of particular importance to this proceeding is the responsibility imposed on electric utilities by §4928.14, Ohio Rev. Code, to be the Provider of Last Resort (POLR) of generation service to customers. More precisely, this POLR obligation, although related to generation service, is imposed by statute on the electric distribution utility function

“After its market development period, an electric distribution utility in this state shall provide consumers . . . . all competitive retail electric services necessary to maintain essential electric service to consumers, including a

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<sup>1</sup> Amended Sub. S.B. No. 3, which enacted, among other statutes, Chapter 4928, Ohio Rev. Code.

firm supply of electric generation service.” (§4928.14(A), Ohio Rev. Code, emphasis added).

While it may be counter-intuitive to conclude that POLR generation service is a function of the distribution arm of the electric utility, §4928.17(E), Ohio Rev. Code, reinforces this conclusion. That section addresses an electric utility’s divestiture of generating assets. In doing so, the General Assembly again recognized that there are aspects of distribution service that are provided by generating assets.<sup>2</sup>

Although the POLR generation service obligation is imposed on the distribution arm of the electric utility, there is no statutory directive regarding how that obligation should be met. It is in that context that AEP Ohio proposed to construct a new electric generating facility to meet a small portion of its combined POLR generating service obligation. The facility, which will be located in Meigs County, Ohio, will utilize Integrated Gasification Combined Cycle (IGCC) technology as opposed to traditional pulverized coal technology.

Therefore, on March 18, 2005, AEP Ohio filed an application with the Commission for approval of a cost recovery plan associated with the construction and ultimate operation of the IGCC facility. The cost recovery plan contemplated three phases. In Phase I, AEP Ohio would recover over a twelve-month period approximately \$24 million, representing pre-construction costs such as a Front End Engineering and Design process and transmission interconnection studies. Contrary to the Relator’s characterization, these costs are not “research and development costs” (Complaint, pp. 10, 14); nor would Phase I cost recovery “prefund” the Phase I costs themselves, as the Relator claims. (*Id.* at 12, 13, 14 and 26).

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<sup>2</sup> That statute refers to “distribution . . . service provided by such generating asset.”

Phase II cost recovery would be set at a level to recover the financing costs incurred during the construction of the IGCC facility. During Phase III, which would extend over the life of the IGCC facility, the Commission would determine the difference between the Market Based Standard Service Offer (MBSSO) under §4928.14(A), Ohio Rev. Code, and the rate requirement associated with the IGCC. If the MBSSO were greater than the rate for the IGCC facility the difference would be passed back to all customers as a credit to distribution service. If the MBSSO rate were less than the rate for the IGCC facility, the difference would be passed back to all customers as a surcharge to distribution service.

By its order dated April 10, 2006, the Commission authorized AEP Ohio to begin recovery of Phase I rates and directed that further hearings were needed and should be held before the Commission could rule on Phase II and Phase III cost recovery.<sup>3</sup>

Several intervenors, including the Relator, challenged the Commission's order by filing applications for rehearing. The Commission denied the applications for rehearing on June 28, 2006, clearing the way for Relator (and other intervenors) to file with the Court an appeal from the Commission's Finding and Order and Entry on Rehearing.<sup>4</sup> In a separate order also issued on June 28, 2006, the Commission authorized the implementation of the Phase I rates.<sup>5</sup>

Instead of pursuing its appeal as of right, Relator filed this Complaint on June 29, 2006, in which it asks the Court to "prohibit the use of the PUCO's authorization by OPCo and CSP to enforce the collection of any such rate increase, and prohibit the PUCO

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<sup>3</sup> The April 10, 2006 Finding and Order is Exhibit D to the Complaint.

<sup>4</sup> The June 28, 2006 Entry on Rehearing is Exhibit G to the Complaint.

<sup>5</sup> The June 28, 2006 Finding and Order is Exhibit F to the Complaint.

from further entertaining any increase in rates for a hypothetical IGCC generating plant unless it does so in accordance with the requirements of Ohio law as such requirements apply to both competitive electric service and noncompetitive electric services . . . .”

(Complaint, p. 29).

AEP Ohio filed a motion to intervene in this Complaint on June 30, 2006.

Although that motion is yet to be ruled on, AEP Ohio now moves the Court to dismiss the complaint because it fails to state a claim on which prohibition can be based.

### ARGUMENT

Even accepting Relator’s factual assertions as true for purposes of this motion to dismiss, Relator has not satisfied any of the three criteria against which a complaint for a Writ of Prohibition is judged.<sup>6</sup> Those criteria are:

1. the 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.

(State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas et al. 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E. 2d 92 ¶14).

It is, of course, well established that if the lower tribunal “patently and unambiguously lacks jurisdiction to proceed” the requirements that the exercise of judicial or quasi-judicial power is about to occur and that there not be an adequate remedy in the ordinary course of law may be excused. (State ex rel. Columbia Gas of Ohio, Inc. v. Henson, Judge (2004) 102 Ohio St. 3d 349, 2004-Ohio-3208, 810 N.E. 2d 953 ¶ 14; State ex rel. Tubb Jones v. Suster (1998) 84 Ohio St. 3d 70, 74).

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<sup>6</sup> Of course, legal assertions are not entitled to such deference.

These three criteria, and the exception for circumstances where there is a patent and unambiguous lack of jurisdiction, must be considered in the context of the general reluctance to grant Writs of Prohibition.

[A] writ of prohibition is an 'extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.' Citations omitted. ('Prohibition is an extraordinary writ and we do not grant it routinely or easily.') (State ex rel. Tubb Jones v. Suster supra p. 73).

**1. About to Exercise Judicial or Quasi-Judicial Power**

There are two aspects to this criterion. The key aspect of this criterion is that the power that is about to be exercised must be judicial or quasi-judicial. It is obvious that the Commission is not a court and therefore, does not exercise judicial power. Further, while there are some functions of the Commission which may be quasi-judicial, setting rates is not one of those functions.

Ratemaking in Ohio is a legislative function. (Office of Consumers' Counsel v. Pub. Util. Comm. (1994), 70 Ohio St. 3d 244, 249. While the process used by the Commission in setting rates is quasi-judicial in appearance, the function of setting rates is legislative. Therefore, the power the Commission exercised in authorizing recovery of Phase I rates and the Commission's future determinations concerning Phase II and Phase III rates are legislative powers. As such, the question of whether there is a patent and unambiguous lack of jurisdiction supporting the Commission's orders is immaterial.

Even if the power exercised by the Commission were deemed to be quasi-judicial, the Relator still has not met the other aspect of this criterion. The exercise of the power must be about to occur. Since the Commission authorized the implementation of Phase I

rates prior to the filing of this Complaint it is apparent that at least as to Phase I rates the issuance of a Writ of Prohibition would be inappropriate since:

“it may be invoked only to prevent proceeding in a matter in which there is an absence of jurisdiction and not to review the regularity of an act already performed.” Citations omitted. (State ex rel. The Ohio Stove Co. v. Coffinberry et al. (1948) 149 Ohio St. 400, 405).

Even the portion of the relief sought by Relator which pertains to future proceedings in the case pending at the Commission fails this test. The Commission already has determined its jurisdiction in this proceeding and, absent a patent and unambiguous lack of jurisdiction to continue acting in this proceeding, prohibition is not available.

**2. Is the Exercise of Judicial or Quasi-Judicial Power Authorized by Law**

If the Court agrees that the Commission’s actions in the IGCC proceeding represent the exercise of the legislative ratemaking function, rather than a quasi-judicial function, the Court’s inquiry would be at an end. If, however, the Court believes that the Commission is exercising quasi-judicial power in the IGCC proceeding, then it must consider the question of the Commission’s subject matter jurisdiction. (State ex. Rel. Tubbs Jones v. Suster supra, p. 73).

The Commission’s subject matter jurisdiction is supported not only by relatively recent decisions by this Court in the context of Ohio’s electric utility industry restructuring legislation, but also by earlier decisions of this Court which recognized the Commission’s complete and comprehensive jurisdiction over matters pertaining to the rates and service of public utilities.

As noted at the outset of this memorandum, the IGCC proceeding, including AEP Ohio’s cost recovery proposals, are tied to the POLR obligation imposed on AEP Ohio’s

distribution function by §4928.14(A), Ohio Rev. Code. In Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767, this Court affirmed the Commission's jurisdiction to authorize a rate stabilization surcharge (RSS) imposed on all customers that enabled the electric distribution utility to recover its POLR costs. The Court noted with approval the Commission's explanation for that POLR charge: The electric distribution utility "will incur costs in its position as the provider of last resort ['POLR'], which costs would not be recoverable other than through the RSS" and that "the existence of POLR costs makes it reasonable to apply the RSS to all customers." Id. at ¶39.

