

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF APPELLANT  
INDUSTRIAL ENERGY USERS-OHIO

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**Samuel C. Randazzo** (Reg. No. 0016386)  
(Counsel of Record)

**Joseph E. Oliker** (Reg. No. 0086088)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Facsimile: (614) 469-4653  
sam@mwncmh.com  
joliker@mwncmh.com

**COUNSEL FOR APPELLANT,  
INDUSTRIAL ENERGY USERS-OHIO**

**Richard Cordray** (Reg. No. 0038034)  
Attorney General of Ohio

**William L. Wright** (Reg. No. 0018010)  
Section Chief, Public Utilities Section

**Thomas McNamee** (Reg. No. 0017352)  
(Counsel of Record)

**Steven L. Beeler** (Reg. No. 0078076)  
Assistant Attorneys General

180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215

Telephone: (614) 466-4397

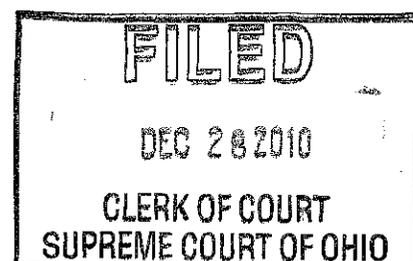
Facsimile: (614) 644-8764

william.wright@puc.state.oh.us

thomas.mcnamee@puc.state.oh.us

steven.beeler@puc.state.oh.us

**COUNSEL FOR APPELLEE,  
PUBLIC UTILITIES COMMISSION  
OF OHIO**



**Matthew Satterwhite** (Reg. No. 0071972)  
(Counsel of Record)  
**Steven Nourse** (Reg. No. 0046705)  
**Anne Vogel** (Reg. No. 0073774)  
American Electric Power Service Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215-2373  
Telephone: (614) 716-1606  
Facsimile: (614) 716-2950  
mjsatterwhite@aep.com  
stnourse@aep.com  
amvogel@aep.com

**COUNSEL FOR INTERVENING  
APPELLEE, COLUMBUS SOUTHERN  
POWER COMPANY**

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## INTRODUCTION

The Merit Briefs filed by the Public Utilities Commission of Ohio (“PUCO”) and Columbus Southern Power Company (hereinafter referred to as “CSP” or “AEP-Ohio”) highlight the errors in the PUCO’s unwarranted decisions. AEP-Ohio’s approved Portfolio Plan, PUCO Case No. 09-1089-EL-POR<sup>1</sup>, produced significant rate increases. The increases were not justified and they were authorized despite readily available lower cost opportunities to produce targeted outcomes. The PUCO’s decision is unlawful and unreasonable: The PUCO’s reasoning contradicts itself, fails to properly apply the law to the facts, and fails to carry out statutory mandates. Accordingly, Industrial Energy Users-Ohio (“IEU-Ohio”) respectfully requests that this Court reverse the PUCO’s decision on the issues raised herein and remand this proceeding to the PUCO to correct the errors identified herein for the reasons set forth below.

## ARGUMENTS

### PROPOSITION OF LAW NO. 1

**The PUCO’s Opinion and Order and Entry on Rehearing authorizing AEP-Ohio to recover lost distribution revenue is unreasonable, unlawful, and contrary to the evidence in the record.**

This Court must reverse the PUCO’s Opinion and Order and Entry on Rehearing because the decisions are unreasonable, unlawful, and contrary to the evidence in the record.<sup>2</sup> The

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<sup>1</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, PUCO Case No. 09-1089-EL-POR, Opinion and Order at 26 (May 13, 2010) (IEU-Ohio Appx. at 66) (hereinafter cited as “*Portfolio Plan Case*”).

<sup>2</sup> *Office of 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).

decisions were unlawful because the PUCO lacks the authority to award lost distribution revenue in the absence of a finding regarding AEP-Ohio's fixed distribution costs—otherwise the PUCO cannot determine whether any distribution revenue has, in fact, been “lost”. The PUCO's decision was unreasonable because the PUCO's decisions contradicted the facts; thus, it is against the manifest weight of the evidence.

