ORIGINAL

IN THE SUPREME COURT OF OHIO

Columbus Southern Power Company	:	**Case No. 10-723**
	:	
Appellant,	:	
	:	**Appeal from Public**
v.	:	**Utilities Commission of Ohio**
	:	
The Public Utilities Commission of Ohio,	:	**Public Utilities**
	:	**Commission of Ohio**
Appellee.	:	**Case No. 09-516-EL-AEC**

REPLY BRIEF OF APPELLANT COLUMBUS SOUTHERN POWER COMPANY

Steven T. Nourse (0046705)
Counsel of Record
Matthew J. Satterwhite (0071972)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Counsel for Appellant,
Columbus Southern Power Company

Richard Cordray (0038034)
Attorney General of Ohio
William L. Wright (0018010)
Chief, Public Utilities Section
Thomas McNamee (0017352)
Counsel of Record
Thomas G. Lindgren (0039210)
Werner L. Margard, III (0024858)
Assistant Attorneys General
180 East Broad Street
Columbus, Ohio 43215-3793
Telephone: (614) 644-8698
Facsimile: (614) 644-8764
thomas.mcnamee@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
werner.margard@puc.state.oh.us

Counsel for Appellee,
Public Utilities Commission of Ohio

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Lisa G. McAlister (0075043)
Counsel of Record
Thomas L. Froehle (0061830)
McNees, Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215-4228
lmcalister@mwncmh.com
tfroehle@mwncmh.com

**Counsel for Intervening Appellee,
Eramet Marietta, Inc**

Samuel C. Randazzo (00016386)
Counsel of Record
Joseph M. Clark (0080711)
McNees, Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215-4228
sam@mwncmh.com
jclark@mwncmh.com

**Counsel for Intervening Appellee,
Industrial Energy Users - Ohio**

Janine L. Migden-Ostrander (0002310)
Consumers' Counsel
Maureen R. Grady (0020847)
Counsel of Record
Michael E. Idzkowski (0062839)
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (614) 466-8574
Facsimile: (614) 466-9475
grady@occ.state.oh.us
idzkowski@occ.state.oh.us

**Counsel for Intervening Appellee,
Office of the Ohio Consumers' Counsel**

INTRODUCTION

Columbus Southern Power (CSP) will address the significant opposing arguments being made and otherwise rest on the dispositive arguments set forth in CSP's initial brief, because it cannot possibly respond in this 20-page reply brief to all of the points argued in the four opposing briefs filed by appellees (totaling more than 100 pages).

STANDARD OF REVIEW

Initially regarding the standard of review for this appeal, there were two erroneous points made in intervening appellee briefs that CSP will briefly address. First, IEU alone argues (at 9-10) that it was a "fatal flaw" for CSP not to apply the three prongs of the test applicable to contesting a partial Stipulation of issues, *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126. Consequently, IEU invites the Court should summarily uphold the Commission's decision without addressing appellant's claims. IEU's invitation should be rejected. Eramet's Stipulation below, which was supported only by the Commission's Staff and not by any of the three intervening parties, did not address any of the issues being raised on appeal. Accordingly, CSP indicated on brief (at 11, note 9) that the three-prong test was inapplicable and need not be applied on appeal. Consistent with CSP's position, the Commission's decision below explicitly found that "[t]he Stipulation does not speak to delta revenue recovery or any offsets. Additionally, neither Eramet nor Staff have advanced any specific argument regarding the POLR adjustment question." (*Eramet Case*, Opinion and Order at 7, Ap. at 37.) Further, the Commission's decision simply did not rely on the three-part test as a framework for evaluating or deciding the issues raised by CSP. Tellingly, the Commission's own brief on appeal does not support IEU's claim that the three-part test

was used below or should apply on appeal. In any case, application of the three-part test does not diminish CSP's claims on appeal since application of that test does not permit the Commission to violate applicable statutes or adopt findings against the manifest weight of the record. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394 (2006), 398-399; *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 83.

