

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

In the Matter of the Application of Columbus Southern : Case No. 2010-0722  
Power Company and Ohio Power Company to Adjust :  
Their Economic Development Cost Recovery Rider : Appeal from the Public  
Rates : Utilities Commission of Ohio  
:  
: Public Utilities  
: Commission of Ohio  
: Case No. 09-1095-EL-RDR

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**MERIT BRIEF OF APPELLEE/CROSS-APPELLANT  
INDUSTRIAL ENERGY USERS-OHIO**

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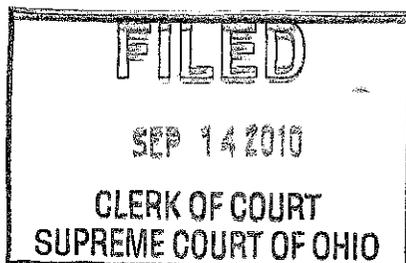
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## **BACKGROUND AND STATEMENT OF FACTS**

### **A. Electric Security Plan Proceeding**

On May 1, 2008, Governor Strickland signed into law Amended Substitute Senate Bill 221 (“SB 221”). SB 221, among many other things, revised Ohio law related to the regulation of electric distribution utilities’ (“EDU”) Standard Service Offer (“SSO”).<sup>1</sup> SB 221 created a new vehicle to offer an SSO called an electric security plan or “ESP.” Under R.C. 4928.143, in order to approve an ESP, the Public Utilities Commission of Ohio (“PUCO”) must find that an ESP is “more favorable in the aggregate” compared to the expected results of a market rate option (“MRO”) plan.<sup>2</sup> SB 221 also established specific periods within which the PUCO must act on an MRO or ESP application. Through R.C. 4928.143(C)(2)(a), the ESP-related discretion given to the PUCO by SB 221 was also effectively subject to an applicant-utility’s unilaterally exercisable right to terminate and withdraw the ESP application if the PUCO modified and approved the ESP application in a manner in which the electric utility disapproves.

On July 31, 2008, the effective date of SB 221, Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”) (collectively, “American Electric Power-Ohio” or “AEP-Ohio”) filed an Application at the PUCO to establish an SSO under the newly-created ESP option.<sup>3</sup> Pursuant to R.C. 4928.143(C)(1), the PUCO was required to issue an Order on

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<sup>1</sup> The SSO is the service offering which incumbent electric utilities must make available to all retail customers not obtaining electricity from a competitive supplier. Under Rule 4901:1-35-01, Ohio Administrative Code, SSO is defined as “an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.” (IEU-Ohio Appx. at 180).

<sup>2</sup> R.C. 4928.143(C)(1) (AEP-Ohio Appx. at 22).

<sup>3</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Application (July 31, 2008) (hereinafter cited as “*AEP-Ohio ESP Proceeding*”).

AEP-Ohio's ESP Application within 150 days, or by December 28, 2008. The PUCO issued its Opinion and Order modifying and approving AEP-Ohio's ESP Application on March 18, 2009, 80 days beyond the 150-day statutory mandate contained in R.C. 4928.143.<sup>4</sup>

Among other things,<sup>5</sup> the PUCO modified AEP-Ohio's proposed ESP by setting what the PUCO characterized as maximum bill increases for OP and CSP during each year of the approved three-year ESP. While AEP-Ohio proposed maximum bill increases of 15% per year, the PUCO limited the total annual bill increases to 7% for CSP and 8% for OP in 2009, 6% for CSP and 7% for OP for 2010, and 6% for CSP and 8% for OP in 2011.<sup>6</sup> The PUCO also modified and approved AEP-Ohio's proposal to create a fuel adjustment clause ("FAC") to recover OP's and CSP's respective fuel costs. The PUCO declared that any authorized FAC revenue increases that exceed the yearly caps (non-FAC revenues are collected first) would be deferred (with interest) for future collection through an unavoidable charge after the end of AEP-Ohio's ESP.<sup>7</sup>

Additionally, the PUCO approved a provider of last resort or "POLR" charge to compensate AEP-Ohio for the alleged risk that its customers might switch to a competitive supplier during the term of the ESP and, after doing so, return to obtain generation supply from AEP-Ohio. The PUCO authorized AEP-Ohio to collect **\$456 million** from customers during the

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<sup>4</sup> *AEP-Ohio ESP Proceeding*, Opinion and Order at 75 (March 18, 2009) (IEU-Ohio Appx. at 122).

<sup>5</sup> Industrial Energy Users-Ohio ("IEU-Ohio") does not attempt to wholly summarize the PUCO's decisions in the AEP-Ohio ESP Proceeding but rather identifies the items of significance that will be discussed further in this Merit Brief.

<sup>6</sup> *Id.* at 22 (IEU-Ohio Appx. at 69).

<sup>7</sup> R.C. 4928.144 (IEU-Ohio Appx. at 179).

ESP period for this alleged risk.<sup>8</sup> The PUCO also approved as part of the ESP the creation of an unavoidable<sup>9</sup> economic development cost recovery rider (“EDR”). The EDR collects costs, incentives, and delta revenue associated with reasonable arrangements approved by the PUCO for economic development and job retention purposes.<sup>10</sup>

After multiple parties filed Applications for Rehearing in April 2009, the PUCO granted rehearing to give itself more time to consider the rehearing applications and eventually issued a substantive Entry on Rehearing on July 23, 2009. The PUCO’s July 23, 2009 Entry on Rehearing largely denied the Applications for Rehearing of AEP-Ohio, IEU-Ohio, and the other Parties to the case. However, the PUCO’s July 23, 2009 Entry on Rehearing announced that, despite the supposed previous rate increase limitations included in its Opinion and Order, there were exceptions to the rule. The PUCO “clarified” that AEP-Ohio’s transmission cost recovery rider (“TCRR”), energy efficiency / peak demand reduction (“EE/PDR”) rider,<sup>11</sup> and any increased charges resulting from a distribution service rate case would be exempted from the total bill rate increases promised in the PUCO’s Opinion and Order.<sup>12</sup> Importantly, these were

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<sup>8</sup> *AEP-Ohio ESP Proceeding*, Opinion and Order at 40 (March 18, 2009) (IEU-Ohio Appx. at 87). This \$456 million has nothing to do with any risk that was demonstrated to exist during the ESP proceeding or any actual cost incurred by AEP-Ohio to insure itself against this risk. *See Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022, Merit Brief of Industrial Energy Users-Ohio at 16-30 (January 25, 2010).

<sup>9</sup> A rider is “unavoidable” when a customer cannot avoid paying for that particular charge even if they choose a competitive supplier for their generation service.

<sup>10</sup> *AEP-Ohio ESP Proceeding*, Opinion and Order at 47 (IEU-Ohio Appx. at 94).

<sup>11</sup> The EE/PDR rider recovers AEP-Ohio’s costs associated with meeting the energy efficiency and peak demand reduction mandates contained in R.C. 4928.66, as enacted in SB 221. The PUCO’s unlawful and unreasonable implementation of the portfolio mandates of SB 221 will likely also come before this Court soon.

<sup>12</sup> *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 9 (AEP-Ohio Appx. at 201).

the only charges the PUCO described in its Orders as being exempt from the rate increase limitations.

IEU-Ohio and CSP eventually filed Second Applications for Rehearing in response to the July 23, 2009 Entry on Rehearing, which the PUCO denied on November 4, 2009. Appeals were then taken by IEU-Ohio, the Office of the Ohio Consumers' Counsel ("OCC"), and AEP-Ohio. The briefing stage in these appeals has finished and, at the time this brief is being filed, the cases await the scheduling of oral arguments before the Court.

