ORIGINAL

IN THE SUPREME COURT OF OHIO

Columbus Southern Power Company and Ohio Power Company	:	**Case No. 10-722**
Appellants,	:	**Appeal from the Public Utilities Commission of Ohio**
v.	:	
The Public Utilities Commission of Ohio,	:	**Public Utilities Commission of Ohio Case No. 09-1095-EL-RDR**
Appellee.	:	

THIRD MERIT BRIEF AND APPENDIX UPDATE OF APPELLANT/CROSS APPELLEE OF COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

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INTRODUCTION

Pursuant to Sup. Ct. R. Prac. 6.5(D), Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, "AEP Ohio" or "Appellant") hereby submits this Third Brief which will (1) address the opposing arguments being made and otherwise rest on the dispositive arguments set forth in AEP's initial brief, because it cannot possibly respond in this brief to all of the points argued in the four opposing briefs filed by appellees (totaling more than 100 pages); and (2) respond to the Initial Brief of Cross-Appellant, the Industrial Energy Users – Ohio (IEU).

With respect to AEP Ohio's appeal, Appellee, the Public Utilities Commission of Ohio (Commission) is partially correct in stating (at 1, note 1) that AEP Ohio's real dispute relates to two prior decisions reached by the Commission in the *Ormet Case* and the *Eramet Case*. But AEP Ohio disagrees with the Commission's suggestion in this regard that appellant does not dispute the decision below – because it does object to the ongoing implementation of the underlying decisions that were unlawful and unreasonable. In any case, as AEP Ohio stated in its Initial Brief (at 3), "the instant appeal was filed as a protective measure in order to preserve AEP Ohio's remedy for recovery of foregone revenues relating to 2009- should appellants prevail in Case No. 2009-2060 and/or Case No. 2010-723. Consequently, AEP Ohio fully expects that the disposition of this appeal will follow the outcome of Case Nos. 2009-2060 and 2010-723 (and all three cases could be consolidated for argument and decision, should the Court wish to do so)."

With respect to IEU's cross-appeal, AEP Ohio submits that the Court should reject each of the claimed errors, as discussed in greater detail below.

ARGUMENT

REPLY BRIEF IN SUPPORT OF AEP OHIO'S APPEAL

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. (*EDR Case*, February 5, 2010 Application for Rehearing of AEP Ohio, Ap. at 447.) AEP Ohio 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 for Ormet or Eramet without having made *any* provision allowing Appellant to collect *any* amount from other customers to pay Appellant for lowering the rates for Ormet or Eramet." (Commission Brief at 14-15) (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 16.) In circular fashion, the Commission then concludes that the POLR charge that otherwise applies to Ormet and 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 17.) Intervenors IEU and OCC adopt this same flawed claim on brief. (IEU Brief at 30-32; OCC Brief at 18-22.)

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 initial brief, AEP Ohio set forth an extensive and detailed discussion of the plain language and meaning of R.C. 4905.31(E). (AEP Ohio Brief at 5-13.) The Commission's response is simply to fall back on the argument that the statute says "may include, not must include." (Commission Brief at 14.) 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 AEP OHIO'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. (*Ormet Case*, Entry on Rehearing at 10, Ap. at 86; *Eramet Case*, Opinion and Order at 8, Ap. at 418, and Entry on Rehearing at 5, Ap. at 436.) 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 occasion for resorting to rules of statutory interpretation" in this case because the language of an unambiguous statute is applied, not interpreted. (OCC Brief at 5, 6-14.) In making this argument, OCC ignores the fact that the starting point and primary thesis of AEP Ohio's robust statutory interpretation argument is the plain language of the statute and R.C. 1.42 which categorically requires Revised Code provisions to be read in context and construed according to the rules or grammar and common usage. (AEP Ohio Initial Brief at 6-12.) This is precisely what AEP Ohio'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 AEP Ohio's reading is *also supported* by the canons of statutory construction discussed in Appellants' Initial Brief merely reinforces the plain language reading.

The Commission also advances the argument on brief (at 16) that R.C. 4905.31(E) only allows a mechanism to recover costs of the unique arrangement. As a related matter, the Commission claims (at 12, not 9) that AEP Ohio "is being fully paid for providing its service" The OCC Brief also repeats the false notion that AEP Ohio will receive 100% of the discounts granted to Ormet and Eramet. (OCC Brief at 1, 3, 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 18.) This line of argument concludes that "there are no POLR costs" associated with the Ormet or Eramet unique arrangements and there is nothing for the other customers to pay for. (*Id.*) The IEU and OCC Briefs also fall in line with this conclusion. (IEU Brief at 27; OCC Brief at 18-28) Nonetheless, those claims are flawed in multiple respects.

As a threshold matter, the POLR costs incurred by AEP Ohio in offering firm generation service to its customers was certainly considered an item of "real cost" by the Commission in adopting the non-bypassable POLR charge for application to all of AEP Ohio's customers: the Commission awarded a revenue requirement to AEP Ohio of nearly $100 million based on a scientific financial risk modeling analysis. (*ESP Case*, Opinion and Order at 38, Ap. at 151; *Id.* at 40, Ap. at 153.) In adopting the POLR charge for application to all customers, the Commission made no exception for customers operating under a reasonable arrangement or for a customer who promises not to shop.[1]

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

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

program of the utility within its certified territory, *including recovery of revenue foregone* as a result of such program." (Emphasis added.) Thus, the "including recovery of revenue foregone" language establishes that revenue foregone is a cost incurred under such an arrangement. Through the "recover costs ... including recovery of revenue foregone" language and structure of R.C. 4905.31(E), the General Assembly has already directly provided that "costs incurred" in conjunction with an approved economic development program include recovery of the utility's revenue foregone as a result of such program. Thus, the Commission's position that foregone revenues are not "costs incurred" conflicts with the language of the statute.

Moreover, it is simply not true that that the POLR charge being foregone by AEP Ohio under the Ormet and Eramet arrangements does not represent a foregone revenue or a "real cost incurred" under the arrangement. Though the Commission and Intervening Appellees claim that AEP Ohio is not providing POLR service to Ormet and Eramet and need not collect the POLR charge (an erroneous claim addressed in AEP Ohio Prop. of Law No. III, *infra*), it cannot reasonably be disputed as a factual matter that avoidance of the POLR charge is revenue foregone as a result of the arrangement. But for the Ormet and Eramet arrangements, there is no question that AEP Ohio would collect the POLR charge from Ormet and Eramet. R.C. 4905.31(E) requires an approved financial device for economic development to include recovery of revenues foregone and provides that the costs incurred under such an arrangement, by definition, include revenues foregone.[2] Thus, the Commission is wrong in concluding that it was not required to allow recovery

[2] The Commission's own rule, Rule 4901:1-38-01(C), Ohio Admin. Code, is consistent with AEP Ohio'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.")

of all of the costs associated with the aid package it approved for Ormet and 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 Ormet and Eramet contracts are not based on cost savings to AEP Ohio; thus, the rule is inapplicable.

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

The Commission in the *ESP Case* specifically rejected arguments that AEP Ohio's non-bypassable POLR charge can be avoided if a customer agrees not to shop. (*ESP Case*, Opinion and Order at 40, Ap. at 153; July 23, 2009 Entry on Rehearing, at 25-26, Ap. at 217-218.) 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 AEP Ohio and found that only customers who: (1) actually switch to a competitive supplier and (2) agrees at the time they decide to shop that, if they return it would be at a market price, would avoid the POLR charge during the time they are served by a competitive provider. (*Id.*) The narrow exception for customers who are not being served by AEP Ohio and who promise to return at market has no application to this case. In other words, regardless of whether a customer promises not to shop during the ESP term, all customers must pay the POLR charge for the entire time they are served under

AEP Ohio's Standard Service Offer (SSO) and can avoid that charge while taking generation service from an alternative provider only if they agree to pay a market price if they return to AEP Ohio.[3] That basic shopping rule was established as an integral part of AEP Ohio's approved ESP and it was supposed to control such matters during the three-year ESP term.

Yet the Commission's decision below and its arguments on brief 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 AEP Ohio's SSO. (Commission Brief at 25-27. See also OCC Brief at 22-23; IEU Brief at 28.) 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 ones approved in the Ormet and Eramet cases, 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 (as was the case for Eramet) or, (as was case for Ormet), allow the continuation, of the customer's business through *lower rates for electricity.*

[3] OCC (at 22, note 40) suggests that AEP Ohio'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 27), can be avoided by individual customers "only under certain conditions" – conditions that are wholly inapplicable to this case.

(Commission Brief at 13 (emphasis added).) This description of a reasonable arrangement correctly depicts the fact that the primary distinction between service provided via tariff and service provided via contract is the price – not the character of the service or the attendant risks (*i.e.* POLR risks included) associated with the provision of service.

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 Ormet and Eramet would have included the POLR charge. Under the Commission's decisions, Ormet's and Eramet's "lower rates for electricity" effectively bypass 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 AEP Ohio a specific "revenue requirement" (which was reduced through the decision below), saying now (at 26) that the adoption of the unique arrangement "changed the factual situation" and that the Commission did not actually award AEP Ohio 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 AEP Ohio and $60.9 million for OP." (*ESP Case*, Opinion and Order at 38, Ap. at 151) (emphasis added). Similarly, when deciding to grant 90% of the POLR proposed rate, the Commission ordered that "the POLR rider shall be established to collect a POLR *revenue requirement* of $97.4 million for AEP Ohio and $54.8 million for OP." (*Id.* at 40, Ap. at

153) (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 AEP Ohio's revenue requirements and create firm revenues to support the POLR duty through a non-bypassable revenue stream as part of the overall ESP decision – not just create a charge that can simply be avoided by a promise not to shop. In short, the Commission's attempt on brief to presently re-characterize and distinguish the findings in the *ESP Case* is not valid and should be rejected.

