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INTRODUCTION

The Merit Briefs filed by the Public Utilities Commission of Ohio (“Commission” or “PUCO”) as well as Columbus Southern Power (“CSP”) and Ohio Power Company (“OP”) (collectively, American Electric Power-Ohio or “AEP-Ohio”) in this proceeding once again fail to justify the Commission’s decisions to ignore statutory edicts contained in Amended Substitute Senate Bill 221 (“SB 221”), to follow its own precedent, and to investigate whether a lower carrying cost rate could afford customers lower rates. The Court should reverse and remand this proceeding in accordance with the arguments presented by Industrial Energy Users-Ohio (“IEU-Ohio”) in its Merit Brief as well as this Fourth Brief.

ARGUMENT¹

PROPOSITION OF LAW NO. I

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

This Court must reverse the PUCO’s Finding and Order and Entry on Rehearing in their entirety inasmuch as the PUCO forfeited its jurisdiction over AEP-Ohio’s electric security plan (“ESP”) case, and all proceedings stemming from the ESP case, when it voluntarily chose to miss the 150-day statutory deadline imposed by R.C. 4928.143(C)(1) in AEP-Ohio’s ESP case. Thus, the Court should remand with instructions that direct the PUCO to immediately require AEP-Ohio to replace, pursuant to R.C. 4928.141, its current rates with the rates that were in effect on July 31, 2008 (the then-current rate plan in effect on the effective date of SB 221).

¹ The underlying proceeding on appeal in this case is referred to as the “EDR Case”.

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

The crux of the arguments advanced by the PUCO and AEP-Ohio is that statutes containing time restrictions are not mandatory but rather are directory.² The PUCO and AEP-Ohio raise many of the same arguments defending the PUCO’s Orders as they did in their Merit Briefs in IEU-Ohio’s Appeal of the PUCO’s initial AEP-Ohio ESP Orders in Ohio Supreme Court Case No. 2009-2022 and in IEU-Ohio’s Appeal of the PUCO’s Orders in Ohio Supreme Court Case No. 2010-1073 (the second appeal involving the EDR rider).³ The arguments advanced by the PUCO and AEP-Ohio cannot and do not explain away the statutory consequences of the PUCO’s voluntary failure to issue an Order within the 150-day time period mandated by R.C. 4928.143. These same arguments, as substantially repeated below, again rebut the arguments raised by the PUCO and AEP-Ohio.

In State ex rel. Jones v. Farrar,⁴ the Court explained:

Whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its effect and the consequences which would result from construing it one way or another. In each instance, it is necessary to look to the subject matter of the statute and consider the importance of the provision which has been disregarded and the relation of that provision to the general object intended to be secured by the act.

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

² AEP-Ohio Third Merit Brief at 20-26; PUCO Merit Brief in Response to IEU-Ohio’s Cross Appeal at 4-8.

³ The second EDR case on appeal in Ohio Supreme Court Case No. 2010-1073 is referred to as the “EDR Update Case”.

⁴ *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472-473, 66 N.E.2d 531 (1946).

to be done in a certain way and indicates that a compliance with such provision is essential to the validity of the act or proceeding, or where it requires some antecedent and prerequisite conditions to the exercise of a *473 power, the statute may be regarded as mandatory. Hurford v. City of Omaha, 4 Neb. 336. The character of the statute may be determined by the consideration of (1) the words of the statute, (2) the nature, context and object of the statute and (3) the consequences of the various constructions. See Miller v. State, 3 Ohio St. 475.

Contrary to AEP-Ohio's incorrect assertions in its Third Merit Brief, the PUCO's disregard for the 150-day time limit fits neatly within the *Farrar* construct and a finding that the PUCO lost jurisdiction over the ESP case when the 150-day period lapsed.⁵

The context surrounding the passage of SB 221 demonstrates that the General Assembly intended the 150-day timeframe to be mandatory, not directory. The 150-day requirement was not fixed merely for convenience or orderly conduct of public business; it had a very specific purpose responding to the situation at hand. While SB 221 was being debated by the General Assembly, each of Ohio's four electric distribution utilities ("EDU") were operating under rate stabilization plans ("RSP"). The RSPs approved for three of the four Ohio EDUs extended only through the end of calendar year 2008.⁶ It was against this timing backdrop that the General Assembly worked to pass SB 221, which became effective on July 31, 2008 or 153 days before expiration of the RSPs. All of the EDUs with RSPs expiring on December 31, 2008 filed their respective ESP Applications on the same day the law became effective in order to have their approved ESPs in place before January 1, 2009. Thus the object and purpose, as well as the importance of the 150-day timeframe evident, the PUCO was mandated to follow the General Assembly's timing edict.