**B. Reasonable Arrangements Approved by the PUCO<sup>13</sup>**

Given the steep rate increases effectuated by the PUCO's approval of AEP-Ohio's ESP proposal, customers began seeking alternatives to alleviate some of the impact on their businesses, including the possibility of a reasonable arrangement. A reasonable arrangement is essentially a customized service arrangement for a mercantile customer or group of mercantile customers<sup>14</sup> that, with the approval of the PUCO, allows the EDU to deviate from the requirements of the otherwise applicable standard tariff provided by the EDU. With the enactment of SB 221, R.C. 4905.31 was modified to give customers, as opposed to only EDUs, the opportunity to propose a reasonable arrangement with an EDU for approval by the PUCO.

Ormet Primary Aluminum Corporation ("Ormet") is an AEP-Ohio customer who unilaterally proposed a reasonable arrangement and obtained PUCO approval of its unilaterally

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<sup>13</sup> IEU-Ohio's Merit Briefs in AEP-Ohio's appeals of the Ormet reasonable arrangement case (Ohio Supreme Court Case No. 2009-2060) and Eramet Marietta, Inc.'s ("Eramet") reasonable arrangement case (Ohio Supreme Court Case No. 2010-0723) also provide greater background detail on the respective cases discussed in this subsection.

<sup>14</sup> "Mercantile customer" means "a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states." R.C. 4928.01(A)(19) (AEP-Ohio Appx. at 6).

proposed reasonable arrangement on July 15, 2009.<sup>15</sup> The PUCO-approved reasonable arrangement under which Ormet is currently operating is a long-term arrangement meant to supersede a previously approved temporary reasonable arrangement.<sup>16</sup> The reasonable arrangement is a full requirements contract that provides Ormet, under defined circumstances, generation service priced at a different rate than would otherwise apply under AEP-Ohio's applicable tariffs. In general terms, the structure of the contract provides Ormet with a lower price for electricity when aluminum prices are lower and a higher price for electricity when aluminum prices are higher.

Additionally, another CSP customer, Eramet, unilaterally proposed a reasonable arrangement and obtained PUCO approval of its unilaterally proposed reasonable arrangement on October 15, 2009.<sup>17</sup> The PUCO-approved reasonable arrangement for Eramet is also a full requirements contract that provides Eramet, under defined circumstances, generation service priced at a different rate than would otherwise apply under CSP's applicable tariffs. As part of its reasonable arrangement, Eramet committed to making capital expenditures of at least \$40 million in its Marietta facility by the end of 2014 (with a potential investment of up to \$100

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<sup>15</sup> *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, PUCO Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009) (hereinafter "*Ormet Case*") (IEU-Ohio Appx. at 156).

<sup>16</sup> *In the Matter of the Joint Application of Columbus Southern Power Company and Ohio Power Company and Ormet Primary Aluminum Mill Products Corporation for Approval of a Temporary Amendment to their Special Arrangement*, PUCO Case No. 08-1339-EL-UNC, Finding and Order (January 7, 2009).

<sup>17</sup> *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC, Opinion and Order (October 15, 2009) (hereinafter "*Eramet Case*") (AEP-Ohio Appx. at 411).

million overall in the Marietta facility) as well as promised to maintain a minimum average employment level of 200 people during the 10-year term of its reasonable arrangement.<sup>18</sup>

The difference between what Ormet and Eramet would respectively pay under the otherwise applicable SSO tariff and what Ormet and Eramet pay under their reasonable arrangements is commonly referred to as delta revenue.<sup>19</sup> R.C. 4905.31(E) states, in pertinent part, that reasonable arrangements “may include 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 any such program....” The same code section also states that every reasonable arrangement “shall be under the supervision and regulation of the PUCO, and is subject to change, alteration, or modification by the PUCO.”

Under the PUCO-approved reasonable arrangements, other AEP-Ohio customers pay AEP-Ohio for the delta revenue through the EDR. In its Orders approving reasonable arrangements for Ormet and Eramet, the PUCO required any POLR charges paid by Ormet and Eramet to be credited to the EDR in order to reduce the recovery of delta revenue from other ratepayers inasmuch as the PUCO determined there is no risk that Ormet or Eramet will shop for generation supply and then return to AEP-Ohio as the default service provider.<sup>20</sup>

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<sup>18</sup> *Id.* at 3-4 (AEP-Ohio Appx. at 413-414).

<sup>19</sup> The PUCO recently adopted a definition of “delta revenue” in Rule 4901:1-38-01, Ohio Administrative Code, as “the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission.” (IEU-Ohio Appx. at 182).

<sup>20</sup> *Ormet Case*, Opinion and Order at 13-14 (July 15, 2009) (IEU-Ohio Appx. at 168-169); *Ormet Case*, Entry on Rehearing at 11 (September 15, 2009) (AEP-Ohio Appx. at 87); *Eramet Case*, Opinion and Order at 8-9 (October 15, 2009) (AEP-Ohio Appx. at 418-419).

AEP-Ohio has taken appeals of both the Ormet Case and Eramet Case to this Court. The Ormet Case has been fully briefed and is awaiting oral arguments. The Eramet Case is still being briefed by the Parties to that appeal, including IEU-Ohio. Generally speaking, AEP-Ohio raises the same Propositions of Law and Arguments in its appeals of the Ormet Case and Eramet Case as it raised in the instant EDR Case appeal.

**C. Case No. 09-1095 Proceeding (“EDR Case”)**

On November 13, 2009, AEP-Ohio filed an Application at the PUCO to create and establish a rate for the EDR mechanism approved in its ESP case and, specifically, to recover the delta revenue associated with the Ormet and Eramet reasonable arrangements. In its Finding and Order, consistent with its previous Orders in the Eramet and Ormet cases, the PUCO approved an EDR rate that reflected a credit of POLR charges associated with service to Ormet and Eramet against the EDR.<sup>21</sup> Additionally, for the first time in any PUCO proceeding, the PUCO found that the EDR is not subject to the maximum rate increase limitations described above. The PUCO explained that its list of riders and other mechanisms exempt from the rate increase limitations was not “exhaustive” and that the recovery of delta revenues is permitted by statute and the PUCO’s rules.<sup>22</sup> The PUCO also noted that to find otherwise would result in considerable deferrals being created, including carrying costs, which would be passed on to customers.

On February 5, 2010, IEU-Ohio filed an Application for Rehearing from the PUCO’s January 7, 2010 Finding and Order that raised the issues brought before the Court in the instant appeal. AEP-Ohio also filed an Application for Rehearing on the same day. After granting

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<sup>21</sup> *EDR Case*, Finding and Order at 10 (January 7, 2010) (AEP-Ohio Appx. at 385) (ICN 20).

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

IEU-Ohio's and AEP-Ohio's Applications for Rehearing for the purposes of further considering the matters raised therein, the PUCO denied IEU-Ohio's Application for Rehearing on March 24, 2010. The PUCO's Entry on Rehearing also granted in part and denied in part AEP-Ohio's Application for Rehearing. AEP-Ohio and IEU-Ohio then timely filed their respective Notices of Appeal in this docket.<sup>23</sup>

Pursuant to the PUCO's Finding and Order in the EDR Case, AEP-Ohio filed its proposed semi-annual EDR rate update on February 8, 2010 in Case No. 10-154-EL-RDR.<sup>24</sup> In order to continue its challenge of the PUCO's persistently illegal and unreasonable implementation of the ESP Orders in subsequent AEP-Ohio cases stemming from the approved ESP, IEU-Ohio again raised the same arguments brought before the PUCO in the EDR Case. The PUCO again rejected IEU-Ohio's arguments and PUCO Case No. 10-154-EL-RDR is also currently on appeal in Ohio Supreme Court Case No. 2010-1073.

