

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern : Case No. 2010-1533
Power Company for Approval of its Program Portfolio :
Plan and Request for Expedited Consideration : Appeal from the Public Utilities
: Commission of Ohio
:
: Public Utilities
: Commission of Ohio
: Case No. 09-1089-EL-POR

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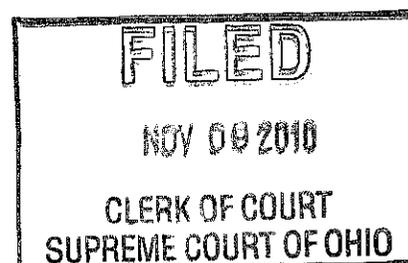
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIESii

BACKGROUND AND STATEMENT OF FACTS 1

STANDARD OF REVIEW 5

ARGUMENTS6

PROPOSITION OF LAW NO. I
The PUCO’s Opinion and Order and Entry on Rehearing authorizing AEP-Ohio to recover lost distribution revenue through January 1, 2011 is unreasonable, unlawful, and contrary to the record evidence 6

PROPOSITION OF LAW NO. II
The PUCO’s Opinion and Order and Entry on Rehearing approving the Stipulation and Recommendation without considering the overall rate impacts on Ohio customers is unreasonable and unlawful. 10

PROPOSITION OF LAW NO. III
The PUCO’s Opinion and Order and Entry on Rehearing approving cost recovery for AEP-Ohio’s peak demand reduction proposal is unreasonable, unlawful and contrary to the record evidence 14

 A. The PUCO’s Opinion and Order and Entry on Rehearing are unlawful inasmuch as they approve an AEP-Ohio program that is not “designed to achieve” AEP-Ohio’s peak demand reduction mandates. 14

 B. The PUCO’s Opinion and Order and Entry on Rehearing are unreasonable inasmuch as the PUCO ignored without explanation lower cost compliance options for AEP-Ohio to meet its peak demand reduction obligations that are explicitly provided for in the PUCO’s own rules. 15

PROPOSITION OF LAW NO. IV
The PUCO’s Opinion and Order and Entry on Rehearing prohibiting AEP-Ohio and mercantile customers from relying on the “benchmark comparison method” for agreements reached after December 10, 2009 is unreasonable and unlawful 19

CONCLUSION 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Ohio Supreme Court	
<i>AK Steel Corp. v. Pub. Util. Comm.</i> , 95 Ohio St.3d 81, 765 N.E.2d 862 (2002).....	6
<i>Cincinnati Gas & Electric Co. v. Pub. Util. Comm.</i> , 86 Ohio St.3d 53, 711 N.E.2d 670 (1999).....	5
<i>Constellation New Energy v. Pub. Util. Comm.</i> , 104 Ohio St.3d 530, 2004-Ohio-6767	5
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992).....	6
<i>Ohio Consumers' Counsel v. Pub. Util. Comm.</i> , 125 Ohio St.3d 57, 2010-Ohio-134	7
<i>Ohio Edison Co. v. Pub. Util. Comm.</i> , 78 Ohio St.3d 466, 678 N.E.2d 922 (1977).....	5

PUBLIC UTILITIES COMMISSION OF OHIO CASES

Public Utilities Commission of Ohio Orders in Case Below

<i>In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration</i> , Case Nos. 09-1089-EL-POR, et al., Entry on Rehearing (Attachment B to Amended Notice of Appeal) (July 14, 2010).....	4, 8, 10
<i>In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration</i> , Case Nos. 09-1089-EL-POR, et al., Finding and Order (May 26, 2010)	4
<i>In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration</i> , Case Nos. 09-1089-EL-POR, et al., Opinion and Order (Attachment A to Amended Notice of Appeal) (May 13, 2010)	3, 6, 7, 10, 12, 17, 21

Other Public Utilities Commission of Ohio Cases

In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders,
PUCO Case Nos. 10-834-EL-EEC, *et al.*, Entry
(September 15, 2010)21

In the Matter of the Application of Columbus Southern Power Company for Approval of an 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
(July 23, 2009)..... 11

In the Matter of the Application of Columbus Southern Power Company for Approval of an 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.*, Opinion and Order
(March 18, 2009).....1, 11, 17

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan,
PUCO Case Nos. 04-169-EL-UNC, *et al.*, Opinion and Order
(January 26, 2005)..... 12

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates,
PUCO Case No. 09-1095-EL-RDR, Finding and Order
(January 7, 2010)..... 11

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,
PUCO Case No. 08-935-EL-SSO, Second Opinion and Order
(March 25, 2009)..... 21

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period,
PUCO Case Nos. 03-93-EL-ATA, *et al.*, Order on Remand
(October 24, 2007)..... 13

STATUTES

R.C. 4903.13.....4, 5
R.C. 4928.01.....1, 19
R.C. 4928.02.....12, 13
R.C. 4928.66.....1, 6, 7, 8, 9, 14, 15, 16, 19, 22

RULES

Rule 4901:1-35-01, Administrative Code 1
Rule 4901:1-38-01, Administrative Code 11
Rule 4901:1-39-04, Administrative Code2, 5, 8
Rule 4901:1-39-05, Administrative Code16
Rule 4901:1-39-07, Administrative Code7
Rule 4901:1-39-08, Administrative Code21, 22

BACKGROUND AND STATEMENT OF FACTS

On May 1, 2008, Governor Strickland signed into law Amended Substitute Senate Bill 221 (“SB 221”). SB 221, among many other things, revised Ohio law related to the regulation of electric distribution utilities’ (“EDU”) Standard Service Offer (“SSO”).¹ The current SSO price for Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”) (collectively, “American Electric Power-Ohio or “AEP-Ohio”) is determined pursuant to the “electric security plan” or “ESP” approved by the Public Utilities Commission of Ohio (“PUCO”) for AEP-Ohio.² Additionally, SB 221 created mandatory energy efficiency, peak demand reduction, and alternative energy portfolio requirements. Specifically, R.C. 4928.66 (as enacted in SB 221) requires EDUs to implement energy efficiency and peak demand reduction (“EE/PDR”) programs to meet certain mandates established in SB 221. Under SB 221’s energy efficiency requirements, EDUs must achieve annual reductions in kilowatt hour (“kWh”) sales that ultimately culminate in cumulative energy efficiency achievements in excess of 22% by 2025.³ SB 221 also requires EDUs to implement peak demand reduction

¹ The SSO is the service offering which incumbent electric utilities must make available to all retail customers not obtaining electricity from a competitive supplier. Under Rule 4901:1-35-01, Ohio Administrative Code (“O.A.C.”), SSO is defined as “an electric utility offer to provide consumers, on a comparable and nondiscriminatory basis within its certified territory, all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.” (IEU-Ohio Appx. at 352).