⁵ AEP-Ohio Third Merit Brief at 21-22.

⁶ The RSP for Dayton Power and Light Company ("DP&L") would expire December 31, 2010, pursuant to a Stipulation and Recommendation in a case subsequent to its RSP case. The General Assembly inserted special language in R.C. 4928.141 applicable only to DP&L to recognize DP&L's unique situation among the EDUs.

Besides using the word “shall” in R.C. 4928.143, the remaining provisions of R.C. 4928.143 demonstrate that the General Assembly required and intended for the 150-day time limit to be mandatory.⁷ The 150-day timeframe was essential to the validity of the proceeding. Not only does R.C. 4928.143(C)(1) contain a 150-day requirement for the initial ESP Application, it also sets a 275-day timeframe on PUCO action on subsequent ESP plans. The inclusion of differing timing requirements demonstrates that the General Assembly was very cognizant of the timing necessary for the initial ESP cases. The PUCO’s own Brief in IEU-Ohio’s Appeal of the underlying ESP case admits the PUCO was “compelled to act within a compressed time to adopt a first authorized rate plan, the only time it would adopt such a plan for the Companies.”⁸

Further, the General Assembly provided the PUCO in R.C. 4928.141(A) with the rates that should be charged if it could not authorize an ESP within the 150-day timeframe.⁹ On the 151st day after the ESP Application was filed, the PUCO was required to comply with the statutory default provision of R.C. 4928.141(A). R.C. 4928.141(A) mandates that “the rate plan

⁷ While Ohio does not have official legislative history documents, some of the General Assembly’s intent can be gleaned from the bill analyses and fiscal notes and local impact statements provided to members of the General Assembly and the public by the Legislative Service Commission (“LSC”). The bill analysis for the as-enacted version of SB 221 notes that “The PUCO must issue an order approving, modifying and approving, or disapproving an initial ESP application not later than 150 days after the application's filing date and within 275 days for later applications.” (emphasis added). See http://www.legislature.state.oh.us/analysis.cfm?ID=127_SB_221&ACT=As%20Enrolled&hf=analyses127/08-sb221-127.htm. Additionally, the fiscal note for as-enacted version of SB 221 states the “PUCO would be required to schedule a hearing on the application, and to issue an order within 150 days of the application filing indicating whether it approves the application, modifies and approves it, or disapproves the application. See <http://www.lbo.state.oh.us/fiscal/fiscalnotes/127ga/SB0221EN.htm>.

⁸ *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, Ohio Supreme Court Case No. 2009-2022, PUCO Merit Brief at 15 (January 25, 2010).

⁹ R.C. 4928.141(A) (AEP-Ohio Appx. at 17).

of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code..." Thus, under R.C. 4928.141, until the PUCO issues an Order approving, modifying and approving, or denying an ESP Application and upon expiration of the jurisdictional deadline, the then-current rate plan of an EDU (i.e. AEP-Ohio's RSP) must continue until a standard service offer ("SSO") is first timely and lawfully authorized under R.C. 4928.143. This provision provides customers the continuity, predictability, and stability that were touted by the Governor and members of the General Assembly as the main virtues of the legislation when SB 221 was signed into law.¹⁰

This Court's canons of statutory construction also militate in favor of interpreting the word "shall" in R.C. 4928.143 to require the PUCO to issue an Order within the 150-day timeframe. In *Dorrian v. Scioto Conservancy Dist.*, this Court held that "[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage."¹¹ The *Dorrian* Court went on to explain that "Although it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word 'shall' is a mandatory one, whereas

¹⁰ See R.C. 4928.143(D) (AEP-Ohio Appx. at 23); R.C. 4928.144 (IEU-Ohio Appx. at 179). In his press release accompanying the signing of SB 221, the Governor stated: "This bill, Senate Bill 221, will ensure predictability of affordable energy prices and maintain state controls necessary to protect Ohio jobs and businesses." See <http://www.governor.ohio.gov/Default.aspx?tabid=622> (last accessed on October 29, 2010).