### **STANDARD OF REVIEW**

R.C. 4903.13 states that “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the Supreme Court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” With regard to the PUCO's determinations regarding questions of fact, the Court has held that it “will not reverse or modify a [PUCO] decision as to questions of fact where the record contains sufficient probative evidence to show that the determination is not manifestly against the weight of the

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<sup>23</sup> IEU-Ohio also filed an Amended Notice of Cross Appeal on May 21, 2010. (IEU-Ohio Appx. at 7).

<sup>24</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Pursuant to Rule 4901:1-38-08(A)(5), Ohio Administrative Code*, PUCO Case No. 10-154-EL-RDR, Finding and Order at 1 (March 24, 2010). In its Finding and Order in the EDR Case, the PUCO ordered AEP-Ohio to file semiannual adjustments to the EDR rates in time to be effective in April and October of each year. *EDR Case*, Finding and Order at 12 (January 7, 2010) (AEP-Ohio Appx. at 387).

evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.”<sup>25</sup> The appellant “bears the burden of demonstrating that the PUCO’s decision is against the manifest weight of the evidence or is clearly unsupported by the record.”<sup>26</sup> As to matters of law, the Court has “complete and independent power of review of all questions of law” in appeals from the PUCO.<sup>27</sup>

## ARGUMENTS<sup>28</sup>

### *PROPOSITIONS OF LAW AS CROSS-APPELLANT*

#### PROPOSITION OF LAW NO. I

**The PUCO’s Finding and Order and March 24, 2010 Entry on Rehearing are unlawful and unreasonable inasmuch as the PUCO has no subject matter jurisdiction over the EDR Case. The PUCO lost jurisdiction over AEP-Ohio’s ESP and all proceedings stemming from the ESP when it failed to issue an order within the 150-day time frame required by R.C. 4928.143.**

As a creature of statute, the PUCO may only exercise that jurisdiction conferred upon it by the Ohio Revised Code.<sup>29</sup> For the reasons demonstrated below, the Court must find as a matter of law that the expiration of the 150-day time clock in SB 221 divested the PUCO of any authority over the initial ESP case as well as all proceedings stemming from the ESP case, including the EDR Case. SB 221 requires the Court to reverse the PUCO’s Orders and remand the case with instructions to immediately 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

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<sup>25</sup> *The Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St.3d 53, 58, 711 N.E.2d 670 (1999).

<sup>26</sup> *Constellation NewEnergy v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767 at ¶50.

<sup>27</sup> *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1977).

<sup>28</sup> Propositions of Law I and II are also addressed in greater detail in IEU-Ohio’s Merit Brief and Reply Brief in Ohio Supreme Court Case No. 2009-2022, which is the appeal of the underlying ESP case.

<sup>29</sup> *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 234, 661 N.E. 2d 1097 (1999).

date of SB 221).<sup>30</sup> The Court should also explicitly bar the PUCO from further entertaining any proposed change in rates stemming from the approved ESP. Finally, the Court should direct the PUCO to refrain from continuing or allowing further judicial or quasi-judicial proceedings of any kind or nature that are connected to AEP-Ohio's ESP unless it does so in accordance with the requirements of Ohio law.

**a. The PUCO's failure to dismiss AEP-Ohio's EDR Case violates R.C. 4928.143 and 4928.141.**

R.C. 4928.143(C)(1) states: "The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date." Pursuant to R.C. 4928.141(A), until the PUCO 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 must continue for the purpose of the utility's compliance with R.C. 4928.141(A).

When interpreting laws passed by the General Assembly, the Court and the PUCO must first apply the text of a statute according to its express terms. "Plain and unambiguous statutory authority leaves no occasion to resort to other rules of construction."<sup>31</sup> Indeed, "where the language of an enactment is clear and construction according to its terms does not lead to absurd

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<sup>30</sup> R.C. 4928.141(A) (AEP-Ohio Appx. at 17).

<sup>31</sup> *State ex rel. Stanton v. Zangerie*, 117 Ohio St. 436, 159 N.E. 829 (1927). The PUCO's precedent explicitly acknowledges the PUCO's obligation to follow this canon of statutory construction. See *In the Matter of Agel Cox, dba Cox's Auction House, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 03-1138-TR-CVF, Finding and Order at 6 (November 6, 2003) (IEU-Ohio Appx. at 45).

or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”<sup>32</sup>

The PUCO failed to issue an Order in the AEP-Ohio ESP proceeding within the 150-day time frame mandated by R.C. 4928.143. Under the plain language of R.C. 4928.143, the PUCO lost subject matter jurisdiction over the ESP Application once the 150-day statutory deadline expired. The PUCO’s loss of jurisdiction over the ESP case further divested the PUCO of jurisdiction over all cases stemming from the ESP, including the EDR Case.

**b. Basic tenets of statutory construction required the PUCO to dismiss the EDR Case and grant IEU-Ohio’s requested relief.**

In *Dorrian v. Scioto Conservancy Dist.*, the 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.”<sup>33</sup> 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.”<sup>34</sup> Additionally, in *State ex rel. Jones v. Farrar*,<sup>35</sup> the Court observed that 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. The *Farrar* Court also explained that “In each instance, it

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<sup>32</sup> *Cleveland Trust Co. v. Eaton*, 21 Ohio St.2d 129, 138, 256 N.E.2d 198 (1970), quoting *United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322 (1929).

<sup>33</sup> *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus.

<sup>34</sup> *Id.* at 107-108.

<sup>35</sup> *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472-473, 66 N.E.2d 531 (1946).

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.”<sup>36</sup>

The PUCO cannot simply ignore the General Assembly’s use of the word “shall.” There is no clear or unequivocal legislative intent that the word “shall” in R.C. 4928.143, as it relates to the 150-day time frame, should be interpreted as “may.” And, in R.C. 4928.143 alone, the word “shall” appears 32 times while the word “may” appears 20 times. The General Assembly’s frequent use of the words “shall” and “may” and its differentiated use of “shall” and “may” throughout R.C. 4928.143 shows that the General Assembly understood the difference and impact between these words. Indeed, the PUCO’s own Merit Brief in the pending appeal of AEP-Ohio’s ESP proceeding admits the PUCO 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.”<sup>37</sup>

Additionally, the context surrounding the passage of SB 221 demonstrates that the General Assembly intended the 150-day time frame 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.<sup>38</sup> While SB 221 was being debated by the General Assembly, three of the four Ohio EDUs were operating under rate stabilization plans (“RSP”) that extended only through the end of calendar year 2008. It was against this timing backdrop that the General Assembly worked to pass SB 221, which became effective on July 31,

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<sup>36</sup> *Farrar*, 146 Ohio St. at 473.

<sup>37</sup> *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022, PUCO Merit Brief at 15 (March 5, 2010) (emphasis added).

<sup>38</sup> *Farrar*, 146 Ohio St. at 473.

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 (July 31, 2008) in order to have their approved ESP plans in place before January 1, 2009.