Moreover, as demonstrated in AEP Ohio's initial brief, the interpretation adopted by the Commission below also conflicts with SB 221's new pricing regimen for electric service. (AEP Ohio Brief at 19-20.) 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. AEP Ohio's argument in this regard was not addressed by the Commission on brief – presumably because it does not have a good response.

Finally in this regard, the Commission also argues on brief (at 15) that AEP Ohio cannot complain if it receives no recovery of revenues foregone in connection with a compulsory arrangement because AEP Ohio can always file a rate case if it is not earning a reasonable return on its regulated operations and that the Commission does not need to provide any customer-specific amount in connection with the Ormet or Eramet contracts.

Saying the utility can always file a rate case if it is injured by a compulsory agreement ordered by the Commission is an insufficient response, for several reasons.

First and foremost, AEP Ohio is in the middle of a three-year ESP rate plan, wherein the rate adjustments are already specified from 2009-2011, and any new rate plan would not commence until 2012. The case below was contemporaneously decided with the Commission's approval of AEP Ohio's rate plan. Further, the filing of such a rate case is an enormous undertaking, based on the resources and expense involved, and takes more than a year to complete. Moreover, the practice described on page 15 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 two of AEP Ohio's largest customers forego their 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 Ormet's and Eramet's choice for AEP Ohio 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 in the underlying *Ormet Case* and *Eramet Case* ordered AEP Ohio to be the exclusive supplier to Ormet's and Eramet's enormous electric loads for an entire decade. (*Ormet Case*, Opinion and Order at 13, Ap. Update at 19; *Eramet Case*, Opinion and Order at 7, Ap. at 417.) The Commission responds to AEP Ohio's claim that this aspect of the compulsory contracts is unlawful by saying that it was simply honoring Ormet's and Eramet's unilateral request to be locked into discounted rates for ten years. (Commission Brief at 28-29.) The OCC brief also advocates (at 15) Ormet's and Eramet's right to choose an exclusive supplier for a term. As previously established in AEP Ohio's Initial Merit Brief in this case, Eramet did not waive its right to shop and neither the Order nor the adopted contract provides that AEP Ohio is the exclusive supplier. AEP Ohio Brief at 39-41. Similarly, Ormet did not assert its right to shop nor waive it as a basis for supporting the compulsory contract. *See also* Case No. 2009-2060 (April 1, 2010 Reply Brief of AEP Ohio at 12). Thus, it appears that the Commission merely used the "customer choice" rationale to do what it wanted to do: approve the full discount for Ormet and Eramet without fully compensating AEP Ohio. Further, as demonstrated by AEP Ohio in its initial brief (at 33-47) and also addressed below in Proposition of Law No. III, the Commission's conclusion key findings in the *Ormet Case* and the *Eramet Case* – that Ormet and Eramet chose to designate AEP Ohio as an exclusive supplier and waive its right to shop during the entire term of the agreement – are 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 17-18.) As AEP Ohio discussed in its initial brief (at 22-24), however, R.C. Chapter 4928 contains even more explicit provisions than the overarching policy statements in R.C. 4928.02: SB 3 directly established a right to shop for generation and other competitive retail electric services through R.C. 4928.03, a statute that confers upon consumers in Ohio the right to obtain generation service from any supplier. Ohio Rev. Code Ann. 4928.03 (2010), Ap. at 12. In addition, the General Assembly enacted R.C. 4928.06 entitled "Commission to ensure competitive retail electric service" – originally as part of SB 3 and retained by SB 221. Ohio Rev. Code Ann. 4928.06 (2010), Ap. at 14. Thus, unlike the policies in R.C. 4928.02, effective competition is a fundamental, structural and foundational aspect of SB 3 and SB 221 through these affirmative statutory mandates – all of which are ignored by the appellees.

Perhaps the most puzzling argument in response to AEP Ohio's complaint regarding the exclusive supplier provision is the Commission's view of competition expressed on brief. The Commission characterized AEP Ohio's view of competition as being able to buy power from someone other than the utility (at 29) as "wrong headed." Instead, the Commission explained (at 30) that, while many of the competitive choices come from market participants other than the utility, two of these choices relate back to the utility itself: (1) the SSO under R.C. 4928.141, and (2) the possibility of a unique arrangement under R.C. 4905.31. In other words, the Commission believes it can approve a SSO rate plan in one instant (establishing the default service offer or competitive "bogey") and in the next instant require the utility to establish a discounted rate for an individual customer deemed to be deserving (in order for the utility to "compete" with itself).

AEP Ohio respectfully submits that such a regulatory system, requiring a utility to offer a discounted rate as an alternative choice to its SSO, is not competition in any sense. Yet, this is precisely how the Commission is characterizing what it did in approving AEP Ohio's ESP rate plan while contemporaneously approving Ormet's and Eramet's discounts – all without providing AEP Ohio full recovery of Ormet's and Eramet's discounts. 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 conclusions that there is no risk of Ormet and Eramet shopping for competitive generation service and subsequently returning to SSO service conflict with controlling statutes and is otherwise against the manifest weight of the record in the *Ormet Case* and *Eramet Case*, respectively.**

AEP Ohio's Initial Brief set forth a detailed set of arguments in Propositions of Law Nos. IV, V and VI (pages 33-47) showing that the decision below (fully relying on the prior decisions in the *Ormet Case* and *Eramet Case*) was against the manifest weight of the record regarding purpose and effect of the so-called exclusive supplier provision associated with the two contracts. In response, the Commission merely suggests (at 18, 21) that Ormet and Eramet will not buy power from anyone other than AEP Ohio "at least for the period of time that Appellant's current rate plan exists, that is, until December 31, 2011." Accordingly, the Commission argues (at 17) "[a]s it is an impossibility for either Ormet or Eramet to leave to shop elsewhere, it cannot return from shopping." From this, the Commission concludes (*id.*) that there is no POLR risk for

AEP Ohio. These arguments are flawed and the Commission's finding of no POLR risk misapprehends the facts and law and is against the manifest weight of the record. Regarding both the underlying *Ormet Case* and the *Eramet Case*, the Commission's qualified finding that Ormet and Eramet will not shop through 2011 does not eliminate risk during the entire ten-year term approved by the Commission for the two contracts. Even on brief the Commission admits (at 23-24) that "[w]hile the term of the reasonable arrangements approved for Ormet and Eramet is ten years, the Commission only determined the recovery of the difference between the amount paid by those customers under the reasonable arrangements and the standard service offer for the period that the current standard service offer will exist, that is, until December 31, 2011. Yet, the Commission on brief also speculates (at 24) that "[t]he POLR charge at issue in this case will assuredly be gone" by 2012. This assumption is telling because it reveals the Commission's true thinking: the Commission's finding of "no POLR risk" is really based on a key *assumption* about matters that are, to use the Commission's own words on brief, "impossible to know today" involving "unknown and unknowable charges." As such, the finding necessarily lacks record support. In any case, there is nothing that precludes AEP Ohio from proposing a POLR charge in its next SSO or the Commission from accepting it as part of a reasonable package.

The Commission could have approved three-year contracts for Ormet and Eramet to be commensurate with AEP Ohio's rate plan for the rest of its customers. The Commission could have committed that, regardless of whatever the future holds during the approved term of the compulsory contracts, AEP Ohio will be made whole for the discounts required by the Commission. Instead of doing either of those two things, the

Commission approved a ten-year contract for both Ormet and Eramet while only examining AEP Ohio's POLR risk for the first three years. This inequitable mismatch manifestly undercuts the Commission's finding of "no risk."

AEP Ohio also spelled out multiple detailed examples in its initial brief to illustrate the many and varied POLR risks associated with the Ormet and Eramet contracts. (AEP Ohio Brief at 34-36, 42-44.) 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 Ormet and Eramet arrangements. AEP Ohio's POLR obligation is *statutory* and will not be eliminated during any part of the ten-year term of the contract (absent further legislative action). Whatever the circumstances are that unfold during the next decade for Ormet's or Eramet's operations, it is a certainty that AEP Ohio will continue to have its statutory POLR obligation and all of the attendant financial risks – regardless of whether the Commission approves a new POLR charge starting in 2012. Beyond those additional points, AEP Ohio rests on the un-rebutted showing it made in its initial brief. (AEP Ohio Brief at 33-39, 41-47.) Whether considered for three years, or more appropriately for the full ten-year term of the compulsory contract, the POLR risk to AEP Ohio is real and the Commission lacked record support in concluding that there is "no risk" of Ormet and Eramet shopping.

PROPOSITION OF LAW NO. IV:

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

In Proposition of Law No. III of its initial brief, AEP Ohio supported its understanding of R.C. 4905.31, as amended by SB 221. The "reasonable arrangement" to which the statute refers is a contract and as such there must be mutual assent. This understanding of the phrase "reasonable arrangement" is particularly obvious when one considers that an interpretation that does not require the mutual assent of the utility would permit the Commission to order a utility to provide service to a mercantile customer *outside* its certified service area and then disallow recovery of some or all of the foregone revenues associated with sales that utility otherwise would have made. The new language in R.C. 4905.31 permits a mercantile customer to file reasonable arrangements that relate to the new types of contracts being filed – economic development, energy efficiency and other unique arrangements. (AEP Ohio Brief at 30-34.) The mercantile customers' ability to file a reasonable arrangement does not support the mistaken interpretation that the affected utility's consent to the arrangement is unnecessary.

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

The Commission's brief argues that a "better way to think of the 'unique arrangement' under R.C. 4905.31 is, not that it is a contract, but rather that it is a tariff applicable to only one customer." (Commission Brief at 11.) This is an disingenuous argument given that the Commission specifically ordered AEP Ohio to "file an executed power agreement" with Ormet and Eramet in the *Ormet Case* and *Eramet Case*, respectively. (*Ormet Case*, Opinion and Order at 16, Ap. Update at 22; *Eramet Case*, Opinion and Order at 13, 423.) Contracts are "executed"; tariffs are not. The *Ormet Case* and the *Eramet Case* both resulted in an executed contract, per the Commission's orders. 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. 4905.31, it sought the Commission's authority for that cancellation. AEP Ohio does not quarrel with the argument that once a special contract had been approved by the Commission, the Commission has authority over the continuing effect of the contract. In contrast, the case now before the Court presents the situation in which one of the parties to the required contract (the utility) is being adversely and significantly affected at the outset.

