

IN THE SUPREME COURT OF OHIO

ORIGINAL

Columbus Southern Power Company :
and Ohio Power Company : Case No. 09-2060
:
Appellants, : Appeal from the Public
:
v. : Utilities Commission of Ohio
:
The Public Utilities Commission of Ohio, : Public Utilities
:
Appellee. : Commission of Ohio
:
Case No. 09-119-EL-AEC
:
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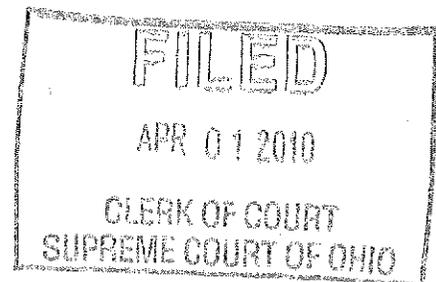
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ARGUMENT

PROPOSITION OF LAW NO. I:

The Commission erred as a matter of law in concluding that “the recovery of delta revenues is a matter for the Commission’s discretion” under R.C. 4905.31.

The Commission’s decision below clearly indicated its position that R.C. 4905.31 does not constrain its discretion to impose a compulsory arrangement without allowing recovery of any costs incurred as a result of the contract. (*Ormet Case*, Entry on Rehearing at 10-11 (emphasis original), Ap. at 86-87.) AEP Ohio has an established record of supporting economic development, but it is neither reasonable nor lawful under R.C. 4905.31 for the Commission to impose a “reasonable arrangement” for economic development on a utility without also providing for recovery of foregone revenues associated with the arrangement.

On brief, the Commission continues to argue in the extreme that “it would have been statutorily valid for the Commission to have approved a unique arrangement with Ormet without having made *any* provision allowing Appellant to collect *any* amount from other customers to pay Appellant for lowering the rates for Ormet.” (Commission Brief at 12 (emphasis added); see also Commission Brief at 15.) Such a result follows from the Commission’s reading of R.C. 4905.31 as permissive, because “[i]t says ‘may include’, not ‘must include’.” (*Id.*) Rather, the Commission states that “R.C. 4905.31(E) only allows a mechanism to recover costs of the unique arrangements.” (*Id.* at 13.) In circular fashion, the Commission then concludes that the POLR charge that otherwise applies to

Ormet is not a cost of the compulsory arrangement ordered by the Commission because the contract does not support provision of the underlying POLR service. (*Id.* at 14.) The IEU and OCC/OEG adopt this same posture on brief. (IEU Brief at 13; OCC/OEG Brief at 9-18.)

A. R.C. 4905.31 does not authorize the Commission to impose an involuntary contract on a utility and then deny full recovery of the resulting revenue foregone under the compulsory arrangement.

In its Merit Brief, AEP Ohio set forth an extensive and detailed discussion of the plain language and meaning of R.C. 4905.31. (AEP Ohio Merit Brief at 13-19.) The Commission's response is simply to fall back on the argument that the statute says "may include, not must include." (Commission Brief at 12.) A closer review of the statutory language is conspicuously absent, which is somewhat understandable because the decision below is not supported by the plain language of the statute. And neither the Intervening Appellees nor the Commission has offered a substantive, let alone persuasive, response to AEP Ohio's arguments.

The introductory language in the sentence preceding the list in R.C. 4905.31(E) applies to all of the four items and the entire sentence must be read and understood before reaching any conclusions about the General Assembly's use of the phrase "may include" in the introductory part of the sentence. The context and grammatical structure of the sentence used by the General Assembly in R.C. 4905.31(E), including the use of semicolons to separately list the four items, is that a financial device "may include" 1; 2; 3 and 4. The phrase "may include" in the first part of the sentence is in prelude to listing the four permitted items and the phrase does not modify the language internally used to describe any of the individual items 1; 2; 3; and 4.