Second, OCC argues (at 43-45), based on R.C. 4903.21 and *State of Ohio v. Ishmail* (1978), 54 Ohio St.3d 402, that the Court should not add certain "extra-record information" referenced in CSP's brief to the record on appeal and then decide the appeal on the basis of the new matter added to the record. The primary item challenged by OCC is a mathematical calculation made by CSP on brief (at 2, 35) to illustrate the impact of the Commission's decision. The illustrative calculation was based on the electric load explicitly reflected in the contract approved below – clearly a matter of record. CSP used publicly-available data (which was not and cannot be disputed by OCC) merely to convert the large industrial customer's electric load under the contract to an equivalent amount of electric load for a number of typical households. CSP offered the illustration as a means to help the Court (who does not frequently deal with megawatts or kilowatts and other technical forms of expressing electric usage) better understand the impact of the Commission's decision. Contrary to OCC's implication, the information is not extra-record evidence that CSP wishes to add to the record on appeal or to be used as a critical basis upon which to decide the appeal.

In sum, there should be no disagreement about the appropriate standard of review applicable to this appeal, as set forth (at 11-12) in CSP's initial brief.

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 decision below clearly set forth the position that R.C. 4905.31 does not constrain the Commission's discretion to impose a compulsory arrangement without allowing recovery of any costs incurred as a result of the contract. (*Eramet Case*, Opinion and Order at 8, Ap. at 38; Entry on Rehearing at 5-6, Ap. at 56-57.) CSP has an established record of responsibly 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 Eramet without having made *any* provision allowing Appellant to collect *any* amount from other customers to pay Appellant for lowering the rates for Eramet." (Commission Brief at 12-13 (emphasis added).) Such a result highlights what is at stake in this appeal and is based on 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 14.) In circular fashion, the Commission then concludes that the POLR charge that otherwise applies to Eramet 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 15.) Intervenors Eramet, IEU and OCC adopt this same flawed claim on brief. (Eramet Brief at 11; IEU Brief at 14-16; OCC Brief at 23-28.)

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, CSP set forth an extensive and detailed discussion of the plain language and meaning of R.C. 4905.31(E). (CSP Merit Brief at 12-19.) 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 from the Commission's brief, 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 CSP's comprehensive arguments regarding the plain meaning of R.C. 4905.31(E).

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 lacks 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. (*Eramet Case*, Opinion and Order at 8, Ap. at 38; Entry on Rehearing at 5, Ap. at 56.) 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 interpretation is also flawed. 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 maintains that there is "no need for this Court to apply the rules of statutory construction" in this case because the language of an unambiguous statute is applied, not interpreted. (OCC Brief at 10, 14-18.) In making this argument, OCC ignores the fact that the starting point and primary thesis of CSP's robust statutory interpretation argument is the plain language of the statute and R.C. 1.42 which categorically requires Revised Code provisions to be read in context and construed according to the rules or grammar and common usage. (CSP Merit Brief at 12-13.) This is precisely what CSP's reading does. By contrast, the OCC'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 CSP'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 14) 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) it ordered that the costs associated with the reduced rates for Eramet be paid by other customers and that its decision makes CSP whole, suggesting that CSP "wants to be more than whole." *See also* Commission Brief at 12 (note 6, stating CSP "will recover all of its costs"). The OCC Brief also repeats the false notion that CSP will receive 100% of the revenues for services they provide to Eramet, just as if Eramet had otherwise paid non-discounted standard tariff rates. (OCC Brief at 1, 13, 20.) 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 16.) This line of argument concludes that "there are no POLR costs" associated with the Eramet unique arrangement and there is nothing for the other customers to pay for. (*Id.*) The Eramet, IEU and OCC Briefs all fall in line with this conclusion. (Eramet Brief at 11; IEU Brief at 11; OCC Brief at 23-34) Nonetheless, those claims are flawed in multiple respects.

As a threshold matter, the POLR costs incurred by CSP 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 CSP's customers: the Commission awarded a revenue requirement to CSP of nearly $100 million based on a scientific financial risk modeling analysis. (*ESP Case*, Opinion and Order at 38, Ap. at 131; *Id.* at 40, Ap. at 133.) 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]

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[1] In addition to the fact that the Commission has considered this POLR risk to impose a real and substantial cost on CSP, the manner in which the Commission's decision below

