ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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TABLE OF CONTENTS **PAGE**

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 1

PROPOSITION OF LAW NO. I

The Commission's Orders are unlawful inasmuch as the Commission lost jurisdiction over AEP-Ohio's July 31, 2008 ESP Application when it failed to authorize an ESP within the 150-day time frame required by R.C. 4928.143 1

A. The 150-day issue is properly before this Court 2

B. The plain language of R.C 4928.141 and R.C. 4928.143, the context surrounding the passage of SB 221, and this Court's precedent dictate that the Court find that the Commission lost jurisdiction over the ESP Application when it failed to issue an order within the 150-day period contained in SB 221 2

C. The case law presented by AEP-Ohio is inapplicable and its rationale easily distinguishable 7

PROPOSITION OF LAW NO. II

The Commission's Orders are unlawful inasmuch as the Commission failed to prohibit AEP-Ohio from accepting the higher rates approved in the ESP while simultaneously preserving the right to withdraw and terminate the approved ESP. 10

PROPOSITION OF LAW NO. III

The Commission's approval of the gridSMART Rider is unlawful inasmuch as the Commission failed to determine that the gridSMART Program is cost-effective under R.C. 4928.02(D) 12

PROPOSITION OF LAW NO. IV

The Provider of Last Resort charge authorized by the Commission is unlawful and unreasonable 14

A. The Commission's violation of this Court's precedent in *Indus. Energy Users-Ohio v. Pub. Util. Comm.* is properly before this Court 14

B. The Commission's POLR authorization is unlawful 15

PROPOSITION OF LAW NO. V

The Commission's Orders are unlawful inasmuch as the Commission failed to meet the requirements of R.C. 4903.09 18

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

CASES **PAGE**

United States Supreme Court

Brock v. Pierce County,
476 U.S. 253, 106 S.Ct. 1834 (1986) 7

Mahasco Corp. v. Silver,
447 U.S. 807, 100 S.Ct. 2486 (1980) 7

Sixth Circuit Court of Appeals

United States v. Alcan Foil Products Division of Alcan Aluminum Corporation,
889 F.2d 1513 (6th Cir. 1989) 7

Ohio Supreme Court

Constellation New Energy v. Pub. Util. Comm.,
104 Ohio St.3d 530, 2004-Ohio-6767 3

Dorrian v. Scioto Conservancy Dist.,
27 Ohio St.2d 102, 271 N.E. 2d 834 (1971) 6

Elyria Foundry v. Pub. Util. Comm.,
114 Ohio St.3d 305, 2007-Ohio-4164 13

Indus. Energy Users-Ohio v. Pub. Util. Comm.,
117 Ohio St.3d 486, 2008-Ohio-990 ..... 9, 14, 15, 16, 18

In re Davis,
84 Ohio St.3d 520, 705 N.E.2d 1219 (1999) 6

MCI Corp. v. Pub. Util. Com.,
38 Ohio St.3d 266, 527 N.E. 2d 777 (1988) 18

MCI Telecommunications Corp. v. Pub. Util. Comm.,
32 Ohio St.3d 306, 513 N.E. 2d 337 (1987) 19

Ohio Consumers' Counsel v. Pub. Util. Comm.,
Slip Opinion No. 2010-Ohio-134 13

Ohio Consumers Counsel v. Pub. Util. Comm.,
114 Ohio St.3d 340, 2007-Ohio-4276 4

Pratts v. Hurley,
102 Ohio St.3d 81, 2004-Ohio-1980 2

State ex rel Jones v. Farrar,
146 Ohio St. 467, 66 N.E.2d 531 (1946) 2

State ex rel Shisler v. Ohio Pub. Emps. Retirement Sys.,
122 Ohio St.3d 148, 2009-Ohio-2522 16

Time Warner AxS v. Pub. Util. Comm.,
75 Ohio St.3d 229, 661 N.E. 2d 1097 (1996) 2

Ohio Courts of Appeals

Livingston v. Clawson,
2 Ohio App.3d 173, N.E.2d 1383 (Ohio App. 2nd Dist. 1982) 17

Northwestern Nat. Ins. Co. v. Ferstman,
42 Ohio App. 55, 181 N.E. 499 (Ohio App. 8th Dist. 1932) 7

OHIO JURISPRUDENCE

2 Oh Jur.3d Administrative Law § 38 17
23 Ohio Jur. 3d Courts and Judges § 392 7
85 Ohio Jur.3d Statutes § 179 16

PUBLIC UTILITIES COMMISSION OF OHIO CASES

Public Utilities Commission of Ohio in the Case Below

In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,
PUCO Case Nos. 08-917-EL-SSO, *et al.*, Entry on Rehearing
(July 23, 2009) 19

In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,
PUCO Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order
(March 18, 2009) 16, 19

STATUTES

R.C. 4903.09 ..... 13, 14, 18, 19, 20
R.C. 4909.18 5
R.C. 4909.42 5
R.C. 4928.02 ..... 12, 13
R.C. 4928.141 ..... 1, 2, 4, 5, 8, 10, 12
R.C. 4928.142 ..... 5, 8
R.C. 4928.143 ..... 1, 2, 4, 5, 6, 8, 10, 11, 15, 16, 17, 18, 19