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 customers involved would argue that if the Commission modified the contract in a manner that was financially unacceptable to those affected customers that Ormet or Eramet would have no choice but to take service for ten years under the terms of the Commission's unacceptably modified contract. Similarly, AEP Ohio should also have the right to not be forced into a contract it finds unacceptable at the outset.

RESPONSE BRIEF IN OPPOSITION TO IEU-OHIO'S CROSS-APPEAL

PROPOSITION OF LAW NO. V

The Public Utilities Commission of Ohio has jurisdiction to issue orders implementing subsequent elements related to previously approved Commission orders, even when the previously approved order was approved under R.C. 4928.143 more than 150 days after the application was filed.

IEU provides the Court with the same arguments it provided as its first proposition of law in its Merit Briefs in Supreme Court Cases 2010-729, 2010-730, and 2010-1073. IEU argues that the fact that the Commission was unable to issue an order in the Companies' ESP cases within the 150-day period set out in R.C. 4928.143(C)(1), the Commission lost jurisdiction to issue the underlying orders in this case. (IEU Brief at 9-15.) IEU's arguments continue to misunderstand or misapply R.C. 4928.143 and 4928.141, the meaning of the statutory language, and the Commission's dismissal of the matter as re-litigation of the issue.

The Court has held that a timeframe to act in a statute can be construed as directory and not jurisdictional. The general rule is that "a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Hardy v. Delaware Bd. of Revision* (2005), 106 Ohio St. 3d 359, 835, N.E. 2d, 353, quoting *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 66 N.E. 2d, 531 (syllabus); see also *Schick v. Cincinnati* (1927), 116 Ohio St. 16, 155 N.E. 555 (syllabus) (statutes with deadlines for exercise of power and not limits of power may be construed as directory). The Court has held that a tribunal does not lose jurisdiction for failing to act within a prescribed time if there is not an express intent to restrict jurisdiction for untimeliness. *See, e.g. In re Davis* (1999), 84 Ohio St. 3d 520, 705 N.E. 2d 1219; *State v. Bellman* (1999), 86 Ohio St. 3d 208, 714 N.E. 2d 381. The absence of any such language in the statute makes the time performance directory and not mandatory.

AEP Ohio expects IEU to reply to this argument as it did in its Reply Brief in the 729 and 730 appeals, where it makes these identical arguments. Any reliance upon *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 66 N.E.2d 531 to treat the parts of SB 221 to support a loss of Commission jurisdiction is misplaced.

In *State ex rel. Jones v. Farrar*, the Court explained:

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

Jones v. Farrar, 146 Ohio St. at 472-473.

While it is anticipated that IEU will apply the Court's guidance from *Jones v. Farrar* as supporting a rigid 150-day deadline, that interpretation does not properly represent the Court's findings. IEU itself recognizes the unique situation facing the industry upon passage of SB 221. IEU notes the number of EDUs with rate stabilization plans expiring on December 31, 2008, and that each of those EDUs filed applications under the new law on July 31, 2008, the effective date of the statute, seeking approval before the end of the year. (IEU Merit Brief at 13.) The Commission processed rule making dockets implementing the new statute and two of the three largest service provider's applications before the end of the year.

IEU would have the Court find that the Commission's efforts to implement the new law and process applications was not enough and that the Commission failed to fully implement the General Assembly's requirements. IEU's proposed consequence of not processing a standard service offer application by the end of the year to address the expiring rate plan in place is to start the process over again. The response to not meeting the General Assembly's desire that the Commission implement the new statute by the start of 2009 is not to put the implementation of the new methodology further behind schedule by starting over. Under the *Jones v. Farrar* analysis it is clear that the timeframe of the statute was directory, the object of the statute was to implement a new manner to determine the standard service offer, and the consequence of IEU's reading of the statute is to put what was a wrapping up process back at square one, in fact frustrating the purpose of the statute.

The Supreme Court of the United States also considered the question of whether an administrative agency loses jurisdiction to act when it misses the time set by the legislature to act. *Brock v. Pierce County*, (1986), 476 U.S. 253, 106 S. Ct. 1834, 90 L. Ed. 2d 248 considered statutory language which required that the Secretary of Labor " 'shall' issue a final determination as to the misuse of CETA (Comprehensive Employment and Training Act) funds by a grant recipient within 120 days after receiving a complaint alleging such misuse." (*Id.* at 255). The question before the Court was whether the Secretary lost the power to recover misused funds after the expiration of the 120-day period. The Court stated that it:

> would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act. (*Id.* at 260, footnote deleted).

The Court went on to note that the statute in question:

> does not merely command the Secretary to file a complaint within a specified time, but requires him to resolve the entire dispute within that time. This is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control. There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline. (*Id.* at 261).

The Court concluded that "the mere use of the word "shall" in Sec. 106 (b), standing alone, is not enough to remove the Secretary's power to act after 120 days." (*Id.* at 262, footnote deleted). The U.S. Sixth Circuit Court of Appeals ruled consistently with the *Brock* decision. When faced with an agency's inability to comply with a statutory deadline to complete an administrative proceeding that Court held that, "courts must apply remedies that, as nearly as possible, promote the primary purpose of the Act." *United States v. Alcan Foil Products Div. of Alcan Aluminum Corp.* 889 F. 2d 1513 (6th Cir. 1989).

When the Supreme Court of Ohio's and United States Supreme Court's reasoning is applied to the Commission's authority to rule on an ESP application within 150 days of the application being filed, it is clear that the Commission does not lose its authority to act beyond the 150-day period. First, there is no statutory language in R. C. 4928.143, or elsewhere in R. C. Chapter 4928, that precludes the Commission from acting after the passage of the 150-day period. Absent such language, it should not be assumed that the General Assembly intended the agency to lose its power to act and that a new application be filed restarting the process.

IEU also misinterprets R.C. 4928.141, the statutory provision on which it bases its argument. R.C. 4928.141 requires EDUs to apply for either an electric security plan or a market rate offer. It does not, however, specify a time by which such an application must be filed. While the Companies filed their applications on July 31, 2008, the first date that SB 221 became effective, a September filing would have resulted in the 150-day time period expiring well beyond the end of 2008. The significance of the lack of specificity regarding when a SSO application could be filed relates to the portion of R.C. 4928.141 (A) on which IEU relies:

> 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 ****

R.C. 4928.141 (A) is not a permanent default for failure to meet the 150-day time period. The continuation of the rate plan applies only where there is not sufficient time for the 150-day period to be completed before the existing rate plan would expire. There is nothing in R.C. 4928.141 (A) or 4928.143 (C)(1) that suggests that, if the Commission does not meet the 150-day time period for ruling on the Companies' ESP application, the Commission loses its authority to ever act on that application. Nor is there any reason to believe that if the General Assembly intended to specify a remedy for the Commission not meeting that time period that such a remedy would have been placed in a provision other than the provision which sets out the requirement itself.

IEU also cites R.C. 4909.42 as an example demonstrating that the General Assembly is cognizant of differing timing requirements and thus the timing necessary for the initial ESP cases. (IEU Merit Brief at 13 footnote 39.) That argument is unpersuasive. R.C. 4909.42 relates to traditional rate cases and permits a utility to put into effect its proposed rates, subject to refund, if the Commission has not ruled on a rate increase application within 275 days of the application being filed. If after 545 days the Commission still has not ruled on the application, the proposed rates can remain in effect with no ongoing refund obligation. To be sure the Commission meets its responsibility to set rates even once the 545-day period has been reached, the statute provides that "[n]othing in this section shall be construed to mitigate any duty of the commission to issue a final order under section 4909.19 of the Revised Code." This sentence was not a grant to the Commission of authority to act even after 545 days. Instead, it is a directive to the Commission to meet its responsibility to set rates.

IEU effectively seeks a stay of all future proceedings related to Commissions orders from the *ESP cases*. Specifically, IEU seeks the Court to "direct the PUCO to refrain from continuing or allowing further judicial of 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." (IEU Brief at 10.) The Court already denied this request in *State ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-1907. The Commission already responded to IEU's argument in other proceedings including the *ESP Appeal*, the appropriate forum to address an appeal of an issue from the *ESP Cases*. Ultimately, this is an issue for the *ESP Appeal* and is not an issue in this case. Accordingly, IEU's First Proposition of Law should be rejected.

PROPOSITION OF LAW NO. VI

> **The Companies right to withdraw and terminate the ESP applications under R.C. 4928.143(C)(2)(a) is a right of the Companies to exercise, available until the application is no longer subject to modification. It is not a duty or prerequisite for the Companies to exercise that right while the plan is subject to modification.**

IEU incorrectly argues that it is unlawful and unreasonable for the Commission to allow the Companies to operate under the Commission approved ESP, while maintaining an appeal, and still maintaining its right to withdraw and terminate the ESP under R.C. 4928.143(C)(2)(a).[4] (IEU Brief at 16-17.) The right to withdraw from ESP modifications is a right provided to the Companies in recognition of potential modifications that could make the ultimate approval undesireable. The right to withdraw was provided as a statutory protection against that risk and to provide a utility the ability

4 Other than citations to the underlying orders in this appeal, this is the same proposition of law and support that IEU provided the Court in its pleadings in Case Nos. 10-729, 10-730, and 10-1073, all pending before the Court.

to ultimately make a decision based upon the final known outcome. IEU's argument essentially seeks to contradict the statute and take away the ability of a utility to weigh the benefits and disadvantages of the final product that incorporates all possible modifications. IEU seeks to dictate how the Companies must exercise their right, but that is up to the Companies not IEU, and the Commission decision recognizes this fact.