More importantly for the present discussion, the Commission's premise that foregone revenues are not "costs" directly conflicts with the statute. As mentioned above, 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 CSP under the Eramet arrangement does not represent a foregone revenue or a "real cost incurred" under the arrangement. Though the Commission and Intervening Appellees claim that CSP is not providing POLR service to Eramet and need not collect the POLR charge (an erroneous claim addressed in CSP Prop. of Law No. III, *infra*), it cannot reasonably be disputed as a factual matter that avoidance of the POLR charge is revenue foregone as a result of the arrangement. But for the Eramet arrangement, there is no question that CSP would collect the POLR charge from Eramet. R.C. 4905.31(E) requires an approved financial device for economic development to include recovery of

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conflicts with the contemporaneous decision issued by the Commission in CSP's *ESP Case* is separately addressed, infra, in Proposition of Law No. I.B.

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 Eramet, including the foregone revenue associated with the POLR charge avoided under the arrangement.

OCC also argues (at 17, note 28) 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 Eramet contract is not based on cost savings to CSP; thus, the rule is inapplicable.

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

The Commission in the *ESP Case* specifically rejected arguments that CSP's non-bypassable POLR charge can be avoided if a customer agrees not to shop. (*ESP Case*, Opinion and Order at 40, Ap. at 133; July 23, 2009 Entry on Rehearing, at 25-26, Ap. at 195-196.) After considering these arguments in the *ESP Case*, the Commission adopted a *non-bypassable* POLR charge reflecting 90 percent of the estimated POLR costs presented by CSP 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

[2] The Commission's own rule, Rule 4901:1-38-01(C), Ohio Admin. Code (attached to this brief), is consistent with CSP's position ("Delta revenue" means 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.")

would be at a market price, would avoid the POLR charge during the time they are served by a competitive provider. (*Id.*) The narrow exception for customers who are not being served by CSP 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 CSP'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 CSP.[3] That basic shopping rule was established as an integral part of CSP'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 improperly reverse course on this issue. Now the Commission is saying that a customer who simply promises not to shop can avoid the approved POLR charge. In support of its latest position, the Commission attempts to distinguish the earlier *ESP Case* by asserting that the service provided under a reasonable arrangement is different from the service provided under CSP's SSO. (Commission Brief at 21-23. See also OCC Brief at 29; IEU Brief at 12.) This rationale is a classic example of a distinction without difference.

Elsewhere in its own 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

[3] OCC (at 28, note 47) suggests that CSP's POLR Charge should not be considered as non-bypassable. As described above, the POLR Charge is properly considered non-bypassable for all customers by default and, as OCC admits elsewhere on brief (at 33), can be avoided by individual customers "only under certain conditions" – conditions that are wholly inapplicable to this case.

> or, as in this case, allow the continuation, of the customer's business through *lower rates for electricity*.

(Commission Brief at 11 (emphasis added).) IEU (at 12) and OCC (at 36-37) argue that the Eramet contract is for "full requirements" service that is to be distinguished from standard service offer service provided under the *ESP Case* and that the contract need not specify "magic words" to support the claimed exclusive supplier status. This ignores similar language in CSP's SSO tariff and, more importantly, the legal requirement that all standard service offers (whether based on an electric security plan or a market rate offer) must include "all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service" needed by the customer. Ohio Rev. Code Ann. § 4928.141 (2010), Ap. at 10. Regarding the language needed in the contract, CSP submits that explicit contractual language is needed in order to conclude that a customer waived their fundamental statutory right to shop for a decade, as is further discussed below in Proposition of Law No. II.

In sum, 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 Eramet would have included the POLR charge. Under the Commission's decision, Eramet's "lower rates for electricity" effectively bypasses the non-bypassable POLR charge and undermines the decision in the *ESP Case* refusing to allow large industrial customers who agreed to waive their shopping rights to bypass the POLR charge.

As a related matter, the Commission on brief attempts to back away from the holding in the *ESP Case* that awarded CSP a specific "revenue requirement" (which was reduced through the decision below), saying now (at 22) that the adoption of the unique

arrangement "changed the factual situation" and that the Commission did not actually award CSP a revenue requirement as a result of the holding in the *ESP Case*. In the *ESP Case*, 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 Case*, Opinion and Order at 38, Ap. at 131) (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 133) (emphasis added). The Commission's "90% risk" rationale and corresponding decision to award exactly 90% of the requested revenue requirement demonstrates that the Commission's intention in the *ESP Case* was to increase CSP'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 presently re-characterize and distinguish the findings in the *ESP Case* is not valid and should be rejected.