The PUCO and AEP-Ohio do not dispute that there is no evidentiary basis from which the PUCO could authorize lost distribution revenue. In fact, the PUCO rejected the Stipulation regarding lost distribution revenue because AEP-Ohio failed to provide an evidentiary basis for authorizing lost distribution revenue.<sup>3</sup> But the PUCO still authorized AEP-Ohio to collect lost distribution revenue in contradiction to the PUCO's own factual determination. Thus, it is unreasonable, unlawful, and contrary to the evidence that the PUCO authorized AEP-Ohio to collect lost distribution revenue.

The PUCO and AEP-Ohio attempt to mischaracterize the issues before this Court. The PUCO entertains a long, drawn-out discussion of whether the PUCO has the authority to authorize the collection of lost distribution revenue under Section 4928.66, Revised Code (“R.C.”) and Rule 4901:1-39-07, Ohio Administrative Code (“O.A.C.”). PUCO Merit Brief at 5-7. IEU-Ohio does not dispute that the PUCO may—in appropriate circumstances—authorize collection of “appropriate” lost distribution revenue.<sup>4</sup> But the PUCO cannot determine which

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<sup>3</sup> *Portfolio Plan Case*, Opinion and Order at 26 (May 13, 2010) (IEU-Ohio Appx. at 91).

<sup>4</sup> Rule 4901:1-39-07(A), O.A.C. (“With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, **appropriate lost distribution revenues**, and shared savings. Any such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter.”) (emphasis added) (IEU-Ohio Appx. at 361).

amount of distribution revenue is appropriate without first quantifying AEP-Ohio's fixed distribution costs. Otherwise, the PUCO cannot determine whether AEP-Ohio rates, in fact, need to be increased to provide recovery for such appropriate amount. It is disingenuous for the PUCO to argue otherwise given that it came to the same conclusion in its May 13, 2010, Opinion and Order, stating:

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.<sup>5</sup>

The PUCO's decision to authorize collection of lost distribution revenue was unlawful, unreasonable, and contrary to the PUCO's own factual findings.

In the Entry on Rehearing, the PUCO attempted a *post hoc* justification for its illogical, contradictory decision: "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."<sup>6</sup> This after-the-fact PUCO statement about reliance on the Stipulation further undermines the PUCO's decision: The end-game relief stipulated to by the parties did not provide the PUCO with an evidentiary basis for awarding lost distribution revenue. This Court has noted—on several occasions—that:

[a] stipulation entered into by parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, **but**

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<sup>5</sup> *Portfolio Plan Case*, Opinion and Order at 26 (May 13, 2010) (IEU-Ohio Appx. at 91) (ICN 33).

<sup>6</sup> *Portfolio Plan Case*, Entry on Rehearing at 6 (July 14, 2010) (IEU-Ohio Appx. at 55) (ICN 44); see PUCO Merit Brief at 5, 7; see also AEP-Ohio Merit Brief at 5.

**must determine what is just and reasonable from evidence presented at the hearing.**<sup>7</sup>

If the parties had stipulated to a quantitative value for AEP-Ohio's fixed distribution cost, and the stipulated value had been supported by the evidence, that would be a different story—but they did not. Under the PUCO's logic, the PUCO could approve a settlement that has no evidentiary support so long as the parties claim it is a key element.

The PUCO purports that its decision was reasonable because it “qualified” its decision to award lost distribution revenue. PUCO Merit Brief at 7. This boils down to saying that since the PUCO knew that it was authorizing the collection of lost distribution revenue without a factual basis, it is allowed to award lost distribution revenue without a factual basis. This position is as illogical as it is illegal. The PUCO's after-the-fact qualification effort only highlights the lack of any legitimate basis to award lost distribution revenue.

The PUCO alleges that IEU-Ohio is asking this Court to reweigh evidence and reject factual findings made by the PUCO. Not true. The PUCO's factual findings directly support IEU-Ohio's position that the PUCO had no evidentiary basis for awarding lost distribution revenue:

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.<sup>8</sup>

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<sup>7</sup> *Office of Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 64 Ohio St. 3d 123, 125-126 (1992) (quoting *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 379 (1978) (emphasis added); see also *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St. 3d 305, 311, 871 N.E.2d, 1176, 1184, (2007), (holding that the Commission violated R.C. 4903.09 because there was no factual basis to support the Commission's finding).