LEGISLATION

Amended Substitute Senate Bill 221 ..... 1, 2, 3, 4, 5, 6, 8, 9, 16, 17

INTRODUCTION

The Merit Briefs filed by the Public Utilities Commission of Ohio ("Commission") as well as Columbus Southern Power ("CSP") and Ohio Power Company ("OP") (collectively, American Electric Power or "AEP-Ohio") in this proceeding are as informative for what they do not contain as for what they do contain. The Merit Briefs are a treasure trove of explanations for the Commission's Orders in this case in an attempt to make up for the Commission's illegal and unreasonable determinations in this proceeding. The Court should clearly see the Commission's and AEP-Ohio's Merit Briefs and the gaping holes in the Commission's Orders that they so desperately try to fill. The Court must reverse the Commission's Orders inasmuch as they are, as described in Industrial Energy Users-Ohio's ("IEU-Ohio") Merit Brief as well as this Reply Brief, beyond the Commission's statutory authority and unreasonable.

ARGUMENT

PROPOSITION OF LAW NO. I

The Commission's Orders are unlawful inasmuch as the Commission lost jurisdiction over AEP-Ohio's July 31, 2008 ESP Application when it failed to authorize an ESP within the 150-day time frame required by R.C. 4928.143.

This Court must reverse the Commission's electric security plan ("ESP") Orders in their entirety inasmuch as the Commission forfeited its jurisdiction over AEP-Ohio's ESP when it voluntarily chose to miss the 150-day statutory deadline imposed by R.C. 4928.143(C)(1). Thus, the Court should remand with instructions that direct the Commission to immediately require AEP-Ohio to replace, pursuant to R.C. 4928.141, its current rates with the rates that were in effect on July 31, 2008 (the then-current rate plan in effect on the effective date of Amended Substitute Senate Bill 221 ["SB 221"]).

A. The 150-day issue is properly before this Court.

The Commission and AEP-Ohio once again urge this Court not to consider this argument inasmuch as IEU-Ohio did not raise it on rehearing. AEP-Ohio filed a Motion to Strike (which the Commission did not join) this allegation of error in IEU-Ohio's Notice of Appeal and the Court denied AEP-Ohio's Motion to Strike on January 25, 2010. Neither AEP-Ohio nor the Commission has presented any new rationale for the Court's consideration and this second-bite-at-the-apple argument should be similarly rejected.[1] As IEU-Ohio demonstrated in its Memorandum in Opposition to the Motion to Strike and consistent with this Court's precedent, issues related to the Commission's subject matter jurisdiction cannot be waived and may be raised for the first time on appeal.[2] For these reasons, the Court should once again find that the issue of the Commission's jurisdiction over the ESP Application once it missed the 150-day deadline is properly before the Court.

B. The plain language of R.C 4928.141 and R.C. 4928.143, the context surrounding the passage of SB 221, and this Court's precedent dictate that the Court find that the Commission lost jurisdiction over the ESP Application when it failed to issue an order within the 150-day period contained in SB 221.

The crux of the arguments advanced by the Commission and AEP-Ohio is that statutes containing time restrictions are not mandatory but rather are directory. *In State ex rel Jones v. Farrar*,[3] the Court explained:

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[1] AEP-Ohio attempts to utilize this Court's *Pratts v. Hurley* decision to buttress its argument. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980. This argument should be rejected. The statute interpreted in *Pratts* had no time limit on the lower court's decision-making authority and thus the jurisdictional precedent in *Pratts* is inapplicable to the instant situation.

[2] Memorandum in Opposition of Industrial Energy Users-Ohio at 6-9 (January 15, 2010); *see also Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.2d 229, 233, 661 N.E.2d 1097 (1996).

[3] *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472-473, 66 N.E.2d 531 (1946).

> Whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its effect and the consequences which would result from construing it one way or another. In each instance, it is necessary to look to the subject matter of the statute and consider the importance of the provision which has been disregarded and the relation of that provision to the general object intended to be secured by the act.
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> If the provision involved relates to some immaterial matter or directs certain actions with view to the proper, orderly and prompt conduct of public business the provision may be regarded as directory; but, where it directs acts or proceedings to be done in a certain way and indicates that a compliance with such provision is essential to the validity of the act or proceeding, or where it requires some antecedent and prerequisite conditions to the exercise of a ***473** power, the statute may be regarded as mandatory. Hurford v. City of Omaha, 4 Neb. 336. The character of the statute may be determined by the consideration of (1) the words of the statute, (2) the nature, context and object of the statute and (3) the consequences of the various constructions. *See* Miller v. State, 3 Ohio St. 475.

The Commission's disregard for the 150-day time limit fits neatly within the *Farrar* construct and a finding that the Commission lost jurisdiction over the ESP case when the 150-day period lapsed.