¹¹ *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus.

‘may’ denotes the granting of discretion.’”¹² The *Dorrian* Court further pointed out that the word “shall” is interpreted to be mandatory when it is frequently repeated in a statute.¹³

There is no clear or unequivocal legislative intent that the word “shall” in R.C. 4928.143 as it relates to the 150-day timeframe should be interpreted as “may” so that the clear directive from the General Assembly to the PUCO can be treated as a suggestion. In fact, the opposite is true given the plain language as well as the context and history described above by IEU-Ohio. And, in R.C. 4928.143 alone, the word “shall” appears 32 times while the word “may” appears 20 times.¹⁴ The legislature’s purposeful use of the word “shall” should not be disregarded in the manner suggested by the PUCO and AEP-Ohio.

The Court should overturn the Commission’s decision inasmuch as it continues to violate R.C. 4928.143(C)(1) in accordance with the plain language of SB 221, this Court’s *Farrar* and *Dorrian* precedent, and the canons of statutory construction.

B. The case law presented by AEP-Ohio and the PUCO is inapplicable and their rationale is distinguishable.

The arguments and precedent asserted by AEP-Ohio and the PUCO are easily distinguished or otherwise explained. The Court should follow the *Farrar* and *Dorrian* precedent, find as a matter of law that the expiration of the 150-day clock divested the PUCO of any authority over the July 31, 2008 ESP Application and all cases stemming from the approved ESP, and grant the relief requested by IEU-Ohio in this case.

¹² *Id.* at 107-108, quoting *Dennison v. Dennison*, 165 Ohio St. 146 (1956).

¹³ *Id.*; see also *In re Davis*, 84 Ohio St. 3d 520, 705 N.E.2d 1219 (1999) (Dissenting Opinion of Chief Justice Moyer and Justice Pfeiffer).

¹⁴ *Dorrian*, 27 Ohio St. 2d at 108 (“On the contrary, the use of the word ‘shall’ in R.C. 6101.45 to describe how expenses of a conservancy district prior to organization are to be met, and the use of the word ‘may’ in the same section to describe how expenses of a conservancy district after organization are to be met, clearly reflect a legislative intent that the two words be given their usual statutory construction.”).

Both the PUCO and AEP-Ohio cite federal case law from the United States Supreme Court and the Sixth Circuit Court of Appeals to support their incorrect statutory interpretations. The precedent from the United States Supreme Court and Sixth Circuit Court of Appeals, respectively, dealt with the interpretation of federal statutes passed by Congress as applied to federal administrative agencies, not a state statute passed by the Ohio General Assembly.¹⁵ The Ohio Supreme Court is the ultimate arbiter of the meaning of state statutes and is not required to follow suit or adopt the rationale found in the federal court decisions, especially when this Court's own precedent sufficiently deals with the statutory construction issue at hand.¹⁶

AEP-Ohio also attempts to excuse the PUCO's failure to issue an order in the ESP case within the mandatory 150-day timeframe.¹⁷ However, AEP-Ohio's argument only highlights the fact that the ability to issue an Order in this case within the statutory time frame was well within the PUCO's capacity, was not precluded due to circumstances beyond its control, and the PUCO prioritized its decision-making in a manner that illegally ignored the 150-day mandate in SB 221 so that the predictability and stability benefits that were supposed to be made available to customers were denied.

AEP-Ohio also asserts that IEU-Ohio misinterprets the default rate provision found in R.C. 4928.141, saying that R.C. 4928.141 only applies when the 150-day period would expire after the existing rate plan (i.e. AEP-Ohio's RSP) would end.¹⁸ There is nothing in R.C. 4928.141(A) that supports this interpretation. In fact, R.C. 4928.141 states quite the

¹⁵ AEP-Ohio Third Merit Brief at 23-24; PUCO Merit Brief in Response to IEU-Ohio's Cross Appeal at 7.