Similarly, the Commission has the jurisdiction to consider and approve AEP Ohio's IGCC cost recovery proposal. As was the case with the rate stabilization surcharge addressed in Constellation NewEnergy supra, the costs of the IGCC plant are costs AEP Ohio will be incurring to meet the long-term obligation as the provider of last resort; they are costs that will be incurred to assist AEP Ohio in meeting the POLR obligation to all consumers in AEP Ohio's certified territory; they are costs the recovery of which can be assured through the three-phase recovery mechanism proposed by AEP Ohio; and the existence of these costs makes it reasonable to recover them through a POLR cost recovery mechanism that applies to all customers. Accordingly, the proposed mechanism for assuring recovery of the IGCC plant's costs is comparable to the rate stabilization surcharge that this Court confirmed when it affirmed the Commission decision in Constellation NewEnergy, supra. See also Consumers' Counsel v. Pub. Util. Comm. 109 Ohio St. 3d 328, 2006-Ohio-2110 847 N.E. 2d 1184, ¶ 20, where the Court also affirmed the Commission's authorization of recovery of POLR-related expenses.

In addition to the Court's recent decisions which confirmed the existence of the Commission's jurisdiction to consider the recovery of costs associated with fulfilling the POLR obligation, earlier decisions by this Court lend further support to the argument that the Commission has subject matter jurisdiction to consider the IGCC cost recovery proposals.

In State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas (2000), 88 Ohio St. 3d 447, 727 N.E. 2d 900, this Court, in considering whether a Writ of Prohibition should issue, considered the broad nature of the Commission's jurisdiction. Relying on yet earlier decisions the Court stated:

The commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service, effectively denying to all Ohio courts (except this court) any jurisdiction over such matters. *R.C. 4905.26* specifically establishes the commission's exclusive jurisdiction over such matters, which "in any respect" are alleged to be "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law \* \* \*." In addition, "no court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission \* \* \*." *R.C. 4903.12*.

We have held that when the General Assembly has enacted a comprehensive scheme of public utility rate regulation and has specifically conferred regulatory jurisdiction upon the commission, such jurisdiction is exclusive. As we said in Kazmaier Supermarket, Inc. v. Toledo Edison Co. (1991), 61 Ohio St. 3d 147, 150-153, 573 N.E. 2d 655, 658-660;

"The General Assembly has by statute pronounced the public policy of the state that the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission. This court has recognized this legislative mandate.

" "There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance, and in which the authority to

review such rates is vested exclusively in the Supreme Court by Section 4903.12, Revised Code \*\*\*.”

Two years later the Court again considered the extent of the Commission’s jurisdiction in the context of a prohibition proceeding. Relying on its then–recent decision quoted above, the Court repeated its holding regarding the Commission’s exclusive jurisdiction over matters involving public utilities such as rates and charges. (State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E. 2d 92. ¶ 18).

Based on this authority, it is clear that the Commission has subject matter jurisdiction to consider the IGCC cost recovery proposal related to AEP Ohio’s fulfillment of the POLR obligation. However, even if there were some doubt concerning the Commission’s subject matter jurisdiction it cannot be demonstrated that there is a “patent and unambiguous” lack of jurisdiction. The inability to establish a patent and unambiguous lack of jurisdiction is important because without such a finding there is no basis to excuse either the fact that the Commission already has acted in this matter – and therefore the first criterion has not been met – or the fact that Relator has an adequate remedy in the ordinary course of the law, as discussed next.

**3. There is an Adequate Remedy in the Ordinary Course of the Law**

It is axiomatic that prohibition should not be used as a substitute for an appeal. (State ex. rel. Ragozine et al. v. Shaker, Judge 96 Ohio St. 3d 201, 2002-Ohio-3992, 772 N.E. 2d 1192, ¶ 7). As this Court is all too well aware, direct appeal to this Court is available from all final orders of the Commission. Since the Commission already has authorized the initiation of Phase I rates (i.e. a final order) and has denied rehearing

applications of Relator and other intervenors before the Commission, the path is clear for such an appeal to be taken. Consequently, Relator fails to meet this criterion.

Relator contends that its right of appeal, even if pursued to a successful conclusion, still would not be an adequate remedy. Relator supports this claim by arguing that no means exists to make the customers whole for the Phase I rates they will pay during the pendency of such an appeal. (Complaint, pp. 26, 27).

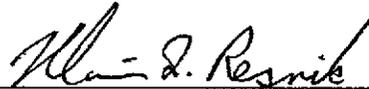
The deficiency in Relator's argument is that it overlooks §4903.16, Ohio Rev. Code. That provision provides appellants from Commission orders the ability to apply to the Court for a stay of the order. The appeal, particularly with an opportunity to seek a stay of the Commission's order, provides an adequate remedy in the ordinary course of the law. Although Relator might not like the process established by the General Assembly, it has worked well for many decades and should not be evaded by the filing of a complaint for a Writ of Prohibition.

### CONCLUSION

The Commission has subject matter jurisdiction to issue the orders brought before the Court in this prohibition action. Even if there were a question concerning the Commission's jurisdiction in this regard, it cannot be concluded that there is a "patent and unambiguous" lack of jurisdiction. Further, the Commission's orders represent an exercise of legislative ratemaking power, not quasi-judicial power. Even if the Court were to conclude that these orders result from the exercise of quasi-judicial power, the orders already have been issued. The Commission has authorized rates which already are in effect and already has determined that it has jurisdiction to consider the cost recovery proposal associated with AEP Ohio meeting the POLR obligation, in part, by building an

IGCC generating plant, and it has exercised that jurisdiction. Finally, an adequate remedy in the ordinary course of the law exists for this Court to review the Commission's order. That remedy, of course, is by appeal. For all these reasons, Relator's complaint should be dismissed for its failure to state a claim on which the requested relief can be granted.

**Respectfully submitted,**



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**PROOF OF SERVICE**

Columbus Southern Power Company's and Ohio Power Company's Motion to Dismiss of Movant Intervenor's was served by First-Class U.S. Mail upon counsel identified below for all parties of record this 21st day of July, 2006.

  
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**IN THE  
SUPREME COURT OF OHIO**

**State of Ohio, ex rel. Industrial  
Energy Users-Ohio,**

Relator,

v.

**The Public Utilities Commission of  
Ohio**

**Alan R. Schriber, Chairman**

**Ronda H. Fergus, Commissioner**

**Judith A. Jones, Commissioner**

**Donald L. Mason, Commissioner**

**Valerie A. Lemmie, Commissioner**

Respondents.

Case No. 06-1257

Complaint for Writ of Prohibition to Prevent the Public Utilities Commission of Ohio from Enabling Electric Rate Increases Pursuant to Its Order dated April 10, 2006, its Finding and Order dated June 28, 2006 and its Entry on Rehearing dated June 28, 2006 in PUCO Case No. 05-376-EL-UNC Without Meeting Applicable Procedural and Substantive Requirements of Ohio law.

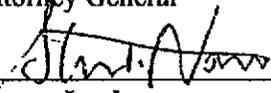
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**MOTION TO DISMISS  
SUBMITTED ON BEHALF OF RESPONDENT,  
PUBLIC UTILITIES COMMISSION OF OHIO**

---

The Public Utilities Commission of Ohio, respondent, moves this Honorable Court, under Sup. Ct. Prac. XIV, Section, and Rule 12(B)(6) of the Ohio Rules of Civil Procedure, for an order dismissing this appeal. The reasons supporting this motion are fully set forth in the accompanying Memorandum in Support.

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## MEMORANDUM IN SUPPORT

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### INTRODUCTION

Because of its nature, the writ of prohibition is to be used with care and caution. The right to such relief must be clear, and in a doubtful or borderline case, its issuance should be refused. *State ex rel. Merion v. Court of Common Pleas of Tuscarawas County, et al.*, 137 Ohio St. 273, 277, 28 N.E.2d 641, 643 (1940). A writ of prohibition is an “extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies.” *State ex rel. Henry v. Britt*, 67 Ohio St.2d 71, 73, 424 N.E.2d 297, 298-299 (1981). A writ of prohibition is the most extraordinary of the original writs and *should only be sought as a remedy of last resort*. *State ex rel. Merion v. Court of Common Pleas*, 137 Ohio St. 273, 277, 29 N.E.2d 641, 643 (1940) (emphasis added).