The context surrounding the passage of SB 221 demonstrates that the General Assembly intended the 150-day timeframe to be mandatory, not directory. The 150-day requirement was not fixed merely for convenience or orderly conduct of public business; it had a very specific purpose responding to the situation at hand. While SB 221 was being debated by the General Assembly, each of Ohio's four electric distribution utilities ("EDU") were operating under rate stabilization plans ("RSP").[4] The RSPs were necessary to mitigate the possible price shock impacts of the mismatch between expectations about the development of a competitive electric market that existed when Amended Substitute Senate Bill was enacted and the actual results

[4] All four RSP cases were appealed to this Court. The Court affirmed the Commission's authority to consider and approve RSPs in *Constellation New Energy v. Pub. Util. Comm.*, 104 Ohio St.3d 340, 2004-Ohio-6767.

thereafter, which this Court acknowledged in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276 at ¶ 41. The RSPs approved for three of the four Ohio EDUs extended only through the end of calendar year 2008.[5] It was against this timing backdrop that the General Assembly worked to pass SB 221, which became effective on July 31, 2008 or 153 days before expiration of the RSPs. All of the EDUs with RSPs expiring on December 31, 2008 filed their respective ESP Applications on the same day the law became effective in order to have their approved ESP Plans in place before January 1, 2009. Thus the object and purpose, as well as the importance of the 150-day timeframe evident, the Commission was mandated to follow the General Assembly's timing edict.

Besides using the word "shall" in R.C. 4928.143, the remaining provisions of R.C. 4928.143 demonstrate that the General Assembly required and intended for the 150-day time limit to be mandatory.[6] The 150-day timeframe was essential to the validity of the proceeding. Not only does R.C. 4928.143(C)(1) contain a 150-day requirement for the initial ESP Application, it also sets a 275-day timeframe on Commission action on subsequent ESP

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[5] The RSP for Dayton Power and Light Company ("DP&L") would expire in December 31, 2010 pursuant to a Stipulation and Recommendation in a case subsequent to its RSP case. The General Assembly inserted special language in R.C. 4928.141 applicable only to DP&L to recognize DP&L's unique situation among the EDUs.

[6] While Ohio does not have official legislative history documents, some of the General Assembly's intent can be gleaned from the bill analyses and fiscal notes and local impact statements provided to members of the General Assembly and the public by the Legislative Service Commission ("LSC"). The bill analysis for the as-enacted version of SB 221 notes that "The PUCO *must* issue an order approving, modifying and approving, or disapproving an initial ESP application *not later than* 150 days after the application's filing date *and within* 275 days for later applications." (emphasis added). *See* http://www.legislature.state.oh.us/analysis.cfm?ID=127_SB_221&ACT=As%20Enrolled&hf=analyses127/08-sb221-127.htm. Additionally, the fiscal note for as-enacted version of SB 221states the "PUCO would be required to schedule a hearing on the application, and to issue an order within 150 days of the application filing indicating whether it approves the application, modifies and approves it, or disapproves the application. *See* http://www.lbo.state.oh.us/fiscal/fiscalnotes/127ga/SB0221EN.htm.

plans.[7] The inclusion of differing timing requirements demonstrates that the General Assembly was very cognizant of the timing necessary for the initial ESP cases.[8] Indeed, the Commission's own Brief in this case admits the Commission was "compelled to act within a compressed time to adopt a first authorized rate plan, the only time it would adopt such a plan for the Companies."[9]

Further, the General Assembly provided the Commission in R.C. 4928.141(A) with the rates that should be charged if it could not authorize an ESP within the 150-day timeframe.[10] On the 151st day after the ESP Application was filed, the Commission was required to comply with the statutory default provision of R.C. 4928.141(A). R.C. 4928.141(A) mandates that "the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code..." Thus, under R.C. 4928.141, until the Commission issues an Order approving, modifying and approving, or denying an ESP Application and upon expiration of the jurisdictional deadline, the then-current rate plan of an EDU (i.e. AEP-Ohio's RSP) must continue until a standard service offer ("SSO") is first timely and lawfully authorized under R.C. 4928.143. This outcome is not the "drastic" remedy that AEP-Ohio cites in its Brief.[11] This

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[7] R.C. 4928.143 (IEU-Ohio Appx. at 378-379).

[8] SB 221 does not contain the first time the General Assembly has obligated the Commission to act within a stated period of time. In R.C. 4909.42, the General Assembly established time periods within which the Commission is expected to process an application to increase rates made pursuant to R.C. 4909.18 and provided, using the word "shall", utilities with specified rights in the event the Commission fails to do so. In addition to being contrary to the clear meaning of SB 221, the arguments of the Commission and AEP are also inconsistent with the General Assembly's other directives to the Commission. *See* IEU-Ohio Merit Brief at 11.

[9] Commission Merit Brief at 15.

[10] R.C. 4928.141(A) (IEU-Ohio Appx. at 372).