<sup>8</sup> *Portfolio Plan Case*, Opinion and Order at 26 (May 13, 2010) (IEU-Ohio Appx. at 91) (ICN 33) (emphasis added).

IEU-Ohio's Appeal seeks relief from this Court that will hold the PUCO accountable for applying the law to its own factual conclusions. There is no factual basis to support the PUCO's decision to authorize a rate increase for lost distribution revenue, and the record evidence contradicts the PUCO's decision.

## **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.**

The PUCO cannot approve a portfolio plan unless the electric utility proves "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."<sup>9</sup> R.C. 4928.02 sets forth Ohio's state policy and requires the PUCO to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. The policy requirements set forth in R.C. 4928.02 must be carried out by the PUCO. R.C. 4928.06; *see also Elyria Foundry v. Pub. Util. Comm'n.*, 114 Ohio St. 3d 305, 871 N.E.2d 1176 (2007). Thus, in considering AEP-Ohio's Application,<sup>10</sup> Ohio law required the PUCO to consider electric service price impacts on customers.<sup>11</sup> Accordingly, the PUCO's failure to consider these rate impacts was unlawful and unreasonable.

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<sup>9</sup> Rule 4901:1-39-04(E), O.A.C. (IEU-Ohio Appx. at 356).

<sup>10</sup> *Portfolio Plan Case*, Application for Rehearing of IEU-Ohio at 7-12 (June 14, 2010) (IEU-Ohio Appx. at 21-26) (ICN 36).

<sup>11</sup> 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*, PUCO 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 Amended Substitute Senate Bill 221("S.B. 221").

The PUCO's failure to consider the rate impacts, as a whole, on customers was unlawful and unreasonable. The PUCO failed to consider the current rate increase in conjunction with previous rate increases.

As a result of AEP-Ohio's electric security plan ("ESP"), CSP customers saw, on average, a 6% increase in the total amount of their January 2010 electric bills.<sup>12</sup> Customers also experienced unexpected increases in January 2010 when the PUCO exempted,<sup>13</sup> for the first time, the economic development cost recovery rider ("EDR") from the maximum rate increases.<sup>14</sup> Under the EDR, CSP customers experienced an additional 10.52701% increase in

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<sup>12</sup> *Portfolio Plan Case*, Testimony of Kevin M. Murray at 14 (February 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, *In the Matter of the Application of Columbus Southern 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.*, (hereinafter referred to as "*AEP-Ohio ESP Proceeding*") the PUCO approved what it characterized as maximum revenue increases for Ohio Power Company ("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).

<sup>13</sup> AEP-Ohio's approved ESP also exempted from the maximum rate increases AEP-Ohio's Energy Efficiency and Peak Demand Rider ("EE/PDR"), 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).

<sup>14</sup> *Portfolio Plan Case*, Testimony of Kevin M. Murray at 14 (February 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).

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.<sup>15</sup> And, at the time that the PUCO 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.

In addition to the above rate increases which the PUCO refused to consider, the PUCO approved the Stipulation which triggered additional 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.<sup>16</sup> Moreover, the PUCO allowed AEP-Ohio to recover three years of portfolio compliance costs in seventeen months, further increasing the bill impact on customers.<sup>17</sup>

The PUCO's decision is unlawful and unreasonable inasmuch as the PUCO failed to consider the cumulative impact of these rate increases. The PUCO's refusal to consider the cumulative impact of these rates renders the PUCO's decision unlawful and unreasonable.

AEP-Ohio wrongly claims that IEU-Ohio is attempting to relitigate cases already approved by the PUCO. AEP-Ohio Merit Brief at 8. This mischaracterizes the issue raised by IEU-Ohio's Appeal. IEU-Ohio's position is that the PUCO's decision was unlawful and unreasonable inasmuch as it failed to consider the cumulative impact of these rate increases alongside the current rate increase. That is the analysis required by R.C. 4928.02 and R.C. 4928.06. R.C. 4928.66(A)(2)(b) gives the PUCO discretion to alter the compliance benchmarks

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<sup>15</sup> *Portfolio Plan Case*, Testimony of Kevin M. Murray at 14-15 (February 11, 2010) (IEU-Ohio Supp. at 56-57).