¹⁶ *Northwestern Nat. Ins. Co. v. Ferstman*, 42 Ohio App. 55, 63-64, 181 N.E. 499 (Ohio App. 8th Dist. 1932); *See also* 23 Ohio Jur.3d Courts and Judges § 392.

¹⁷ AEP-Ohio Third Merit Brief at 22.

¹⁸ *Id.* at 24-25.

contrary. Even if a utility filed an SSO Application well in time to have it in place prior to the end of 2008, if the Application failed on substantive or other grounds, it is clear that R.C. 4928.141(A) directs the PUCO to apply the default outcome specified by the General Assembly; the rate plan in effect on July 31, 2008 must remain in effect until an SSO Application is properly and lawfully authorized under either R.C. 4928.142 or 4928.143. On this front, AEP-Ohio further asserts that it does not make sense for the default option for missing the 150-day deadline to reside in a different statute.¹⁹ This is unpersuasive as well. It makes perfect sense that the default outcome for not following R.C. 4928.143 would come from R.C. 4928.141 since the base requirement to have an SSO price set through an ESP or market rate offer is found in R.C. 4928.141.

Finally, the PUCO faults IEU-Ohio for not seeking a writ of procedendo to compel the PUCO to comply with the 150-day deadline.²⁰ In order to grant a writ of procedendo, the relator must show: (1) a clear legal right to require the court to proceed; (2) a clear legal duty on the part of the court to proceed; and (3) the lack of an adequate remedy in the ordinary course of law.²¹ A direct appeal as of right constitutes a plain and adequate remedy in the ordinary course of law, the existence of which is fatal to a request for the extraordinary remedy of procedendo.²² As the Court knows well, R.C. 4903.12 provides litigants in PUCO proceedings with a direct appeal as of right to this Court. Further, the PUCO's argument regarding the writ of procedendo is unfair inasmuch as the PUCO claimed in its Motion to Dismiss IEU-Ohio's Complaint for Writ of Prohibition that IEU-Ohio's request for the extraordinary remedy in prohibition should be

¹⁹ *Id.* at 25.

²⁰ PUCO Merit Brief in Response to IEU-Ohio's Cross Appeal at 8.

²¹ 67 Ohio Jur.3d Mandamus, etc. § 210.

²² *Id.*, citing *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio v. Davis*, 113 Ohio St. 3d 410, 2007-Ohio-2205.

dismissed inasmuch as IEU-Ohio had an adequate remedy in the course of law.²³ It is patently unfair for the PUCO to fault IEU-Ohio for not asking for a writ of procedendo, the final requirement of which is the lack of an adequate remedy in the course of law, when it previously argued that the Court should dismiss IEU-Ohio's request for a writ of prohibition because IEU-Ohio did not lack an adequate remedy at law in the writ of prohibition case. The PUCO's rationale is a circuitous trap that should not be accepted by this Court.

PROPOSITION OF LAW NO. II

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

The Court should overturn the PUCO's failure to prohibit AEP-Ohio from taking the benefits of its approved ESP while simultaneously holding out its statutory right to withdraw and terminate its ESP. As IEU-Ohio explained on pages 16-17 of its Merit Brief, R.C. 4928.143 and R.C. 4928.141 prohibit an EDU from taking the benefits of the higher rates approved in an ESP while also challenging the lawfulness and reasonableness of the same rates from which it is benefiting and holding out its ability to withdraw and terminate its ESP.