By contrast, the Commission's decision misapprehends the phrase "may include" as modifying the far-removed phrase "including recovery of revenue foregone." Thus, the Commission's interpretation improperly joins the distant phrases together to awkwardly interpret that language as saying that a financial device "may include ... including recovery of revenue foregone." In addition to the fact that this strained reading makes no grammatical sense, it inappropriately grafts the list's introductory phrase "may include" onto the internal language describing item one in the list of four items. The Commission's flawed interpretation emasculates the General Assembly's manifest intention to permit recovery of economic development costs "including revenue foregone."

Not only does the Commission's primary interpretation essentially rewrite the statute, the Commission's secondary argument is equally flawed in stating that the General Assembly would have used "shall" or "must" rather than "may" if it had intended to require recovery of delta revenues. (*Ormet Case*, Entry on Rehearing at 10, Ap. at 86.) If the General Assembly had used the phrase "shall include" instead of "may include" in this instance, then the sentence would have been rendered useless as a list of permissible alternatives. Under the secondary argument used in the Commission's entry on rehearing, the sentence structure would be that a financial device "shall include" 1; 2; 3 and 4. In other words, all of the four categories would have to be included in a financial device in order to be permissible under R.C. 4905.31. That would render the statute useless, which should be avoided when interpreting statutes. Ohio Rev. Code Ann. § 1.47(B) (2010), Ap. at 2. *See also Moore v. Goeller* (2004), 103 Ohio St.3d 427, 429; *Whitman v. Hamilton Co. Bd. of Elections* (2002), 97 Ohio St.3d 216, 219-220.

Thus, the Commission's alternative approach is also superficial and further exposes the fallacy of the Commission's interpretation. The Commission's position employs a strained interpretation that reads the phrase "may include" out of context and conflicts with the plain meaning of the complete sentence when read as a whole. Though the Commission has authority to approve or disapprove proposals under R.C. 4905.31, the statute does not permit the Commission to approve a proposed arrangement and simultaneously disallow a portion of the resulting foregone revenue.

On brief, OCC/OEG maintains that there is "no occasion for resorting to rules of statutory construction" in this case because the language of the statute is plain and unambiguous. (OCC/OEG Brief at 9, 13-18.) In making this argument, OCC/OEG ignores the fact that the starting point and primary thesis of AEP Ohio's robust statutory interpretation argument is the plain language of the statute and R.C. 1.42 which requires Revised Code provisions to be read in context and construed according to the rules of grammar and common usage. (AEP Ohio Merit Brief at 14.) This is precisely what AEP Ohio's reading does. The OCC/OEG's interpretation, like the Commission's, is undermined, not advanced, by the plain language and obvious meaning of R.C. 4905.31(E). The fact that AEP Ohio's reading is *also supported* by the canons of statutory construction discussed in Appellants' Merit Brief merely reinforces the plain language reading.

The Commission also advances the argument on brief (at 13) that R.C. 4905.31(E) only allows a mechanism to recover costs of the unique arrangement. As a related matter, the Commission argues (at 2) that it ordered that the costs associated with the reduced rates for Ormet be paid by other customers and that its decision makes AEP

Ohio whole, suggesting that AEP Ohio “wants to be more than whole.” *See also* Commission Brief at 12 (note 7, AEP Ohio “will recover all of its costs”). The OCC/OEG Brief also repeats the false notion that AEP Ohio will receive 100% of the revenues for services they provide to Ormet, just as if Ormet had otherwise paid non-discounted standard tariff rates. (OCC/OEG Brief at 1, 12, 19.) Next, the Commission asserts: “If other customers are going to have to pay for something, that something must be real. It must be a cost.” (Commission Brief at 15.) This line of argument concludes that “there are no POLR costs” associated with the Ormet unique arrangement and there is nothing for the other customers to pay for. (*Id.*) The IEU and OCC/OEG Briefs fall in line with this argument as well. (IEU Brief at 13-14; OCC/OEG Brief at 9-18) Nonetheless, the argument is flawed in multiple respects.