The right to withdraw from ESP modifications not consented to by the utility makes sense given that the ESP under R.C. 4928.143 is a voluntary filing and a utility could instead choose to establish its Standard Service Offer (SSO) by filing a Market Rate Offer under R.C. 4928.142. IEU complains that the Companies could not simultaneously reserve the right to withdraw and collect the new rates authorized under the modified ESP during the statutory rehearing and appeal process. In reaching this conclusion, IEU relies primarily upon R.C. 4928.141, which provides that a utility's existing rate plan will stay in place until an SSO is first authorized by the Commission under either R.C. 4928.142 (Market Rate Offer) or R.C. 4928.143 (Electric Security Plan). However, IEU does not recognize that the right to withdraw an ESP application under R.C. 4928.143(C)(2) contains no time restriction.

IEU's reliance on R.C. 4928.141 offers no support for its argument. Given that the Commission has approved a SSO under R.C. 4928.143, the requirement found in R.C. 4928.141 that a utility must charge its pre-ESP rates until an SSO under R.C. 4928.143 has been authorized by the Commission is not applicable and IEU's position should be rejected.

IEU identifies the Commission's proper finding that IEU's argument in this regard is not ripe for consideration because the Companies have not filed a notice of intent to withdraw. (IEU Brief at 16-17.) The Commission found that it previously denied the same argument in the *ESP Cases*. *EDR Case* (March 24, 2010) (Entry on Rehearing at 6; Ap. at 400.) There the Commission stated, "[g]iven that AEP-Ohio has not filed notice with the Commission that it wishes to withdraw its ESP, as modified and approved, it is unnecessary to address this issue on rehearing." (Id.) Because the Companies have not attempted to withdraw and terminate the modified ESP, the Commission was correct in finding that there is no present need to address what would happen if they did attempt to withdraw or terminate the modified ESP. As the Commission did, so should this Court find that IEU's concern is not ripe for consideration. *Ohio Edison Co. v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 555 (appellant must show prejudice); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280 (same).

It is anticipated that IEU will argue that a utility not satisfied with a Commission modification has a unilateral right to terminate the decision by withdrawal. Yet there is no support anywhere in R.C. Chapter 4928 or elsewhere in Ohio law for the position that once a utility exercises a statutory right to file for rehearing and appeal in some manner that precludes it from implementing the dictates of the Commission's Opinion and Order. The right to withdraw an ESP application under R.C. 4928.143(C)(2) contains no time restriction; nor is there any suggestion in that provision that filing for rehearing or waiting for a Commission order on rehearing before determining whether to withdraw an ESP application precludes the electric utility from implementing the rates authorized by the Commission. Surely if the General Assembly had intended to create such a novel process within R.C. Title 49, it would have explicitly so indicated. IEU's absolute proposal discourages any give and take and development of issues to get to a reasoned end through the appellate process.

Being a procedural matter governed by the integrated rehearing and appeal process under R.C. Chapter 4903, the review process for orders issued under R.C. Chapter 4928 is also governed by R.C. 4903.10, 4903.11, 4903.12, 4903.13, 4903.16 and 4903.17. If a utility seeks rehearing and appeal from a Commission order providing benefits to the utility in the form of increased rates, the utility need not postpone the implementation of the increased rates. *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 259. IEU's argument is essentially another attempt to undercut the implementation of the approved ESP rates during the integrated rehearing and appeal process set forth in R.C. Chapter 4903. This is confirmed by IEU's argument seeking to overturn the Orders in the underlying case, essentially while the Companies participate as a party in the appellate process.[5] Such relief is a *non-sequitur* for a merit decision –the Court's merit decision will either affirm or reverse and remand the Commission's decision to be implemented prospectively. Absent a stay of execution by the Commission during the rehearing process or by this Court on appeal under R.C. 4903.16, rate orders of the Commission are implemented during the rehearing and appeal process pursuant to R.C. 4903.15 and 4905.32. On February 3, 2010, this Court issued an Entry denying a request to suspend the approved ESP rates on in the ESP Appeal.

In sum, IEU's arguments seeking to exercise or define the right provided the Companies in R.C. 4928.143(C)(2)(a) to withdraw the ESP applications are without any

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[5] Further proof is found in IEU's footnote 28 at page 9 of its Merit Brief that admits the arguments in the merit brief are "addressed in greater detail in IEU-Ohio's Merit Brief and Reply Brief in its appeal of AEP-Ohio's ESP cases in Ohio Supreme Court Case No. 2009-2022."

foundation in R.C. Chapter 4928. In fact the argument contradicts the statute that allows a utility to judge the modifications to its application before determining if it will exercise its unilateral right to withdraw. Rather, the Companies' decision of whether to exercise its right of withdrawal can only be meaningfully exercised after the Commission issues a final order and appeals are decided (including any potential remand proceeding). The Court should not disturb the Commission's intent, and the General Assembly's design, that the approved ESP rates be implemented during the rehearing and appeal process. Accordingly, IEU's Second Proposition of Law should be rejected.

PROPOSITION OF LAW NO. VII:

> **The Commission's approval of the Economic Development Rider outside of the fixed percentage increase ordered as part of the Electric Security Plan is lawful and should be affirmed.**

IEU challenges (IEU's Merit Brief at 15-21) the lawfulness and reasonableness of permitting the Commission's decision to exempt the Economic Development Rider from the fixed percentage increases ordered in the application approvals. The substance of IEU's argument is that the Commission failed to provide any justification for this modification of the application.

R.C. 4905.31, Ohio Rev. Code, provides for recovery of costs "in conjunction with any economic development and job retention program of the utility***including recovery of revenue foregone as a result of any such program." The Economic Development Rider allows AEP Ohio to recover the revenues that the Companies would have collected under the GS-4 tariffs but for the special contracts approved by the Commission in Commission Case Nos. 09-119-EL-AEC and 09-516-EL-AEC.

IEU asserts a legal challenge to the Commission's action under R.C. 4905.31 based upon the Commission not specifically mentioning this particular rider as an item outside of the caps established in the electric security plan. (IEU Merit Brief at 18-21.) IEU also argues that the fact that the increase, "piles on additional rate increases for customers at a most precarious time for Ohio's economy." (Id. at 20.) The fact that Commission did not specifically enumerate that an economic development rider would exist outside the construct of the caps imposed on standard service offer rates is not a legal or factual argument to reverse the Commission. The Commission found that it "enumerated a few of the riders and other mechanisms that are exempt from the ESP rate increase limitations in the first entry on rehearing, the list was not, as IEU-Ohio suggests, exhaustive." (*EDR Case*, 09-1095-EL-RDR, January 7, 2010 Finding and Order at ¶27; Ap. at 385.) IEU seeks to hold the Commission to a standard that it is required to enumerate every right, consequence, power, and result of every decision it makes of be forbidden to every consider a related matter at any time in the future. Such a standard is impractical and off base. As determined by the Commission, it has the authority over these reasonable arrangements that further state policy and are consistent with R.C. Sections 4905.31 and 4928.02, and Chapter 4901:1-38, O.A.C. (*Id.*)

IEU's argument that the costs should not be added because it puts an economic burden on the Companies' customers shows a lack of understanding of the electric security plan. Any amounts not recovered due to the caps that are justified can be recovered in the fuel adjustment clause deferrals. The costs are still going to customers. Those deferrals contain associated carrying charges based on the Companies' weighted average cost of capital. The caps do not prevent customers from paying for the cost of the standard service offer and the Economic Development Rider in this instance. Inclusion of the costs under the cap would only serve to increase the costs as reflected in the deferral. These costs will impact customers regardless of the treatment. IEU's argument is not a legal argument and is without merit and should be denied. Accordingly, IEU's Third Proposition of Law should be rejected.

PROPOSITION OF LAW NO. VIII:

The Commission's approval of the Companies Weighted Average Long-Term cost of debt for calculating carrying costs associated with recovery of the costs of the Economic Development Rider is proper and should be affirmed.

IEU takes issue with the Commission's adoption of the Commission's approval of the use of the weighted average costs of each operating company's respective long-term debt. (IEU Merit Brief at 21-22.) As IEU points out at page 21 of its Brief, the Commission found that under the process outlined by its rules that the use of each company's average cost of long-term debt is a more appropriate mechanism for calculating carrying charges than short-term debt, and, therefore, should be utilized. (*EDR Case*, January 7, 2010 Finding and Order at ¶24; Ap. at 384.)

IEU equates the Commission's lack of description of the reasons why it did not investigate IEU's request to use a different method as a reason to overturn the Commission's decision. (IEU Merit Brief at 21-22.) That is not the standard. IEU must show that the Commission's decision is unlawful or unreasonable. The Companies provided the Commission with arguments supporting the use of long term debt and the fact that they do not finance items like the economic development rider on a piecemeal basis, necessitating a long-term debt. Under Rule 4901:1-38-08(A)(1), O.A.C, "[T]he approval of the request for revenue recovery, including the level of such recovery, shall be at the commission's discretion." IEU provides no argument that the Commission's decision was unlawful or unreasonable and the Commission decision should be affirmed. Accordingly, IEU's Fourth Proposition of Law should be rejected.

CONCLUSION

For the foregoing reasons, AEP Ohio respectfully requests that this Court reverse and remand the Commission's decision below with respect to the issues raised in Appellant's Notice of Appeal and affirm the Commission's decision below with respect to the issues raised in Cross-Appellant's Notice of Appeal.

Respectfully submitted,

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PROOF OF SERVICE

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

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Appendix

APPENDIX UPDATE
Supreme Court Case No. 2010-722

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Ohio Rev. Code Ann. §4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

Ohio Rev. Code Ann. §4903.11 Proceeding deemed commenced.

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

Effective Date: 09-29-1997

Ohio Rev. Code Ann. §4903.12 Jurisdiction.

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Effective Date: 10-01-1953

Ohio Rev. Code Ann. §4903.15 Orders effective immediately - notice.