[11] AEP-Ohio Merit Brief at 13.

provision provides customers the continuity, predictability, and stability that were touted by the Governor and members of the General Assembly as the main virtues of the legislation when SB 221 was signed into law.[12]

This Court's canons of statutory construction also militate in favor of interpreting the word "shall" in R.C. 4928.143 to require the Commission to issue an Order within the 150-day timeframe. In *Dorrian v. Scioto Conservancy Dist.*, this Court held that "[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage."[13] The *Dorrian* Court went on to explain that "'Although it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion."[14] The *Dorrian* Court further pointed out that the word "shall" is interpreted to be mandatory when it is frequently repeated in a statute.[15]

There is no clear or unequivocal legislative intent that the word "shall" in R.C. 4928.143 as it relates to the 150-day timeframe should be interpreted as "may" so that the clear directive from the General Assembly to the Commission can be treated as a suggestion. In fact, the opposite is true given the plain language as well as the context and history described above by IEU-Ohio. And, in R.C. 4928.143 alone, the word "shall" appears 32 times while the word

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[12] *See* IEU-Ohio Merit Brief at 1, fn 2.

[13] *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus.

[14] *Id.* at 107-108.

[15] *Id.*; *see also In re Davis*, 84 Ohio St.3d 520, 705 N.E.2d 1219 (1999) (Dissenting Opinion of Chief Justice Moyer and Justice Pfeiffer).

"may" appears 20 times. The legislature's purposeful use of the word "shall" should not be disregarded in the manner suggested by the Commission and AEP-Ohio.

C. The case law presented by AEP-Ohio is inapplicable and its rationale easily distinguishable.

The arguments and precedent asserted by AEP-Ohio are easily distinguished or otherwise explained. The *Brock v. Pierce County* and *United States v. Alcan Foil Products Div. of Alcan Aluminum Corp.* precedent from the United States Supreme Court and Sixth Circuit Court of Appeals, respectively, dealt with the interpretation of federal statutes passed by Congress as applied to federal administrative agencies, not a state statute passed by the Ohio General Assembly.[16] The Ohio Supreme Court is the ultimate arbiter of the meaning of state statutes and is not required to follow suit or adopt the rationale found in the *Brock* and *Alcan* decisions, especially when this Court's own precedent sufficiently deals with the statutory construction issue at hand.[17]

AEP-Ohio also asserts that IEU-Ohio's description of the Commission's task is too simplistic and doesn't accurately describe the time crunch the PUCO experienced in the last five months of 2008.[18] AEP-Ohio fails to mention that the Commission did manage to issue an Order in the other two ESP cases filed on the same day as AEP-Ohio's within the statutory deadline and that the FirstEnergy ESP case, like the AEP-Ohio ESP case, was fully litigated. Nor does AEP-Ohio mention that the Commission also managed to issue orders in two rulemaking

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[16] AEP-Ohio Merit Brief at 10-12.

[17] *Northwestern Nat. Ins. Co. v. Ferstman*, 42 Ohio App. 55, 63-64, 181 N.E. 499 (Ohio App. 8th Dist. 1932); *See also* 23 Ohio Jur. 3d Courts and Judges § 392. United States Supreme Court precedent also exists for the opposite conclusion asserted in *Brock*, holding that time frames inserted by Congress are mandatory and are jurisdictional. *See Mahasco Corp v. Silver*, 447 U.S. 807, 100 S.Ct. 2486 (1980).

[18] AEP-Ohio Merit Brief at 12.

proceedings related to SB 221, including Case No. 08-777-EL-ORD in which the Commission adopted rules related to the form and substance of ESP and market rate option ("MRO") applications as well as transmission cost recovery riders, corporate separation, and reasonable arrangements. Thus, the ability to issue an Order in this case within the statutory time frame was well within the Commission's capacity, was not precluded due to circumstances beyond its control, and merely reflects the Commission's illegal decision to prioritize its decision-making in a manner that ignores the 150-day mandate in SB 221 so that the predictability and stability benefits that were supposed to be made available to customers were denied.

AEP-Ohio further claims that IEU-Ohio misinterprets the default rate provision found in R.C. 4928.141, saying that R.C. 4928.141 only applies when the 150-day period would expire after the existing rate plan (i.e. AEP-Ohio's RSP) would end.[19] There is nothing in R.C. 4928.141(A) that supports this interpretation. In fact, R.C. 4928.141 states quite the contrary. Even if a utility filed an SSO Application well in time to have it in place prior to the end of 2008, if the Application failed on substantive or other grounds, it is clear that in this case R.C. 4928.141(A) directs the Commission to apply the default outcome specified by the General Assembly; the rate plan in effect on July 31, 2008 must remain in effect until an SSO Application is properly and lawfully authorized under either R.C. 4928.142 or 4928.143. On this front, AEP-Ohio further asserts that it does not make sense for the default option for missing the 150-day deadline to reside in a different statute. This is unpersuasive as well. It makes perfect sense that the default outcome for not following R.C. 4928.143 would come from R.C. 4928.141 since the base requirement to have an SSO price set through an ESP or MRO is found in R.C. 4928.141.

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[19] *Id.* at 13.