As a threshold matter, the POLR costs incurred by AEP Ohio in offering firm generation service to its customers was certainly considered an item of “real cost” by the Commission in adopting the non-bypassable POLR charge for application to all of AEP Ohio’s customers: the Commission awarded a revenue requirement to AEP Ohio of more than \$150 million based on a scientific financial modeling analysis. (*ESP Cases*, Opinion and Order at 38, Ap. at 151; *Id.* at 40, Ap. at 153.) In adopting the POLR charge for application to all customers, the Commission made no exception for customers operating under a reasonable arrangement or for a customer who promises not to shop.¹

More importantly for the present discussion, the Commission’s premise that foregone revenues are not “costs” directly conflicts with the statute. As mentioned above,

¹ In addition to the fact that the Commission has considered this POLR risk to impose a real and substantial cost on AEP Ohio, the manner in which the Commission’s decision below conflicts with the contemporaneous decision issued by the Commission in AEP Ohio’s *ESP Cases* is separately addressed, *infra*, in Proposition of Law No. I.B.

the first in the list of four permissible financial devices in R.C. 4905.31(E) is “a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, *including recovery of revenue foregone* as a result of such program.” (Emphasis added.) Thus, the “including recovery of revenue foregone” language establishes that revenue foregone is a cost incurred under such an arrangement. Through the “recover costs ... including recovery of revenue foregone” language and structure of R.C. 4905.31(E), the General Assembly has already directly provided that “costs incurred” in conjunction with an approved economic development program include recovery of the utility’s revenue foregone as a result of such program. Thus, the Commission’s position that foregone revenues are not “costs incurred” conflicts with the language of the statute.

Moreover, it is simply not true that that the POLR charge being foregone by AEP Ohio under the Ormet arrangement does not represent a foregone revenue or a “real cost incurred” under the arrangement. Though the Commission and Intervening Appellees claim that AEP Ohio is not providing POLR service to Ormet and need not collect the POLR charge (an erroneous claim addressed in AEP Ohio Prop. of Law No. III, *infra*), it cannot reasonably be disputed that the POLR charge is revenue foregone as a result of the arrangement. But for the Ormet arrangement, there is no question that AEP Ohio would collect the POLR charge from Ormet. R.C. 4905.31(E) requires an approved financial device for economic development to include recovery of revenues foregone and provides that the costs incurred under such an arrangement, by definition, include revenues

foregone.² Thus, the Commission is wrong in concluding that it was not required to allow recovery of all of the costs associated with the aid package it approved for Ormet, including the foregone revenue associated with the POLR charge avoided under the arrangement.

OCC/OEG also argues (at 16) that Rule 4901:1-38-08(A)(3), Ohio Admin. Code, permits cost savings to the utility to be an offset to recovery of delta revenues. Even if that rule were lawful, it only applies to contracts in which the discount is *based upon* cost savings to the utility. The Ormet contract is not based on cost savings to AEP Ohio, but rather is based on the price Ormet receives from the aluminum market for its product; thus, the rule is inapplicable.

B. The decision below, which denies AEP Ohio recovery of POLR charges that Ormet would pay but for the compulsory agreement, conflicts with the Commission's contemporaneously-adopted Electric Security Plan for AEP Ohio and undermines SB 221's new regimen for establishing electricity rates.

The Commission in the *ESP Cases* specifically rejected arguments that AEP Ohio's non-bypassable POLR charge can be avoided if a customer agrees not to shop. (*ESP Cases*, July 23, 2009 Entry on Rehearing, at 25, Ap. at 127.) After considering these arguments in the *ESP Cases*, the Commission adopted a *non-bypassable* POLR charge reflecting 90 percent of the estimated POLR costs presented by AEP Ohio and found that only customers who: (1) actually switch to a competitive supplier and (2) agrees at the time they decide to shop that, if they return it would be at a market price, would avoid the POLR charge during the time they are served by a competitive provider.

² The Commission's own rule defining "delta revenues," Rule 4901:1-38-01(C), Ohio Admin. Code, is consistent with this understanding.