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

Effective Date: 10-25-1961

Ohio Rev. Code Ann. §4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

Ohio Rev. Code Ann. §4903.17 Order in case of stay.

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

Effective Date: 10-01-1953

Ohio Rev. Code Ann. §4905.32 Schedule rate collected.

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Effective Date: 10-01-1953

Ohio Rev. Code Ann. §4909.42 Commission fails to issue timely order.

If the proceeding on an application filed with the public utilities commission under section 4909.18 of the Revised Code by any public utility requesting an increase on any rate, joint rate, toll, classification, charge, or rental or requesting a change in a regulation or practice affecting the same has not been concluded and an order entered pursuant to section 4909.19 of the Revised Code at the expiration of two hundred seventy-five days from the date of filing the application, the proposed increase shall go into effect upon the filing of an undertaking by the public utility. The undertaking shall be filed with the commission and shall be payable to the state for the use and benefit of the customers affected by the proposed increase or change. The undertaking must be signed by two of the officers of the utility, under oath, and must contain a promise to refund any amounts collected by the utility over the rate, joint rate, toll, classification, charge, or rental, as determined in the final order of the commission. All refunds shall include interest at the rate stated in section 1343.03 of the Revised Code. The refund shall be in the form of a temporary reduction in rates following the final order of the commission, and shall be accomplished in such manner as shall be prescribed by the commission in its final order. The commission shall exercise continuing and exclusive jurisdiction over such refunds. If the public utilities commission has not entered a final order within five hundred forty-five days from the date of the filing of an application for an increase in rates under section 4909.18 of the Revised Code, a public utility shall have no obligation to make a refund of amounts collected after the five hundred forty-fifth day which exceed the amounts authorized by the commission's final order. Nothing in this section shall be construed to mitigate any duty of the commission to issue a final order under section 4909.19 of the Revised Code.

Effective Date: 07-06-2001

Ohio Administrative Code 4901:1-38-01

(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

Ohio Administrative Code 4901:1-38-08

(A) Each electric utility that is serving customers pursuant to approved reasonable arrangements, may apply for a rider for the recovery of certain costs associated with its delta revenue for serving those customers pursuant to reasonable arrangements in accordance with the following:

(1) The approval of the request for revenue recovery, including the level of such recovery, shall be at the commission's discretion.

(2) The electric utility may request recovery of direct incremental administrative costs related to the programs as part of the rider. Such cost recovery shall be subject to audit, review, and approval by the commission.

(3) For reasonable arrangements in which incentives are given based upon cost savings to the electric utility (including, but not limited to, nonfirm arrangements, on/off peak pricing, seasonal rates, time-of-day rates, real-time-pricing rates), the cost savings shall be an offset to the recovery of the delta revenues.

(4) The amount of the revenue recovery rider shall be spread to all customers in proportion to the current revenue distribution between and among classes, subject to change, alteration, or modification by the commission. The electric utility shall file the projected impact of the proposed rider on all customers, by customer class.

(5) The rider shall be updated and reconciled, by application to the commission, semiannually. All data submitted in support of the rider update is subject to commission review and audit.

(B) If it appears to the commission that the proposals in the application may be unjust and unreasonable, the commission shall set the matter for hearing.

(1) At such hearing, the burden of proof to show that the revenue recovery rider proposal in the application is just and reasonable shall be upon the electric utility.

(2) The revenue recovery rider shall be subject to change, alteration, or modification by the commission.

(3) The staff shall have access to all customer and electric utility information related to service provided pursuant to the reasonable arrangements that created the delta revenue triggering the electric utility's application to recover the costs associated with said delta revenue.

(C) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

Effective: 04/02/2009

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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.	)))))	Case No. 09-119-EL-AEC

OPINION AND ORDER

The Commission, considering the above-entitled application, hereby issues its opinion and order in this matter.

APPEARANCES:

Sonnenschein Nath & Rosenthal LLP, by Clifton A. Vince, Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand, 1301 K Street NW, Suite 600 East Tower, Washington, D.C. 20005, on behalf of Ormet Primary Aluminum Corporation.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Thomas Lindgren and Thomas McNamee, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Marvin I. Resnik and Steven T. Nourse, American Electric Power Service Corporation, 1 Riverside Plaza, 29th Floor, Columbus, Ohio 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Gregory J. Poulos, and Maureen R. Grady, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential consumers of Columbus Southern Power Company and Ohio Power Company.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister and Joseph M. Clark, 21 East State Street, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Chester, Willcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

OPINION:

I. History of the Proceeding

On February 17, 2009, Ormet Primary Aluminum Corporation (Ormet) filed an application pursuant to Section 4905.31, Revised Code, to establish a unique arrangement with the Ohio Power Company and Columbus Southern Power Company (AEP-Ohio) for electric service to its aluminum-producing facility located in Hannibal, Ohio. In its application, Ormet requests that the Commission establish a unique arrangement for electric service with AEP-Ohio that links the price of electricity for its facility for calendar years 2010 through 2018 with the price of aluminum as reported on the London Metal Exchange (LME). Ormet filed an amended application on April 10, 2009, to reflect the possible curtailment of the equivalent of at least two of its six potlines.

On March 9, 2009, Industrial Energy Users-Ohio (IEU-Ohio) filed comments regarding Ormet's application. Further on April 28, 2009, Ohio Energy Group (OEG) and Kroger Company (Kroger) each filed comments regarding Ormet's amended application.

Motions to intervene were filed by AEP-Ohio, IEU-Ohio, OEG, Kroger, and the Ohio Consumers' Counsel (OCC). Those motions were granted by the attorney examiner.

Based upon the comments, the attorney examiner set this matter for hearing. The hearing in this matter commenced on April 30, 2009, and concluded on June 17, 2009. At the hearing, Ormet presented four witnesses, OCC presented three witnesses, and Staff presented one witness. Briefs were filed on July 1, 2009, by Ormet, AEP-Ohio, OCC and OEG, IEU-Ohio, Kroger, and Staff.

II. Discussion and Conclusions

In support of the unique arrangement, Ormet argues that the benefits to the region of keeping Ormet in operation will more than offset the delta revenue paid by other ratepayers. Ormet claims that the undisputed expert testimony in the record of this proceeding demonstrates that, at full operations, Ormet provides $195 million of benefits to the regional economy (Ormet Ex. 5 at 1).

Ormet also contends that the proposed unique arrangement furthers the policy of the State of Ohio as codified in Section 4928.02, Revised Code. Ormet claims that the unique arrangement is designed to meet the specific needs of Ormet with respect to the price, terms, conditions, and quality options of electric service as specified by Section 4928.02(B), Revised Code. Further, Ormet claims that the unique arrangement will help Ohio compete in the global economy pursuant to Section 4928.02(N), Revised Code. Ormet contends that it competes in a global market and needs affordable energy in order to compete.

Ormet further contends that it has provided the information needed by the Commission to approve the unique arrangement. Ormet notes that it has provided an affidavit from its chief executive officer verifying the information provided in the application and that it has also provided verifiable data in support of the application.

OCC and OEG claim that Ormet's economic analysis of its impact on the region is flawed because it fails to factor in the negative economic impact on the rest of the state from raising electric rates to pay for the delta revenues (Tr. I at 263, 265). OCC and OEG assert that there will be a clear negative economic impact to requiring all other AEP-Ohio ratepayers to pay increased rates to pay for the delta revenues under the proposed unique arrangement.

IEU-Ohio notes that the Commission may approve a proposed unique arrangement if it is shown to be just and reasonable and that it furthers the policy of this state. However, IEU-Ohio argues that Ormet's application should not be approved. IEU-Ohio claims that there are no clear or reliable indications of how the proposed unique arrangement will produce sufficient beneficial outcomes to make the transfer of revenue responsibility just and reasonable. IEU-Ohio alleges that there are many unanswered questions regarding the proposed unique arrangement, including questions related to the future price of aluminum, the treatment of delta revenue, pending litigation between Ormet and its alumina supplier, Ormet's ability to negotiate a new tolling contract, the sale of significant assets currently owned by Ormet, and the minimum cash requirement associated with labor costs for 2010 and beyond.

The Commission finds that Ormet's application for a unique arrangement should be approved subject to a number of modifications set forth below. The evidence in the record of this proceeding demonstrates that Ormet provides significant economic benefits to the region. Specifically, the evidence demonstrates that Ormet provides $195 million in total employee compensation and benefits to the regional economy (Ormet Ex. 5 at 1). The evidence also indicates that Ormet is a key employer for the region (Ormet Ex. 5 at 3-4) and that Ormet's operations are responsible, indirectly, for the creation of an additional 2,400 jobs in the region (Tr. 1 at 262-263). Further, the record shows that Ormet's operations generate over $6.7 million in tax revenue each year (Tr. 1 at 271). Finally, although OCC and OEG, as well as Staff, claim that the increased rates paid by ratepayers will have a negative economic effect on the state's economy, no party presented evidence in the record which quantified this negative effect (TR. 1 at 264-265).

The Commission notes that, although the proposed unique arrangement covers the period between January 1, 2009 and December 31, 2018, the specific terms and conditions of the unique arrangement are distinctly different for calendar year 2009 than for the remaining years of the unique arrangement. Therefore, the Commission will address the terms related to calendar year 2009 separately.

A. Terms of the Unique Arrangement for Calendar Year 2009

Under the terms of the amended application, for the balance of calendar year 2009, Ormet will pay AEP-Ohio the lesser of the applicable AEP-Ohio tariff rate or $38.00 per MWh. If Ormet reduced its production by the equivalent of at least two potlines, Ormet's rate would be reduced to the lesser of the applicable AEP-Ohio tariff rate or $34.00 per MWh. Ormet requests that the rate for 2009 going forward be set at a level that, taking into account the rate that Ormet has been paying to date, would result in an average rate of $38.00 per MWh for the portion of the year that Ormet was above the four potline operating level and an average rate of $34.00 per MWh for the portion of the year that Ormet was operating at four potlines or less.