The remaining provisions of R.C. 4928.143 further demonstrate that the General Assembly required and intended for the 150-day time limit to be mandatory. Not only does R.C. 4928.143 contain a 150-day requirement for the initial ESP Application, it also sets a 275-day time frame on PUCO action on subsequent ESP plans. The inclusion of differing timing requirements demonstrates that the General Assembly was very cognizant of the timing necessary for the initial ESP cases.<sup>39</sup>

The Court's canons of statutory construction counsel towards a finding that the PUCO lost subject matter jurisdiction over AEP-Ohio's ESP, and all proceedings stemming from the ESP, when the 150-day timeframe lapsed without the PUCO issuing an Order in the ESP proceeding.

**c. The PUCO's determination that IEU-Ohio improperly attempted to re-litigate the 150-day subject matter jurisdiction issue is unlawful and unreasonable.**

In addition to raising the 150-day issue in its ordinary appeal of the ESP case as well as all PUCO proceedings stemming from AEP-Ohio's ESP case, IEU-Ohio also specifically brought to this Court the 150-day argument in a stand-alone Complaint for Writ of Prohibition.<sup>40</sup> On January 27, 2010, the Court granted the PUCO and AEP-Ohio Motions to Dismiss the Writ

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<sup>39</sup> See also R.C. 4909.42 for an additional example of the General Assembly obligating the PUCO to act within a stated period of time. (IEU-Ohio Appx. at 178).

<sup>40</sup> *State ex rel. Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-1907.

of Prohibition case.<sup>41</sup> In its March 24, 2010 Entry on Rehearing in the case below, the PUCO declined to reach a decision on the merits of IEU-Ohio's arguments, instead rejecting IEU-Ohio's arguments because the PUCO claimed it was an improper attempt to re-litigate this Court's dismissal of IEU-Ohio's Complaint for Writ of Prohibition.<sup>42</sup> The PUCO's determination is illegal and unreasonable and should be reversed.

First, the Court's determination cannot be considered a determination of the merits of IEU-Ohio's 150-day argument. The Court's dismissal of the Writ of Prohibition only stands for the proposition that the Court determined that IEU-Ohio did not meet the burden of proof associated with the extraordinary remedy of the Writ of Prohibition. The PUCO wrongly and illegally extrapolated a dismissal based on the burden of proof into a decision on the merits of IEU-Ohio's 150-day argument.

The PUCO's reasoning also denies IEU-Ohio the opportunity to obtain the remedy at law that the PUCO pointed to as a basis for granting its Motion to Dismiss IEU-Ohio's Complaint for Writ of Prohibition. In its Motion to Dismiss IEU-Ohio's Complaint for Writ of Prohibition, the PUCO argued that IEU-Ohio had an appropriate remedy at law and therefore did not meet the requirements for issuance of a Writ of Prohibition.<sup>43</sup> However, the PUCO's determination that IEU-Ohio's argument was an improper litigation of the Writ of Prohibition case denied IEU-Ohio the very legal process to obtain a substantive decision that the PUCO told the Court it could rely upon as a basis for dismissal of the Writ of Prohibition.

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<sup>41</sup> See *01/27/2010 Case Announcements*, 2010-Ohio-188.

<sup>42</sup> *EDR Case*, Entry on Rehearing at 5-6 (March 24, 2010) (AEP-Ohio Appx. at 399-400) (ICN 28).

<sup>43</sup> *State ex rel. Indus. Energy Users-Ohio v. Alan R. Schriber, et al.*, Ohio Supreme Court Case No. 2009-1907, Motion to Dismiss Submitted on Behalf of Respondents Alan R. Schriber, *et al.* at 10-11 (November 12, 2009).

The PUCO was also required to freshly consider the 150-day argument in this specific case regardless of the Writ of Prohibition case.<sup>44</sup> As IEU-Ohio demonstrated previously, subject matter jurisdiction is so fundamental to a court's or administrative agency's authority that it can never be waived or forfeited and a court or administrative agency must substantively address a subject matter jurisdiction claim when raised in a case.<sup>45</sup> Issues of subject matter jurisdiction can be raised at any time and a court or administrative agency has the responsibility to determine whether it possesses subject matter jurisdiction over a case.<sup>46</sup>

The PUCO's determination that IEU-Ohio improperly attempted to re-litigate the Writ of Prohibition proceeding illegally misinterpreted this Court's decision to dismiss IEU-Ohio's Writ of Prohibition case, directly contradicts its own advocacy when asking for a dismissal of IEU-Ohio's Writ of Prohibition case, and illegally ignored this Court's precedent dictating that subject matter jurisdiction arguments must be addressed at any stage of any proceeding by the decision-maker. The Court should find that the PUCO's rationale regarding the Writ of Prohibition proceeding was illegal, also find that IEU-Ohio's 150-day subject matter jurisdiction arguments are well-made, and grant the relief requested by IEU-Ohio.

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<sup>44</sup> This issue is still also being considered by the Court in IEU-Ohio's pending appeal of AEP-Ohio's ESP because the Court denied an AEP-Ohio Motion to Strike this argument from IEU-Ohio's Notice of Appeal in that case. *01/22/2010 Case Announcements*, 2010-Ohio-160.

<sup>45</sup> See *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022, Memorandum in Opposition of Industrial Energy Users-Ohio to Motion to Strike by Movants for Intervention as Appellees Columbus Southern Power Company and Ohio Power Company (January 15, 2010). See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235 (2006). See also *State ex rel. Sugardale Foods, Inc. v. Indus. Comm.*, 90 Ohio St.3d 383, 385-386, 738 N.E.2d 1238 (2000).

<sup>46</sup> *Int'l Lottery, Inc. v. Kerouac*, 102 Ohio App. 3d 660, 670, 657 N.E.2d 320 (1<sup>st</sup> Dist. Ham. Cty. 1995); see also *Kontrick v. Ryan*, 440 U.S. 443, 455, 124 S. Ct. 906 (2004).

## **PROPOSITION OF LAW NO. II**

**The PUCO's continuing failure to prohibit AEP-Ohio from accepting the benefits of the higher rates approved in the ESP while AEP-Ohio reserves the right to withdraw and terminate the approved ESP as well as maintain its own legal challenge to the ESP Orders is unlawful and unreasonable under R.C. 4928.141 and 4928.143.**

R.C. 4928.143(C)(1) only permits the PUCO to approve an ESP if it finds that the approved ESP, which the PUCO may modify before approving, is "more favorable in the aggregate" as compared to the expected results of an MRO plan. Additionally, R.C. 4928.143(C)(2)(a) permits an EDU such as AEP-Ohio to withdraw, and thereby terminate, an ESP application when modifications made by the PUCO are not acceptable to the EDU. Upon such withdrawal and termination, the EDU may file a new ESP application under R.C. 4928.143 or an MRO under R.C. 4928.142. Further, R.C. 4928.141 states plainly that:

Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, 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, an EDU cannot accept the benefits of the rates approved in an ESP while simultaneously preserving the right to withdraw and terminate its approved ESP as well as filing its own challenges to the lawfulness and reasonableness of the very ESP orders that authorize higher rates for the EDU.

In its March 24, 2010 Entry on Rehearing, the PUCO determined (again) that this issue was not ripe for review inasmuch as AEP-Ohio has not filed a notice of intent to withdraw its

ESP Application.<sup>47</sup> The PUCO's decision is wrong and the Court should reverse. IEU-Ohio raised a valid legal issue, the resolution of which would not be premature and which would have an instant and material effect on this case. AEP-Ohio cannot withhold its decision on withdrawal and termination, contest the lawfulness of the PUCO's Orders in the AEP-Ohio ESP Proceeding 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.