By contrast, IEU-OH has abandoned caution and undertaken this extraordinary remedy as its first resort even though it has an equivalent legal remedy readily available: a direct appeal under R.C. 4903.11 and 4903.13 and a stay request under R.C. 4903.16. As such, relator seeks to bypass and contravene the controlling statutory process for challenging and halting implementation orders of the Public Utilities Commission of Ohio (Commission). Prior to relator filing the complaint, the Commission had already issued a final order on the subject being challenged and had fully implemented that decision –the decision is ripe for appeal. In the absence of a patent and unambiguous lack of jurisdic-

tion, an appeal constitutes an adequate remedy precluding a writ of prohibition. *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 451, 835 N.E.2d 1232, 1236 (2005); *State ex rel. U.S. Steel Corp. v. Zalinski*, 98 Ohio St. 3d 395, 396, 786 N.E.2d 39, 41 (2003).

Relator's complaint does not support the conclusion that the Commission patently and unambiguously lacks jurisdiction over the subject matter of the orders below. Although the Court should not address IEU-OH's specific jurisdictional claims here, the Commission adequately explained its authority supporting the orders below. IEU-OH's complaint should also be dismissed because relator did not file an application for rehearing raising the question of whether the Commission patently and unambiguously lacks jurisdiction. *State ex rel. Consumers' Counsel v. Pub. Util. Comm'n*, 102 Ohio St.3d 301, 809 N.E. 1146 (2004). This action should be dismissed.

#### STATEMENT OF THE CASE

On March 18, 2005, Columbus Southern Power Company and Ohio Power Company, both subsidiaries of American Electric Power (collectively "AEP"), filed an application for authority to recover costs associated with the construction and ultimate operation of an integrated gasification combined cycle (IGCC) electric generation facility in Ohio. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generation*

*Facility*, Case No. 05-376-EL-UNC (“*IGCC Phase I*”) (Opinion and Order) (April 10, 2006), Ap. at 13-36. IGCC is a “clean coal” technology that promotes use of the nation’s most abundant energy resource – including Ohio’s high sulfur bituminous coals – even in the context of increasingly stringent environmental regulations. *IGCC Phase I* (Opinion and Order at 19) (April 10, 2006), Ap. at 31.

In filing the application, AEP asserted that the proposed IGCC facility is necessary to allow its operating companies to provide a firm supply of generation service to the companies’ Ohio customers. *Id.* at 3, Ap. at 15. AEP contended that the operating companies must be ready and able to provide firm generation service to customers who have not selected a competitive retail electric service provider and any customer who returns to the AEP companies’ service as a result of a competitive provider’s default or at the customer’s voluntary election. *Id.* AEP maintained that the proposed IGCC facility would help its operating companies to meet their respective obligations as the provider of last resort (sometimes referred to as “POLR obligation”). *Id.*

AEP requested approval of its proposed cost recovery mechanism to provide the design, construction and operation of a 629 megawatt electric generation facility in Meigs County, Ohio. *Id.* AEP proposed to recover the costs of the IGCC facility in three phases to continue throughout the commercial life of the facility. *Id.* Relative to Phase I – the only phase decided by the Commission below – AEP requested permission to recover pre-construction costs of approximately \$23.7 million through a 12-month bypassable generation surcharge (“*IGCC Phase I Rider Charge*”). *Id.* at 11, Ap. at 23. After conducting public and evidentiary hearings and allowing the parties to file briefs, the

Commission decided to grant AEP authority to implement the IGCC Phase I Rider Charge.

In approving the Phase I charge, the Commission made clear that it was not approving the IGCC facility itself and left major issues concerning the prudence and economic justification of the power plant for future determination:

The Commission concludes that AEP should economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application. The reasonable costs to develop that plan and supporting analysis should be recoverable from ratepayers as a proper cost of providing distribution service.

*Id.* at 20-21, *Ap.* at 32-33. The Commission went on to list several particular issues to be considered in the future prior to any final approval of the IGCC facility. *Id.*

In approving the IGCC Phase I Rider Charge, the Commission found that the proposed IGCC facility would yield substantial positive economic and environmental impacts in Ohio, as well as significant secondary benefits:

In addition to the direct economic and environmental impact of building an IGCC unit in Ohio, there are also significant secondary or indirect benefits including generation of new tax revenue and promotion of advanced technology. \* \* \* The Commission agrees that such economic benefits and technological advances are beneficial for the environment, the state of Ohio, the region, and the nation. Further, the commission finds that, with the recent volatility of natural gas prices, the environmental cost of pulverized coal generation facilities, the age of the generating facilities in Ohio, the likely implementation for carbon sequestration legislation, the lead time required to place a generation facility in operation

and the life-cycle of generation facilities, the diversification of electric generation facilities is wise.

*Id.* at 20, Ap. at 32. Each of the benefits discussed were established in the record below.

Notwithstanding all of these benefits, the Commission emphasized that the primary bases for the approval were the State of Ohio policy mandates created by the General Assembly in R.C. 4928.02 and the reliability of AEP's distribution system in the context of its provider-of-last-resort obligation under R.C. Chapter 4928.14:

Adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service cannot be provided to consumers in Ohio unless there is a functioning distribution system. The Commission's decision in this case is about ensuring the long-term viability of the distribution system and adequate capacity for AEP's POLR obligation. The AEP Companies should be permitted to recover the reasonable costs of further developing and detailing their proposal, to be considered by the Commission in a future proceeding.

*Id.* at 21, Ap. at 33. Significantly, the Commission also provided in its entry on rehearing that "if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest." *IGCC Phase I* (Entry on Rehearing at 16) (June 28, 2006), Ap. at 71.

In a separate order, the Commission also approved AEP's tariff that set forth the terms and conditions of the IGCC Phase I Charge. *IGCC Phase I* (Finding and Order) (June 28, 2006), Ap. at 73-75. After the Commission's decision approving the IGCC

Phase I Charge was final and after the decision had been fully implemented through approval of AEP's tariff, the instant complaint for writ of prohibition was filed by relator.

## LAW AND ARGUMENT

### Proposition of Law I:

**In the absence of a patent and unambiguous lack of jurisdiction, an appeal constitutes an adequate remedy precluding a writ of prohibition. *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 451, 835 N.E.2d 1232, 1236 (2005); *State ex rel. U.S. Steel Corp. v. Zalinski*, 98 Ohio St. 3d 395, 396, 786 N.E.2d 39, 41 (2003).**

The general standard to justify issuance of a writ of prohibition is for a relator to show that: (1) the lower tribunal is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Koren v. Grogan*, 68 Ohio St. 3d 590, 592, 629 N.E.2d 446, 448 (1994), cited in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 81 Ohio St. 3d 1226, 1228, 689 N.E.2d 971, 972 (1998). As the relator, IEU-OH bears the burden of establishing each requisite element. *State ex rel. Enyart v. O'Neill*, 71 Ohio St. 3d 655, 656, 646 N.E.2d 1110, 1112 (1995). Because the Commission already finalized its decision below and IEU-OH can presently appeal the decision, relator has a heavier burden of proof to avoid dismissal in this case. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349, 351, 810 N.E.2d 953, 956 (2004) (relator can bypass available appeals process if patent and unambiguous lack of jurisdiction demonstrated).

As indicated, the Commission had fully decided the case below and had even completed its action implementing the decision before IEU-OH filed a complaint initiating this action. Since the Commission previously issued a final order, an appeal is a readily-available legal remedy for IEU-OH. It is well established that, in the absence of a patent and unambiguous lack of jurisdiction, an appeal constitutes an adequate remedy precluding a writ of prohibition. *State ex rel. U.S. Steel Corp. v. Zalinski*, 98 Ohio St. 3d 395, 396, 786 N.E.2d 39, 41 (2003); *Hughes v. Calabrese*, 95 Ohio St.3d 334, 338, 767 N.E. 725 (2002); *State ex rel. Kreps v. Christiansen*, 88 Ohio St.3d 313, 316, 725 N.E. 663 (2000); *State ex rel. Hunter v. Summit Cty. Human Resource Comm'n*, 81 Ohio St. 3d 450, 451, 692 N.E.2d 185, 186-187 (1998). This Court only recently stated that "if the lack of jurisdiction is not patently and unambiguous, there is generally no entitlement to a writ of prohibition to prevent a [lower tribunal's] exercise of jurisdiction." *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 451, 835 N.E.2d 1232, 1236 (2005). Thus, IEU-OH must show that the Commission patently and unambiguously lacks jurisdiction over the subject matter of the order in order to successfully establish that the normal remedy of appeal is inadequate. It has failed to do so and the action should be dismissed.