OCC and OEG argue that, while Ormet's proposed unique arrangement for 2009 is reasonable in most respects, the provisions calling for retroactive recovery of discounted rates should be rejected. OCC and OEG note that the proposed unique arrangement requests the Commission make the unique arrangement retroactive to January 1, 2009. OCC and OEG allege that this would result in Ormet receiving discounted rates for electricity that were different from the rates which were approved and in effect at the time the service was delivered. OCC and OEG argue that this would constitute retroactive ratemaking which is prohibited. *Lucas County v. Public Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349. Further, OCC and OEG contend that Ormet should be required to pay AEP-Ohio's economic development rider. OCC and OEG note that this rider is unavoidable and that Ormet should pay this rider just like all other customers.

Finally, OCC and OEG claim that the proposed unique arrangement for 2009 is unreasonable and unlawful because it provides compensation to AEP-Ohio for its POLR responsibilities when Ormet cannot shop under the contract. OCC and OEG claim that, because AEP-Ohio will not incur any risk that Ormet would leave and come back to system and seek service when the market makes it more economical, AEP-Ohio should not assess a POLR charge on Ormet, and ratepayers should not pay any discount which compensates AEP-Ohio for a non-existent POLR risk for this consumer.

AEP-Ohio argues that the Commission should not reopen its prior approval of the temporary amendment to the 2007-2008 contract between Ormet and AEP-Ohio. This temporary amendment was approved by the Commission effective January 1, 2009. AEP contends that, if the Commission approves the proposed unique arrangement, the unique arrangement should be effective on a prospective basis only because an earlier effective date would violate the terms of the temporary amendment.

Staff notes that Ormet's rate for 2009, the first year of the agreement, would be fixed at either $38 per MWh or $34 per MWh, depending on the number of potlines in operation (OCC Ex. 3 at 6-7). Although Staff had previously recommended that the Commission bifurcate this proceeding and address calendar year 2009 separately, Staff recommends Commission approval of the terms for the first year of the unique arrangement.

The Commission finds that the terms of the unique arrangement for 2009 should be approved subject to the following modifications. With respect to price, the Commission orders AEP-Ohio to bill Ormet, for the balance of 2009, at a rate which, for all of calendar year 2009, averages $38.00 per MWh for the periods when Ormet was in full operation (i.e., six potlines), $35.00 per MWh for the periods when Ormet curtailed production to 4.6 potlines, and $34.00 per MWh for the periods when Ormet curtailed production to 4 potlines. This rate will ensure that Ormet will receive the benefits of the rates proposed for calendar year 2009 in its amended application without bifurcating the proceeding as originally proposed by Staff. Further, this rate is contingent upon Ormet maintaining employment levels at 900 employees for calendar year 2009 pursuant to Ormet's representations in the record of this proceeding (Ormet Ex. 11A at 5-6; Tr. III at 425).

However, with respect to the delta revenue for 2009, the Commission believes further proceedings are necessary regarding the recovery of delta revenues by AEP-Ohio for calendar year 2009. Therefore, the Commission authorizes AEP-Ohio to defer the delta revenues created by the unique arrangement for the remainder of calendar year 2009, and the Commission directs AEP-Ohio to file an application to recover the appropriate amounts of the deferrals authorized by the Commission in Case No. 08-1338-EL-AAM and the delta revenues for calendar year 2009.

The approved unique arrangement shall be effective for services rendered following the filing in this docket of an executed power agreement which conforms to the modifications ordered by the Commission in this Opinion and Order. Although the power agreement shall be effective for services rendered after the filing of an executed power agreement, the Commission retains the right, upon review of the executed power agreement, to order further revisions to the power agreement in order to ensure that the power agreement conforms to the modifications of the proposed unique arrangement ordered by the Commission in this Opinion and Order.

B. Terms of the Unique Arrangement for Calendar Years 2010 through 2018

For calendar years 2010 through 2018, the rate Ormet will pay under the proposed unique arrangement will be determined based upon schedules filed each year with the Commission. Each schedule would include an "indexed rate" and a "target price." The indexed rate would be the rate that Ormet could pay to produce the minimum cash flow necessary to sustain operations and pay its required legacy costs depending upon the LME price of aluminum. The target price will be the projected average price of aluminum for the calendar year as reported on the LME at which Ormet would be able to pay the AEP-Ohio tariff rate and still maintain the minimum cash flow necessary to maintain its operations and pay its required legacy costs. Under the proposed unique arrangement, the Commission may require an independent third-party review of each year's schedule at Ormet's expense.

When the LME price of aluminum is less than or equal to the target price, Ormet will pay the indexed rate. When the LME price of aluminum is greater than the target price, but not more than $300 per tonne above the target price, Ormet will pay 102 percent of the AEP-Ohio tariff rate. When the LME price is greater than $300 per tonne than the target price, Ormet will pay 105 percent of the AEP-Ohio tariff rate. At the end of each year, there will be a true-up to reconcile the projected LME prices for the year with the actual LME prices.

With respect to the terms of the unique arrangement for calendar years 2010 through 2018, intervenors in this proceeding and Staff have raised a number of specific arguments related to: (1) the proposed discount and delta revenue recovery; (2) potential delta revenue credits; (3) POLR charges; (4) deposit and advance payment requirements; and (5) the need for future review of the proposed unique arrangement. Although the Commission will approve the proposed unique arrangement, the Commission will order a number of modifications to the unique arrangement in order to address the issues raised by intervenors and Staff.

1) Proposed Discount and Delta Revenue Recovery

IEU-Ohio argues that the unique arrangement, if approved, would impose an excessive burden on other customers of AEP-Ohio. IEU-Ohio claims that, under the pricing formula contained in the proposed unique arrangement and assuming an AEP-Ohio tariff rate of $44.24 per MWh, Ormet would need to sell aluminum at $2,843 per tonne to avoid creating delta revenues; however, if Ormet sold aluminum in 2010 at $1,602 per tonne, which was the LME forward price as of April 29, 2009, delta revenues would amount to $283 million (OEG Ex. 1; OEG Ex. 6).

Likewise, OCC and OEG claim that the proposed unique arrangement is unreasonable because it fails to limit the delta revenues that ratepayers could be asked to pay. OCC and OEG note that any LME price less than $2,200 per tonne will result in Ormet being paid, in the form of a credit on its bill, to use electricity (Tr. I at 153; Tr. II at 297). As of May 1, 2009, the LME futures price for July 2010 was $1,602 per tonne (Tr. I at 150-155). OCC and OEG claim that, if the futures price for July 2010 accurately reflects the actual LME price for July 2010, Ormet will be paid $77.1 million to use power in 2010 (Tr. I at 153). OCC and OEG contend that there is no basis in law for the proposed unique arrangement and that Ormet has failed to provide any credible legal justification for requiring ratepayers to pay cash to a company beyond discounting rates to zero dollars. Therefore, OCC and OEG conclude that the proposed unique arrangement would not be reasonable without an appropriate floor for the rate Ormet will pay.

OCC and OEG note that, although the total impact of wages on the states of Ohio, West Virginia and Pennsylvania, if Ormet were to close, would be $195 million per year (Ormet Ex. 8 at 4), half of the employees and retirees identified in the amended application reside in Pennsylvania and West Virginia (Ormet Ex. 5 at 5), and a substantial amount of the tax revenues received from Ormet goes to West Virginia (Ormet Ex. 5 at 11-12). Thus, OCC and OEG conclude that Ormet's economic study should be discounted by 42 percent before it can be considered a relevant study on the Ohio economic impact of a potential closing by Ormet. OCC and OEG note that Staff recommended in the hearing that the amount of the rate discount be limited to $54 million per year and that the discount be phased out over the term of the contract (Staff Ex 2 at 3). However, OCC and OEG maintain that the limit should not exceed $32 million, the amount of wages of the Ohio workers at the Ormet plant.

Kroger argues that, when considering a proposed unique arrangement, the Commission must balance all costs of the proposed arrangement with the benefits of assuming those costs. Further, Kroger contends that, in order to avoid exposing ratepayers to unreasonable and unlimited risk, any unique arrangement approved by the Commission in this proceeding should include reasonable protections for AEP-Ohio ratepayers. Kroger believes that the reasonable protections should include a definitive limit on the cost that ratepayers are required to pay, by either limiting the discount Ormet receives to a certain percentage below AEP-Ohio's tariff rates or placing a dollar limit on the amount of delta revenues AEP-Ohio may recover annually from the unique arrangement.

AEP-Ohio believes that the amount of any discount to be provided to Ormet is a matter for the Commission's judgment. However, AEP-Ohio claims that, under Section 4905.31(E), Revised Code, AEP-Ohio must be provided full recovery of all delta revenues under the unique arrangement because the statute specifies that all costs of an economic development program or job retention program are recoverable by an electric utility, including all "revenue forgone."

Ormet claims that the potential harm predicted by the intervenors in this proceeding is speculative and based upon an unlikely worst case scenario. Ormet contends that the delta revenue calculations by OCC and OEG are based upon the erroneous assumption that current LME forward prices are reliable predictors of future LME prices and that future LME prices are likely to stay below $1,941 per tonne (OCC Ex. 3 at 11-12). However, Ormet contends that a more reliable projection predicts that aluminum prices will be near $2,000 per tonne by the end of 2009 (Ormet Ex. 9 at 1; Tr. I at 173-174). Ormet also claims that there are several additional factors that will lower its costs, and the need for rate discounts, over time; these factors include deleveraging through the proceeds raised by asset sales and internally-generated cash (Ormet Ex. 7 at 2), and reductions in Ormet's pension contributions beginning in 2013 (Tr. III at 434-436).

Staff argues that any unique arrangement approved by the Commission should contain a floor and a ceiling. The Staff believes that a price floor, below which a customer's payments cannot go, reflects the need to maintain the customer's incentive to operate efficiently and effectively. Staff maintains that a maximum reduction of 25 percent from the tariff rate is the appropriate balance, keeping the customer focused on efficiency but providing temporary assistance as well (Staff Ex. 2). This floor would result in a maximum rate discount of $54 million.