<sup>16</sup> *Portfolio Plan Case*, Stipulation at Attachment A (November 12, 2009) (IEU-Ohio Supp. at 120-123) (ICN 2).

<sup>17</sup> *Portfolio Plan Case*, Opinion and Order at 28-29 (May 13, 2010) (IEU-Ohio Appx. at 111).

due to regulatory, economic or technological reasons and consideration of the rate impacts is a necessary part of implementing the mandates in R.C. 4928.66 in harmony with R.C. 4928.02.

The PUCO misstates the character of R.C. 4928.02 and attempts to support its position with an inapplicable case: *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 St. 3d 208 (2007) is completely irrelevant to R.C. 4928.02. PUCO Merit Brief at 19. The PUCO wrongly alleges that R.C. 4928.02, contains flimsy guidelines that the PUCO can follow or disregard at its leisure. Not so. The law states, “the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.” R.C. 4928.06(A) (emphasis added). The PUCO agreed with this position, stating:

The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to “ensure the policy specified in section 4928.02 of the Revised Code is effectuated . . . . Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy provisions of Section 4928.02, Revised Code.<sup>18</sup>

*Ohio Partners* is inapplicable because it involved two completely different statutory provisions: R.C. 4929.02 and R.C. 4929.04. Importantly, R.C. 4929.04(A) specifically provides an exemption if “the commission finds that the natural gas company is in substantial compliance

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<sup>18</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (November 25, 2008) (hereinafter “*FirstEnergy*”) (citing *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St. 3d 305 (2007) (IEU-Ohio Appx. Reply at 13-14).

with the policy of this state specified in section 4929.02 of the Revised Code. . . .”<sup>19</sup> No such language applies to R.C. 4928.02. In fact, R.C. 4928.06 requires full compliance—not substantial compliance—with the provisions of R.C. 4928.02.<sup>20</sup>

Perhaps, in an attempt to justify its own failure to consider rate impacts in its analysis, the PUCO claims that the CSP Collaborative process considered rate impacts. PUCO Merit Brief at 14. But even if rate impacts had been considered in the CSP Collaborative process, the PUCO cannot discharge its statutory duties to consider rate impacts by simply asserting that someone else might have done so.

In approving the Stipulation, the PUCO failed to consider the impact of all rate increases; thus, approval was unlawful and unreasonable as a matter of law. The policy enumerated in R.C. 4928.02 is not a guideline—it is law. R.C. 4928.06; *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St. 3d 305, 314-317 (2007); *FirstEnergy*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (November 25, 2008). The PUCO’s decision below is unlawful and unreasonable.

**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 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.**

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<sup>19</sup> The PUCO does not mention R.C. 4929.04—the holding in *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208 (2007) was specifically based upon this statutory exemption.

<sup>20</sup> R.C. 4928.06 (IEU-Ohio Appx. Reply at 38).

The PUCO's decision was unlawful and unreasonable inasmuch as it ignored the cost benefits of the compliance options available under its own rules. Rule 4901:1-39-05(E), O.A.C., provides:

An electric utility may satisfy its peak-demand reduction benchmarks through a combination of energy efficiency and peak-demand response programs implemented by electric utilities and/or programs implemented on mercantile customer sites where the mercantile program is committed to the electric utility.

(1) For energy efficiency programs, an electric utility may count the programs' effects resulting in coincident peak-demand savings.

(2) For demand response programs, an electric utility may count demand reductions towards satisfying some or all of the peak-demand reduction benchmarks by demonstrating that either the electric utility has reduced its actual peak demand, or has the capability to reduce its peak demand and such capability is created under either of the following circumstances: **(a) A peak-demand reduction program meets the requirements to be counted as a capacity resource under the tariff of a regional transmission organization approved by the federal energy regulatory commission.**

(b) A peak-demand reduction program equivalent to a regional transmission organization program, which has been approved by this commission.<sup>21</sup>

The PUCO's analysis completely brushes this provision (highlighted above) of its own rules aside in favor of increasing rates unnecessarily by \$7 million. AEP-Ohio witness Jon F. Williams agreed, that this component of the overall compliance could have been avoided by a PJM Interconnection LLC ("PJM")<sup>22</sup> participation option.<sup>23</sup> The record evidence shows no

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<sup>21</sup> Rule 4901:1-39-05(E), O.A.C. (emphasis added) (IEU-Ohio Appx. at 358).