**A. Relator has an adequate remedy at law to challenge the Commission's jurisdiction and attempt to halt collection of the IGCC Phase I Rider Charge: a stay request under R.C. 4903.16 upon filing an appeal under R.C. 4903.11 and 4903.13.**

If IEU-OH's purpose in filing a writ of prohibition was to prevent the IGCC Phase I Rider Charge rate from going into effect, it is too late: before this action was filed, the Commission approved a tariff fully implementing the approved charge. *IGCC Phase I* (Finding and Order) (June 28, 2006), Ap. at 73-75. Hence, even if this Court were to issue a peremptory writ of prohibition in this case (which it most certainly should not do), the IGCC Phase I Rider Charge would not be prevented from going into effect – that event has already occurred as of July 1, 2006. Although a peremptory writ of prohibition could operate to halt further collection of the IGCC Phase I Rider Charge, that same result could also be achieved if IEU-OH: (1) files an appeal under R.C. 4903.11 and 4903.13, and (2) successfully obtains a stay order from this Court under R.C. 4903.16. Further, if IEU-OH did file an appeal and was successful in obtaining a stay order halting collection of the IGCC Phase I Rider Charge, that outcome could also become permanent if IEU-OH were to ultimately prevail on the merits of its appeal. The existence of an adequate legal remedy should bar IEU-OH from obtaining a writ of prohibition against the Commission, absent a showing of patent and unambiguous lack of jurisdiction. In other words, IEU-OH cannot pursue its appeal through a writ of prohibition request and this action should be dismissed.

IEU-OH's complaint completely fails to mention its adequate remedy at law for halting implementation of the IGCC Phase I Rider Charge: a stay request under R.C. 4903.16. Of course, a stay request under R.C. 4903.16 can only be filed in an appeal filed under R.C. 4903.11 and 4903.13. And R.C. 4903.13 provides that the proceeding to obtain reversal, vacation, or modification of a Commission order "shall be by notice of appeal" – not by original action. Ohio Rev. Code Ann. § 4903.13 (Anderson 2006), Ap. at 2. IEU-OH should not be permitted to use this original action as a substitute for obtaining a stay order under R.C. 4903.16 in an appeal filed under R.C. 4903.11 and 4903.13. In the context of challenging Commission orders, this Court has held that the predecessor to R.C. 4903.13 "provides a clear, adequate legal remedy for which [an extraordinary writ action] cannot be substituted." *State ex rel. Ohio Electric Ry. Co. v. Pub. Util. Comm'n*, 101 Ohio St. 313, 315-316, 128 N.E. 83, 84 (1920).

As referenced, IEU-OH's effort to halt implementation of the Commission's order fails to follow the statutory process for obtaining a stay of a Commission order. Significantly, this statutory process includes a commitment to the financial undertaking that is required by R.C. 4903.16. Ohio Rev. Code Ann. § 4903.16 (Anderson 2006), Ap. at 2-3. By this omission, IEU-OH has failed to satisfy the statutory procedural requirements necessary for halting implementation of a Commission order. Entertaining a writ of prohibition action for this same purpose would, therefore, circumvent the mandatory procedures and requirements of R.C. 4903.16 – including the important requirement of financial undertaking "in such a sum . . . conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of. . . ." *Id.*

This Court has determined "that there is no automatic stay of any [PUCO] order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond." *City of Columbus v. Pub. Util. Comm'n*, 170 Ohio St. 105, 109-110, 163 N.E.2d 167, 171 (1959); *Keco Industries, Inc., v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465, 468 (1957). R.C. 4903.16 provides *without exception* that an appellant seeking to stay the execution of a Commission order must execute an undertaking for the potential payment of damages if the Commission order is sustained. Ohio Rev. Code Ann. § 4903.16 (Anderson 2006), Ap. at 2-3. Indeed, the Court has rejected stay requests by concluding that appellant "did not follow the statutory procedure of asking the Supreme Court to stay an order of the Commission, *including posting a bond.*" *Consumers' Counsel v. Pub. Util. Comm'n*, 61 Ohio St.3d 396, 403, 575 N.E.2d 157, 162 (1991) (emphasis added). *See also Columbus v. Pub. Util. Comm'n*, 170 Ohio St. 105, 109, 163 N.E.2d 167, 171 (1959) (the statutory procedures control the process for appealing final Commission orders and "*any stay* of an order of the commission is dependent on the execution of an undertaking by the appellant \* \* \*") (emphasis added).

Through the mandatory appeal and stay process found in R.C. Chapter 4903, IEU-OH has an adequate remedy at law. Prohibition does not lie to prevent a merely erroneous decision or where jurisdiction was exercised erroneously; the extraordinary remedy of prohibition may not be employed as a substitute for appeal to review errors or irregularities. *State ex rel. Enyart v. O'Neill*, 71 Ohio St.3d 655, 656, 646 N.E. 1110, 1112

(1995). IEU-OH should be required to pursue its statutory remedy of appeal and stay request.

**B. Relator's complaint does not support the conclusion that the Commission patently and unambiguously lacks jurisdiction over the subject matter of the orders below.**

IEU-OH merely asserts that the Commission's decision was not authorized by law because it allegedly violates several statutory provisions governing the Commission's regulatory decisions. Specifically, the complaint alleges that the Commission's decision "is unauthorized by law," violates specified statutory provisions, that the Commission "lacks the jurisdiction," is "without jurisdiction," and is "without authority" to allow implementation of the IGCC rider rate. Complaint at ¶¶ 30-32. Even if IEU-OH's complaint had referenced the proper legal standard of "patent and unambiguous lack of jurisdiction" – which it did not – the opaque statutory arguments made within the complaint do not support a conclusion that the Commission patently and unambiguously lacks jurisdiction over the subject matter addressed below. In reality, the substance of IEU-OH's arguments and supporting allegations really attack the *exercise* – not the existence – of Commission jurisdiction over AEP's rates.

The controlling law prevents IEU-OH from challenging the exercise of Commission jurisdiction, as contrasted from establishing an obvious and total lack of subject matter jurisdiction. It is well established that a writ of prohibition is sought in order to prevent an action due to a perceived total lack of jurisdiction, not to review the regularity of an act already performed. *State ex rel. Beacon Journal Pub. Co. v. Kainrad*, 46 Ohio St.

2d 349, 355, 348 N.E.2d 695, 699 (1976); *State ex rel. Stafanick v. Municipal Court of Marietta*, 21 Ohio St. 2d 102, 104-105, 255 N.E.2d 634, 635 (1970); *State ex rel. Maysville Bridge Co. v. Quinlan, Probate Judge*, 124 Ohio St. 658, 181 N.E. 880, 881 (1931). In *State ex rel. Jackson v. Miller*, 83 Ohio St.3d 541, 543, 700 N.E.2d 1273, 1275 (1998), the Court emphasized that entertaining relator's position that erroneous exercise of jurisdiction gives rise to a writ of prohibition would require every potentially erroneous trial court ruling to be subject to review by extraordinary writ rather than by appeal.<sup>1</sup> That is a result the Court squarely rejected. *Id.*

The plain meaning of the words "patent and unambiguous" also requires that IEU-OH's complaint be rejected. Webster's New World Dictionary defines patent as "obvious; plain; evident." As will be discussed below, the Commission's lack of jurisdiction is not obvious; on the contrary, the Commission obviously has subject matter jurisdiction over the matters addressed below. Likewise, the American Heritage Dictionary defines unambiguous as "having or exhibiting no ambiguity or uncertainty; clear." And Black's Law Dictionary, 5th Edition West, defines "unambiguous" to mean "susceptible of but one meaning." Consequently, IEU-OH's complaint had to establish that there is but one conclusion that the Court could reach: that the Commission patently and unambiguously

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<sup>1</sup> Similarly, because the Commission is a creature of statute and compliance with R.C. Title 49 statutes is virtually always an issue for determination in appeals of Commission orders, entertaining the same type of claims in IEU-OH's extraordinary action would undermine the General Assembly's careful design in R.C. Title 49 for judicial review of Commission orders and invite all would-be appellants to file extraordinary actions to pursue merit appeals.

lacked authority to address AEP's rates. Using a plain meaning approach, IEU-OH must establish an *obvious and inescapable lack of jurisdiction* by the Commission in order to prevail. It has failed to do so.

This plain meaning approach to applying the "patent and unambiguous lack of jurisdiction" standard is supported by the decisions of this Court. The Court does not examine the details of jurisdictional arguments when rejecting a relator's claim that a lower court patently and unambiguously lacks jurisdiction. Instead, this Court holds that a lower court having general subject-matter jurisdiction can determine its own jurisdiction and a party challenging that jurisdiction has an adequate remedy by appeal, absent a patent and unambiguous lack of jurisdiction. *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d 447, 450, 835 N.E.2d 1232, 1236 (2005). As a corollary to this principle, this Court has also held, in *Page v. Riley*, 85 Ohio St.3d 621, 624, 710 N.E. 690, 693 (1999), that it need not expressly rule on relator's jurisdictional claims in rejecting relator's theory of patent and unambiguous lack of jurisdiction.