IEU-Ohio noted in its Merit Brief that it has raised this issue multiple times and that the PUCO has consistently dodged responding to IEU-Ohio's assertions. AEP-Ohio and the PUCO argue that the PUCO was correct not to rule upon IEU-Ohio's claim inasmuch as the claim is not

²³ *State ex rel. Indus. Energy Users-Ohio v. Alan R. Schriber, et al.*, Ohio Supreme Court Case No. 2009-1907, Motion to Dismiss Submitted on Behalf of Respondents, Alan R. Schriber, *et al.*, at 10-11 (November 12, 2009). The elements for a writ of prohibition are: (1) the court or tribunal against which the writ is sought is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is not authorized by law, and (3) relator possesses no other adequate remedy at law. (emphasis added). *Id.* at 5, citing *State ex rel. Triplett v. Ross*, 111 Ohio St.3d 231, 234, 855 N.E.2d 1174 (2006).

ripe for the PUCO's consideration²⁴ and because it would entail the PUCO offering an advisory opinion.²⁵ Both of these arguments should be rejected by the Court. IEU-Ohio raised a valid legal issue, the resolution of which would not be premature or advisory and which would have had an instant and material effect on this case. IEU-Ohio's claim is merely asking the PUCO to determine, now, that AEP-Ohio cannot take the benefits of the very Orders that it claimed were illegal in its Applications for Rehearing and that it still claims are illegal in its pending Appeal to this Court.

AEP-Ohio and the PUCO also argue that AEP-Ohio was required to charge the rates approved in the ESP Orders.²⁶ This is not a case where, as in traditional rate proceedings, the PUCO's directives regarding rates and charges must be followed by the utility until the directives are modified by the PUCO through the rehearing process or through the appellate jurisdiction of this Court. The General Assembly has equipped EDUs with an absolute right to veto any Order issued by the PUCO that modifies a proposed ESP.²⁷ Upon the exercise of this veto right, the PUCO's Orders are null and void. Thus, an EDU cannot charge those rates approved by the PUCO until the EDU actually accepts the approved ESP as lawful and reasonable.

Ohio law does not allow AEP-Ohio to take the benefits of the PUCO's Orders while it is itself challenging the lawfulness and reasonableness of the very Orders that bestow these benefits as well as reserving judgment to withdraw and terminate its ESP proposal. The Court should instruct the PUCO to prohibit AEP-Ohio from accepting the benefits of its approved ESP if

²⁴ AEP-Ohio Third Merit Brief at 27-28.

²⁵ PUCO Merit Brief in Response to IEU-Ohio's Cross Appeal at 9.

²⁶ PUCO Merit Brief in Response to IEU-Ohio's Cross Appeal at 10; *see* AEP-Ohio Third Merit Brief at 29.

²⁷ R.C. 4928.143(C)(2)(a) (AEP-Ohio Appx. at 22-23).

AEP-Ohio chooses to simultaneously preserve the right to withdraw and terminate the ESP while also filing for rehearing or bringing an appeal of the ESP before this Court.

PROPOSITION OF LAW NO. III

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

The Court should reverse the PUCO's decision to exempt the EDR from the maximum rate increases established by the PUCO in AEP-Ohio's ESP case. As IEU-Ohio explained in its Merit Brief, the PUCO established certain maximum rate increases that would be permitted during the term of AEP-Ohio's ESP and very clearly delineated which charges would be exempted from the rate increase caps.²⁸ In this case, the PUCO unlawfully permitted AEP-Ohio to exempt the EDR from the maximum rate increase limitation despite not one hint in its ESP Orders that the EDR was exempt.²⁹

As this Court has stated, "when the PUCO has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified. We have previously articulated this concern in *Cleveland Elec. Illuminating Co.*, *supra*, 42 Ohio St. 2d at 431, 330 N.E.2d 1, as follows: '* * * Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which

²⁸ IEU-Ohio Merit Brief at 3-4, 18-21.

²⁹ *Id.* at 18-20, *citing EDR Case*, Finding and Order (January 7, 2010) (AEP-Ohio Appx. at 339) (ICN 20). The PUCO then again allowed the EDR to be unlawfully exempted in the EDR Update Case that is also on appeal before the Court.

is essential in all areas of the law, including administrative law.”³⁰ The arguments provided by the PUCO and AEP-Ohio do not overcome the PUCO’s duty to properly apply its precedent in this case.