<sup>22</sup> PJM is a regional transmission organization subject to the jurisdiction of the Federal Energy Regulatory Commission.

<sup>23</sup> *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); *see also 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).

disagreement between the PUCO, AEP-Ohio and IEU-Ohio on the fact that compliance was achievable at a price tag of \$7 million less.

The PUCO and AEP-Ohio claim that AEP-Ohio's recent submission of a proposal that would emulate the PJM programs<sup>24</sup> somehow justifies the PUCO's unreasonable past decision to increase rates by \$7 million more than the available compliance cost. PUCO Merit Brief at 22; AEP-Ohio Merit Brief at 10. But the PUCO and AEP-Ohio cannot rely on these after-the-fact proposals. They were not part of AEP-Ohio's Portfolio Plan, and they were not considered when the PUCO made its decision. Moreover, the PUCO has not approved that proposal.

**B. 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.**

AEP-Ohio's peak demand reduction ("PDR") program is not "designed" to achieve peak PDR requirements. Thus, the PUCO's approval was unlawful and unreasonable.

R.C. 4928.66 requires electric distribution utilities ("EDUs") to implement measures designed to achieve a 1.0% PDR in 2009 and an additional 0.75% PDR each year through 2018.<sup>25</sup> 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.<sup>26</sup> Despite the long-standing availability of AEP-Ohio's interruptible

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<sup>24</sup> *In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Rider*, PUCO Case No. 10-343-EL-ATA (March 19, 2010) (PUCO Second Supp. at 1).

<sup>25</sup> Specifically, R.C. 4928.66(A)(1)(b) (IEU-Ohio Appx. at 350).

<sup>26</sup> *Portfolio Plan Case*, Stipulation at 4 (November 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

schedules, only one CSP customer subscribed to Schedule IRP-D and only six OP customers are served under Schedule IRP-D.<sup>27</sup> AEP-Ohio has previously acknowledged that the interruptible programs it offers customers are not attractive, particularly in comparison to PJM demand response programs.<sup>28</sup> AEP-Ohio did not propose substantive changes to its current IRP-D Schedules and AEP-Ohio did not propose any new programs that may be more attractive to customers.<sup>29</sup> R.C. 4928.66 specifies that programs approved by the PUCO must be “designed to achieve” the peak demand reductions required by R.C. 4928.66. Thus, the PUCO’s decision to approve the use of existing rate schedules as though they were designed to achieve the compliance specified by statute is against the manifest weight of the evidence and it is unlawful and unreasonable.

The PUCO’s decision fails to explain how AEP-Ohio’s use of existing rate schedules to implement its PDR program is designed to achieve PDR requirements and is thereby unlawful and unreasonable. *MCI Telecommunications v. Pub. Util. Comm.*, 32 Ohio St. 3d. 306, 312, 513 N.E.2d 337, 343-344 (1988). The PUCO wrongly alleges that Attachment B in the Stipulation<sup>30</sup> demonstrates how AEP-Ohio will achieve PDR requirements. PUCO Merit Brief at 20. But, Attachment B merely contains a table that shows the performance that is necessary to achieve

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reduction capabilities in order for CSP to achieve its benchmarks in 2010 and 2011. *Id.* at 39 (IEU-Ohio Supp. at 129).

<sup>27</sup> *Id.* at 58-59 (IEU-Ohio Supp. at 144-145).

<sup>28</sup> *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).

<sup>29</sup> Nonetheless, AEP-Ohio witness Jon F. Williams stated that the costs associated with developing new PDR programs are included in the Portfolio Plan. Tr. at 39-40 (March 11, 2010) (IEU-Ohio Supp. at 129-130).

<sup>30</sup> *Portfolio Plan Case*, Stipulation at Attachment B (November 12, 2009) (IEU-Ohio Supp. at 125).