When presented with a writ of prohibition, the Court merely examines the existence of general subject matter jurisdiction and does not determine the lawfulness or unlawfulness of that exercise of jurisdiction. *See e.g. State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d at 451-452, 835 N.E.2d at 1237-1238 (sufficient that court had "basic statutory jurisdiction over actions for declaratory judgment and injunction" and had general "jurisdiction over equitable claims" so that it could sever any monetary damage claims beyond its jurisdiction); *State ex rel. Goldberg v. Mahoning County Probate Court*, 93 Ohio St.3d 160, 162, 753 N.E.2d 192, 196 (2001) (court found that trial court

completely lacked “subject matter jurisdiction” and granted writ); *State ex rel. Jackson v. Miller*, 83 Ohio St.3d 541, 542, 700 N.E.2d 1273, 1275 (1998) (only needed to determine that the lower court possessed jurisdiction to rule on the parties’ motions, not whether jurisdiction was exercised lawfully); *State ex rel. Stern v. Mascio*, 81 Ohio St.3d 297, 298, 691 N.E.2d 253, 255 (1998) (court having “general subject matter jurisdiction” can determine its own jurisdiction and party can challenge by appeal); *State ex rel. Enyart v. O’Neill*, 71 Ohio St.3d 655, 656, 646 N.E.2d 1110, 1112 (1995) (same). Based on this standard, it is appropriate for this Court to merely determine whether the Commission had general subject matter jurisdiction to issue the orders below – and not address the statutory application arguments raised in IEU-OH’s complaint.<sup>2</sup>

There can be no debate that the General Assembly has vested the Commission with comprehensive subject matter jurisdiction over public utility companies, as follows:

- **General regulatory authority.** Ohio Rev. Code Ann. Chapters 4901. to 4908., 4933., 4935., and 4963. (Anderson 2006).
- **Broad supervisory powers.** Ohio Rev. Code Ann. § 4905.04 to 4905.06 (Anderson 2006), Ap. at 3-5.
- **Plenary authority over the establishment and fixation of rates.** Ohio Rev. Code Ann. Chapter 4909. (Anderson 2006); *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, Ohio St.3d

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<sup>2</sup> For example, IEU-OH claims in ¶29 of its complaint that the Commission decision violates the process found in R.C. 4909.18 governing rate increases and claims in ¶30 that R.C. Chapter 4928 is violated because the IGCC rider rate relates to a generating facility. These claims plainly involve the sufficiency and exercise of the Commission’s jurisdiction; they do not demonstrate a patent and unambiguous lack of jurisdiction. As such, the claims should be determined only in an appeal under R.C. 4903.11 and 4903.13, not in this writ action.

447, 450, 727 N.E.2d 900 (2000); *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150-153, 573 N.E.2d 655, 658-660 (1991).

- **Authority to promote competition in the electric industry.** Ohio Rev. Code Ann. Chapter 4928. (Anderson 2006).
- **Authority to approve charges relating to Electric Distribution Utility's provider-of-last-resort obligations.** *Consumers' Counsel v. Pub. Util. Comm'n*, 109 Ohio St.3d 328, 335, 847 N.E.2d 1184, 1192 (2006); *Constellation NewEnergy v. Pub. Util. Comm'n*, 104 Ohio St.3d 530, 539, 820 N.E.2d 885, 893 (2004).
- **Expertise deserving of deference on review when establishing and modifying rates associated with electric restructuring.** *Consumers' Counsel v. Pub. Util. Comm'n*, 102 Ohio St. 3d 451, 456, 812 N.E.2d 955, 960 (2004).

Any one of these jurisdictional categories should be sufficient to conclude that the Commission has general subject matter jurisdiction to establish AEP's IGCC Phase I Rider Charge, for purposes of dismissing this writ action.

This deferential level of jurisdictional analysis is consistent with the Court's examination of "general subject matter jurisdiction" when rejecting a claim that a lower tribunal patently and unambiguously lacks jurisdiction. The Court need not determine the specific statutory claims raised in IEU-OH's complaint. Under this standard, it cannot be reasonably concluded that the Commission patently and unambiguously lacks jurisdiction to issue an order affecting AEP's rates. On the contrary, the obvious and inescapable conclusion is that the Commission has subject matter jurisdiction and any challenges on the exercise of that jurisdiction must be brought in an appeal under R.C. 4903.11 and 4903.13.

As a related matter, entertaining a writ based on hollow, unsubstantiated claims would indirectly serve to violate the controlling standard of review applicable to appeals of Commission orders. The well-established deferential standard of review in an R.C. 4903.13 appeal would be undermined if the Court were to consider granting a stay based on such general claims. The Court has consistently refused to reverse or modify a finding or decision of the Commission, unless the Commission's finding or decision is manifestly against the weight of the evidence. *Stephens v. Pub. Util. Comm'n*, 102 Ohio St. 3d 44, 49, 806 N.E.2d 527, 532 (2004); *Ohio Edison Co. v. Pub. Util. Comm'n*, 63 Ohio St.3d 555, 589 N.E.2d 1292 (1992); *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777 (1988); *Dayton Power & Light Co. v. Pub. Util. Comm'n*, 4 Ohio St.3d 91, 94, 447 N.E.2d 733 (1983); and *Columbus v. Pub. Util. Comm'n*, 58 Ohio St. 2d 103, 388 N.E.2d 1237 (1979). And this Court will not substitute its judgment for that of the Commission on evidentiary matters. *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 571, 578, 820 N.E.2d 921 (2004); *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St.3d 81, 84, 765 N.E.2d 862 (2002). Of course, the Court has also repeatedly found it proper to defer to the Commission's judgment in matters that require the Commission to apply its specialized expertise and discretion, with regard to fact-intensive matters. *Monongahela Power*, 104 Ohio St. 3d at 578; *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 179-180, 749 N.E.2d 262 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288 (1990); *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 107-108, 346 N.E.2d 778 (1976). Concluding that the IEU-OH has established a patent

and unambiguous lack of jurisdiction based on the cursory analysis set forth in its complaint would violate these well-established principles and the Court's deferential standard of review in reviewing Commission orders. The Commission has subject matter jurisdiction over AEP's rates and this Court should only review the exercise of that jurisdiction in a direct appeal using the proper standard of review.

**C. Although the Court should not address IEU-OH's specific jurisdictional claims here, the Commission did explain its authority supporting the orders below.**

As discussed above, the Court should not address the particular jurisdictional and statutory arguments raised by IEU-OH in its complaint. The Commission determined it had jurisdiction and this Court should review that determination in an appeal under R.C. 4903.11 and 4903.13 – not in this case. *State ex rel. Blackwell v. Crawford*, 106 Ohio St.3d at 450, 835 N.E.2d at 1236. Although the Court need not address the specifics of IEU-OH's jurisdictional claims in this action here, the orders below did explain the Commission's jurisdiction.

Under S.B. 3, the Commission continues to regulate noncompetitive services – during and after electric restructuring. The statute defines which services are competitive and which are not. Specifically the test is as follows:

For purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise,

the service component shall be deemed a noncompetitive retail electric service.

Ohio Rev. Code Ann. § 4928.01(B) (Anderson 2006), Ap. at 10. Thus, a service is only considered competitive where it is deemed so by statute or by Commission order. Pertinent to this case, the Commission retains regulatory control over the provision of ancillary service for distribution customers as a non-competitive service, a fact recognized by the Commission in its decision below. *IGCC Phase I* (Opinion and Order at 17) (April 10, 2006), Ap. at 29. Having regulatory control over the service, the Commission has the jurisdiction to examine the ways in which that service is to be provisioned.

The statutory competitive services are retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility. Ohio Rev. Code Ann. § 4928.03 (Anderson 2006), Ap. at 10. Ancillary services are not included in this group. Rather, ancillary services are included within the group of services that the Commission could find to be competitive by order, specifically these services are: retail ancillary, metering, or billing and collection service supplied to consumers within the certified territory of an electric utility. Ohio Rev. Code Ann. § 4928.03(A) (Anderson 2006), Ap. at 10. But the Commission has never declared any service to be competitive under R.C. 4928.03(A). *IGCC Phase I* (Opinion and Order at 17) (April 10, 2006), Ap. at 29. Since ancillary service has neither been declared competitive by statute or by Commission order, it remains a noncompetitive service. Ohio Rev. Code Ann. § 4928.01(B) (Anderson 2006), Ap. at 10.

The Commission retains all of its traditional powers and responsibilities vis-à-vis noncompetitive services. The General Assembly said:

On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law.

Ohio Rev. Code Ann. § 4928.05(A)(2) (Anderson 2006), Ap. at 11. In short, the Commission continues to regulate ancillary services, and other noncompetitive services, just as it always has. Lest there be any doubt, the General Assembly was very clear that there are to be no gaps in regulation. It said:

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.