Moreover, as demonstrated in CSP's initial brief, the interpretation adopted by the Commission below also conflicts with SB 221's new pricing regimen for electric service. (CSP 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 Electric Security Plan or an Market Rate Offer. CSP'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 on brief (at 13) that CSP cannot complain if it receives no recovery of revenues foregone in connection with a compulsory arrangement because CSP 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 Eramet 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, CSP 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 CSP'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. Moreover, the practice described on page 13 of the Commission's brief is also not appropriate under the new regulatory regime established by SB 221 because the establishment of SSO rates is no longer based on traditional notions of the opportunity to earn a reasonable return on regulated operations. More specifically, the ESP 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 should be reversed for adopting a provision within the involuntary contract requiring that one of CSP's largest customers forego its statutory right to shop for competitive generation service for an entire decade, because (i) the Commission found against**

the manifest weight of the record that it was Eramet's choice for CSP to be the exclusive supplier for the term of the contract, and (ii) any such exclusive supplier status ordered by the Commission violates of the well-established and fundamental retail competition policy of the State of Ohio as reflected in the retail shopping provisions of both Senate Bill 3 and Senate Bill 221.

The Commission below ordered CSP to be the exclusive supplier to Eramet's enormous electric load for an entire decade. (*Eramet Case*, Opinion and Order at 7, Ap. at 37.) The Commission responds by saying that it was simply honoring Eramet's unilateral request to be locked into discounted rates for ten years. (Commission Brief at 24-25.) The OCC brief also advocates (at 20-21) Eramet's right to choose an exclusive supplier for a term. Upon closer examination, it is evident that the Commission merely used the "customer choice" rationale to do what it wanted to do: approve the full discount for Eramet without fully compensating CSP. And after criticizing CSP for not presenting expert testimony regarding the alleged harm to competition relating to the Eramet arrangement, the Commission on brief now improperly states without basis or citation to the record (at 27) that allowing Eramet to have its choice "does not harm other consumers." As demonstrated by CSP in its initial brief (at 29-32) and further addressed below in Proposition of Law No. III, the Commission's conclusion key finding in this regard – that Eramet's chose to designate CSP as an exclusive supplier and waive its right to shop during the entire term of the agreement – is against the manifest weight of the record.

OCC 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 Brief at 21-22.) As CSP discussed in its initial brief (at 32-34), 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 8. 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 8. 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.

Perhaps the most puzzling argument in response to CSP's complaint regarding the exclusive supplier provision is the Commission's view of competition expressed on brief. The Commission characterized CSP's view of competition as being able to buy power from someone other than the utility (at 25) as "wrong headed." Instead, the Commission explained (at 26) 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).

CSP 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 CSP's

ESP rate plan while contemporaneously approving Eramet's discount – all without providing CSP full recovery of Eramet'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 Eramet 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 16) that Eramet will not buy power from anyone other than CSP "at least for the period of time that Appellant's current rate plan exists, that is, until December 31, 2011." Accordingly, the Commission argues (at 15) "[a]s it is an impossibility for Eramet to leave to shop elsewhere, it cannot return from shopping." From this, the Commission concludes (*id.*) that there is no POLR risk for CSP. 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 Eramet 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 20) 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 speculates (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 CSP 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 CSP'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, CSP will be made whole for the discount required by the Commission. Instead of doing either of those two things, the Commission approved a ten-year contract while only examining CSP's POLR risk for the first three years. This inequitable mismatch fundamentally undercuts the Commission's finding of "no risk."

CSP also spelled out multiple detailed examples in its initial brief to illustrate the many and varied POLR risks associated with the Eramet contract. (CSP Brief at 37-39.) Appellees only acknowledge a select few of those examples. In reality, the same POLR risk that formed the basis for the POLR charge adopted in the *ESP Case* is present under the Eramet arrangement. CSP'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 Eramet's operations, it is a certainty that CSP 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, CSP rests on the un-rebutted showing it made in its initial brief. (CSP Brief at 37-39.) Whether considered for three years, or more appropriately for the full ten-year term of the compulsory contract, the POLR risk to CSP is real and the Commission lacked record support in concluding that there is "no risk" of Eramet shopping.