(*ESP Cases*, Opinion and Order at 40, Ap. at 153.) The narrow exception for customers who are not being served by AEP Ohio and who promise to return at market has no application to this case. In other words, regardless of whether a customer promises not to shop during the ESP term, all customers must pay the POLR charge for the entire time they are served under AEP Ohio's Standard Service Offer (SSO) and can avoid that charge while taking generation service from an alternative provider only if they agree to pay a market price if they return to AEP Ohio. That basic shopping rule was established as an integral part of AEP Ohio's approved ESP and it was supposed to control such matters during the three-year ESP term.

Yet the Commission's decision below and its arguments on brief totally reverse course on this issue. Now the Commission is saying that a customer who simply promised not to shop can avoid the approved POLR charge. In support of its position, the Commission attempts to distinguish the *ESP Cases* by asserting that the service provided under a reasonable arrangement is different from the service provided under AEP Ohio's SSO. (Commission Brief at 20-22.) This rationale is a classic example of a distinction without difference.

Elsewhere on brief, the Commission frankly acknowledges the purpose and effect of an economic development arrangement:

An economic development arrangement, like the one approved in the case below, typically includes a *reduction in the rate charged* to the customer involved *below the rate level which would otherwise have applied* to that customer. *That is the point of the transaction*, to support the development or, as in this case, allow the continuation, of the customer's business through *lower rates for electricity*.

(Commission Brief at 11) (emphasis added) In other words, the only meaningful difference between the SSO and a special arrangement is the lower price. There is no

question that the rates “which would otherwise have applied” to Ormet would have included the POLR charge. Under the Commission’s decision, Ormet’s “lower rates for electricity” effectively bypasses the non-bypassable POLR charge. Yet the decision below does not permit AEP Ohio to recover the foregone revenue associated the POLR charge.

As a related matter, the Commission on brief attempts to back away from the holding in the *ESP Cases* that awarded AEP Ohio a specific “revenue requirement” (which was reduced through the decision below), saying now (at 21) that the adoption of the unique arrangement “changed the factual situation” and that the Commission really did not actually award AEP Ohio a revenue requirement as a result of the holding in the *ESP Cases*. In the *ESP Cases*, the Commission plainly stated that “[t]he POLR charge was proposed to collect a POLR *revenue requirement* of \$108.2 million for CSP and \$60.9 million for OP.” (*ESP Cases*, Opinion and Order at 38, Ap. at 151) (emphasis added). Similarly, when deciding to grant 90% of the POLR proposed rate, the Commission ordered that “the POLR rider shall be established to collect a POLR *revenue requirement* of \$97.4 million for CSP and \$54.8 million for OP.” (*Id.* at 40, Ap. at 153) (emphasis added). This demonstrates that the Commission’s intention in the *ESP Cases* was to increase AEP Ohio’s revenue requirements and create firm revenues to support the POLR duty through a non-bypassable revenue stream as part of the overall ESP decision – not just create a charge that can simply be avoided by a promise not to shop. In short, the Commission’s attempt on brief to re-characterize and distinguish the findings in the *ESP Cases* is not valid and should be rejected.

Moreover, as demonstrated in AEP Ohio's Merit Brief, the interpretation adopted by the Commission below also conflicts with SB 221's new pricing regimen for electric service. (AEP Ohio Merit Brief at 26-28.) When the Commission imposes an involuntary economic development contract on a utility without making the utility whole for revenue foregone *vis-à-vis* its approved SSO rates (*i.e.*, full delta revenue recovery), it undermines the approved SSO pricing established under SB 221 – whether that rate plan is an ESP or an MRO. AEP Ohio's argument in this regard was not addressed by the Commission on brief – presumably because it does not have a good response.