Ohio Rev. Code Ann. § 4928.05(A)(2) (Anderson 2006), Ap. at 11. Thus, not only *can* the Commission regulate ancillary services, it *must* do so. The jurisdiction is mandatory.

As noted by the Commission, most ancillary distribution services are generation-related. *IGCC Phase I* (Opinion and Order at 18) (April 10, 2006), Ap. at 30. Even a cursory review of the statutory definition shows this:

“Ancillary service” means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling,

system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

Ohio Rev. Code Ann. § 4928.01(A)(1) (Anderson 2006), Ap. at 6. These are all the components needed to maintain a functioning electric distribution grid. Without a functioning distribution grid, power cannot be delivered. If the voltage drops, it must be raised or the distribution grid will fail. If power is not supplied by a marketer when it is needed, it must be replaced by the utility or the distribution grid will fail.

These ancillary services are generation based and, per statute, the Commission maintains regulatory control over these services so that the grid can continue to function, and the lights remain on, for all customers, regardless of where they obtain their power. Far from hampering the development of a competitive market, Commission control over these ancillary services is indispensable to *having* a competitive market. If these services are not provided, the grid will fail and it will fail for marketers as well as the utility. The provider of last resort function cannot be met without the underlying grid. As the Commission found, no other entity is in a position to be provider of last resort, it must come from the utility and it must come over a functioning grid. *IGCC Phase I* (Opinion and Order at 18) (April 10, 2006), Ap. at 30. While regional transmission organizations, like PJM, are important at the transmission level, they can do nothing at the distribution level.

The state-regulated distribution companies, like Columbus Southern and Ohio Power, must provide distribution services *or the lights will go out*. It is just that simple.

Power is needed to perform these limited functions so as to maintain grid integrity. How that power is to be provisioned is the question presented, but not decided, below. The Commission has only decided that the company proposal should be studied further and that the costs of that investigation provide sufficient value for customers that those investigatory costs should be paid by customers currently. Whether the Commission is right or wrong in its use of discretion is a matter to be determined in an appeal in the normal course. Even if the Court were to take the view that the Commission has abused its discretion or even violated its statutes in some way, that is a matter for appeal, not prohibition. Prohibition could only come into play where the Commission patently and unambiguously lacks jurisdiction, whereas the Commission plainly has subject matter jurisdiction over the provision of ancillary services involved in this case.

**Proposition of Law II:**

**IEU-OH's complaint should be dismissed because relator did not file an application for rehearing raising the question of whether the Commission patently and unambiguously lacks jurisdiction. *State ex rel. Consumers' Counsel v. Pub. Util. Comm'n*, 102 Ohio St.3d 301, 809 N.E. 1146 (2004).**

A writ of prohibition cannot issue against the Commission on a finding that the Commission patently and unambiguously lacked jurisdiction to proceed unless relator presented this argument to the Commission through an application for rehearing. *State ex*

*rel. Consumers' Counsel v. Pub. Util. Comm'n*, 102 Ohio St.3d 301, 809 N.E. 1146 (2004). IEU-OH did not present this argument to the Commission. The Court cannot, therefore, find an unambiguous lack of jurisdiction and the complaint must be dismissed as moot.

The reasons for this rehearing requirement are statutory. As this Court held in *State ex rel. Consumers' Counsel v. Pub. Util. Comm'n*, 102 Ohio St.3d 301 (2004), R.C. 4903.10 precludes the filing of either an original action or an appeal without first filing a timely application for rehearing. That statute provides: "No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing." Ohio Rev. Code Ann. § 4903.10 (Anderson 2006), Ap. at 1-2. Further, "no party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in said application." *Id.* Failing this requirement, there can be no cause of action. Relator has failed this requirement. As the Court dismissed the extraordinary writ filed in the 2004 *Consumers' Counsel* decision because relator failed to apply for rehearing on the issue raised before the Court, so should it dismiss IEU-OH's writ request in this action.

Although the relator did file an application for rehearing in the case below, it made no argument that the Commission lacked jurisdiction. The relator argued specifically:

1. The Commission erred by failing to comply with Section 4903.09, Revised Code;
2. The Commission's order is unreasonable, unlawful, arbitrary and capricious as it disregards prior holdings and the necessary implications

of the order as it must comprehensively and symmetrically apply to the Commission's ratemaking obligations;

3. The Commission unreasonably and unlawfully erred by authorizing AEP to increase rates by \$23.7 million (as estimated by AEP) without adhering to sections 4909.15, 4909.18, and 4909.19, Revised Code;
4. The Commission unreasonably and unlawfully erred by authorizing AEP to increase rates by \$23.7 million (as estimated by AEP) in violation of the distribution rate freeze approved by the Commission in AEP's Rate Stabilization Plan proceeding; and
5. The process followed by the Commission in this proceeding deprived IEU-Ohio of its fundamental due process rights.

IEU-Ohio (Application for Rehearing at 1-2) (May 8, 2006), Ap. at 39-40. The first and third items presented by relator in its application for rehearing concern the Commission's statutory obligations. The second claims the Commission ignored its own precedent. The fourth suggests the Commission improperly violated an earlier order and the last tries to raise a constitutional matter. Plainly none of these items question to ability of the Commission to proceed at all. Each of the items assumes that the Commission had the ability to proceed but violated some legal requirement in the way in which it proceeded.

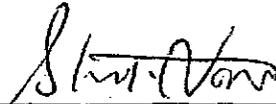
Having failed to present the argument that the Commission lacked jurisdiction to proceed through a rehearing application, it cannot be presented in this case. *State ex rel. Consumers' Counsel v. Pub. Util. Comm'n*, 102 Ohio St3d 301, 809 N.E. 1146 (2004). Since the claim cannot be made that the Commission lacked jurisdiction to proceed below, it cannot be found in this case. As this Court has noted "[h]owever hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alterna-

## CONCLUSION

IEU-OH has an adequate remedy at law of filing an appeal and stay request, if it wishes to properly pursue challenging the Commission orders below and attempting to halt implementation of the decision. Relator has failed to meet the required showing that the Commission patently and unambiguously lacks jurisdiction over the subject matter of the decision below involving AEP's rates. To the extent ¶3 of the prayer for relief in IEU-OH's complaint seeks to recover attorney fees, the request is premature at this stage in the proceedings; the Commission opposes the request while reserving the right to address it later, if necessary. This action should be dismissed.

Respectfully submitted,

**Jim Petro**  
Attorney General

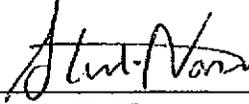


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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss submitted on behalf of the Respondent Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 21<sup>st</sup> day of July, 2006.



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**§ 2505.09. Appeal as stay of execution; supersedeas bond.**

Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken. That bond shall be conditioned as provided in section 2505.14 of the Revised Code.

**HISTORY:** GC § 12223-9; 116 v 104; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 149 v S 161. Eff 6-28-2002.

**§ 4905.26. Complaints as to service.**

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange, whichever number be smaller, or by the legislative authority of any municipal corporation served by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by the telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory, or preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall fix a time for the hearing of such complaint.

The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the date, time of day, and location of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by the telephone company in the county or counties affected, and shall be published for not less than two consecutive weeks in a newspaper of general circulation in the county or counties affected.

Such hearing shall be held not less than fifteen nor more than thirty days after the second publication of such notice.

**HISTORY:** GC § 614-21; 102 v 549, § 23; Bureau of Code Revision, 10-1-53; 125 v 613 (Eff 10-26-53); 139 v S 378 (Eff 1-11-83); 147 v H 215. Eff 9-29-97.

The effective date is set by section 222 of HB 215.

**[§ 4909.15.4] § 4909.154. Management policies, practices and organization of utility to be considered.**

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall consider the management policies, practices, and organization of the public utility. The commission shall require such public utility to supply information regarding its management policies, practices, and organization.

If the commission finds after a hearing that the management policies, practices, or organization of the public utility are inadequate, inefficient, or improper, the commission may recommend management policies, management practices, or an organizational structure to the public utility.

In any event, the public utilities commission shall not allow such operating and maintenance expenses of a public utility as are incurred by the utility through management policies or administrative practices that the commission considers imprudent.

**HISTORY: 136 v S 94 (Eff 9-1-76); 139 v S 378. Eff 1-11-83.**

The effective date of S 378 is set by section 3 of the act.

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**[§ 4909.15.6] § 4909.156. Utility report showing property valuation.**

In fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by any public utility, the public utilities commission shall, in action upon an application filed pursuant to section 4909.18 of the Revised Code, require a public utility to file a report showing the proportionate amounts of the valuation of the property of the utility, as determined under section 4909.05 of the Revised Code, and the proportionate amounts of the revenues and expenses of the utility that are proposed to be considered as attributable to the service area involved in the application.