The Court should find, as a matter of law, that the expiration of the 150-day clock divested the Commission of any authority over the July 31, 2008 ESP Application. The Court should remand this case to the Commission with instructions to immediately[20] (within 14 days) require AEP-Ohio to replace its current tariffs with the tariffs that were in effect on July 31, 2008 (the then-current rate plan in effect on the effective date of SB 221).[21] Further, the Court should bar the Commission from further entertaining any increase in rates in other, separate Commission proceedings stemming from the ESP Application filed on July 31, 2008 inasmuch as the Commission's statutory jurisdiction over AEP-Ohio's ESP Application ended December 28, 2008. Finally, the Court should direct the Commission to refrain from continuing or allowing further judicial or quasi-judicial proceedings of any kind or nature in connection with the Companies' ESP Application filed on July 31, 2008 unless it does so in accordance with the requirements of Ohio law.

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[20] As IEU-Ohio noted in its Merit Brief, based on recent history and experience with the Commission's expediency on addressing remand decisions, the Court should make explicit in its remand instructions that the Commission must move immediately to address the rate-setting implications of a reversal of the Commission's Orders. *See* IEU-Ohio Merit Brief at 8, fn 16. Due to the timing of a likely decision in this case and the short duration of the ESP (only three years ending on December 31, 2011), it is very likely there will not be much time left in the ESP case once a decision is rendered by this Court. *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-1620, Industrial Energy Users-Ohio's Memorandum in Opposition to Motions to Dismiss of American Electric Power-Ohio and the Public Utilities Commission of Ohio at 5-8 (October 2, 2009). Thus, an immediate implementation of the remand is necessary to afford customers any prospective relief from the Commission's unlawful and unreasonable orders.

[21] The practical effect of such a decision from the Court would be to require AEP-Ohio to file another ESP plan or an MRO proposal to establish its SSO while its RSP rates would continue until such time as a new ESP or MRO was lawfully and timely authorized.

PROPOSITION OF LAW NO. II

The Commission's Orders are unlawful inasmuch as the Commission failed to prohibit AEP-Ohio from accepting the higher rates approved in the ESP while simultaneously preserving the right to withdraw and terminate the approved ESP.

The Court should overturn the Commission's failure to prohibit AEP-Ohio from taking the benefits of its approved ESP while simultaneously holding out its statutory right to withdraw and terminate its ESP. As IEU-Ohio explained on pages 12-15 of its Merit Brief, R.C. 4928.143 and R.C. 4928.141 prohibit an EDU from taking the benefits of the higher rates approved in an ESP while also challenging the lawfulness and reasonableness of the same rates from which it is benefiting and holding out its ability to withdraw and terminate its ESP.

IEU-Ohio noted in its Merit Brief that it has raised this issue multiple times and that the Commission consistently dodged responding to IEU-Ohio's assertions. AEP-Ohio and the Commission argue that the Commission was correct not to rule upon IEU-Ohio's claim inasmuch as the claim is not ripe for the Commission's consideration[22] and because it would entail the Commission offering an advisory opinion.[23] Both of these arguments should be rejected by the Court. IEU-Ohio raised a valid legal issue, the resolution of which would not be premature or advisory and which would have had an instant and material effect on this case. IEU-Ohio's claim is merely asking the Commission to determine, now, that AEP-Ohio cannot take the benefits of the very Orders that it claimed were illegal in its Applications for Rehearing and that it still claims are illegal in its pending appeal to this Court.[24]

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[22] AEP-Ohio Merit Brief at 39.

[23] Commission Merit Brief at 18.

[24] *Columbus Southern Power Co. v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298.

AEP-Ohio and the Commission also argue that AEP-Ohio was required to charge the rates approved in the ESP Orders.[25] This is not a case where, as in traditional rate proceedings, the Commission's directives regarding rates and charges must be followed by the utility until the directives are modified by the Commission through the rehearing process or through the appellate jurisdiction of this Court. The General Assembly has equipped EDUs with an absolute right to veto any Order issued by the Commission that modifies a proposed ESP.[26] Upon the exercise of this veto right, the Commission's Orders are null and void. Thus, an EDU cannot charge those rates approved by the Commission until the EDU actually accepts the approved ESP as lawful and reasonable.

AEP-Ohio further asserts that IEU-Ohio's position would place it in a "Hobson's choice" situation.[27] This is not true. IEU-Ohio does not suggest that AEP-Ohio cannot withhold its decision on the use of its veto until it sees what happens on rehearing. IEU-Ohio's position is that AEP-Ohio cannot withhold this decision, contest the lawfulness of the Orders itself AND, at the same time, treat the Orders modifying its ESP as lawful for purposes of billing and collecting rate increases that can only be lawful if the Orders are lawful. IEU-Ohio's position is that if the Order was accepted by AEP-Ohio and then the Commission changed the Order through the rehearing process in ways that AEP-Ohio did not agree with, then AEP-Ohio could exercise its veto power, but AEP-Ohio cannot, in this circumstance, be one of the parties contesting the lawfulness of the Orders by asking for rehearing or appealing the Commission's Orders.

Ohio law does not allow AEP-Ohio to take the benefits of the Commission's Orders while it is itself challenging the lawfulness and reasonableness of the very Orders that bestow

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[25] Commission Merit Brief at 18; AEP-Ohio Merit Brief at 40.