The PUCO's Orders in the EDR Case should be overturned inasmuch as they illegally permit AEP-Ohio to enjoy the benefits (higher rates) made possible by the ESP Orders while AEP-Ohio simultaneously retains the ability to terminate the ESP as well as bring legal challenges to the very ESP Orders that permit AEP-Ohio to charge those higher rates. The PUCO's Orders illegally and unreasonably permit AEP-Ohio to have the best of all worlds and the Court should reverse.

### **PROPOSITION OF LAW NO. III**

**The PUCO's Finding and Order and March 24, 2010 Entry on Rehearing are unlawful and unreasonable inasmuch as the brand new exception for the EDR from the maximum percentage increases permitted in the ESP violates the Commission's precedent and unreasonably increases customers' rates.**

The Court should reverse the PUCO's decision to exempt the EDR from the maximum rate increases set out by the PUCO in AEP-Ohio's ESP case. The PUCO has no justification for its surprise modification of the ESP and its decision unreasonably increased customers' bills to a magnitude rejected less than a year earlier in the ESP case.

On December 11, 2009, IEU-Ohio filed a Motion to Consolidate the EDR case with the pending AEP-Ohio cases to increase its 2010 rates up to the maximum percentages permitted in the ESP Orders. IEU-Ohio observed in its Motion to Consolidate that it appeared that AEP-Ohio

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<sup>47</sup> *EDR Case*, Entry on Rehearing at 6 (March 24, 2010) (AEP-Ohio Appx. at 400) (ICN 28).

believed that Rider EDR was excluded from the maximum rate increase percentages included in its approved ESP.<sup>48</sup> In its Finding and Order, the PUCO (for the first time) found that Rider EDR is not subject to the maximum rate increase limitations. The PUCO explained that its list of riders and other mechanisms exempt from the rate increase limitations in its Entry on Rehearing in the ESP Case was not “exhaustive” and that the recovery of delta revenues is permitted by statute and the PUCO’s rules.<sup>49</sup> The PUCO also stated that finding otherwise would result in considerable deferrals being created, including carrying costs, which would be passed onto customers.<sup>50</sup>

The Court should reverse the PUCO’s unlawful Orders inasmuch as they are contrary to its own precedent. As this Court has stated, “When the PUCO has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified. We have previously articulated this concern in *Cleveland Elec. Illuminating Co.*, *supra*, 42 Ohio St.2d at 431, 330 N.E.2d 1, as follows: ‘\* \* \* Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.’”<sup>51</sup>

Nowhere does the PUCO mention in its July 23, 2009 Entry on Rehearing or any other Order in AEP-Ohio’s ESP proceeding that any other rider or other charge will be excluded from the maximum revenue increase limitations. Nor does the PUCO indicate or give any hint that the list of exemptions (which it recited twice in the July 23, 2009 Entry on Rehearing) was not

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<sup>48</sup> See *EDR Case*, Motion to Consolidate at 6, FN 9 (December 11, 2009).

<sup>49</sup> *EDR Case*, Finding and Order at 10 (AEP-Ohio Appx. at 385) (ICN 20).

<sup>50</sup> *Id.*

<sup>51</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984).

exhaustive. The PUCO's Entry on Rehearing made it clear that only the energy efficiency / peak demand reduction ("EE/PDR") Rider and the transmission cost recovery rider ("TCRR") as well as any increase from a distribution rate case are exempt from the maximum rate increase limitations.

Specifically, the July 23, 2009 Entry on Rehearing enumerated the exempted charges, saying "Additionally, the Commission clarifies that the Transmission Cost Recovery (TCR) rider should not impact the allowable total percentage increase. ... Similarly, any future adjustments to the EE/PDR Rider are excluded from the allowable total percentage increases. ... We further clarify that the phase-in/deferral structure does not include revenue increases associated with any distribution base rate case that may occur in the future."<sup>52</sup> Even more succinctly, the PUCO again listed in its Entry on Rehearing the riders that would be exempt from the maximum rate increase limitations, stating "As discussed in findings (27) and (28) above in regard to the TCR, we clarify that the percentage cap increase on total customer bills does not include the EE/PDR rider or future distribution base rates established pursuant to a separate proceeding."<sup>53</sup>

Simply put, the PUCO provided no justification for why it modified its ESP Orders to suddenly provide AEP-Ohio another revenue stream outside of the supposed maximum rate increase levels set forth in the ESP Orders. To accept the PUCO's explanation that its listing of previous exemptions from the maximum rate increase percentages was not exhaustive would essentially render this Court's precedent useless as the PUCO could claim in any proceeding that it did not intend for its Orders to be constraining even though it did not give the slightest hint that it was leaving open the possibility of changing its mind in the future. The PUCO's Finding and Order and March 24, 2010 Entry on Rehearing squarely frustrate the "predictability which is

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<sup>52</sup> *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 9 (AEP-Ohio Appx. at 201).

<sup>53</sup> *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 31 (AEP-Ohio Appx. at 223).

essential in all areas of the law” as well as the price stability and predictability critical to Ohio customers that Governor Strickland and the General Assembly promised SB 221 would bring.<sup>54</sup> The PUCO’s failure to follow its own precedent is unlawfully outside the institutional constraints requiring the PUCO to follow its own precedent and the Court should reverse the PUCO’s decision.

The PUCO’s decision is also unreasonable inasmuch as it piles on additional increases for customers at a most precarious time for Ohio’s economy. As this Court knows, Ohio has been especially hard hit by the downturn in the economy. In the ESP Opinion and Order, the PUCO determined that customers could not absorb the annual 15% increases proposed by AEP-Ohio and instead instituted the maximum bill increases previously described.<sup>55</sup> However, the PUCO’s decision essentially placed some larger customers on the same path the PUCO found untenable only 11 months after the PUCO’s original ESP Order. The base 2010 increases of 6% for CSP customers and 7% for OP customers, combined with the rate increases approved in the EDR Case as well as AEP-Ohio’s proposed total bill increases of up to 4% through its EE/PDR Rider that was pending at the time of the PUCO’s Orders, totaled increases of over 10% for 2010 for some larger customers’ bills.<sup>56</sup> These increases did not include an adjustment to the TCRR

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<sup>54</sup> See R.C. 4928.143(D); R.C. 4928.144 (AEP-Ohio Appx. at 23; IEU-Ohio Appx. 179). In his press release accompanying the signing of SB 221, the Governor stated: “This bill, Senate Bill 221, will ensure predictability of affordable energy prices and maintain state controls necessary to protect Ohio jobs and businesses.” See <http://www.governor.ohio.gov/Default.aspx?tabid=622> (last accessed on August 11, 2010).

<sup>55</sup> *AEP-Ohio ESP Proceeding*, Opinion and Order at 22 (IEU-Ohio Appx. at 69). “Nonetheless, given the current economic climate, we believe that the 15 percent cap proposed by the Companies is too high.” The PUCO noted in a footnote that its belief was confirmed by various letters filed in the AEP ESP docket.

<sup>56</sup> The Stipulation and Recommendation in AEP-Ohio’s EE/PDR portfolio plan proceeding proposed up to 4% total bill increases for some larger customers solely attributable to the proposed EE/PDR Rider. The PUCO approved the Stipulation on May 13, 2010. See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program*

due in June 2010 or possible upward adjustments to distribution rates resulting from a distribution rate case. Thus, the PUCO's decision to, for the first time, exempt the EDR from the revenue increase limitations unreasonably placed customers in nearly the same position that the PUCO found untenable when it approved AEP-Ohio's ESP in March 2009.