² *In the Matter of the Application of Columbus Southern Power Company for Approval of an 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.*, Opinion and Order at 22 (March 18, 2009) (hereinafter cited as “*AEP-Ohio ESP Proceeding*”) (IEU-Ohio Appx. at 182).

³ R.C. 4928.66 (IEU-Ohio Appx. at 350). SB 221 also requires each EDU, by 2025 and thereafter, to provide from “alternative energy resources” twenty-five percent (25%) of the electricity supply required for its requisite SSO sales. Alternative energy resources are made up of “advanced energy resources” and “renewable energy resources”, which are defined in R.C. 4928.01 (IEU-Ohio Appx. at 345-346).

programs designed to achieve peak demand reductions of 1% in 2009 and designed to achieve additional peak demand reductions of .75% each year thereafter through 2018.

Each EDU has an obligation to meet the EE/PDR requirements even when the EDU is part of a larger holding company structure. For example, OP and CSP each have individual EE/PDR portfolio requirement benchmarks. As part of its implementation of SB 221, the PUCO promulgated rules requiring each EDU to file EE/PDR portfolio plans for the PUCO's consideration and approval.⁴ The portfolio plans detail each EDU's programs and other related efforts to meet the EE/PDR benchmarks over a three-year time frame. AEP-Ohio's approved Portfolio Plan for 2010-2012 is the subject of the instant appeal.

On November 12, 2009, AEP-Ohio filed its Application⁵ for approval of a Portfolio Plan to comply with the Commission's rules. Contemporaneously, AEP-Ohio submitted a Stipulation and Recommendation⁶ ("Stipulation") entered into by some parties in support of AEP-Ohio's Portfolio Plan. AEP-Ohio requested expedited consideration of its Application and the Stipulation, presumably to have the Portfolio Plan in place by January 1, 2010.

As proposed, AEP-Ohio's Portfolio Plan included estimated expenditures in excess of \$161.9 million over a three year period.⁷ AEP-Ohio proposed to recover the entire \$161.9 million from customers during 2010 and 2011 through its EE/PDR Rider previously created (at a

⁴ Rule 4901:1-39-04, O.A.C. (IEU-Ohio Appx. at 355).

⁵ *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Application and Request for Expedited Consideration (Nov. 12, 2009) (IEU-Ohio Supp. at 1) (ICN 1) (hereinafter cited as "*Portfolio Plan Case*").

⁶ *Portfolio Plan Case*, Stipulation (Nov. 12, 2009) (IEU-Ohio Supp. at 100) (ICN 2).

⁷ *Portfolio Plan Case*, Application and Request for Expedited Consideration at 3 (Nov. 12, 2009) (IEU-Ohio Supp. at 3) (ICN 1).

zero funding level) by the PUCO in AEP-Ohio's ESP proceeding.⁸ In addition to AEP-Ohio's proposal to recover the estimated (not actual) expenditures of \$161.9 million, AEP-Ohio also requested approval to increase the amount ultimately collected from customers (and the resulting rate increases) through allowances for shared savings, incentives, and lost distribution revenues.⁹

On December 11, 2009, IEU-Ohio submitted objections and recommended modifications to AEP-Ohio's Portfolio Plan.¹⁰ On January 21, 2010, the Commission issued an Entry adopting a procedural schedule and an evidentiary hearing was conducted on February 25, 2010. IEU-Ohio, AEP-Ohio and, jointly, the Office of the Ohio Consumers' Counsel, the Ohio Environmental Council, the Sierra Club and the Natural Resources Defense Council filed Initial Briefs on March 10, 2010. Only IEU-Ohio and AEP-Ohio filed Reply Briefs on March 19, 2010.

On May 13, 2010, the Commission issued its Opinion and Order approving the Stipulation, with modifications.¹¹ On May 21, 2010, AEP-Ohio filed tariffs to comply with the Commission's Order. AEP-Ohio's compliance tariffs compressed the time period to recover AEP-Ohio's projected costs from the 24 months reflected in AEP-Ohio's initial Application to 17 months (June 2010 through December 2011) and, thus, resulted in larger rate increases than AEP-Ohio projected in its Application.¹² On May 26, 2010, the Commission approved

⁸ *Portfolio Plan Case*, Companies Exhibit 1 (Direct Testimony of Jon F. Williams) at 11 (Nov. 12, 2009) (hereinafter cited as "Williams Testimony") (IEU-Ohio Supp. at 18).

⁹ *Portfolio Plan Case*, Stipulation at 7-9 (Nov. 12, 2009) (IEU-Ohio Supp. at 106-108) (ICN 2).

¹⁰ *Portfolio Plan Case*, Initial Objections and Recommendations of IEU-Ohio (Dec. 11, 2009) (IEU-Ohio Supp. at 70) (ICN 18).

¹¹ *Portfolio Plan Case*, Opinion and Order (May 13, 2010) (IEU-Ohio Appx. at 66) (ICN 33).

¹² *Portfolio Plan Case*, Revised PUCO Tariff No. 7 (May 21, 2010) (IEU-Ohio Supp. at 91) (ICN 34).

AEP-Ohio's tariffs, making the EE/PDR Riders effective, on a bills rendered basis, commencing with AEP-Ohio's June 2010 billing cycle.¹³

On June 14, 2010, IEU-Ohio filed its Application for Rehearing of the PUCO's May 13, 2010 Opinion and Order and on July 14, 2010, the PUCO issued an Entry on Rehearing denying IEU-Ohio's Application for Rehearing.¹⁴ The Court should be aware that IEU-Ohio filed its Application for Rehearing electronically and, by inadvertent error, filed the Application for Rehearing in only one of the two case numbers assigned to AEP-Ohio's Portfolio Plan case. Consequently, the PUCO considered IEU-Ohio's Application for Rehearing only as it pertained to CSP and not OP.¹⁵ Accordingly, while there was only one Portfolio Plan Application and only one Stipulation covering both EDUs, IEU-Ohio's appeal specifically relates to the portions of AEP-Ohio's Portfolio Plan that pertain to CSP, even if the description of the PUCO's errors references AEP-Ohio, which IEU-Ohio has done for ease of reference and to avoid confusion for the Court and for the Parties to this case.