[26] R.C. 4928.143(C)(2)(a) (IEU-Ohio Appx. at 379).

[27] AEP-Ohio Merit Brief at 41.

these benefits as well as reserving judgment to withdraw and terminate its ESP proposal. So long as AEP-Ohio reserves judgment to withdraw and terminate the approved ESP as a result of modifications made by the Commission or the Court pursuant to requests from AEP-Ohio, R.C. 4928.141 requires the prior "rate plan" to continue.

PROPOSITION OF LAW NO. III

The Commission's approval of the gridSMART Rider is unlawful inasmuch as the Commission failed to determine that the gridSMART Program is cost-effective under R.C. 4928.02(D).

The Commission's approval of the gridSMART Rider should be overturned inasmuch as the Commission did not find that the gridSMART Program is cost effective, as required by R.C. 4928.02(D).[28] On remand, the Court should require the Commission to immediately order AEP-Ohio to stop charging customers the gridSMART Rider until the Commission determines, with record evidence, that the gridSMART Program is cost-effective.

The General Assembly set out Ohio's State Energy Policy in R.C. 4928.02. R.C. 4928.02 specifically encourages "innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure." (Emphasis added.) In addition to the plain language of the statute, the General Assembly's indication that programs advancing the policy of R.C. 4928.02(D) must be cost effective is further demonstrated by the fact that the General Assembly also included a cost-effectiveness limitation in R.C. 4928.02(E) as well and there are no other sections of R.C. 4928.02 requiring cost-effectiveness. While it is true that the Commission will consider all of the state policies when making a decision, the Commission is not free to ignore or issue orders (such as the ones in

[28] R.C. 4928.02(D) (IEU-Ohio Appx. at 366).

this case) that directly contravene the state policies that impede the Commission's own ambitions that differ from the General Assembly's ambitions.[29]

Both the Commission and AEP-Ohio spend considerable time in their briefs explaining how and why the gridSMART Program is cost-effective. However, noticeably absent is any citation to the record or to the Commission's Orders in this case specifically finding that the gridSMART Program is cost-effective, as required by R.C. 4928.02(D). The Commission only speaks through its Orders[30] and its Orders contain no determination that the gridSMART Program is cost-effective. Just because the Commission and AEP-Ohio tout the alleged benefits of the gridSMART Program and say the Program is cost-effective in their briefs does not make it so; the Commission must make that determination in its Orders and failed to do so.[31] It is also telling that neither the Commission nor AEP-Ohio mention the $109 million price tag or attempt to quantify benefits of the gridSMART Program in order to rebut IEU-Ohio's cost-effective analysis. Indeed, AEP-Ohio's definition of cost-effective would essentially re-write R.C. 4928.02(D) and render the cost-effective requirement contained in R.C. 4928.02(D) meaningless.[32]

The Court should reverse the Commission's decision and require the Commission to order AEP-Ohio to immediately stop collecting the gridSMART Rider until the Commission makes a cost-effectiveness determination related to AEP-Ohio's gridSMART Rider based on record evidence.

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[29] *See Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164 at ¶47-58.

[30] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, Slip Opinion No. 2010-Ohio-134 at ¶43.

[31] The Commission's failure to make this determination is yet one more example (as discussed below) of the problems caused by the failure of the Commission to follow R.C. 4903.09 and explain the rationale for its Orders.

[32] AEP-Ohio Merit Brief at 36.

PROPOSITION OF LAW NO. IV

The Provider of Last Resort ("POLR") charge authorized by the Commission is unlawful and unreasonable.

This Court should overturn the Commission's POLR charge authorization and require the Commission on remand to legally as well as factually justify any POLR charge approved by the Commission. As IEU-Ohio (and the Ohio Consumers' Counsel or "OCC") demonstrated in the merit briefs submitted in this case, the Commission's decision is illegal and unreasonable in addition to lacking the transparency required by R.C. 4903.09.[33]

A. The Commission's violation of this Court's precedent in *Indus. Energy Users-Ohio v. Pub. Util. Comm.* is properly before this Court.

In its Merit Brief IEU-Ohio demonstrates that the POLR charge approved in this case is illegal inasmuch as it was approved outside of the distribution rate case construct, as required by this Court in *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990. AEP-Ohio avers that IEU-Ohio failed to raise this argument in its Application for Rehearing and Notice of Appeal. The Court should reject AEP-Ohio's claim; IEU-Ohio properly raised this claim in its Application for Rehearing and Notice of Appeal.