The PUCO was very clear and specific in its Entry on Rehearing in the ESP case that only the energy efficiency / peak demand reduction (“EE/PDR”) rider, the transmission cost recovery rider (“TCRR”), and increases from a distribution rate case were exempt from the maximum rate increase limitations.³¹ The PUCO relies on the scant language in its Finding and Order in this case, which stated that the list of exemptions it provided in the ESP case was not “exhaustive” and that the PUCO merely “enumerated a few of the riders and other mechanisms” that were exempt from the limitations.³² In support of this proposition, the PUCO leans on its rationale that the EDR was exempt because “[f]inding otherwise would result in considerable deferrals being created.”³³ However, the PUCO’s Orders in the ESP case did not mention this as a reason for any of its exemptions.³⁴

The defense of the PUCO’s decisions should be rejected in their entirety. The language in the Entry on Rehearing in the ESP case provides not one hint that there may be additional charges that are also exempt from the maximum rate increases. Indeed, the PUCO spent three

³⁰ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St. 3d 49, 50-51, 461 N.E.2d 303 (1984).

³¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, PUCO Case Nos. 08-917-EL-SSO, *et al.*, Entry on Rehearing at 9, 31 (July 23, 2009) (hereinafter cited as “*AEP-Ohio ESP Proceeding*”) (AEP-Ohio Appx. at 201, 223).

³² *EDR Case*, Finding and Order at 10 (January 7, 2010) (AEP-Ohio Appx. at 385) (ICN 20).

³³ *Id.*

³⁴ *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 9 (July 23, 2009) (AEP-Ohio Appx. at 201).

pages of its Entry on Rehearing in the ESP case discussing the EDR but never once gave any clue that the EDR would be exempt from the maximum rate increases.³⁵ To accept the PUCO's explanation that its listing of "a few of" the previous exemptions from the maximum rate increase percentages was not exhaustive would essentially render the PUCO's (and this Court's) precedent useless as the PUCO could claim in any proceeding that it did not intend for its Orders to be constraining even though it did not give the slightest hint that it was leaving open the possibility of changing its mind in the future. There is no clear reason for the modification of the PUCO's precedent, nor any demonstration that the PUCO's ESP Entry on Rehearing was in error.³⁶ The PUCO's decision contravenes the institutional constraints placed upon the PUCO and also upends "the predictability which is essential in all areas of the law, including administrative law."³⁷

Additionally, the PUCO attempts to justify its decision by noting that the TCRR is a pass-through mechanism and exemption of the EDR is consistent with the ESP Entry on Rehearing inasmuch as the EDR is also a pass-through cost recovery mechanism.³⁸ There is no language in the Entry on Rehearing delineating why the EE/PDR rider, TCRR, or changes in distribution rates due to a rate case were exempted and therefore this rationale is unsupported by the Entry on Rehearing in the ESP case.³⁹ Applying this same logic, other AEP-Ohio cost recovery

³⁵ *Id.* at 32-34 (AEP-Ohio Appx. at 224-226).

³⁶ *EDR Case*, Finding and Order at 10 (January 7, 2010) (AEP-Ohio Appx. at 385) (ICN 20).

³⁷ *Ohio Consumers' Counsel*, 10 Ohio St. 3d at 50-51.

³⁸ PUCO Merit Brief in Response to IEU-Ohio's Cross Appeal at 13.

³⁹ As this Court well knows, the Commission only speaks through its Orders. *Murray v. Ohio Bell Tel. Co.*, 54 Ohio Op. 82, 117 N.E.2d 495 (1954). While the PUCO's Merit Brief in Response to IEU-Ohio's Cross Appeal may provide an additional rationale, this reasoning is not contained in the Entry on Rehearing in the AEP-Ohio ESP Proceeding or in the Orders in either the EDR Case or the EDR Update Case.

mechanisms approved in the ESP case would also be exempt from the rate increase limitations without any language in the ESP Entry on Rehearing to this effect, essentially rendering the language regarding the rate increase limitations meaningless.

The PUCO's Orders are unlawful inasmuch as they, without any clear need or demonstration of error in its prior decisions, violate this Court's precedent and the PUCO's own precedent. Further, the Orders are unreasonable inasmuch as they unfairly perpetuate rate increases outside the maximum rate increases promised to customers.⁴⁰ The Court should reverse the PUCO's decisions and remand with instructions to place the EDR under the maximum increase limitations approved in AEP-Ohio's ESP proceeding.