AEP-Ohio's approved Portfolio Plan contains significant rate increases which have not been cost-justified and it ignores lower cost and readily available opportunities to meet the statutory requirements. In addition, the PUCO-approved Portfolio Plan escalates the ultimate costs recovered from customers by treating shared savings, incentives, and lost distribution revenues as though they are a cost of compliance. As more fully explained below, for these reasons, the PUCO's Opinion and Order and Entry on Rehearing are unreasonable and unlawful. Accordingly, IEU-Ohio respectfully requests that this Court reverse the PUCO's decision on the

¹³ *Portfolio Plan Case*, Finding and Order (May 26, 2010) (IEU-Ohio Appx. at 62) (ICN 35).

¹⁴ *Portfolio Plan Case*, Entry on Rehearing (July 14, 2010) (IEU-Ohio Appx. at 50) (ICN 44).

¹⁵ *Id.* at 4 (IEU-Ohio Appx. at 53).

issues raised herein and remand this proceeding to the PUCO to correct the errors identified herein for the reasons set forth below.

STANDARD OF REVIEW

R.C. 4903.13 states that “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the Supreme Court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.”¹⁶ With regard to the PUCO’s determinations regarding questions of fact, the Court has held that it “will not reverse or modify a [PUCO] decision as to questions of fact where the record contains sufficient probative evidence to show that the determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.”¹⁷ The appellant “bears the burden of demonstrating that the PUCO’s decision is against the manifest weight of the evidence or is clearly unsupported by the record.”¹⁸ As to matters of law, the Court has “complete and independent power of review of all questions of law” in appeals from the PUCO.¹⁹

Additionally, as noted above, the PUCO modified and approved a Stipulation to establish AEP-Ohio’s Portfolio Plan. The Commission applies a three-part test when evaluating the reasonableness of settlements: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the

¹⁶ R.C. 4903.13 (IEU-Ohio Appx. at 336).

¹⁷ *The Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 86 Ohio St. 3d 53, 58, 711 N.E.2d 670 (1999).

¹⁸ *Constellation NewEnergy v. Pub. Util. Comm.*, 104 Ohio St. 3d 530, 2004-Ohio-6767 at ¶50.

¹⁹ *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St. 3d 466, 469, 678 N.E.2d 922 (1977).

public interest; and whether the settlement package violates any important regulatory principles or practices.²⁰

As the applicant, AEP-Ohio had the burden of proving that its Application as well as the Stipulation was lawful, reasonable, and met the PUCO's criteria to approve settlements.²¹ As IEU-Ohio demonstrates below, AEP-Ohio did not meet its burden and, thus, the PUCO's decisions to approve AEP-Ohio's Application and the Stipulation were unlawful, unreasonable, and contrary to the PUCO's settlement evaluation criteria. Accordingly, this Court should reverse the PUCO's decisions and remand this case to the PUCO with instructions to correct its errors as explained herein.

ARGUMENTS

PROPOSITION OF LAW NO. I:

The PUCO's Opinion and Order and Entry on Rehearing authorizing AEP-Ohio to recover lost distribution revenue through January 1, 2011 is unreasonable, unlawful, and contrary to the record evidence.

R.C. 4928.66(D) allows the PUCO to establish rules regarding the content of an application by an EDU for Commission approval of a revenue decoupling mechanism under this division.²² The PUCO may approve an application for a revenue decoupling mechanism under

²⁰ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 126, 592 N.E.2d 1370 (1992); *See also, AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St. 3d 81, 82-83, 765 N.E.2d 862 (2002)

²¹ Rule 4901:1-39-04(E), O.A.C., requires as follows: "At such hearing, the electric utility shall have the burden to prove that the proposed program portfolio plan is consistent with the policy of the state of Ohio as set forth in section 4928.02 of the Revised Code, and meets the requirements of section 4928.66 of the Revised Code." (IEU-Ohio Appx. at 356).

²² The Commission explained that "The need for a revenue decoupling mechanism arises from traditional rate designs that recover fixed distribution costs through volumetric charges. These designs leave utilities at risk of not collecting enough revenue to cover their fixed distribution costs when sales fall, and may provide an opportunity for utilities to collect revenue in excess of expenses if sales increase. The Commission believes that it is important to break or weaken the link between sales volume and the recovery of fixed distribution costs." *Portfolio Plan Case*, Opinion and Order at 26 (May 13, 2010) (IEU-Ohio Appx. at 91). The "straight fixed variable"

this division if it determines both that: (1) the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be foregone by the EDU as a result of the EDU's implementation of any energy efficiency or energy conservation programs and (2) that the Application reasonably aligns the interests of the EDU and its customers in favor of those programs.²³ In accordance with R.C. 4928.66(D), the PUCO adopted Rule 4901:1-39-07, O.A.C., which permits EDUs to include "appropriate lost distribution revenues" in a cost recovery mechanism.²⁴

In its Opinion and Order, the PUCO declined to adopt the portion of the Stipulation that called for approval of lost distribution revenue recovery for AEP-Ohio.²⁵ The PUCO found that the record failed to establish what revenue is necessary to provide AEP-Ohio with the opportunity to recover its costs and to earn a fair and reasonable return. The PUCO agreed with IEU-Ohio, explaining:

However, in this instance, the Commission agrees with IEU-Ohio that the record fails to establish what revenue is necessary to provide AEP-Ohio with the opportunity to recover its costs and to earn a fair and reasonable return. Without this information, the Commission cannot determine whether the Signatory Parties' proposal included in Section F of the Stipulation is reasonable. Given that CSP's last distribution rate case occurred in 1991 and OP's last distribution rate case occurred in 1994, AEP-Ohio's actual costs of service are unknown at this time.²⁶

rate design recently approved by the Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134 is a similar rate design mechanism that removes the disincentive for utilities to encourage conservation by "decoupling" or removing the link between revenue and consumption. In other words, under traditional rate designs, more sales ordinarily mean more revenue for utilities. The decoupling mechanism, by approving revenue collection that does not vary based on the level of sales, removes the disincentive that utilities had towards encouraging customers to conserve on their energy usage.