The PUCO's Orders are unlawful inasmuch as they, without justification, violate this Court's precedent and the PUCO's own recent precedent. Further, the Orders are unreasonable inasmuch as they unfairly pile on rate increases outside of the maximum rate increases promised to customers at a time when customers can least afford rate increases. The Court should reverse the PUCO's decisions and remand with instructions to place the EDR under the maximum rate increase limitations approved in AEP-Ohio's ESP proceeding.

#### **PROPOSITION OF LAW NO. IV**

**The Finding and Order and March 24, 2010 Entry on Rehearing in the EDR Case are unreasonable inasmuch they permit AEP-Ohio to calculate the carrying costs on deferred EDR delta revenues as the weighted average cost of long-term debt without any evaluation of possible lesser cost alternatives.**

In calculating the carrying costs associated with the EDR delta revenue, AEP-Ohio proposed to use the weighted average costs of each operating company's respective long-term debt. The PUCO adopted AEP-Ohio's proposal to use the average cost of each operating company's long-term debt, reasoning that it is a more appropriate mechanism under the semiannual reconciliation process prescribed for EDR rates under Rule 4901:1-38-08, O.A.C.<sup>57</sup> The PUCO also directed AEP-Ohio to use, on a going-forward basis, the interest rates from its latest-approved filing for the calculation of carrying costs. On rehearing, the PUCO declined

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*Portfolio Plan and Request for Expedited Consideration*, PUCO Case Nos. 09-1089-EL-POR, *et al.*, Opinion and Order at 22 (May 13, 2010) (IEU-Ohio Appx. at 146).

<sup>57</sup> *EDR Case*, Finding and Order at 9 (AEP-Ohio Appx. at 384) (ICN 20).

IEU-Ohio's request to investigate whether a different carrying cost than that approved by the PUCO might provide lower rates for customers.<sup>58</sup>

The Court should reverse the PUCO's Orders inasmuch as they are unreasonable. The PUCO simply accepted AEP-Ohio's request with no examination of possible lower cost alternatives that might benefit customers. The PUCO made no inquiry as to whether a different carrying cost rate would provide a lower interest rate that customers will pay for AEP-Ohio to carry this debt on its books. The PUCO avers in its March 24, 2010 Entry on Rehearing that it did make such an effort in its Finding and Order.<sup>59</sup> However, there is no substantive explanation or indication from the PUCO as to why or how the PUCO came to the conclusion that the debt rate proposed by AEP-Ohio is reasonable or that the use of a lesser cost alternative for customers is not available or warranted. The Court should reverse the PUCO's unreasonable Orders and remand with instructions directing the PUCO to undertake a review to determine whether a lower carrying cost rate is available and appropriate in this instance.

### ***PROPOSITIONS OF LAW AS APPELLEE***

#### **PROPOSITION OF LAW V**

**The PUCO has statutory authority to approve a reasonable arrangement filed without the support or consent of the electric distribution utility.**

AEP-Ohio asserts in its Merit Brief that the PUCO lacks the statutory authority to approve a reasonable arrangement with a mercantile customer over the objection of the mercantile customer's distribution utility.<sup>60</sup> AEP-Ohio's tortured interpretation of R.C. 4905.31, as amended by SB 221, is wrong and should be rejected by the Court.

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<sup>58</sup> *EDR Case*, Entry on Rehearing at 7 (March 24, 2010) (AEP-Ohio Appx. at 401) (ICN 28).

<sup>59</sup> *Id.*

<sup>60</sup> AEP-Ohio Merit Brief at 26-30.

AEP-Ohio correctly points out that prior to the enactment of SB 221, R.C. 4905.31 allowed only a "public utility" to file a schedule or enter into "any reasonable arrangement" with another public utility or with "its customers, consumers or employees" providing for certain enumerated outcomes, including variable rates and different classifications of service.<sup>61</sup> R.C. 4905.31 also provided and continues to provide that no "such arrangement" was lawful until it was filed with and approved by the PUCO and that the public utility was required to conform its rates to the arrangement upon PUCO approval.<sup>62</sup> AEP-Ohio also correctly recognizes that SB 221 amended R.C. 4905.31 to permit mercantile customers to seek approval of a reasonable arrangement or schedule where only the EDUs were permitted to do so before.<sup>63</sup>

However, and even though the meaning of R.C. 4905.31 is not ambiguous, AEP-Ohio spends a significant portion of its Merit Brief to concoct a statutory interpretation that would have this Court conclude that no reasonable arrangement or schedule can be enabled without the EDU's consent and acceptance. In other words, AEP-Ohio urges this Court to find that AEP-Ohio has an absolute veto over the authority delegated to the PUCO by R.C. 4905.31 to enable a reasonable arrangement or schedule that is filed by a mercantile customer or group of such customers. The PUCO has already rejected AEP-Ohio's invitation to modify SB 221.<sup>64</sup> The relief AEP-Ohio seeks on appeal is unlawful and it does not take an exercise in statutory interpretation to conclude as much.

SB 221 explicitly expanded the persons eligible to submit such an arrangement or schedule for the PUCO's consideration and approval by adding mercantile customers to the

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<sup>61</sup> AEP-Ohio Merit Brief at 27.

<sup>62</sup> Former R.C. 4905.31 (IEU-Ohio Appx. at 176).

<sup>63</sup> AEP-Ohio Merit Brief at 27.

<sup>64</sup> *Ormet Case*, Entry on Rehearing at 14-18 (AEP-Ohio Appx. at 90-94). *Eramet Case*, Entry on Rehearing at 6 (AEP-Ohio Appx. at 437).

category of entities that are entitled to submit a proposed reasonable arrangement to the PUCO for its consideration and approval. Specifically, as a result of SB 221, R.C. 4905.31(E) now states:

No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility ***or the mercantile customer or group of mercantile customers of an electric distribution utility*** and is posted on the commission's docketing information system and is accessible through the internet. (Emphasis added.)

Tellingly, despite expanding the scope of persons eligible to submit a proposed reasonable arrangement or schedule to the PUCO, the General Assembly did not modify the requirement that upon PUCO approval of such a reasonable arrangement, “[e]very such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the PUCO in such form and at such times as the PUCO directs.”<sup>65</sup> There is no statutory language that says, “***upon the agreement of the public utility with the Commission-approved reasonable arrangement***, the public utility is required to conform its rates to the arrangement.” The General Assembly could have included such a requirement and it did provide an EDU with a regulator-disabling veto where the PUCO modifies (acting under R.C. 4928.143) a proposed electric security plan. But, the General Assembly did not delegate similar authority to AEP-Ohio, or any other EDU, the right to trump a PUCO determination rendered pursuant to R.C. 4905.31.

The clear and plain language in R.C. 4905.31 states that: (1) either an electric utility, mercantile customer, or group of mercantile customers may submit a proposed reasonable

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<sup>65</sup> R.C. 4905.31(E) (AEP-Ohio Appx. at 4).

arrangement or schedule to the PUCO for the PUCO's consideration and approval; (2) the proposed reasonable arrangement may become lawful and effective only upon PUCO approval; and, (3) the utility must then conform its rates to the PUCO-approved reasonable arrangement.