Finally in this regard, the Commission also argues (at 12-13) that AEP Ohio cannot complain if it receives no recovery of revenues foregone in connection with a compulsory arrangement because AEP Ohio can always file a rate case if it is not earning a reasonable return on its regulated operations and that the Commission does not need to provide any customer-specific amount in connection with the Ormet contract. Saying the utility can always file a rate case if it is injured by a compulsory agreement ordered by the Commission is an insufficient response, for several reasons. First and foremost, AEP Ohio is in the middle of a three-year ESP rate plan, wherein the rate adjustments are already specified from 2009-2011, and any new rate plan would not commence until 2012. The case below was contemporaneously decided with the Commission's approval of AEP Ohio's rate plan. Further, the filing of such a rate case is an enormous undertaking, based on the resources and expense involved, and takes more than a year to complete. Thus, it is unreasonable to take away revenue contemporaneously found to be appropriate by the Commission and tell a utility that just completed the complex and

time-consuming process for establishing a rate plan to file a rate case if it does not like the result.

Moreover, the practice described on pages 12-13 of the Commission's brief is also not appropriate under the new regulatory regime established by SB 221 because the establishment of rates is no longer based on traditional notions of the opportunity to earn a reasonable return on regulated operations. More specifically, the rate plan adopted by the Commission that included the POLR charge was not established based on a traditional cost-based ratemaking formula and it makes no sense to say that the utility's remedy is based on a traditional ratemaking notion of the opportunity to earn a reasonable return.

PROPOSITION OF LAW NO. II:

The Commission unlawfully adopted a provision within the involuntary contract requiring that AEP Ohio's largest customer forego its statutory right to shop for competitive generation service for an entire decade, in violation of the well-established policy of the State of Ohio and the fundamental retail shopping provisions of SB 3 and SB 221.

The Commission below ordered AEP Ohio to be the exclusive supplier to Ormet's enormous electric load for an entire decade. (*Ormet Case*, Opinion and Order at 13, Ap. at 46.) The Commission responds by saying that it was simply honoring Ormet's unilateral request to be locked into discounted rates for ten years. (Commission Brief at 23-24.) The OCC/OEG Brief also advocates (at 21) Ormet's right to choose a supplier.³

³ OCC/OEG (at 8-9) and Ormet (at 13-15) wrongly suggest that AEP Ohio somehow waived the right to challenge the exclusive supplier provision because it was not raise until post-hearing briefs and rehearing. This position should be rejected: (1) AEP Ohio's challenge to the exclusive supplier provision is legal and not factual; (2) there is no requirement that AEP Ohio raise a legal prior to asserting its merit positions on brief below; (3) the Commission did not make any finding of waiver; and (4) there is no

Ironically, all of the parties *except* Ormet are trumpeting Ormet's right to choose – Ormet intervened in the appeal and filed a brief but did not assert such an argument. It appears that the Commission merely used the “customer choice” rationale to do what it wanted to do: approve the full discount for Ormet without fully compensating AEP Ohio. And after criticizing AEP Ohio for not presenting expert testimony regarding the alleged harm to competition relating to the Ormet arrangement, the Commission on brief now improperly states without basis or citation to the record (at 25) that allowing Ormet to have its choice “does not harm other consumers.”

OCC/OEG also suggests that the policy of promoting competition is merely one of several policy statements in R.C. 4928.02 and it can be overcome by other policies. (OCC/OEG Brief at 22.) As AEP Ohio discussed in its Merit Brief (at 29-30), however, R.C. Chapter 4928 contains even more explicit provisions than the overarching policy statements in R.C. 4928.02: SB 3 directly established a right to shop for generation and other competitive retail electric services through R.C. 4928.03, a statute that confers upon consumers in Ohio the right to obtain generation service from any supplier. Ohio Rev. Code Ann. 4928.03 (2010), Ap. at 12. In addition, the General Assembly enacted R.C. 4928.06 entitled “Commission to ensure competitive retail electric service” – originally as part of SB 3 and retained by SB 221. Ohio Rev. Code Ann. 4928.06 (2010), Ap. at 14. Thus, unlike the policies in R.C. 4928.02, effective competition is a fundamental, structural and foundational aspect of SB 3 and SB 221 through these affirmative statutory mandates.

dispute that AEP Ohio raised the issue on rehearing and, thus, has satisfied the jurisdictional prerequisite for advancing the claim before this Court.