²³ R.C. 4928.66(D) (IEU-Ohio Appx. at 351).

²⁴ Rule 4901:1-39-07 (IEU-Ohio Appx. at 361).

²⁵ *Portfolio Plan Case*, Opinion and Order at 26 (May 13, 2010) (IEU-Ohio Appx. at 91) (ICN 33).

²⁶ *Id.*

Then, notwithstanding the legal consequences of this conclusion, the PUCO still authorized AEP-Ohio to increase rates so as to recover lost distribution revenue through January 1, 2011.²⁷

The PUCO continued on to “encourage” but did not “require” AEP-Ohio to propose a mechanism to “answer the Commission's concern regarding quantification of fixed costs, as well as a mechanism to achieve revenue decoupling, which may include, but is not limited to, the method proposed in this filing.”²⁸ The PUCO also stated that it would consider a request by AEP-Ohio to extend the lost distribution revenue recovery period while the Commission considers any proposal AEP-Ohio may produce.²⁹

In response to IEU-Ohio’s arguments on rehearing disputing the PUCO’s decision and raising the same arguments made in this Merit Brief, the PUCO stated:

Although the Commission would have required more information to find that AEP-Ohio had met its burden of proof on a lost distribution revenue recovery mechanism in a litigated case, in this instance, we recognize that it is a key provision of the Stipulation. The lost distribution revenue recovery provision of the Stipulation was negotiated and agreed to by the Companies and numerous interested stakeholders, including representatives of residential, commercial and industrial customers. As such, we find it appropriate to deny IEU-Ohio's request for rehearing.³⁰

As the applicant in this case, AEP-Ohio had the burden of demonstrating that its request for recovery of revenue that otherwise would be foregone (lost distribution revenue) was appropriate.³¹ The PUCO found that AEP-Ohio had not demonstrated that the EE/PDR programs would result in any foregone distribution revenue. Under R.C. 4928.66(D), the PUCO’s decision is unlawful inasmuch as this finding precluded the PUCO from allowing

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Portfolio Plan Case*, Entry on Rehearing at 6 (July 14, 2010) (IEU-Ohio Appx. at 55) (ICN 44).

³¹ Rule 4901:1-39-04(E), O.A.C. (IEU-Ohio Appx. at 356).

AEP-Ohio to recover any lost distribution revenue. Additionally, the PUCO's decision is unreasonable inasmuch as it is against the manifest weight of the evidence. The ultimate legal decision in this case by the PUCO is clearly against the manifest weight of the evidence inasmuch as it is completely contrary to the PUCO's factual findings.

Further, the PUCO may not approve unlawful and unreasonable provisions of a Stipulation simply because some parties agree to include lost distribution revenue as part of a package.³² The PUCO's approval of alleged foregone distribution revenue despite its finding that there was not enough evidence to permit bless the portion of the Stipulation affording AEP-Ohio an opportunity to recover its alleged lost distribution revenue directly contravenes R.C. 4928.66(D). The PUCO's Orders violate Ohio law and thereby violate an important regulatory principle laid out by the General Assembly when passing SB 221. The PUCO's illogical and illegal rationale in its Entry on Rehearing must be rejected.

Based on the record, Ohio law and the PUCO's own conclusions, the PUCO's Opinion and Order and Entry on Rehearing that authorized lost distribution revenue are unreasonable and unlawful. Accordingly, IEU-Ohio respectfully requests that this Court reverse the PUCO's authorization of lost distribution revenue and remand this issue to the PUCO with instructions to correct the error and prohibit AEP-Ohio from recovering lost distribution revenue through its EE/PDR rider unless and until the PUCO makes the required statutory findings based on evidence presented on a record at hearing.

³² See R.C. 4928.66(D) (IEU-Ohio Appx. at 351).

PROPOSITION OF LAW NO. II:

The PUCO's Opinion and Order and Entry on Rehearing approving the Stipulation and Recommendation without considering the overall rate impacts on Ohio customers is unreasonable and unlawful.

In the case below, IEU-Ohio asserted that the Stipulation was not in the public interest because the rate increases resulting from approval of the Stipulation, when considered in the context of the bevy of other rate increases hitting AEP-Ohio customers, were unreasonable and unlawful. In its Order, the PUCO noted that it had rejected similar arguments by IEU-Ohio that approval of a stipulation that increases rates is unlawful or unreasonable or does not meet the Commission's criteria for the approval of settlements.³³ The Commission stated that it "evaluates the benefits of the Stipulation to ratepayers on a variety of factors, not just rates. Particularly in this case, we will consider whether AEP-Ohio's Action Plan sufficiently encourages energy efficiency such that it is likely to achieve a reduction in energy consumption and an associated public benefit."³⁴ There is no indication in the Opinion and Order that the Commission ever considered price impact on customers in its decision.

The Entry on Rehearing in this case observed that the PUCO is "mindful of the rate impact of this case on AEP-Ohio's customers" and that the PUCO has "already determined, through an extensive process, that the EE/PDR rider rates are outside of the ESP rate caps."³⁵ However, the Entry on Rehearing still never asserted that it took the overall rate impacts hitting AEP-Ohio customers into consideration in its decision.

³³ *Portfolio Plan Case*, Opinion and Order at 22 (May 13, 2010) (IEU-Ohio Appx. at 87) (ICN 33).

³⁴ *Id.* at 22-23 (IEU-Ohio Appx. at 87-88).

³⁵ *Portfolio Plan Case*, Entry on Rehearing at 8 (July 14, 2010) (IEU-Ohio Appx. at 57) (ICN 44).