IEU-Ohio's April 16, 2009 Application for Rehearing explicitly challenges the Commission's POLR-related decision. In fact, IEU-Ohio disputed the Commission's POLR decision in two separate and distinct instances in the Application for Rehearing. IEU-Ohio stated as follows at pages i and 26 of its Application for Rehearing: "The Commission's rate increase for ninety percent of AEP-Ohio's requested POLR revenue requirement is unjust,

[33] It is worth noting that neither the Commission nor AEP-Ohio's attempt to rebut IEU-Ohio's factual assertions that AEP-Ohio has no POLR risk because of its voluntary fixed resource requirement ("FRR") election, that AEP-Ohio has not shown that it could not mitigate its alleged POLR risk, and that AEP-Ohio's risk profile has not changed to merit substantially increasing its POLR charge. *See* IEU-Ohio Merit Brief at 24-29.

unreasonable and unlawful."[34] Further, IEU-Ohio also directly challenged the Commission at page 16 of its Application for Rehearing to explain why the distribution-related POLR element was not required to be considered in a distribution rate case when the Commission found that AEP-Ohio's other distribution-related components in its ESP Plan (except the gridSMART and Enhanced Vegetation Management Plan) should be considered in a full distribution rate case.[35]

Additionally, IEU-Ohio's Notice of Appeal states that "The Commission's rate increase for 90% of AEP-Ohio's requested provider of last resort 'POLR' revenue requirement is unsupported by the evidence, unjust, unreasonable, and unlawful."[36] IEU-Ohio goes on to delineate some of the specific ways in which the Commission's Orders were illegal, but IEU-Ohio never indicated that the list was exhaustive.

IEU-Ohio's Application for Rehearing and Notice of Appeal challenged every aspect of the POLR revenue opportunity authorized by the Commission on every legal and factual front available to IEU-Ohio. IEU-Ohio's direct legal and reasonableness challenges to a rate increase for 90% of AEP-Ohio's POLR revenue opportunity meets the Court's specificity requirements and properly preserves IEU-Ohio's right to bring the distribution rate case requirement found in *Indus. Energy Users-Ohio* before this Court.

B. The Commission's POLR authorization is unlawful.

Both the Commission and AEP-Ohio attempt to locate subsections of R.C. 4928.143 that refute IEU-Ohio's argument from *Indus. Energy Users-Ohio* that the Commission was required to approve the POLR charge in a distribution rate case. Both the Commission and AEP-Ohio

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[34] IEU-Ohio Application for Rehearing at i and 26 (April 16, 2009) (IEU-Ohio Appx. at 15, 42) (ICN 230).

[35] *Id.* at 16 (April 16, 2009) (IEU-Ohio Appx. at 32) (ICN 230).

[36] IEU-Ohio Notice of Appeal at 1 (IEU-Ohio Appx. at 3) (ICN 282).

point to R.C. 4928.143(B)(2)(d) for the Commission's authority to approve AEP-Ohio's POLR charge. AEP-Ohio also relies on the "without limitation" language contained in R.C. 4928.143(B)(2) for the Commission's authority to approve the POLR charge. The Commission's and AEP-Ohio's assertions should be rejected.

While SB 221 does grant the Commission discretion as to what may be included in an ESP, SB 221 did not substantively modify the provisions of R.C. Chapters 4909 and 4905 related to distribution rate cases. Under the *in pari materia* canon of construction, this Court must harmonize the provisions in R.C. Chapters 4909 and 4905 and those contained in R.C. Chapter 4928 (pursuant to SB 221) to give the proper force and effect to each and all of the statutes in these R.C. Chapters.[37] The Application of this Court's *Indus. Energy Users-Ohio* precedent in this case is consistent with and in harmony with the plain language of SB 221. The interpretations of R.C. 4928.143 advanced by AEP-Ohio and the Commission should be denied inasmuch as SB 221 did not change the legal authority found in *Indus. Energy Users-Ohio* and the interpretations of SB 221 espoused by AEP-Ohio and the Commission would essentially render R.C. Chapters 4909 and 4905 meaningless.

Both AEP-Ohio and the Commission rely on R.C. 4928.143(B)(2)(d) for the Commission's authority to approve the POLR charge in the ESP case. The Court should also reject this claim. The Commission's Orders contain absolutely no indication that it relied on R.C. 4928.143(B)(2)(d) for its authority to approve a POLR charge. The elements included in this subsection relate to generation-service issues – the POLR charge approved for AEP-Ohio is a distribution-related function and therefore this subsection is not applicable.[38]

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[37] *See State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St. 3d 148, 2009-Ohio-2522 at ¶20; *see also* 85 Oh Jur.3d Statutes § 179.

[38] Opinion and Order at 38 (IEU-Ohio Appx. at 198) (ICN 214).

Further, the Court must reject AEP-Ohio's assertion that the "without limitation" provision of R.C. 4928.143(B)(2) permits the Commission to approve AEP-Ohio's distribution-related POLR charge outside of a rate case. The interpretation encouraged by AEP-Ohio would create an exception that swallows the rule, render Chapters 4909 and 4905 essentially meaningless, and amount to an unconstitutional abdication of legislative authority.[39] Under the theory advanced by AEP-Ohio, the Commission could entertain an entire distribution rate case of an EDU in the context of an ESP. This reading of R.C. 4928.143 cannot be consistent with the fact that the General Assembly left R.C. Chapters 4909 and 4905 untouched during the SB 221 process. It would be hard to imagine an EDU voluntarily choosing to go through all of the expense and effort associated with a rate case, including the consideration of a distribution POLR element, when it could just include its distribution rate case in the already complex provisions that are part of an ESP under the provisions of R.C. 4928.143.