**HISTORY: 136 v S 94. Eff 9-1-76.**

**§ 4909.17. Approval required for change in rate.**

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 and 4909.19 of the Revised Code. Such sections do not apply to any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of railroads, street and electric railways, motor transportation companies, telegraph companies, and pipe line companies. Any change of any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of telegraph companies, may be made in the same manner as such changes may be made by railroad companies. All laws respecting such changes by railroad companies apply to such changes by telegraph companies.

**HISTORY:** GC § 614-20; 102 v 549, § 22; 108 v PtII, 1094; 110 v 366; 113 v 16; 119 v 275; Bureau of Code Revision. Eff 10-1-53.

**§ 4928.03. Identification of competitive services access to noncompetitive services.**

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.

Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

**HISTORY: 148 v S 3. Eff 10-5-99.**

**§ 4928.12. Transfer of control of transmission facilities to qualifying transmission entity; regional oversight body or mechanism.**

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no entity shall own or control transmission facilities as defined under federal law and located in this state on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities, as described in division (B) of this section, that are operational.

(B) An entity that owns or controls transmission facilities located in this state complies with division (A) of this section if each transmission entity of which it is a member meets all of the following specifications:

(1) The transmission entity is approved by the federal energy regulatory commission.

(2) The transmission entity effects separate control of transmission facilities from control of generation facilities.

(3) The transmission entity implements, to the extent reasonably possible, policies and procedures designed to minimize pancaked transmission rates within this state.

(4) The transmission entity improves service reliability within this state.

(5) The transmission entity achieves the objectives of an open and competitive electric generation marketplace, elimination of barriers to market entry, and preclusion of control of bottleneck electric transmission facilities in the provision of retail electric service.

(6) The transmission entity is of sufficient scope or otherwise operates to substantially increase economical supply options for consumers.

(7) The governance structure or control of the transmission entity is independent of the users of the transmission facilities, and no member of its board of directors has an affiliation, with such a user or with an affiliate of a user during the member's tenure on the board, such as to unduly affect the transmission entity's performance. For the purpose of division (B)(7) of this section, a "user" is any entity or affiliate of that entity that buys or sells electric energy in the transmission entity's region or in a neighboring region.

(8) The transmission entity operates under policies that promote positive performance designed to satisfy the electricity requirements of customers.

(9) The transmission entity is capable of maintaining real-time reliability of the electric transmission system, ensuring comparable and nondiscriminatory transmission access and necessary services, minimizing system congestion, and further addressing real or potential transmission constraints.

(C) To the extent that a transmission entity under division (A) of this section is authorized to build transmission facilities, that transmission entity has the powers provided in and is subject to sections 1723.01 to 1723.08 of the Revised Code.

(D) For the purpose of forming or participating in a regional regulatory oversight body or mechanism

developed for any transmission entity under division (A) of this section that is of regional scope and operates within this state:

(1) The commission shall make joint investigations, hold joint hearings, within or outside this state, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States, whether in the holding of those investigations or hearings, or in the making of those orders, the commission is functioning under agreements or compacts between states, under the concurrent power of states to regulate interstate commerce, as an agency of the United States, or otherwise.

(2) The commission shall negotiate and enter into agreements or compacts with agencies of other states for cooperative regulatory efforts and for the enforcement of the respective state laws regarding the transmission entity.

(E) If a qualifying transmission entity is not operational as contemplated in division (A) of this section, division (A)(13) of section 4928.34 of the Revised Code, or division (G) of section 4928.35 of the Revised Code, the commission by rule or order shall take such measures or impose such requirements on all for-profit entities that own or control electric transmission facilities located in this state as the commission determines necessary and proper to achieve independent, nondiscriminatory operation of, and separate ownership and control of, such electric transmission facilities on or after the starting date of competitive retail electric service.

**HISTORY: 148 v S 3. Eff 10-5-99.**

**4901-7-01 Standard filing requirements.**

All applications for an increase in rates filed under section 4909.18 of the Revised Code, all complaints filed under section 4909.34 of the Revised Code, and all petitions filed by a public utility under section 4909.35 of the Revised Code shall conform to the "Standard Filing Requirements," set forth in "appendix A" to this rule. The commission may, upon timely motion, waive specific provisions of the "Standard Filing Requirements," but such waivers must be obtained prior to the time that application, complaint, or petition is filed with the commission. In the absence of such a waiver, the commission may reject any filing which fails to comply with the requirements of this rule.

**HISTORY: Replaces rule 4901-7-01 Case No. 86-2073-AU-ORD; Eff 2-2-85; 1-11-83; 3-1-81; 9-25-76; 5-15-91**

Rule promulgated under: RC 4909.18

Rule amplifies: RC 4901.13, 4909.38, 4909.154

119.032 Review Date: 10-8-02; 9-30-07

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :  
Application of Columbus :  
Southern Power Company : Case No. 05-376-EL-UNC  
for Authority to Recover:  
Costs Associated with :  
the Construction and :  
Ultimate Operation of an:  
Integrated Gasification :  
Electric Generating :  
Facility. :

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PROCEEDINGS

before Hearing Examiners Steven D. Lesser and  
Greta See, at the Public Utilities Commission  
of Ohio, commencing at 10:00 a.m., on Monday,  
August 8, 2005, in Hearing Room 11-C, 180 East  
Broad Street, Columbus, Ohio.

- - -

VOLUME I

- - -

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1 carbon dioxide emissions. Do you see that?

2 A. I see that.

3 Q. Start with SO2 first. Do you know  
4 what percentage of those emissions are from  
5 power plants?

6 A. I do not know what percentage are  
7 from power plants.

8 Q. Same for NOx?

9 A. Exactly.

10 Q. And we were only second in the CO2.

11 A. Yes. I'm not familiar with the  
12 split.

13 Q. Speaking of the CO2, the planned  
14 facility at Meigs County, would it include a  
15 carbon sequestration facility?

16 A. While we haven't gotten the final  
17 plan, I believe the initial plan, the baseline  
18 plant, does not have a carbon sequestration with  
19 it.

20 Q. Do you know whether or not without  
21 sequestration whether the carbon dioxide  
22 emissions for IGCC will be greater or lesser  
23 than the same for a pulverized coal plant that  
24 meets standards?

1           A.    I believe a technical person would  
2 be better to address that question to, sir.

3           Q.    Does American Electric Power plan to  
4 reduce or retire any of the Ohio generating  
5 facilities in the next 20 years?

6           A.    We are consistently looking at our  
7 plants.  I'm not aware of any plan to retire any  
8 of those plants at this point.

9           Q.    Is it fair to say that if AEP does  
10 not retire any plants, at that point they would  
11 have to put the latest pollution control  
12 equipment on them in order to continue to  
13 generate in the United States?

14          A.    Would you ask that question again?

15          Q.    Let me withdraw the question and try  
16 again.

17                    At this point you're not aware of  
18 any plan to retire any generating equipment in  
19 Ohio by AEP.

20          A.    Yes, that's correct.

21          Q.    So that if the Meigs County plant is  
22 built, one can assume that the SO<sub>2</sub>, NO<sub>x</sub> and CO<sub>2</sub>  
23 emissions will just increase in Ohio.

24          A.    Everything else held equal, it would

1 envisioning that the Commission would look at  
2 the costs incurred and determine whether putting  
3 the plant in service was reasonable prior to the  
4 establishment of those Phase III costs; is that  
5 correct?

6           A.    If you look at my testimony on page  
7 9, lines 13 through 18 and actually through 21,  
8 it describes the process that you were asking  
9 about.

10           Q.    And just so we're clear, you agree  
11 that that would be done prior to the  
12 commencement of Phase III cost recovery.

13           A.    Yes.  I believe that's what it says  
14 in the second sentence of that response.

15           Q.    And further down below, I believe on  
16 19, you talk about future adjustments, and you  
17 envision there will be additional PUCO  
18 proceedings that will be necessary to address  
19 these future adjustments.

20           A.    Yes.

21           Q.    Mr. Baker, to your knowledge do the  
22 companies plan to retrofit the proposed 600  
23 megawatt plant in the future, specifically for  
24 carbon sequestration?

1           A.    The companies I don't believe would  
2 make retrofits, except for meeting environmental  
3 regulations.

4           Q.    And if there were environmental  
5 regulations and that retrofit was completed, you  
6 would then fund the retrofit through the Phase  
7 III mechanism of the company cost recovery  
8 proposal; correct?

9           A.    I believe that would be the case,  
10 yes.

11          Q.    And currently at this time you do  
12 not have any estimates of the costs of that kind  
13 of retrofit.