Perhaps the most puzzling argument in response to AEP Ohio's complaint regarding the exclusive supplier provision is the Commission's view of competition expressed on brief. The Commission characterized AEP Ohio's view of competition as being able to buy power from someone other than the utility (at 24) as "wrong headed." Instead, the Commission explained (at 24) that, while many of the competitive choices come from market participants other than the utility, two of these choices relate back to the utility itself: (1) the SSO under R.C. 4928.141, and (2) the possibility of a unique arrangement under R.C. 4905.31. In other words, the Commission believes it can approve a SSO rate plan in one instant (establishing the default service offer or competitive "bogey") and in the next instant require the utility to establish a discounted rate for an individual customer deemed to be deserving (in order for the utility to "compete" with itself).

AEP Ohio respectfully submits that such a regulatory system, requiring a utility to offer a discounted rate as an alternative choice to its SSO, is not competition in any sense. Yet, this is precisely how the Commission is characterizing what it did in approving AEP Ohio's ESP rate plan while contemporaneously approving Ormet's discount – all without providing AEP Ohio full recovery of Ormet's discount. The Commission's approval of an "exclusive supplier" provision is contrary to the most basic and central premise of SB 3 and SB 221: development of competitive electric generation markets for retail customers in Ohio. The Court should reverse or vacate the Commission's adoption of the unlawful exclusive supplier provision.

PROPOSITION OF LAW NO. III:

The Commission's conclusion that there is no risk of Ormet shopping for competitive generation service and subsequently returning to SSO service conflicts with controlling statutes and is otherwise against the manifest weight of the record.

The Commission suggests (at 15) that Ormet will not buy power from anyone other than AEP Ohio "at least for the period of time that Appellant's current rate plan exists, that is, until December 31, 2011," because "[t]hat is the Commission's order." Accordingly, the Commission argues (at 14) "[a]s it is an impossibility for Ormet to leave to shop elsewhere, it cannot return from shopping." From this, the Commission concludes (at 14) that there is no POLR risk for AEP Ohio. These arguments are flawed and the Commission's finding of no POLR risk misapprehends the facts and law and is against the manifest weight of the record.

The Commission's qualified finding that Ormet will not shop through 2011 does not eliminate risk during the entire ten-year term approved by the Commission for the contract. Even on brief the Commission admits (at 19) that "[i]t is impossible to know today what Appellant's rates will be on January 1, 2012" and "[b]ecause the structure of those future rates cannot be known today, it is impossible to know which, if any, of the unknown and unknowable charges should be paid by other customers." Yet, the Commission on brief also states (at 20) that "[t]he POLR charge at issue in this case will assuredly be gone" by 2012. This assumption is telling because it reveals the Commission's true thinking: the Commission's finding of "no POLR risk" is really based on a key *assumption* about matters that are, to use the Commission's own words on brief, "impossible to know today" involving "unknown and unknowable charges." As such, the finding necessarily lacks record support. In any case, there is nothing that precludes AEP

Ohio from proposing a POLR charge in its next SSO or the Commission from accepting it as part of a reasonable package.

The Commission could have approved a three-year contract to be commensurate with AEP Ohio's rate plan for the rest of its customers. The Commission could have committed that, regardless of whatever the future holds during the approved term of the arrangement, AEP Ohio will be made whole for the discount required by the Commission. Instead, the Commission approved a ten-year contract while only examining AEP Ohio's POLR risk for the first three years. This inequitable mismatch fundamentally undercuts the Commission's finding of "no risk."

AEP Ohio also spelled out multiple detailed examples in its Merit Brief to illustrate the many and varied POLR risks associated with the Ormet contract. (AEP Ohio Merit Brief at 34-37, 40.)⁴ While the Commission, Ormet and OCC/OEG only acknowledge a select few of those examples, Ormet does frankly acknowledge regarding the possibility of it shopping during the term of the contract that "[n]o one can predict the future with certainty, and there is always a chance that any party to a contract may be in breach – it is for this reason that many contracts include provisions specifying what