The General Assembly specifically contemplated in R.C. 4928.143(B)(2)(h) that some distribution-service elements (such as AEP-Ohio's POLR charge) may be included in an ESP proceeding. And, the General Assembly even specifically contemplated objections to considering distribution service-related elements outside of a distribution rate case setting, inserting language delineating that the Commission could consider distribution service elements in an ESP regardless of the other provisions of R.C. Chapter 49. However, neither the Commission nor AEP-Ohio seek to use the route specifically identified by the General Assembly because the General Assembly set limitations (not met by the Commission) on the consideration of distribution service elements in the ESP setting.

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[39] *Livingston v. Clawson*, 2 Ohio App.3d 173, 176, 440, N.E.2d 1383 (Ohio App. 2nd Dist. 1982); *see also* 2 Oh Jur.3d Administrative Law § 38.

Under R.C. 4928.143(B)(2)(h), the Commission can only approve a distribution service-related element of an ESP after examining the reliability of the EDU's distribution system and ensuring that customers' and the EDU's expectations are aligned and that the EDU is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.[40] The Commission's Orders contain no finding in the distribution POLR context regarding an examination of the alignment of interests or the dedication of sufficient resources to the distribution system. Thus, without this determination, the only avenue available to consider the distribution-related POLR costs is a distribution rate case, consistent with *Indus. Energy Users-Ohio.*

The Court must find the distribution POLR charge is unlawful and unreasonable. The Court should reverse and remand with instructions, directing the Commission to require AEP-Ohio to immediately cease charging the POLR Rider until the Commission has approved a POLR charge based on record evidence that complies with Ohio law and is reasonable.

PROPOSITION OF LAW NUMBER V

The Commission's Orders are unlawful inasmuch as the Commission failed to meet the requirements of R.C. 4903.09.

R.C. 4903.09 requires the Commission to issue written decisions in contested proceedings "...setting forth the reasons prompting the decisions..."[41] This obligation must be satisfied by the Commission to permit the Court to properly discharge its duties on appeal.[42] To meet the requirements of R.C. 4903.09 the Commission's Orders must show, in sufficient detail,

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[40] R.C. 4928.143(B)(2)(h) (IEU-Ohio Appx. at 378).

[41] R.C. 4903.09 (IEU-Ohio Appx. at 361).

[42] *MCI Corp. v. Pub. Util. Com.*, 38 Ohio St.3d 266, 270, 527 N.E. 2d 777 (1988).

the facts in the record upon which the Order is based and the reasoning followed by the Commission to get to the conclusion.[43]

The merit briefs filed by the Commission and AEP-Ohio vividly demonstrate the reasons why the Commission's Orders violate R.C. 4903.09. Both the Commission and AEP-Ohio scramble to find a legal or factual basis for the Commission's decisions, leaving them to cite Ohio Revised Code sections that may support the Commission's decisions. Of course, neither this Court nor the other Parties actually know which Ohio Revised Code sections and facts the Commission relied upon because the Orders are virtually devoid of any Ohio Revised Code citations and factual citations, thereby violating R.C. 4903.09.

For example, IEU-Ohio challenged the Commission's legal authority to permit AEP-Ohio to collect the costs associated with contractual output entitlements from the Lawrenceburg Generation Station ("Lawrenceburg") and from Ohio Valley Electric Corporation ("OVEC") facilities. Both AEP-Ohio and the Commission point to the "without limitation" portion of R.C. 4928.143(B)(2). However, the Commission's Orders cite absolutely no statutory authority, including the "without limitation" language, for its power to approve the collection of approximately $207 million from customers over the course of the ESP period related to these assets.[44] Thus, the Commission and AEP-Ohio similarly ask this Court to engage in a guessing game that is not permitted under Ohio law. It cannot and is not legal for the Commission to saddle customers with $209 million in rate increases without citing any legal authority for its decision.

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[43] *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 513 N.E. 2d 337 (1987).

[44] Opinion and Order at 52 (IEU-Ohio Appx. at 212) (ICN 214); Entry on Rehearing at 35-36 (IEU-Ohio Appx. at 137-138) (ICN 265).

As discussed above, the Commission and AEP-Ohio claim that the Commission is not required to issue an ESP decision within the time specified by the General Assembly. They support this proposition because the Commission let the order-clock run without issuing an order. With the extra time the Commission delegated itself (with AEP-Ohio's support) to issue an ESP decision, one might have expected that the Commission's decision would transparently display the reasoning and findings that the Commission is purposefully obligated to display in its orders based on R. C. 4903.09. But in addition to being illegally tardy, the Commission illegally failed to explain itself.

The Court should reverse the Commission's Orders in their entirety and require the Commission to explain the rationale for its decisions, citing the statutory authority and factual record evidence to support its decisions.

CONCLUSION

WHEREFORE, IEU-Ohio respectfully submits that the Commission's Orders in this proceeding are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the Commission with instructions to immediately correct the errors complained of herein.

Respectfully Submitted,

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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 all parties listed below on March 25, 2010.

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