14          A.    That might be better asked of one of  
15 the other witnesses who showed some comparisons  
16 with retrofits.

17          Q.    Mr. Jasper, I believe.

18          A.    Either be Mr. Jasper, Mr. Braine or  
19 Mr. Mudd.

20          Q.    Mr. Baker, to your knowledge, did  
21 AEP request in its corporate separation plan  
22 that was filed in the electric transition plan  
23 proceeding a request to allow its distribution  
24 companies to own generating assets?

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter the :  
Application of Columbus :  
Southern Power Company and :  
Ohio Power Company for :  
Authority to Recover Costs :  
Associated with the : Case No. 05-376-EL-UNC  
Construction and Ultimate :  
Operation of an Integrated :  
Gasification Combined :  
Cycle Electric Generating :  
Facility. :

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PROCEEDINGS

before Hearing Examiners Steven D. Lesser and Greta  
See, at the Public Utilities Commission of Ohio,  
commencing at 10:00 a.m., on Tuesday, August 9, 2005,  
in Hearing Room 11-C, 180 East Broad Street,  
Columbus, Ohio.

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VOLUME II

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1 me a copy.

2 Can you point me, please, to a specific  
3 section?

4 Q. Sure. It's page 2, paragraph 5, about  
5 the fourth line down.

6 A. I see the reference. Can you restate the  
7 question, please?

8 Q. Sure. I asked whether in this  
9 application you're describing the POLR obligation as  
10 an obligation to meet unanticipated demand.

11 A. No, I don't believe that's what AEP is  
12 stating.

13 Q. What is AEP's understanding of what the  
14 POLR obligation is?

15 A. I believe we talked about this a little  
16 yesterday. When I think of the POLR obligation and  
17 in designing this, it's the total need that the  
18 companies would have to serve any generation  
19 requirements of someone who did not choose an  
20 alternative supplier, so that would include parties  
21 who never switched, parties who switched and came  
22 back, or people who came back under default.

23 Q. Would the IGCC unit be utilized to  
24 satisfy the reserve margin or capacity obligations

1 that AEP has for purposes of serving customers in  
2 Michigan, Indiana, Kentucky, West Virginia, and  
3 Virginia, or would AEP treat capacity obligations  
4 associated with the POLR in Ohio as a stand-alone  
5 basis?

6 A. Under the approach outlined in this  
7 filing, the capacity would not be part of the pool  
8 and, therefore, would be dedicated to Columbus &  
9 Southern and Ohio Power in meeting any requirements  
10 for reserves total -- it's not -- let me back up:

11 It's not reserves. It's the capacity  
12 requirement, which includes reserves, and we would be  
13 looking to use this to meet that requirement.

14 Q. And that's assuming that in 2010 there's  
15 a deregulated environment in Ohio; is that correct?

16 MR. CONWAY: Could I have that question  
17 reread, please?

18 (Question read.)

19 A. That is an assumption that the companies  
20 would no longer be in the pool, which I think would  
21 result from the fact that Ohio is deregulated. In  
22 the case of -- assume it wasn't deregulated, the  
23 companies would likely be using capacity to serve  
24 just the -- meet the Ohio Power and Columbus &

1 Southern needs, and if they were, in fact, using it  
2 in any way to serve others under the pooling  
3 arrangement, there would be a payment received by  
4 Ohio Power and Columbus & Southern for that use.

5 Q. Okay. And in addition to the  
6 interconnection agreement there are other pooling  
7 agreements dealing with AEP operating companies and  
8 AEP East; are there not?

9 A. Yes, there are.

10 Q. And transmission would be one; is that  
11 correct?

12 A. There is a East transmission pooling  
13 arrangement.

14 Q. Okay. And there's also an agreement for  
15 emission allowances as well; is that right?

16 A. Yes, there is, called the Internal  
17 Allowance Agreement.

18 Q. And AEP has not made any application to  
19 FERC or did not include any application in this plan  
20 to modify any pooling agreement that exists with  
21 regard to transmission assets, did it?

22 A. No, and I don't really see any reason why  
23 you would.

24 Q. Okay. Moving to the pooling agreement

1 that's -- strike that.

2           Doesn't the construction of the IGCC  
3 facility require construction of transmission  
4 facilities as well?

5           A.    Yes.

6           Q.    Okay.  Now shifting a little bit to the  
7 pooling agreement that deals with the emissions  
8 allowances, am I correct that the environmental  
9 compliance strategy of AEP East presently is based  
10 upon an integrated system, meaning that the emission  
11 allowances created by environmental compliance  
12 strategies of one operating company can be used to  
13 satisfy environmental obligations of another  
14 operating company?

15          A.    I think you have two questions in there.  
16 One is yes, we have looked at compliance strategy on  
17 a universal basis to meet the total load requirement  
18 of the AEP East fleet.  And the second part of the  
19 question is under the interim allowance agreement  
20 there is a sharing mechanism for emission allowances.

21          Q.    It's the latter part that I'm interested  
22 in, the sharing mechanism.  AEP has not included in  
23 the application any indication that it plans to  
24 modify the existing pooling agreement for emissions

1 allowances that exists between the operating  
2 companies; is that correct?

3 A. No, it has not. When I think of them, I  
4 think of the emission allowances or the interim  
5 allowance agreement and the AEP interconnection  
6 agreement, the pooling agreement, as directly  
7 related, and if we were going to make modifications  
8 or changes to the interconnection agreement, we would  
9 be looking as well at the interim allowance  
10 agreement.

11 Q. Mr. Baker, didn't you state yesterday  
12 that you don't believe that you need to make any  
13 changes to the interconnection agreement?

14 A. What I said was that this request for  
15 approval on its own doesn't require those changes.

16 Q. Okay. So then the application as it's  
17 currently proposed, any environmental benefits that  
18 have been attributed to the IGCC unit, whether  
19 they're related to NOx or SOx, those would be  
20 available to other AEP operating companies; is that  
21 correct?

22 A. That's not an assumption we can make. We  
23 have to determine, and we don't know at this point  
24 what the status of the interconnection agreement and

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1 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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3 In the Matter of the :  
 4 Application of Columbus :  
 5 Southern Power Company : Case No. 05-376-EL-UNC  
 6 for Authority to Recover:  
 7 Costs Associated with :  
 8 the Construction and :  
 9 Ultimate Operation of an:  
 10 Integrated Gasification :  
 11 Electric Generating :  
 12 Facility. :

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10 PROCEEDINGS

11 before Hearing Examiners Steven D. Lesser and  
 12 Greta See, at the Public Utilities Commission of  
 13 Ohio, commencing at 10:00 a.m., on Wednesday,  
 14 August 10, 2005, in Hearing Room 11-C, 180 East  
 15 Broad Street, Columbus, Ohio.

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17 VOLUME III  
18 - - -

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 21 ARMSTRONG & OKEY, INC.  
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1 fact you're not involved in the actual design of  
2 the plant; is that correct?

3 A. That is correct.

4 Q. Shifting gears a little bit again,  
5 with regard to retrofits of the IGCC for carbon  
6 sequestration purposes, there's an efficiency  
7 penalty in IGCC technology for that type of  
8 retrofit, is there not?

9 A. That's correct.

10 Q. And a capital cost penalty  
11 associated with the retrofit as well.

12 A. That is correct.

13 Q. An efficiency penalty would  
14 effectively increase the cost used in the  
15 dispatch of the IGCC unit relative to the fleet  
16 of generating units; is that correct?

17 A. Not necessarily. One would have to  
18 understand whether or not that would be  
19 implemented on this plant alone or other  
20 technologies as well. For example, if it has to  
21 be installed on all the fleets, you have  
22 pulverized coal plants, and the IGCC plant the  
23 penalty is less on the IGCC plant compared with  
24 other plants. Actually, you would probably see

1 a favorable dispatch profile as opposed to a  
2 disfavorable dispatch profile. It is very much  
3 a function of the conditions under which those  
4 retrofits would be done.

5 Q. Are you aware that AEP has recently  
6 purchased a natural gas combined cycle plant in  
7 southern Ohio?

8 A. Yes, I am.

9 Q. Do you know where exactly that  
10 facility is the located?

11 A. I'm not sure exactly where it is.

12 Q. Do you know whether it's near the  
13 proposed IGCC site?

14 A. I know it's in eastern Ohio, I  
15 believe. I do not know how close it is to the  
16 Great Bend site.

17 Q. Would it be possible to convert an  
18 existing combined cycle unit to operate as part  
19 of an IGCC facility?

20 A. It would be possible; however, one  
21 must couch possible with respect to is it  
22 technically and economically appropriate.

23 Q. So if it's technically possible --  
24 or it may be technically possible, but you've