⁴ Contrary to OCC/OEG challenges (at 30-33) that AEP Ohio did not properly raise the issue regarding the potential for modification or termination of the contract on rehearing, AEP Ohio's first assignment of error in its application for rehearing directly challenged the evidentiary basis for the Commission's finding of "no risk" for the 10-year term of the contract. (AEP Ohio Application for Rehearing at 2, 4-5.) In support of its first assignment of error, AEP Ohio specifically complained (at 4-5) that the modifications the Commission made to Ormet's proposed contract reflect the POLR risk associated with this contract and AEP Ohio cited the Commission's general oversight and continuing jurisdiction over the terms of the contract as presenting risk of modification or termination. Clearly, AEP Ohio challenged the record basis for the "no risk" finding on rehearing and was not required to raise each and every one of the supporting record-based points on rehearing in order to be able to continue pursuing this same argument on appeal.

happens if either party breaches the contract, and a large body of contract law deals with this subject.” (Ormet Brief at 18) While this is an honest answer, the factual part of the comment is hardly reassuring for AEP Ohio. Moreover, while the legal part of the comment might hold true if the subject of this appeal was a mutually agreeable, arms-length negotiated contract, it is not relevant here.

In reality, the same POLR risk that formed the basis for the POLR charge adopted in the *ESP Cases* is present under the Ormet arrangement. Factually, Ormet has gone back and forth between market and regulated rates when conditions suited its business needs, even where its prior decision not to return to AEP Ohio was supposed to be permanent. Legally, AEP Ohio’s POLR obligation is *statutory* and will not be eliminated during any part of the ten-year term of the contract (absent further legislative action). Whatever the circumstances are that unfold during the next decade for Ormet’s operations, AEP Ohio will continue to have its statutory POLR obligation and all of the attendant financial risks – regardless of whether the Commission approves a new POLR charge starting in 2012. Beyond those additional points, AEP Ohio rests on the un-rebutted showing it made in its initial brief. (AEP Ohio Merit Brief at 34-41.) Whether considered for three years, or more appropriately for the full ten-year term of the compulsory contract, the POLR risk to AEP Ohio is real and the Commission lacked record support in concluding that there is “no risk” of Ormet shopping.

PROPOSITION OF LAW NO. IV:

There can be no “reasonable arrangement” with AEP Ohio under R.C. 4905.31 where the Commission orders an involuntary contract that causes harm to AEP Ohio’s financial interests.

In Proposition of Law No. IV of its Merit Brief, AEP Ohio supported its understanding of R.C. 4905.31, as amended by SB 221. The “reasonable arrangement” to which the statute refers is a contract and as such there must be mutual assent. This understanding of the phrase “reasonable arrangement” is particularly obvious when one considers that an interpretation that does not require the mutual assent of the utility would permit the Commission to order a utility to provide service to a mercantile customer *outside* its certified service area and then disallow recovery of some or all of the foregone revenues associated with sales that utility otherwise would have made. The new language in R.C. 4905.31 permits a mercantile customer to file reasonable arrangements that relate to the new types of contracts being filed – economic development, energy efficiency and other unique arrangements. (AEP Ohio Brief at 45-47.) The mercantile customers’ ability to file a reasonable arrangement does not support the mistaken interpretation that the affected utility’s consent to the arrangement is unnecessary.

The briefs filed on behalf of the Commission and the Intervening Appellees, taken as a whole, argue that there is no ambiguity in R.C. 4905.31 and that AEP Ohio’s arguments pertaining to the meaning of the statute should be disregarded. AEP Ohio likewise believes that the statute, including the changes incorporated by SB 221, is clear. However, the briefs filed with this Court demonstrate that, if an ambiguity does not exist, then one side or the other is bending the language to suit its position. Whether ambiguity or “bending the language” is in play, the briefs submitted on behalf of the Commission and the Intervening Appellees actually serve to lend support to AEP Ohio’s position.