As IEU-Ohio explained in more detail in other recent appeals of AEP-Ohio's ESP, CSP customers saw, on average, a 6% increase in the total amount of their January 2010 electric bills as a result of CSP's approved ESP.³⁶ Customers also experienced unexpected increases in January 2010 when the PUCO exempted,³⁷ for the first time, the economic development cost recovery rider ("EDR") from the maximum rate increases.³⁸ Under the newly exempted EDR, CSP customers experienced an additional 10.52701% increase in the distribution charges in their January 2010 electric bills while OP customers experienced an additional 8.33091% increase in the distribution charges in their January 2010 electric bills.³⁹ And, at the time that the PUCO

³⁶ *Portfolio Plan Case*, Testimony of Kevin M. Murray at 14 (Feb. 11, 2010) (IEU-Ohio Supp. at 56). See also *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Modify Their Standard Service Offer Rates*, Ohio Supreme Court Case No. 2010-0729, Merit Brief of Industrial Energy Users-Ohio at 3-5 (June 30, 2010). In AEP-Ohio's initial ESP proceeding, the PUCO approved what it characterized as maximum revenue increases for OP and CSP during each year of the approved three-year ESP. More specifically, subject to certain exceptions, the PUCO limited customers' total annual bill increases to 7% for CSP and 8% for OP in 2009, 6% for CSP and 7% for OP for 2010, and 6% for CSP and 8% for OP in 2011. *AEP-Ohio ESP Proceeding*, Opinion and Order at 22 (March 18, 2010) (IEU-Ohio Appx. at 182).

³⁷ AEP-Ohio's approved ESP also exempted from the maximum rate increases AEP-Ohio's EE/PDR rider, transmission cost recovery rider ("TCRR"), and any increase associated with a distribution rate case. *AEP-Ohio ESP Proceeding*, Entry on Rehearing at 9, 31 (July 23, 2009) (IEU-Ohio Appx. at 114, 136).

³⁸ *Portfolio Plan Case*, Testimony of Kevin M. Murray at 14 (Feb. 11, 2010) (IEU-Ohio Supp. at 56), citing *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, PUCO Case No. 09-1095-EL-RDR, Finding and Order at 10 (January 7, 2010) (IEU-Ohio Appx. at 287). The EDR collects from all customers the "delta revenue" associated with reasonable arrangements for Ormet Primary Aluminum Corporation and Eramet Marietta, Inc. "Delta revenue" is the difference between the amount paid by a customer pursuant to a Commission-approved reasonable arrangement or "special contract" as compared to the amount that would have been paid by that customer under the ordinary tariff schedule. See Rule 4901:1-38-01, O.A.C. (IEU-Ohio Appx. at 354).

³⁹ *Portfolio Plan Case*, Testimony of Kevin M. Murray at 14-15 (Feb. 11, 2010) (IEU-Ohio Supp. at 56-57).

issued its Entry on Rehearing, AEP-Ohio had rate increase applications pending to update its gridSMART, enhanced service reliability, and environmental investment carrying cost riders.

The Stipulation approved by the PUCO included typical bill comparisons (in Attachment A to the Stipulation) for customers of both CSP and OP, demonstrating that the Stipulation would result in total electric bill increases for customers in the range of 0.4% to 3.4% for CSP customers and 0.4% to 4.0% for OP customers.⁴⁰ The approved Stipulation also contemplated that AEP-Ohio will recover three years of costs (2009 – 2011) over a two-year period (2010 – 2011), beginning in January 2010.⁴¹ And, to top things off, the PUCO's Orders authorized AEP-Ohio to begin cost recovery commencing with AEP-Ohio's June 2010 billing cycle over a compressed 17-month time period instead of the 24 months contemplated in the Stipulation, thereby pushing even higher the actual bill impacts experienced by customers than those projected in the Stipulation.⁴² All of these increases are compounded on top of the increases allowed in the first year of the ESP as well as those borne by customers from 2006 through 2008 under AEP-Ohio's rate stabilization plan.⁴³

R.C. 4928.02 sets forth Ohio's state policy and requires the Commission to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and

⁴⁰ *Portfolio Plan Case*, Stipulation at Attachment A (Nov. 12, 2009) (IEU-Ohio Supp. at 120-123) (ICN 2).

⁴¹ *Id.* at 12 (IEU- Ohio Supp. at XX)

⁴² *Portfolio Plan Case*, Opinion and Order at 28-29 (May 13, 2010) (IEU-Ohio Appx. at 111).

⁴³ *Portfolio Plan Case*, Direct Testimony of Kevin M. Murray at 15 (Feb. 11, 2010) (IEU-Ohio Supp. at 57). AEP-Ohio's approved RSP permitted AEP-Ohio, during the term of its RSP from 2006 through 2008, to automatically raise CSP customers' generation rates 3% per year and OP customers' generation rates 7% per year. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, PUCO Case No. 04-169-EL-UNC, Opinion and Order at 18-19 (January 26, 2005) (IEU-Ohio Appx. at 255-256). AEP-Ohio was also granted the opportunity to annually request raises for each operating company of 4% per year, which were in fact requested and granted by the PUCO.

reasonably priced retail electric service. Thus, in considering AEP-Ohio's Application,⁴⁴ Ohio law required the Commission to consider electric service price impacts on customers.⁴⁵ The PUCO's Opinion and Order and Entry on Rehearing are unlawful inasmuch as the PUCO failed to consider the cumulative price impacts hitting customers as a result of its approval of the Stipulation. Under R.C. 4928.02(A), the price impacts on customers cannot be assessed in isolation without considering other rate changes, including the annual increases customers are subject to as a result of the Commission's order approving AEP-Ohio's ESP. R.C. 4928.02(A) compels the PUCO to use all the tools at its disposal to secure balanced outcomes and ensure that the public interest is met when considering the Stipulation, including by not considering rate impacts in a vacuum but rather in consideration of the total impacts facing customers, especially when the increases pile rate increases onto customers at an incredibly difficult time for our economy. A finding that AEP-Ohio's rates (including the approved EE/PDR Rider) are not just and reasonable under R.C. 4928.02 is appropriate and would demonstrate the teeth that this statutory provision is intended to have by the General Assembly.

Accordingly, this Court should reverse and find that the Stipulation is not in the public interest or in conformance with R.C. 4928.02 because the rate impacts to customers, in the context of AEP-Ohio's total rate increases under its ESP, are unreasonable and unlawful.

⁴⁴ *Portfolio Plan Case*, Application for Rehearing of IEU-Ohio at 7-12 (June 14, 2010) (IEU-Ohio Appx. at 21-26) (ICN 36).

⁴⁵ R.C. 4928.02(A) (IEU-Ohio Appx. at 348). *In the Matter of the Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA, *et al.*, Order on Remand at 36-37 (October 24, 2007) (IEU-Ohio Appx. at 326-327). This decision was issued the day before the Senate passed SB 221.

PROPOSITION OF LAW NO. III:

The PUCO's Opinion and Order and Entry on Rehearing approving cost recovery for AEP-Ohio's peak demand reduction proposal is unreasonable, unlawful and contrary to the record evidence.