Finally, in addition to being contrary to R.C. 4905.31, AEP-Ohio's proposition of law is contrary to other provisions of Chapter 49 of the Ohio Revised Code. For example, a public utility is specifically prohibited from charging or demanding any unjust or unreasonable charge or a charge in excess of the charge authorized by the PUCO.<sup>66</sup> Further, before a public utility can bill and collect charges for the services it provides, it must have the required regulatory approvals to impose such rates and charges and it must publish the rates and charges in a schedule that is on file with the PUCO.<sup>67</sup> And, only the Ohio Supreme Court has the power to review, suspend or delay any order made by the PUCO.<sup>68</sup> Thus, AEP-Ohio's request that the PUCO rewrite R.C. 4905.31 to equip AEP-Ohio with an absolute veto over the PUCO's authority to determine, in accordance with the law, the rates and charges that a utility must use for billing purposes is also in direct conflict with the clear and plain requirements of other sections of the Ohio Revised Code.

The Court should reject AEP-Ohio's Proposition of Law and directly affirm the obvious legislative changes to R.C. 4905.31 made in SB 221. The Court should unequivocally declare that the PUCO may approve a reasonable arrangement with a mercantile customer (or group of mercantile customers) regardless of whether the EDU consents to the approved reasonable arrangement.

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<sup>66</sup> R.C. 4905.22 and 4909.17 (IEU-Ohio Appx. at 174, 177, respectively).

<sup>67</sup> R.C. 4905.30 (IEU-Ohio Appx. at 175).

<sup>68</sup> R.C. 4903.12 (IEU-Ohio Appx. at 173).

## **PROPOSITION OF LAW VI**

**The PUCO has statutory authority to determine the extent to which an EDU may recover foregone revenue resulting from a reasonable arrangement.**

AEP-Ohio asserts that the PUCO does not have discretion to grant or deny recovery of revenue foregone under a reasonable arrangement approved by the PUCO.<sup>69</sup> AEP-Ohio's assumed right to collect all delta revenues associated with any reasonable arrangement is not found in R.C. 4905.31 or any PUCO precedent. It is, once again, based upon AEP-Ohio's tortured and contrived statutory interpretation of R.C. 4905.31. AEP-Ohio's assertion is wrong and the Court should recognize the flaws in AEP-Ohio's arguments.

Quite simply, R.C. 4905.31 grants the PUCO discretion to consider and address issues related to requests to recover delta revenue. Specifically, R.C. 4905.31(E) states that a schedule or arrangement concerning a public utility "*may* include 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 forgone as a result of any such program." (Emphasis added). As the PUCO previously found, the word "may" in R.C. 4905.31 indicates that the collection of delta revenue by a public utility is a matter for the PUCO's discretion.<sup>70</sup>

This Court should affirm the PUCO's straight-forward, reasonable, and lawful ruling regarding its discretion to allow the collection of delta revenue. AEP-Ohio's advocacy position asks the Court to ignore what is plain and obvious on the face of the statute. The Court should affirm the PUCO's decision appropriately recognizing its discretion related to the recovery of delta revenue.

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<sup>69</sup> AEP-Ohio Merit Brief at 6-12.

<sup>70</sup> *Ormet Case*, Entry on Rehearing at 10-11 (September 15, 2009) (AEP-Ohio Appx. at 86-87). *Eramet Case*, Entry on Rehearing at 5-6 (March 24, 2010) (AEP-Ohio Appx. at 436-437).

## **PROPOSITION OF LAW VII**

**The PUCO's decision to require AEP-Ohio to credit POLR revenue associated with the Eramet and Ormet reasonable arrangements against the delta revenue recovered from customers is both lawful and reasonable.**

The PUCO held in both the Eramet and Ormet reasonable arrangement cases that AEP-Ohio must credit the POLR revenue associated with service to Eramet and Ormet against the delta revenue AEP-Ohio would collect from other customers. The PUCO reasoned that, because AEP-Ohio will be Ormet's and Eramet's exclusive service provider for the term of their respective reasonable arrangements, there is no risk that Ormet or Eramet will shop for a competitive supplier during the term of AEP-Ohio's ESP and return to AEP-Ohio's SSO and therefore AEP-Ohio will incur no costs for providing POLR service that can be recovered under R.C. 4905.31.<sup>71</sup> Accordingly, in the instant case on appeal, the PUCO again directed AEP-Ohio to credit the full amount of the POLR component of the tariff rate that would otherwise apply to Ormet and Eramet on a per megawatt hour ("MWh") basis to the EDR.<sup>72</sup>

The Court should affirm the PUCO's decision to spare other customers from paying for non-existent POLR risk connected to AEP-Ohio service to Ormet and Eramet. The arguments raised by AEP-Ohio are easily refuted and should be rejected by the Court.

**a. The PUCO's decisions do not contradict the terms of AEP-Ohio's approved ESP.**

AEP-Ohio first incorrectly avers that the PUCO's decision in this proceeding conflicts with the Orders in AEP-Ohio's ESP case. Specifically, AEP-Ohio argues that the PUCO's decision to require AEP-Ohio to credit POLR revenues against the delta revenue resulting from Ormet's and Eramet's reasonable arrangement conflicts with the PUCO's decision in its ESP

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<sup>71</sup> *Ormet Case*, Entry on Rehearing at 11 (September 15, 2009) (AEP-Ohio Appx. at 87). *Eramet Case*, Entry on Rehearing at 5-6 (March 24, 2010) (AEP-Ohio Appx. at 436-437).

<sup>72</sup> *EDR Case*, Finding and Order at 10 (January 7, 2010) (AEP-Ohio Appx. at 385) (ICN 20).

case that customers taking SSO service could not avoid paying the POLR charge by agreeing not to shop.<sup>73</sup>

The PUCO succinctly and completely addressed this issue in both the Ormet and Eramet proceedings. There is no conflict inasmuch as the PUCO's ESP decision applied to customers taking service under AEP-Ohio's SSO and neither Ormet nor Eramet are taking AEP-Ohio's SSO service; they are served pursuant to reasonable arrangements approved by the PUCO. Thus, the PUCO specifically distinguished its ruling regarding POLR charges for customers taking service pursuant to PUCO-approved reasonable arrangements. In the Ormet case, the PUCO observed in its Entry on Rehearing:

Under the unique arrangement, Ormet will *not* be receiving service under AEP-Ohio's standard service offer; instead, Ormet will be receiving service under a unique arrangement. Although AEP-Ohio posits that this is a distinction without a difference, the Commission notes that service under a unique arrangement is authorized by a different statute, Section 4905.31, Revised Code, than service under a standard service offer, Section 4928.141, Revised Code. By its very nature, service under a unique arrangement provides for service under different prices, terms, and conditions than service under a standard service offer. In fact, in this proceeding, AEP-Ohio, enumerating several factors that it believes distinguishes Ormet from customers who are on the standard service offer, has argued that Ormet should not receive standard service offer terms for security deposits and advance payments. The Commission agrees that Ormet is different from customers on the standard service offer, and one of those differences is that Ormet has committed to AEP-Ohio to be its exclusive supplier. Therefore, since there is no risk that Ormet will shop during AEP-Ohio's ESP, Ormet does not present the same POLR risk as customers on the standard service offer as claimed by AEP-Ohio.<sup>74</sup>

AEP-Ohio fails to address this important and pivotal distinction. The Court should affirm the PUCO's decision.

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<sup>73</sup> AEP-Ohio Merit Brief at 16-18.

<sup>74</sup> *Ormet Case*, Entry on Rehearing at 11 (September 15, 2009) (emphasis in original, citation omitted) (AEP-Ohio Appx. at 87).