The Commission’s brief argues that a “better way to think of the ‘unique arrangement’ under R.C. 4905.31 is, not that it is a contract, but rather that it is a tariff

applicable to only one customer.” (Commission Brief at 8.) This is an interesting argument given that the Commission ordered Ormet and AEP Ohio to “file an executed power agreement” with the Commission. (Opinion and Order, p. 16; Ap. at 49.) Contracts are “executed”; tariffs are not. The decision below resulted in an executed contract, per the Commission’s order. (Supp. at 1-32.) The Commission order makes clear that the matter before the Court involves a would-be contract, not a tariff. Moreover, the Commission does not respond to AEP Ohio’s argument that historically arrangements under R.C. 4905.31 were considered to be “special contracts.” (AEP Ohio Merit Brief at 42).

The Commission also contends that the statutory reference to the “parties interested” in the contract includes all of AEP Ohio’s customers as well as anyone that might be affected by the economic effects flowing from the contract, *i.e.*, “everyone in Ohio has an interest in these arrangements.” (Commission Brief, p. 9). The Commission bends the language of the statute to argue that just as a resident of, say Toledo, does not have the ability to “veto” the contract, likewise AEP Ohio does not have that authority. The reference in division (E) to “parties interested” refers back to the introductory paragraph of R.C. 4905.31 which identifies the utility and one or more of its customers, consumers, or employees with whom the utility has entered into the reasonable arrangement. The Commission’s failure to read division (E) in the context of the introductory paragraph of the statute is another example of the Commission’s failure to apply the plain meaning of the statutory words in the context of the entire statute in which they are used.

The Commission refers to *City of Canton v. Pub. Util. Comm.* (1980), 63 Ohio St 2d 76 presumably to make the point that back in 1975, when Ohio Power Company wanted to cancel a special contract under R.C. 49053.31, it sought the Commission's authority for that cancellation. AEP Ohio does not quarrel with the argument that once a special contract had been approved by the Commission, the Commission has authority over the continuing effect of the contract. In contrast, the case now before the Court presents the situation in which one of the parties to the required contract (the utility) is being adversely and significantly affected at the outset.

Ormet's brief suggests that the word "arrangement" as used in R.C. 4905.31 contemplates "a plan for a future event." (Ormet Brief, pp. 10, 11). It argues that the executed power agreement which the Commission ordered the parties to the contract to file is nothing more than "a plan for the sale of power from AEP Ohio to Ormet over the next ten years." (*Id.*). Ormet's definition of "arrangement" has its place when someone is making funeral arrangements or dinner arrangements. It is out of place, however, when the statute refers to a reasonable arrangement in the context of utility regulation.

Even then, however, while the Commission has the authority to modify the proposed reasonable arrangement, that is not to say that the parties to the proposed contract are compelled to proceed with the contract as modified. It happens that in this case it is the utility that is financially harmed by the Commission's modification which requires the offset of recovery of foregone revenues by the amount of the POLR credit. Yet, neither the Commission nor the Intervening Appellees, particularly Ormet, would argue that if the Commission modified the contract in a manner that was financially unacceptable to Ormet that Ormet would have no choice but to take service for ten years

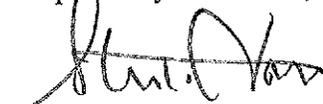
under the terms of the Commission's unacceptably modified contract. AEP Ohio should have the right to not be forced into a contract it finds unacceptable at the outset.

IEU further misses the point when it suggests that in order for AEP Ohio's interpretation of R.C. 4905.31 to be upheld the General Assembly would have had to insert language specifically requiring "the agreement of the public utility." (*Id.* at 11). The existing statutory language which refers to a reasonable arrangement *with* the utility is clear on its face and requires no further clarification.

CONCLUSION

For the foregoing reasons, AEP Ohio respectfully requests that this Court reverse and remand the Commission's decision below.

Respectfully submitted,

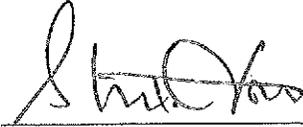


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PROOF OF SERVICE

I certify that Columbus Southern Power Company's and Ohio Power Company's Reply Brief was served by First-Class U.S. Mail upon counsel for all parties of record identified below this 1st day of April, 2010.



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