A. The PUCO's Opinion and Order and Entry on Rehearing are unlawful inasmuch as they approve an AEP-Ohio program that is not "designed to achieve" AEP-Ohio's peak demand reduction mandates.

As previously noted, R.C. 4928.66 requires EDUs to implement measures designed to achieve a 1.0% peak demand reduction in 2009 and designed to achieve an additional 0.75% peak demand reduction each year through 2018.⁴⁶ To achieve these requirements, AEP-Ohio's Application and Stipulation indicated that it intends to rely upon its existing and future customers obtaining interruptible service through Schedules IRP-D.⁴⁷ Industrial and commercial customers who take service under Schedule IRP-D agree to "interrupt" their service, or lower their electricity consumption, for a certain number of hours per year (upon request) in return for rates that are below the rate they would otherwise pay for round-the-clock "firm" service under the tariff schedule applicable to their operations. Despite the long-standing availability of AEP-Ohio's interruptible schedules, only one CSP customer is taking service under the Schedule IRP-D and only six OP customers are served under Schedule IRP-D.⁴⁸ AEP-Ohio has previously

⁴⁶ Specifically, R.C. 4928.66(A)(1)(b) (IEU-Ohio Appx. at 350).

⁴⁷ *Portfolio Plan Case*, Stipulation at 4 (Nov. 12, 2009) (IEU-Ohio Supp. at 103) (ICN 2). In the case of OP, existing customers provide sufficient peak reduction capabilities to allow OP to meet its benchmarks through 2011. *Portfolio Plan Case*, Tr. at 38 (March 11, 2010) (IEU-Ohio Supp. at 128). However, for CSP, additional customers must commit peak demand reduction capabilities in order for CSP to achieve its benchmarks in 2010 and 2011. *Id.* at 39 (IEU-Ohio Supp. at 129).

⁴⁸ *Id.* at 58-59 (IEU-Ohio Supp. at 144-145).

acknowledged that the interruptible programs it offers customers are not attractive, particularly in comparison to PJM Interconnection LLC's ("PJM") demand response programs.⁴⁹

If customers do not find AEP-Ohio's current interruptible rate schedules attractive enough to subscribe to, AEP-Ohio did not include any real substantive changes to its current offers, and AEP-Ohio did not propose any new programs that may be more attractive to customers, then AEP-Ohio's Portfolio Plan cannot be "designed to achieve" the peak demand reductions required by R.C. 4928.66.⁵⁰ As applied to CSP, AEP-Ohio's Portfolio Plan is unlawful and unreasonable because it is not designed to achieve a reduction in peak demand of 1.0% in 2009 and an additional 0.75% reduction each year through 2018 as required by R.C. 4928.66.⁵¹

B. The PUCO's Opinion and Order and Entry on Rehearing are unreasonable inasmuch as the PUCO ignored without explanation lower cost compliance options for AEP-Ohio to meet its peak demand reduction obligations that are explicitly provided for in the PUCO's own rules.

The costs that AEP-Ohio proposed to recover from customers through its EE/PDR Rider include \$3,371,250 in 2010 and \$3,545,625 in 2011 (for a total cost of \$6,916,875) associated with peak demand response programs.⁵² The roughly \$6.9 million reflects \$1,561,875 in administrative costs and \$5,355,000 for customer incentives.⁵³ Customer incentives in this

⁴⁹ *AEP-Ohio ESP Proceeding*, Testimony of David M. Roush on Behalf of Columbus Southern Power Company and Ohio Power Company at 5 (July 31, 2008).

⁵⁰ Nonetheless, AEP-Ohio witness Jon F. Williams stated that the costs associated with developing new peak demand reduction programs are included in the Portfolio Plan. Tr. at 39-40 (March 11, 2010) (IEU-Ohio Supp. at 129-130).

⁵¹ Specifically, R.C. 4928.66(A)(1)(b) (IEU-Ohio Appx. at 350).

⁵² *Portfolio Plan Case*, AEP-Ohio Exhibit JFW-2, Volume 1 at page 16 of 163 (Table E-6) (Nov. 12, 2009) (IEU-Ohio Supp. at 36); *Portfolio Plan Case*, Tr. at 54 (March 11, 2010) (IEU-Ohio Supp. at 140).

⁵³ *Portfolio Plan Case*, AEP-Ohio Exhibit JFW-2 at Volume 1, page 131 of 163 (Nov. 12, 2009) (IEU-Ohio Supp. at 38).

instance reflect the lower electric rate that the customer receives as a result of electing to receive interruptible service.⁵⁴ In other words, AEP-Ohio sought and received permission to treat the discount a customer receives as a result of electing interruptible service under Schedule IRP-D as a “cost” or, perhaps said differently, as quasi-delta revenue that AEP-Ohio may be permitted to recover from other customers.

However, the \$6.9 million in “costs” recovered from customers could have been avoided if the Commission had simply taken advantage of its own rules. The rules adopted by the PUCO to implement Ohio’s portfolio requirements permit a customer’s peak demand reduction capability to count towards an EDU’s portfolio obligation if the customer’s peak demand reduction capability is recognized as a capacity resource under the FERC-approved tariff of a regional transmission organization (“RTO”), and if the peak demand reduction capability is committed to the EDU for purposes of meeting its portfolio requirements. Since AEP-Ohio is a member of PJM, a customer’s peak demand reduction capabilities recognized as a capacity resource by PJM may be counted by AEP-Ohio towards its portfolio obligation so long as the customer commits its capabilities to AEP-Ohio.⁵⁵ The process of committing such capabilities to AEP-Ohio requires the customer to file an application, either jointly or unilaterally, for PUCO approval.⁵⁶ At this time, several applications have been submitted for approval by the PUCO and are pending before the PUCO.⁵⁷

⁵⁴ *Portfolio Plan Case*, AEP-Ohio Exhibit JFW-2 at Volume 1, page 109 of 163 (Nov. 12, 2009) (IEU-Ohio Supp. at 37).

⁵⁵ See Rule 4901:1-39-05(E), O.A.C. (IEU-Ohio Appx. at 358).

⁵⁶ R.C. 4928.66 (A)(2)(d) (IEU-Ohio Appx. at 351). See also Rule 4901:1-39-05(G), O.A.C. (IEU-Ohio Appx. at 359).