PDR requirements—the table does not mention how AEP-Ohio will meet the requirements. There is no evidence presented by Attachment B from which the PUCO could conclude that AEP-Ohio’s programs are designed to achieve PDR requirements. Therefore, the PUCO’s decision to approve the program was unlawful and unreasonable.

The PUCO also attempts to support the decision below on this issue by reference to the fact that some parties stipulated that the PDR program is designed to achieve the PDR requirements. PUCO Merit Brief at 20. The fact that the parties stipulated that the program is designed to achieve PDR requirements does not make it so and a stipulation to a conclusion is not evidence to support the conclusion.

The PUCO also claims that since AEP-Ohio will be fined if the program does not comply, then the program must be designed to comply. PUCO Merit Brief at 20. The risk of being fined has nothing to do with whether AEP-Ohio’s program is designed to achieve PDR requirements. Under the PUCO’s logic, the existence of the potential fine obviates the need to determine whether the program is actually designed to achieve the PDR requirements.

**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.**

The PUCO’s rejection of the benchmark comparison method was unlawful and unreasonable inasmuch as the PUCO rejected the only universally accepted provision in the Stipulation and frustrated the efforts of mercantile customers to obtain exemptions from the EE/PDR rider in contradiction to R.C. 4928.66. The PUCO’s failure to definitely clarify what criteria will be used to calculate the time period that a mercantile customer may qualify for an exemption from the EE/PDR rider renders the decision unlawful and unreasonable.

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 PDR 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.” The PUCO’s discretion in this area is limited. R.C. 4928.66(A)(2)(c) requires that compliance “shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and PDR programs, adjusted upward by the appropriate loss factors.”

In exchange for mercantile customers committing their energy efficiency or peak demand capabilities towards the EDU’s compliance obligation, the PUCO may exempt mercantile customers making such commitments from any mechanism designed to recover the cost of the EDU’s energy efficiency and peak demand reduction programs. R.C. 4928.66(A)(2)(c). The concept adopted by the General Assembly is simple. Customers that make positive contributions towards the compliance targets have the opportunity to be relieved from paying costs otherwise incurred by the utility to purchase the balance of compliance.

The PUCO argues that IEU-Ohio is attempting to elevate a policy dispute into a legal claim, and it is within the PUCO’s purview to set policy. PUCO Merit Brief at 28. However, the PUCO’s confusion about the extent of its limited statutory authority is clearly revealed in its merit brief when it states “[t]he Commission has determined, in its discretion, that the better way to achieve the statutory mandates is to focus on the development of all cost-effective energy efficiency.” PUCO Merit Brief at 27-28. The PUCO offers this explanation to rationalize why it

adopted the total resource cost (“TRC”) test<sup>31</sup> that mercantile customers must satisfy in order to qualify for an exemption from any mechanism designed to recover the cost of the EDU’s energy efficiency and PDR programs.

As the PUCO’s own definition of TRC demonstrates, the TRC test is a measure that compares the benefits or savings from implementing an energy efficiency measure against the costs. If the benefits are greater than the cost, the measure is deemed cost-effective. The TRC test does not provide any guidance on how much or what type of cost-effective performance a mercantile customer must undertake to be eligible for an exemption from the compliance cost recovery mechanism. The benchmark comparison method provides a formula to determine the amount of time that a mercantile customer would be entitled to obtain an exemption by committing cost-effective compliance<sup>32</sup> The PUCO removed the one thing in the Stipulation (the provision recommending the adoption of the benchmark method) that provided this needed

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<sup>31</sup> Rule 4901:1-39-01(Y), O.A.C. states:

“Total resource cost test means an analysis to determine if, for an investment in energy efficiency or peak-demand reduction measure or program, on a life-cycle basis, the present value of the avoided supply costs for the periods of load reduction, valued at marginal cost, are greater than the present value of the monetary costs of the demand-side measure or program borne by both the electric utility and the participants, plus the increase in supply costs for any periods of increased load resulting directly from the measure or program adoption. Supply costs are those costs of supplying energy and/or capacity that are avoided by the investment, including generation, transmission, and distribution to customers. Demand-side measure or program costs include, but are not limited to, the costs for equipment, installation, operation and maintenance, removal of replaced equipment, and program administration, net of any residual benefits and avoided expenses such as the comparable costs for devices that would otherwise have been installed, the salvage value of removed equipment, and any tax credits.” (IEU-Ohio Appx. Reply at 43).