In addition, Staff argues that there should be a ceiling on the amount of delta revenue to be recovered from other ratepayers. Staff notes that the benefits of unique arrangements to other ratepayers are limited and that the ability of other ratepayers to pay for delta revenues is likewise limited. Staff believes that the primary benefit of the unique arrangement is the potential preservation of jobs in Ohio; thus, Staff argues that the cap on annual delta revenue recovery should be set initially at $54 million, which is the amount of Ormet's payroll. In addition, Staff recommends that the amount of any discount be reduced by 11 percent of the initial discount each year during the term of the unique arrangement.

Ormet argues that the $54 million cap proposed by Staff is insufficient. Although Ormet believes that the aluminum market will rebound, Ormet claims that this market is highly volatile and that any cap must address this volatility (Ormet Ex. 6 at 6-7). Ormet maintains that the $54 million cap proposed by Staff is inadequate given the volatility of the aluminum market. Ormet claims that, if the discount in any given year is not sufficient to keep Ormet in business, then the entire contract will fail and Ormet will likely need to curtail production at its Hannibal facility.

Moreover, Ormet contends that Staff's proposed cap is unreasonable and speculative. Ormet believes that Staff's proposed cap fails to consider what Ormet needs to operate or to balance the costs of discounts against Ormet's benefits to this state. Ormet also claims that Staff has provided no support for its position that a maximum reduction of 25 percent from the tariff rate is appropriate. Further, Ormet contends that Staff has not demonstrated that its proposed $54 million cap would enable Ormet to remain in business for the years 2010 through 2019.

The Commission agrees with Staff's position that, generally, unique arrangements must contain a floor, a minimum amount that the party seeking a unique arrangement should be required to pay, and a ceiling, a maximum amount of delta revenue which the ratepayers should be expected to pay. Ormet represents that it does not oppose the application of a cap or floor to its contract (Ormet Brief at 21).

With respect to a floor, Ormet proposes a number of different methods for establishing a floor, with a range of $93 million to $114 million as the maximum discount from tariff rates. This range includes the variable costs of production of the electricity consumed by Ormet, which testimony indicates would be approximately $90 million (Tr. I at 235; Staff Ex. 2A, Tr. IV. at 478-479, 491-492). On the other hand, Staff has proposed a floor in which Ormet would receive a maximum discount from tariff rates of $54 million. OCC and OEG propose a floor of $32 million, based upon the total wages paid to Ormet's employees who reside in this state.

Based upon the record in this case, the Commission finds that Ormet's rate should be determined as proposed in the unique arrangement, but with a floor, or maximum discount from tariff rates. Although the Commission does not agree with Staff's recommendation on the amount of the floor, this floor should be implemented in the manner proposed by Staff at the hearing (Staff Ex. 2). Moreover, the Commission is not persuaded by the arguments presented by OCC and OEG that the Commission should consider only the Ohio portions of the regional economy. All of the jobs which would be retained under the proposed unique arrangement are located in this state irrespective of where the employees reside. Further, neither OCC nor OEG presented any economic analysis regarding how much of the indirect benefits of Ormet's continuing to remain in operation advantage the residents of this state as opposed to other states.

Therefore, the Commission will modify the proposed unique arrangement to set the maximum rate discount at $60 million for calendar years 2010 and 2011. The Commission has based the floor upon the variable costs of production of the electricity consumed by Ormet at full capacity, which the testimony at hearing indicates would be approximately $90 million. However, testimony in the record also indicates that, at the time of the hearing, Ormet was in the process of curtailing production to 4 potlines (Tr. 1 at 70-71). This curtailment of operations should reduce Ormet's demand for electricity by approximately one-third; therefore, the Commission has reduced the estimate of the variable costs of production of the electricity of $90 million by one-third to $60 million. The Commission finds that this is an appropriate floor or maximum discount for Ormet. This floor will be subject to two adjustments: a flexible phase down and a reduction in the discount due to reductions in employment, both of which will be discussed below.

With respect to the ceiling, or the maximum amount ratepayers should be expected to pay in any given year, the Commission agrees with Staff and the intervenors that the ability of ratepayers to fund the recovery of delta revenues is not unlimited. Ormet contends that the Staff has not offered proof for its recommendation of what ratepayers can afford to pay. However, Ormet, not Staff nor the intervenors, has the burden of proof in this proceeding, and it is Ormet that has failed to present evidence contravening the Staff's expert testimony, which was based upon substantial experience in relevant utility matters in this state (Staff Ex. 1 at 1; Tr. II at 336-338; Tr. IV at 505). Therefore, the Commission will adopt Staff's recommendation of $54 million as the maximum amount of delta revenue which ratepayers should be expected to pay in a given year.

However, this will result in a potential differential of up to $6 million per year between the $60 million maximum discount from tariff rates for Ormet and the $54 million maximum in delta revenues which ratepayers can be expected to pay. AEP-Ohio will be authorized to defer this differential, with carrying costs equal to AEP-Ohio's long term cost of debt, during the term of the unique arrangement. During this time, all delta revenue credits attributable to above-tariff payments by Ormet, to be calculated as discussed below, will be first applied to reduce or eliminate the deferral and carrying charges before being applied to AEP-Ohio's economic development rider. At the end of the term of the unique arrangement, AEP-Ohio will be permitted to recover any remaining deferred amounts, including carrying charges, through its economic development rider.

With respect to the adjustments to the floor, or maximum rate discount, the Commission agrees with Staff's recommendation that the unique arrangement be modified to phase down the discount over time. Ormet represents that there are several additional factors that will lower its costs, and in turn the need for rate discounts, over time; these factors include deleveraging through the proceeds raised by asset sales and internally-generated cash (Ormet Ex. 7 at 2) and reductions in Ormet's pension contributions beginning in 2013 (Tr. III at 434-436, 457-458). Therefore, although the $60 million floor will be in effect for calendar years 2010 and 2011, the Commission finds that, for calendar year 2012, the floor should be reduced to $54 million; for calendar years 2013 through 2018, the remaining six years of the contract, the floor should be reduced each year by $10 million, until it phases out completely for calendar year 2018.

The Commission also acknowledges that the aluminum market is subject to a great deal of volatility and that the unique arrangement should address that volatility.

Therefore, for calendar year 2013 through 2018, Ormet may elect to use, in the current year, any unused portion of the floor from a previous year (or years). Ormet shall apply this election by providing written notice to AEP-Ohio and by filing such notice in this docket. For example, if, due to LME prices in 2014, Ormet only uses a discount of $28.75 million, leaving $6 million of the 2014 discount unused, Ormet may elect to increase the floor in calendar year 2015 (or 2016 through 2018) by the $6 million unused discount. In no event will an adjusted floor be permitted to exceed $54 million in any year between 2013 and 2018. This should assist Ormet in weathering any short-term swings in the LME market while ensuring that the floor, or maximum rate discount, phases out over the duration of the unique arrangement.

Second, the Commission notes that the primary purpose of the unique arrangement is to retain jobs rather than to boost worldwide aluminum production or to enrich Ormet's investors. Any rate discounts provided to Ormet must be directly related to Ormet maintaining certain levels of employment. The record in this case demonstrates Ormet cannot continue to employ 900 employees beyond 2009 with curtailed production (Tr. III at 425). Therefore, under the unique arrangement, Ormet will be required to maintain an employment level of full-time employees of 650. Ormet will be required to provide a monthly report to Staff and AEP-Ohio detailing its employment levels. The floor will be reduced each month by $10 million for every 50 employees below 650 full-time employees that were employed by Ormet for the previous month. This reduction will be in addition to any planned phase down of the floor discussed above.

2) <u>Potential Delta Revenue Credits</u>

Kroger argues that the unique arrangement must provide for a greater share in the benefits for AEP-Ohio ratepayers in the event that aluminum prices rise above the target price. Kroger claims that ratepayers are being asked to bear the risk of declining aluminum prices and, therefore, should receive a reasonable return in the event that aluminum prices rebound. Kroger does not believe that a potential five percent gain is sufficient to compensate ratepayers for these risks.

OCC and OEG also allege that, under the proposed unique arrangement, AEP-Ohio's ratepayers bear great risks related to the price of aluminum while receiving little benefit if the price of aluminum rises. OCC and OEG cite to the testimony of OCC witness Ibrahim that the proposed unique arrangement lacks symmetry regarding the risks and benefits born by AEP-Ohio's customers (OCC Ex. 3 at 14-15). OCC and OEG claim that, if aluminum prices double from the price when Dr. Ibrahim filed his testimony, the possible benefit to AEP-Ohio's ratepayers would only be $3.6 million to $8.9 million (OCC Ex. 3 at 15). On the other hand, if the futures price for July 2010 accurately reflects the actual LME price for July 2010, Ormet will be paid $77.1 million to use power in 2010 and ratepayers would be responsible for delta revenues of $281.1 million. OCC and OEG contend that this asymmetry is extremely disadvantageous to AEP-Ohio's ratepayers because these ratepayers will bear huge risks for delta revenues while the benefits are extremely unlikely and minimal compared to the risks. Consequently, OCC and OEG recommend that a reasonable symmetry would require Ormet to pay a rate that exceeds the tariff rate by $0.049 per MWh times 50 percent for each $1 per tonne when the actual LME price exceeds the target price. AEP-Ohio would receive delta revenue credits for the amount that Ormet pays in excess of tariff rates with a maximum delta revenue credit cap of $16.35 million per year.

Ormet contends that the proposed unique arrangement is designed to assure that Ormet is not unreasonably benefitted at the expense of AEP-Ohio's ratepayers. Ormet notes that the unique arrangement is designed to impose the minimum burden on ratepayers by providing for the minimum cash flow necessary to keep its Hannibal facility in operation and pay its required legacy costs; the unique proposed arrangement does not guarantee that Ormet will earn a profit or a particular rate of return. Further, Ormet notes that it has voluntarily offered to pay above-tariff rates when the LME price of aluminum is greater than the target price.