PROPOSITION OF LAW NO. IV:

> **There can be no "reasonable arrangement" with CSP under R.C. 4905.31 where the Commission orders an involuntary contract that causes harm to CSP's financial interests.**

In Proposition of Law No. IV of its initial brief, CSP 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. (CSP Brief at 43-45.) 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 CSP's arguments

pertaining to the meaning of the statute should be disregarded. CSP 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 CSP'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 9.) This is an interesting argument given that the Commission ordered Eramet and CSP to "file an executed power agreement" with the Commission. (Opinion and Order, p. 13; Ap. at 43.) Contracts are "executed"; tariffs are not. The decision below resulted in an executed contract, per the Commission's order. (Supp. at 59.) Thus, the Commission order makes clear that the matter before the Court involves a contract, not a tariff.

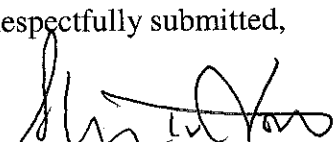
The Commission refers to *City of Canton v. Pub. Util. Comm.* (1980), 63 Ohio St 2d 76 presumably to make the point that back in 1975, when Ohio Power Company wanted to cancel a special contract under R.C. 49053.31, it sought the Commission's authority for that cancellation. CSP does not quarrel with 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.

While the Commission has the authority to modify the proposed reasonable arrangement, that is necessarily not the same as concluding 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 Eramet, would argue that if the Commission modified the contract in a manner that was financially unacceptable to Eramet that Eramet would have no choice but to take service for ten years under the terms of the Commission's unacceptably modified contract. CSP should also have the right to not be forced into a contract it finds unacceptable at the outset.

CONCLUSION

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

Respectfully submitted,



Steven T. Nourse (0046705)
Counsel of Record
Matthew J. Satterwhite (0071972)
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com
mjsatterwhite@aep.com

Counsel for Appellants, Columbus Southern Power Company

APPENDIX

4901:1-38-01 Definitions.

(A) "Affidavit" means a written declaration made under oath before a notary public or other authorized officer.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Delta revenue" means 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.

(D) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(E) "Energy efficiency production facilities" means any customer that manufactures or assembles products that promote the more efficient use of energy (i.e., increase the ratio of energy end use services (i.e., heat, light, and drive power) derived from a device or process to energy inputs necessary to derive such end use services as compared with other devices or processes that are commonly installed to derive the same energy use services); or, any customer that manufactures, assembles or distributes products that are used in the production of clean, renewable energy.

(F) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(G) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 or 4928.141 of the Revised Code, or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by the electric utility.

(H) "Staff" means the staff of the commission or its authorized representative.

Effective: 04/02/2009

R.C. 119.032 review dates: 09/30/2013

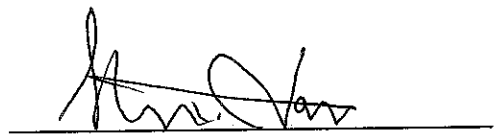
Promulgated Under: 111.15

Statutory Authority: 4905.04, 4905.06

Rule Amplifies: 4905.31, 4928.02

PROOF OF SERVICE

I certify that Columbus Southern Power Company's Reply Brief was served by First-Class U.S. Mail upon counsel for all parties of record identified below this 14th day of September, 2010.



Steven T. Nourse

Janine L. Migden-Ostrander Consumers' Counsel Maureen R. Grady Counsel of Record Michael E. Idzkowski Office of the Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, Ohio 43215-3485	Richard Cordray Attorney General of Ohio William L. Wright Chief, Public Utilities Section Thomas McNamee Counsel of Record Thomas G. Lindgren Werner L. Margard, III Assistant Attorneys General 180 East Broad Street Columbus, Ohio 43215-3793
Lisa G. McAlister (0075043) Counsel of Record Thomas L. Froehle (0061830) McNees, Wallace & Nurick, LLC 21 East State Street, 17th Floor Columbus, Ohio 43215-4228	Samuel C. Randazzo Counsel of Record Joseph M. Clark McNees, Wallace & Nurick, LLC 21 East State Street, 17th Floor Columbus, Ohio 43215-4228