<sup>32</sup> The benchmark comparison method provides an exemption from any mechanism to recover the costs of the EDU’s energy efficiency and PDR programs if the customer’s committed energy savings are equal to or greater than the EDU’s mandated benchmark required percentages of energy savings, measured against a three year average baseline of energy use.

guidance and substituted language that is incapable of providing any guidance on this compliance-related item.

Perhaps acknowledging that its decision below was unreasonable and unlawful, the PUCO points to a recent order<sup>33</sup> and suggests it has changed its rules back to the benchmark comparison method. It suggests that IEU-Ohio's complaint is now moot. PUCO Merit Brief at 28. The PUCO is misinformed. The *Mercantile Program* (relied upon by the PUCO to support its mootness claim) did not "change" the rules: It merely waived the rules for an eighteen month period.<sup>34</sup> Finally—or not so finally—the PUCO recently issued an Entry on Rehearing concerning the *Mercantile Program* stating that the PUCO will take further time to consider the matters specified in the Application for Rehearing.<sup>35</sup> The PUCO's rudderless approach to this issue leaves mercantile customers with no meaningful way to identify the performance that they can contribute to render them eligible for an exemption from the EE/PDR rider. Thus, the PUCO's decision is unlawful and unreasonable.

Instead of 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, "the PUCO decision below

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<sup>33</sup> *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) (hereinafter "*Mercantile Program*") (IEU-Ohio Appx. at 100).

<sup>34</sup> *Mercantile Program*, Entry at 7 (September 15, 2010) (IEU-Ohio Appx. at 103).

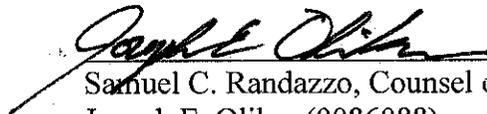
<sup>35</sup> *Mercantile Program*, Entry on Rehearing at 2 (November 10, 2010) (IEU-Ohio Appx. Reply at 35).

muddied the water.”<sup>36</sup> If the PUCO will stipulate that the benchmark comparison method is now the law of the Ohio for purposes of determining the duration of a rider exemption that a mercantile customer may properly seek, IEU-Ohio will gladly withdraw this issue from its appeal. In the meantime, IEU-Ohio urges the Court to find that the PUCO acted unreasonably in stripping the benchmark comparison provision from the approved Stipulation.

**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,



Samuel C. Randazzo, Counsel of Record (0016386)  
Joseph E. Olier (0086088)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Facsimile: (614) 469-4653

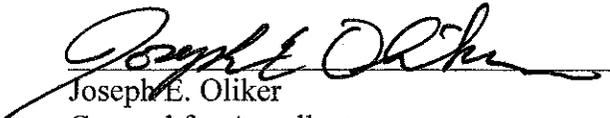
**COUNSEL FOR APPELLANT,  
INDUSTRIAL ENERGY USERS-OH**

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<sup>36</sup> R.C. 4928.66(A)(2)(d).

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this *Reply Brief of Appellant Industrial Energy Users-Ohio*, was sent by ordinary U.S. mail, postage prepaid, or hand-delivered to all parties to the proceeding before the Public Utilities Commission of Ohio, listed below, and pursuant to Section 4903.13 of the Ohio Revised Code, December 28, 2010.

  
Joseph E. Olik  
Counsel for Appellant,  
Industrial Energy Users-Ohio

Matthew J. Satterwhite (0071972)  
Steven T. Nourse (0046705)  
Anne M. Vogel (0073774)  
American Electric Power Service Company  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215  
mjsatterwhite@aep.com  
stnourse@aep.com  
amvogel@aep.com

**ON BEHALF OF COLUMBUS SOUTHERN  
POWER**

Richard Cordray (0038034)  
William L. Wright (0018010)  
Thomas McNamee (0017352)  
Steven L. Beeler (0078076)  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street  
Columbus, OH 43215  
william.wright@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us  
steven.beeler@puc.state.oh.us

**ON BEHALF OF THE PUBLIC UTILITIES  
COMMISSION OF OHIO**