⁵⁷ See, e.g., *In The Matter of the Joint Application of The Dayton Power and Light Company and Airgas, Inc. for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs Into DP&L's Demand Reduction Program*, Case No. 09-702-EL-AEC, Joint Application of the Dayton Power and Light Company and Airgas, Inc., for {C32189:6 }

IEU-Ohio witness Murray demonstrated that achieving peak demand reduction benchmark compliance through a strategy that leverages participation in the demand response options available through PJM instead of through the IRP-D Program could lower the overall cost of AEP-Ohio's Portfolio Plan by approximately \$7 million.⁵⁸ AEP-Ohio witness Jon F. Williams agreed with this conclusion.⁵⁹ However, when questioned about why AEP-Ohio did not include a PJM demand participation option as part of the AEP-Ohio Portfolio Plan, AEP-Ohio witness Williams indicated that the failure to include such an option reflected a management policy decision on behalf of the Companies.⁶⁰

In the face of this uncontested evidence that AEP-Ohio could meet its statutory peak demand reduction requirement through a cheaper alternative, the PUCO still authorized AEP-Ohio to recover approximately \$7 million to expand the availability of Schedule IRP-D.⁶¹

Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs into DP&L's Demand Reduction Program (August 7, 2009); *In The Matter of the Joint Application of The Dayton Power and Light Company and Appleton Papers, Inc. for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs Into DP&L's Demand Reduction Program*, Case No. 09-1701-EL-EEC, Joint Application of the Dayton Power and Light Company and Appleton Papers, Inc., for Approval of a Reasonable Arrangement to Incorporate Customer Participation in PJM's Demand Response Programs into DP&L's Demand Reduction Program (December 17, 2009).

⁵⁸ *Portfolio Plan Case*, Direct Testimony of Kevin M. Murray at 21 (Feb. 11, 2010) (IEU-Ohio Supp. at 63); *see also*, *Portfolio Plan Case*, Tr. at 87 (March 11, 2010) (IEU-Ohio Supp. at 155). Of note, in AEP-Ohio's ESP case, Chairman Schriber and Commissioner Centolella encouraged AEP-Ohio to work with PJM, the Commission, and interested stakeholders to ensure that predictable consumer demand response is recognized as a reduction in capacity that it must carry under PJM market rules. *AEP-Ohio ESP Proceeding*, Opinion and Order, Concurring Opinion of Chairman Alan R. Schriber and Commissioner Paul A. Centolella at 2 (March 18, 2009) (IEU-Ohio Appx. at 236-237).

⁵⁹ *Portfolio Plan Case*, Tr. at 43, 54 (March 11, 2010) (stating that a substantial portion of 3.37 million in 2010 and 3.5 million in 2011, referenced on page 131 of Exhibit JFW-2, could be reduced) (IEU-Ohio Supp. at 133, 140).

⁶⁰ *Id.* at 41 (IEU-Ohio Supp. at 131).

⁶¹ *Portfolio Plan Case*, Opinion and Order at 24 (May 13, 2010) (IEU-Ohio Appx. at 89) (ICN 33). On the same day that Reply Briefs were due in this case, AEP-Ohio filed an application to

Ignoring known lower cost options that reduce the overall cost of AEP-Ohio's Portfolio Plan does not benefit ratepayers and is not in the public interest. The PUCO's failure to protect customers in this way, especially when this lower cost compliance option is explicitly provided for in its rules, must violate the settlement evaluation criteria. There is simply no justifiable reason for customers paying AEP-Ohio the \$7 million allowed by the PUCO when the uncontested evidence demonstrates that simply counting participation in PJM's demand response programs by AEP-Ohio customers would allow AEP-Ohio to meet the peak demand reduction benchmarks at no cost to customers.

Consequently, this Court should overturn the PUCO's approval of this provision of the Stipulation. The Court should then also direct the PUCO to modify AEP-Ohio's Portfolio Plan to provide that customer-sited demand response capabilities that qualify as capacity resources in PJM's market will be counted towards AEP-Ohio's portfolio obligation, provided that the customer commits its capabilities to AEP-Ohio as required under Ohio law and the PUCO's rules.⁶²

modify its tariffs to include a new peak demand reduction program in Case Nos. 10-343-EL-ATA, *et al.* The peak demand reduction plan proposed in that case is not part of AEP-Ohio's Portfolio Plan and is not part of the record in this case.

⁶² *Portfolio Plan Case*, Testimony of Kevin M. Murray at 19-22 (Feb. 11, 2010) (IEU-Ohio Supp. at 61-64); *Portfolio Plan Case*, Tr. at 81 (March 11, 2010) (IEU-Ohio Supp. at 149).

PROPOSITION OF LAW NO. IV:

The PUCO's Order and Entry on Rehearing prohibiting AEP-Ohio and mercantile customers from relying on the "benchmark comparison method" for agreements reached after December 10, 2009 is unreasonable and unlawful.

The General Assembly provided larger customers called "mercantile customers"⁶³ a unique opportunity to participate in helping the EDUs meet the EE/PDR benchmarks. Specifically, R.C. 4928.66 permits the EDUs to integrate into their compliance efforts the customer-sited capabilities of mercantile customers who voluntarily commit their customer-sited capabilities to the EDU for the purpose of meeting the EDU's compliance targets.⁶⁴ In addition, in exchange for committing its EE/PDR capabilities to an EDU's benchmark compliance efforts, mercantile customers are provided an opportunity to ask the PUCO for an exemption from the EDU's rider that recovers its costs of meeting the EE/PDR mandates. R.C. 4928.66(A)(2)(c) states as follows:

Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.

Finally, R.C. 4928.66(A)(2)(d) requires the PUCO to apply the compliance provisions of R.C. 4928.66 in ways that facilitate "...efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction

⁶³ R.C. 4928.01(A)(19) defines a "mercantile customer" as "a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states." (IEU-Ohio Appx. at 343).

⁶⁴ R.C. 4928.66(A)(2)(c)-(d) (IEU-Ohio Appx. at 350-351).

capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.”