The Commission finds that the unique arrangement, as filed, contains insufficient potential benefits to ratepayers in relation to the risks which Ormet proposes the ratepayers bear. Further, the Commission notes that the record indicates that Ormet will be able to substantially reduce its pension fund obligations beginning in the future (Tr. III at 434-436). However, the Commission finds that this can be addressed by increasing the amounts that Ormet will pay when LME prices exceed the LME target price. Therefore, beginning in 2012, if the LME price is greater than the LME target price, but not more than $300 above the LME target price, Ormet will pay 104 percent of the AEP-Ohio tariff rate rather than 102 percent of the AEP-Ohio tariff rate. Assuming full operations at Ormet's facility, this will increase the Ormet's potential contribution to delta revenue credits to approximately $8.74 million per year from $4.37 million. Further, if the LME price is greater than $300 above the LME target price, Ormet will pay 108 percent of the AEP-Ohio tariff rate rather than 105 percent of the AEP-Ohio tariff rate. This will increase Ormet's potential contribution to delta revenue credits to approximately $17.48 million per year from $10.91 million.

The Commission finds that any amounts paid by Ormet in excess of AEP-Ohio's tariff rates should be considered as delta revenue credits. AEP-Ohio is directed to apply the delta revenue credits first to any deferred amounts, including carrying charges, of delta revenues. Any remaining delta revenue credits should be applied to AEP-Ohio's economic development rider.

3) <u>POLR Charges</u>

OCC and OEG claim that the proposed unique arrangement is unreasonable and unlawful because it compensates AEP-Ohio for POLR charges when Ormet cannot shop under the unique arrangement. Under terms of the proposed unique arrangement, AEP-Ohio would be the exclusive supplier to Ormet's Hannibal facility (Ormet Ex. 8, Attachment A at 8-9; Tr. I at 37; Tr. IV at 484). OCC and OEG reason that, since there is no risk that Ormet will shop generation service while the contract is in effect, there is no risk to AEP-Ohio that it will be called to serve as Ormet's provider-of-last-resort; therefore, a POLR charge should not be assessed upon Ormet, and the other ratepayers should not pay delta revenues for POLR charges.

Kroger also contends that POLR charges should be excluded from the amount of delta revenues recovered by AEP-Ohio. Kroger reasons that, because Ormet will be contractually obligated to receive electricity from AEP-Ohio under the proposed unique arrangement, there is no risk to AEP-Ohio that Ormet will purchase electricity from an alternative electric service supplier. Kroger claims that, under the proposed unique arrangement, AEP-Ohio would still receive compensation for being the POLR supplier without incurring POLR costs. Further, Kroger believes that AEP-Ohio should be required to share the cost of any discount to Ormet since AEP-Ohio benefits financially from continued Ormet operations.

AEP-Ohio argues that the POLR charges authorized in its electric security plan should not be reduced. AEP-Ohio notes that the policy of the State is to promote competitive generation markets and customer choice. Section 4928.02, Revised Code. AEP-Ohio believes that any Commission order keeping Ormet's load out of the competitive markets for ten years would conflict with that policy. Further, AEP-Ohio contends that the Commission has already determined, in its electric security plan proceeding, that a customer should not be able to give up its statutory right to obtain service from a competitive supplier in exchange for avoiding the POLR charge. Instead, the only opportunity for a customer to avoid the POLR charge is to switch to a competitive supplier and agree to pay market rates for generation upon any return to the electric utility. *In re Columbus Sothern Power Co. and Ohio Power Co.,* Case No. 08-917-EL-SSO et al., Opinion and Order (March 18, 2009) at 40.

The Commission finds that, under the terms of the unique arrangement, AEP-Ohio will be the exclusive supplier to Ormet (Tr. I at 37-38; Tr. IV at 484). Therefore, there is no risk that Ormet will shop for competitive generation and then return to AEP-Ohio's POLR service. If AEP-Ohio were to retain these charges, AEP-Ohio would be compensated for a service it would not be providing. Moreover, our decision in the AEP-Ohio electric security plan is inapplicable to this case because that holding addressed customers receiving service under AEP-Ohio's standard service offer rather than a customer receiving service under a unique arrangement specifically approved by the Commission. Therefore, the Commission finds that the unique arrangement should be modified such that any POLR charges paid by Ormet are used to reduce the AEP-Ohio's ratepayers' obligations under the unique arrangement. During the term of the unique arrangement, AEP-Ohio shall credit any POLR charges paid by Ormet to its economic development rider in order to reduce the impact of the unique arrangement on other ratepayers' bills.

4) <u>Deposit and Advance Payment Provisions</u>

IEU-Ohio observes that the proposed unique arrangement would shift all risk of a potential default by Ormet to AEP-Ohio's customers by relieving Ormet of its current obligation to provide a security deposit as long as AEP-Ohio is permitted to treat any defaulted amounts as delta revenue to be recovered from its customers (Ormet Ex. 8, Attachment A at 14). IEU-Ohio argues that there is no real offset to the costs as a result of shifting the default risks to the other ratepayers and that this is part of the excessive burden placed upon AEP-Ohio's ratepayers under the proposed unique arrangement.

Ormet claims that all it is seeking with respect to deposit and advance payment terms is a return to standard tariff terms (Tr. I at 124, 227). Ormet believes that these terms will benefit AEP-Ohio's other ratepayers. Ormet notes that the calculation of the rate that Ormet can afford to pay is based on the assumption that the cash deposit currently held by AEP-Ohio will be returned to Ormet, thereby increasing its cash flow. If this deposit is not returned, it will result in increasing the magnitude of the discount required and in increasing the delta revenues to be collected from ratepayers. Thus, Ormet claims that, if the deposit is returned, the certainty of lower delta revenues would offset any potential risk of default.

AEP-Oho argues that the provisions in the proposed unique arrangement regarding waiver of deposit and advanced payment should not be modified. AEP avers that any modification would jeopardize the ability of AEP-Ohio to recover any unpaid amounts.

The Commission finds that the provisions related to deposit and advance payments should not be modified. The record clearly demonstrates that these provisions are an essential element of the proposed unique arrangement (Ormet Ex. 11A at 3, 4). Further, the record also demonstrates that Ormet has curtailed its operations, which will result in less ratepayer exposure to the risk of default by Ormet.

5) <u>Future Review of the Proposed Unique Arrangement</u>

In addition, IEU-Ohio claims that the proposed unique arrangement would prohibit the Commission and other stakeholders from seeking to modify the unique arrangement, except in very limited circumstances, while allowing Ormet to request modifications that would further benefit Ormet. Likewise, OCC and OEG claim that the proposed unique arrangement would unlawfully limit the Commission's jurisdiction to review and modify the agreement. Kroger also states that the Commission must have the ability to periodically review and, if necessary, modify the unique arrangement. Further, Kroger claims that ten years is an unreasonable amount of time to expose ratepayers to the risk and cost of a unique arrangement; thus there must be a reasonable time limit on the unique arrangement. Staff agrees that there should be some limit upon the length of the unique agreement. Thus, Staff believes that there should be periodic reviews of whether the unique agreements should continue.

The Commission believes that the provisions contained in the proposed unique arrangement for future review will be adequate to safeguard ratepayers from undue risks if supplemented by an additional, independent provision. The Commission notes that Ormet has repeatedly, throughout this proceeding, represented to the Commission its belief that, in the long-term, LME prices will recover sufficiently for Ormet to profitably operate. Ormet has disparaged the use of futures prices by OCC and OEG to predict future LME prices and has argued instead that the Commission should rely instead upon an analyst report which predicts a future rise in LME prices (Ormet Ex. 9 at 14).

Therefore, the Commission will modify the unique arrangement to provide an additional, independent, termination provision in the event that long-term LME prices do not recover as Ormet predicts. The Commission, above, has determined that, for calendar years 2010 and 2011, AEP should be permitted to defer for future recovery the differential between the floor, or maximum discount, of $60 million and the ceiling of $54 million. The Commission will modify the proposed unique arrangement to allow the Commission to terminate, by order, the unique arrangement if Ormet does not begin to reduce the amount of the accumulated deferrals, and carrying charges, through the payment of above-tariff rates, pursuant to the terms of the unique arrangement, by April 1, 2012. The Commission specifically notes that the crediting of POLR charges by AEP in the form of delta revenue credits shall not constitute the payment of above-tariff rates by Ormet for purposes of this termination provision. Unless otherwise ordered by the Commission, such termination shall be effective immediately upon issuance of a Commission order terminating the unique arrangement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On February 17, 2009, Ormet filed an application pursuant to Section 4905.31, Revised Code, to establish a unique arrangement with AEP-Ohio for electric service to its aluminum-producing facility located in Hannibal, Ohio.

(2) Ormet filed an amended application on April 10, 2009.

(3) Comments regarding Ormet's application and amended application were filed by IEU-Ohio, OEG, and Kroger.

(4) Based upon the comments, the attorney examiner set this matter for hearing before the Commission.

(5) The hearing in this matter commenced on April 30, 2009, and concluded on June 17, 2009.

(6) The amended application is reasonable and should be approved as modified by the Commission.

ORDER:

It is, therefore,

ORDERED, That the amended application for a unique arrangement filed by Ormet be approved as modified by the Commission. It is, further,

ORDERED, That Ormet and AEP-Ohio file an executed power agreement in this docket that conforms to the modifications ordered by the Commission. It is, further,

ORDERED, That the approved unique arrangement shall be effective for services rendered following the filing in this docket of an executed power agreement. It is, further,

ORDERED, That AEP-Ohio be authorized to defer delta revenues for the remainder of calendar year 2009 and for calendar years 2010 and 2011, to the extent set forth in this Opinion and Order. It is, further, ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP:ct

Entered in the Journal
JUL 15 2009

Reneé J. Jenkins
Secretary