Additionally, AEP-Ohio argues that AEP-Ohio's ESP, as a package, is more favorable in the aggregate than the expected results of an MRO. Thus, by modifying the POLR piece of the package, AEP-Ohio asserts the PUCO undermines the balance of interests reached in the ESP case.<sup>75</sup> AEP-Ohio's argument is erroneous at best for several reasons.

First, as the PUCO noted in the Ormet Case, its decision that AEP-Ohio's ESP was more favorable in the aggregate than the expected results that would otherwise apply under the MRO option "does not imply that the electric utility's ESP is the only basis for setting rates. The rates established by a reasonable arrangement under Section 4905.31, Revised Code, will frequently differ from the rates established under an ESP."<sup>76</sup> Second, AEP-Ohio has not accepted the ESP. In fact, CSP has appealed a portion of its ESP to the Court itself.<sup>77</sup> It is beyond reason for AEP-Ohio to argue that the overall package and balancing of interests reached in the ESP cases is undermined by a POLR offset to recovery of revenues when AEP-Ohio has not yet accepted the ESP and is itself challenging the "balance." Third, in the ESP Case, AEP-Ohio argued that "[t]he public interest is served if the ESP is more favorable in the aggregate than the expected results of an MRO."<sup>78</sup> AEP-Ohio calculated that the ESP is more favorable than an MRO by approximately \$292 million for CSP and \$262 million for OP.<sup>79</sup> Similarly, the PUCO concluded, "Based upon our opinion and order and using Staff witness Hess' methodology of the quantification of the ESP v. MRO comparison, as modified herein, we believe that the cost of the

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<sup>75</sup> AEP-Ohio Merit Brief at 18-20.

<sup>76</sup> *Ormet Case*, Entry on Rehearing at 11-12 (September 15, 2009) (AEP-Ohio Appx. at 87-88).

<sup>77</sup> *Columbus Southern Power Co. v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2298, Notice of Appeal of Columbus Southern Power Company (December 22, 2009).

<sup>78</sup> *AEP-Ohio ESP Proceeding*, Opinion and Order at 69 (March 18, 2009) (IEU-Ohio Appx. at 116).

<sup>79</sup> *Id.* at 70 (IEU-Ohio Appx. at 117).

ESP is \$673 million for CSP and \$747 million for OP, and the cost of the MRO is \$1.3 billion for CSP and \$1.6 billion for OP.”<sup>80</sup> Clearly no level of offset to the POLR charges in this case would reach the level of tipping the scale towards an MRO being more favorable than AEP-Ohio’s unaccepted ESP. In fact, even if the entire POLR revenue requirement for CSP of \$97.4 million and \$54.8 million for OP was wiped out, according to AEP-Ohio’s own calculations, the ESP would still be more favorable in the aggregate than an MRO.

AEP-Ohio’s claims that the PUCO’s decision runs contrary to its approved ESP are meritless and should be rejected.

**b. Preventing AEP-Ohio customers from paying for non-existent risk associated with the Eramet and Ormet reasonable arrangements does not violate Ohio’s state energy policy or contradict the public interest.**

AEP-Ohio also argues that, because the reasonable arrangements include an exclusive supplier clause, the PUCO’s decision violates the policy of the State to ensure diversity of electricity supplies and suppliers, to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment, and to ensure effective competition in the provision of retail electric service.<sup>81</sup> AEP-Ohio characterizes the PUCO’s decision on this issue as unduly restrictive of retail competition. Additionally, CSP asserts that exclusive supplier provisions contradict “the public interest, as expressed in Ohio’s policy adopted in SB 3 and SB 221” and it recommends that the Court consider exclusive supplier provisions “void against public policy and unenforceable.”<sup>82</sup> Both AEP-Ohio’s characterization of the PUCOs rationale and AEP-Ohio’s argument that a

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<sup>80</sup> *Id.* at 72 (IEU-Ohio Appx. at 119).

<sup>81</sup> AEP-Ohio Merit Brief at 22-24.

<sup>82</sup> AEP-Ohio Merit Brief at 25-26.

reasonable arrangement with an exclusive supplier clause necessarily violates the policy of the State are incorrect.

As the PUCO pointed out in the Ormet Case, R.C. 4905.31 specifically states that nothing in Chapter 4928, Revised Code, “including the policy provisions of Section 4928.02, Revised Code, should be construed as prohibiting a reasonable arrangement for the supply of retail electric service.”<sup>83</sup> Further, the PUCO noted in the Ormet case that this is “not an instance in which the electric utility is seeking to become a customer’s exclusive electric supplier as a condition of a unique arrangement. Rather, it is Ormet who is committing to AEP-Ohio to be its exclusive electric supplier. In a competitive retail market, a consumer has the right to choose to enter into a long-term forward contract for generation service.”<sup>84</sup> In its Entry on Rehearing in the Eramet Case, the Commission observed that, one of the policies of the state, as set forth in Section 4928.02(A), Revised Code, is to “ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service.”<sup>85</sup> In this instance, Eramet has chosen to take service from CSP pursuant to the reasonable arrangement in order to secure reliable electric service at a reasonable, predictable price.<sup>86</sup>

Additionally, the Commission found that the concept of customer choice functions as a “legitimate interest” that outweighs the public policy considerations upon which AEP-Ohio

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<sup>83</sup> *Ormet Case*, Entry on Rehearing at 13 (September 15, 2009) (AEP-Ohio Appx. at 89). *See also, Ormet Case*, Opinion and Order at 13-14 (July 15, 2009) (IEU-Ohio Appx. at 168-169).

<sup>84</sup> *Ormet Case*, Entry on Rehearing at 13 (September 15, 2009) (AEP-Ohio Appx. at 89). *See also, Eramet Case*, Opinion and Order at 7 (October 15, 2009) (AEP-Ohio Appx. at 417).

<sup>85</sup> *Eramet Case*, Entry on Rehearing at 4 (March 24, 2010) (AEP-Ohio Appx. at 435).

<sup>86</sup> *Id.*

focuses.<sup>87</sup> And, the authorities cited by AEP-Ohio, specifically a section from Williston on Contracts and *Taylor Building Corp. of America v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938 (hereinafter “*Taylor*”), do not stand for the assertions presented by AEP-Ohio. Specifically, *Taylor* does not stand for the proposition that contracts must be declared unconscionable and void where the contract purports to violate important public policies. In fact, in *Taylor*, the Court found that the contract language in question (an arbitration clause), supported the public policy in favor of arbitration and, thus, was not unconscionable despite other questionable aspects of the clause.<sup>88</sup> Additionally, the portion of Williston referenced does not address a situation in which there are conflicting public policies and statutory authority specifically enabling the contract, such as the case here. AEP-Ohio’s reliance on Williston and *Taylor* are misplaced.

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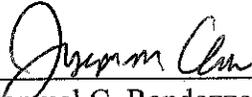
<sup>87</sup> *Id.* See AEP-Ohio Merit Brief at 25, citing 8 Williston on Contracts (4<sup>th</sup> Ed. 1998) 43, Section 18:7.

<sup>88</sup> *Taylor*, 117 Ohio St.3d at 357, 368.

**CONCLUSION**

IEU-Ohio respectfully requests that the Court reverse the PUCO's Orders in accordance with the arguments in Propositions of Laws I through IV and affirm the PUCO's Orders in accordance with the arguments in Propositions of Law V through VII.

Respectfully submitted,



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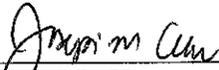
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Merit Brief and Appendix of Appellee/Cross-Appellant Industrial Energy Users-Ohio* was sent by ordinary U.S. mail, postage prepaid, to the parties listed below this 14th day of September 2010.

  
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