PROPOSITION OF LAW NO. IV.

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

The Court should reverse the PUCO's unreasonable Orders and remand with instructions directing the PUCO to undertake a review to determine whether a lower carrying cost rate is available and appropriate in this instance. As IEU-Ohio explained at pages 21-22 of its Merit Brief, the PUCO adopted the weighted average cost of long-term debt for calculating AEP-Ohio's carrying costs without any rationale or explanation. On rehearing, the PUCO rejected IEU-Ohio's request to investigate whether a different method to calculate the carrying cost for the EDR would be appropriate.

The PUCO's Merit Brief contains an explanation of why the weighted average cost of

⁴⁰ IEU-Ohio Merit Brief at 21.

long-term debt was used versus a short-term debt comparison.⁴¹ In its Orders in this case, the Commission merely stated that “under the semiannual reconciliation process prescribed for EDR rates under Rule 4901:1-38-08, O.A.C, 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.”⁴² The Entry on Rehearing in this case, as recited in the PUCO’s Merit Brief, says the PUCO considered and rejected IEU-Ohio’s proposal, but a review of the text of the Finding and Order shows no evidence of what swayed the PUCO to adopt AEP-Ohio’s proposal.⁴³

It was unreasonable for the Commission to rely on these terse statements that fail to reveal any explanation for not exploring whether a different carrying cost rate may save customers money when the “current economic climate”⁴⁴ previously acknowledged by the Commission during the AEP-Ohio ESP proceeding had not improved, but had worsened. Customers of all shapes and sizes needed, and continue to need, every break they can get on their bills and deserve at least some analysis or other review by the Commission to demonstrate that the Commission is attempting to utilize the tools within its toolbox to help customers mitigate the

⁴¹ PUCO Merit Brief in Response to IEU-Ohio’s Cross Appeal at 14-19. Of note, the PUCO’s Merit Brief in Response to IEU-Ohio’s Cross Appeal indicates IEU-Ohio asked the PUCO to adopt a short-term debt rate. PUCO Merit Brief in Response to IEU-Ohio’s Cross Appeal at 15. While IEU-Ohio did assert in its initial comments before the PUCO’s decision that the PUCO should adopt a short-term debt rate, IEU-Ohio’s claim on rehearing did not demand a particular rate. *EDR Case*, IEU-Ohio Application for Rehearing at 15-16 (Feb. 5, 2010) (IEU-Ohio Appx. at 30-31) (ICN 23). IEU-Ohio urged the PUCO to undertake a review to determine whether a lower cost carrying rate was available and proper for the EDR with one potential option being a short-term debt rate. IEU-Ohio’s fourth assignment of error makes this clear.

⁴² *EDR Case*, Finding and Order at 10 (January 7, 2010) (AEP-Ohio Appx. at 385) (INC 20).

⁴³ *EDR Case*, Entry on Rehearing at 7 (March 24, 2010) (AEP-Ohio Appx. at 401) (ICN 28).

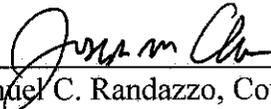
⁴⁴ *AEP-Ohio ESP Proceeding*, Opinion and Order at 22 (March 18, 2009) (IEU-Ohio Appx. at 69). Ohio’s unemployment rate in March 2009, the month that the Commission issued the Opinion and Order in the ESP case, was 9.7%, and stood at 11% in March 2010 when the PUCO issued its Entry on Rehearing in the EDR Case.

impacts of escalating electricity prices under AEP-Ohio's approved ESP.

CONCLUSION

IEU-Ohio respectfully requests that the Court reverse the PUCO's Orders and grant the relief requested by IEU-Ohio.

Respectfully submitted,

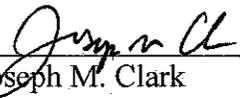


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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Fourth Brief of Appellee/Cross-Appellant, Industrial Energy Users-Ohio* was sent by ordinary U.S. mail, postage prepaid, to the parties listed below this 2nd day of November 2010.



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