AEP-Ohio’s Application and Stipulation included two options to encourage mercantile customers to commit self-directed projects towards AEP-Ohio’s portfolio requirements: 1) a reduced upfront payment from AEP-Ohio equivalent to an advance payment of a portion of the customer’s EE/PDR rider cost obligation (with the customer continuing to pay the rider); or, 2) an exemption from the EE/PDR rider if the customer’s committed energy savings equal to AEP-Ohio’s mandated benchmark requirement percentages of energy savings based upon the customer’s 2006-2008 average annual energy usage baselines.⁶⁵ This element of AEP-Ohio’s Application and Stipulation was supported by all parties, including IEU-Ohio.⁶⁶

Nonetheless, the Commission unilaterally modified the self-direct program by eliminating the methodology reflected in the Stipulation to determine an appropriate exemption from the EE/PDR rider. The PUCO stated:

In previous mercantile rider exemption cases considered by the Commission, we found that it would be both equitable and reasonable to accept a mercantile customer's application for a rider exemption using the benchmark comparison method to determine whether a rider exemption is appropriate when, in reliance upon the prior version of Rule 4901:1-19-08, O. A. C., the customer and the electric utility reached agreement on the application between June 17, 2009 and December 10, 2009. However, mercantile customer rider exemption requests arising from agreements subsequent to the December 10, 2009 effective date of the rules shall not rely upon the benchmark comparison method. Thus, the segment of the Stipulation described herein in Section IV.I.3 of this Order, is clarified to reflect that a calculation that utilizes Option 2, the benchmark comparison method, is only available for applications for mercantile customer

⁶⁵ *Portfolio Plan Case*, Stipulation at 12-13 (Nov. 12, 2009) (IEU-Ohio Supp. at 111-112) (ICN 2).

⁶⁶ *Portfolio Plan Case*, Testimony of Kevin M. Murray at 22 (Feb. 11, 2010) (IEU-Ohio Supp. at 64).

rider exemption for agreements entered into between June 17, 2009 and December 10, 2009.⁶⁷

Rather than providing clarity, the PUCO's Order adds confusion regarding how rider exemptions for mercantile customers will be evaluated.⁶⁸ The PUCO's position on these important implementation matters, as acknowledged by the PUCO above, has flip-flopped and been anything but a model of clarity and predictability.⁶⁹

The PUCO unilaterally modified the only universally supported provision in AEP-Ohio's Application and Stipulation by eliminating a methodology upon which to base the value of customer-sited capabilities committed to the EDU. The PUCO's Orders implicitly suggest that the PUCO's rules provide guidance on what criteria must be met in order for a mercantile customer to qualify for an exemption from the rider.⁷⁰ However, the PUCO's rules do not

⁶⁷ *Portfolio Plan Case*, Opinion and Order at 27 (May 13, 2010) (internal citations omitted) (IEU-Ohio Appx. at 92) (ICN 33).

⁶⁸ The Commission's reference to Rule 4901:1-19-08, O.A.C., is an apparent error, as the relevant rule regarding mercantile customer exemptions is actually Rule 4901:1-39-08, O.A.C. (IEU-Ohio Appx. at 362).

⁶⁹ *Portfolio Plan Case*, Opinion and Order at 27 (May 13, 2010) (IEU-Ohio Appx. at 92) (ICN 33) (noting that the once approved benchmark comparison method would no longer be allowed for mercantile customer rider exemptions arising from agreements made after December 10, 2009). The PUCO recently issued an Entry in PUCO Case No. 10-834-EL-EEC creating a "pilot program" applicable to all EDUs for processing mercantile applications to commit their EE/PDR capabilities to an EDU's compliance efforts. The PUCO's Entry adopts the "benchmark comparison method" for counting mercantile customer applications filed through the pilot program. *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction Riders*, PUCO Case No. 10-834-EL-EEC, Entry at 4 (September 15, 2010) (IEU-Ohio Appx. at 100). The PUCO also approved the use of the "benchmark comparison method" in FirstEnergy's 2009 ESP proceeding. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, PUCO Case No. 08-935-EL-SSO, Stipulation and Recommendation at 29 (February 19, 2009), as approved by a PUCO Second Opinion and Order in the same case on March 25, 2009.

⁷⁰ *Portfolio Plan Case*, Opinion and Order at 27 (May 13, 2010) (IEU-Ohio Appx. at 92) (ICN 33).

directly address this issue. The only specific demonstration required by the PUCO's rules is a demonstration pursuant to Rule 4901:1-39-08(A), O.A.C., that the energy savings associated with the mercantile customer's energy efficiency or peak demand reduction projects are the result of investments that meet the total resource cost test, or that the utility's avoided cost exceeds the cost to the electric utility for the mercantile customer's program.⁷¹ Further, demonstrating that a mercantile customer's program is cost-effective under either approach specified in the rules does not answer the question of over what period of time the mercantile customer should qualify for an exemption from the EE/PDR rider. Thus, customers are left to guess how to interpret the PUCO's Order.

The PUCO's decision is unlawful and unreasonable and this Court should direct the PUCO to definitively clarify what criteria will be used to calculate the time period that a mercantile customer may qualify for an exemption from the rider. Again, R.C. 4928.66(A)(2)(d) directs the PUCO to apply the compliance section of the law in such a manner as to "include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code." (emphasis added). The PUCO failed to articulate why the benchmark compliance methodology reflected in the Stipulation and unanimously supported by the parties in this proceeding is not an appropriate methodology or does not meet the settlement review criteria. The PUCO's decision in this proceeding fails to facilitate, and in fact frustrates, the integration of customer-sited EE/PDR capabilities into AEP-Ohio's EE/PDR benchmark compliance efforts. Accordingly, IEU-Ohio requests that the Court reverse the PUCO's ruling regarding the benchmark comparison methodology and direct the PUCO to adopt the benchmark

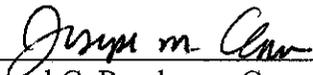
⁷¹ Rule 4901:1-39-08(A), O.A.C. (IEU-Ohio Appx. at 362).

comparison methodology for mercantile customer requests for exemptions from the EE/PDR rider.

CONCLUSION

WHEREFORE, Appellant respectfully submits that Appellee's May 13, 2010 Opinion and Order and July 14, 2010 Entry on Rehearing are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

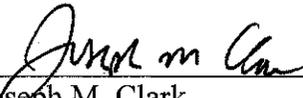


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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Merit Brief and Appendix of Appellant Industrial Energy Users-Ohio* was sent by ordinary U.S. mail, postage prepaid, to the parties listed below this 9th day of November 2010.



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