

IN THE SUPREME COURT OF OHIO

In the Matter of the Commission's : Supreme Court Case No. 2014-1290
Review of Chapter 4901:1-10, Ohio :
Administrative Code, Regarding : Appeal from the Public Utilities
Electric Companies. : Commission of Ohio
: :
: Public Utilities Commission of Ohio
: Case No. 12-2050-EL-ORD

APPELLANT OHIO POWER COMPANY'S MEMORANDUM OPPOSING
APPELLEE PUBLIC UTILITIES COMMISSION OF OHIO'S MOTION TO DISMISS

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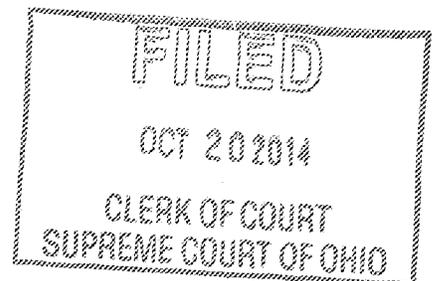


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MEMORANDUM OPPOSING THE MOTION TO DISMISS

I. INTRODUCTION

Appellant Ohio Power Company (“AEP Ohio” or the “Company”) brought this appeal because the January 15, 2014, Finding and Order and subsequent entries on rehearing issued by the Public Utilities Commission of Ohio (“Commission”) in the case below violate several provisions of the Ohio Revised Code (“R.C.”), most notably the “net metering” statute, R.C. 4928.67, as well as this Court’s precedent. “Net metering” is where a retail customer operates generation equipment that produces energy that is fed back into the electric grid, such that the customer-generator is only billed for the usage net of any energy it produces and the customer-generator can actually get a net credit where it produces more energy than is used. In this appeal, AEP Ohio has no qualms with the plain meaning of the net metering statute, R.C. 4928.67, or the prior more balanced interpretation of that statute applied by the Commission. But AEP Ohio does object to the Commission’s recent overbroad amendments to its net metering rule. As is discussed and supported in AEP Ohio’s October 6, 2014 Merit Brief, the newly-adopted net metering rule is in conflict with several provisions of R.C. Chapter 4928 and this Court’s ruling in *FirstEnergy Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 401, 2002-Ohio-2430, 768 N.E.2d 648.

On October 9, 2014, the Commission filed a motion to dismiss the instant appeal, claiming that the appeal raises no justiciable controversy. As more fully discussed below, the Commission’s orders below do impose definite (but unlawful) regulatory obligations on AEP Ohio and inflict concrete financial harm upon the Company. While the unfunded mandates of the newly-adopted rule will become effective only after completion of a legislative review process (*i.e.*, through the Joint Committee on Agency Rule Review or “JCARR” process), the regulatory obligations and related financial harm are self-executing based on the existing final

orders already issued by the Commission. Absent any invalidation of the adopted rule as a result of the JCARR process, the express terms of the Commission's orders require that the rules be filed with the Secretary of State in accordance with R.C. 111.15 and that the final rules will automatically "become effective on the earliest date permitted."

Of course, the Commission is well aware that the subsequent effective date of the rules (which will occur long before this Court addresses the merits of AEP Ohio's appeal) does not provide an additional opportunity for AEP Ohio to file an appeal before this Court. Meanwhile, under R.C. 4905.54 through 4905.59 and R.C. 4905.99, AEP Ohio, its officers and its employees are bound to follow Commission orders or be subjected to potential civil forfeitures or even conviction of a fifth degree felony criminal offense. App. at 37-43.¹ Thus, a dismissal of this appeal now as being premature would likely leave AEP Ohio with no remedy other than to commit an act of civil disobedience to cause a rule enforcement action to be brought by the Commission. No precedent of this Court requires such an unfair and unjust result. Moreover, if the Commission's standard for a justiciable controversy is adopted, the Commission could effectively evade judicial review for even those orders that inflict harm in a manner that exceeds the Commission's powers as a creature of statute – which is an apt description of the final orders below.

Contrary to the Commission's arguments, the appeal does raise justiciable issues that are ripe for review by this Court and the motion to dismiss should be denied.

¹References to Appellant's appendix attached hereto are denoted herein as "App.;" References to Appellant's appendix attached to its October 6, 2014 Merit Brief are denoted herein as "Merit Brief App.;" references to Appellee's appendix attached to its Motion to Dismiss are denoted herein as "Appellee App."

II. LAW AND ARGUMENT

- A. A final Commission order imposing regulatory requirements that result in financial harm to an electric distribution utility is a justiciable order and the simple fact that the order is issued at the close of a rulemaking proceeding does not make the order non-justiciable.**

The Commission argues that the instant appeal should be dismissed because it raises no justiciable controversy. The Commission first argues that AEP Ohio's appeal is based upon an abstract policy debate and does not present an actual controversy. *See* Motion to Dismiss at 7 ("AEP Ohio's rule challenge is predicated on an abstract disagreement with the Commission over how best to develop and administer the policies embodied in Chapter 4928."). But this argument must fail because it is based on the faulty premise that a final Commission order issued at the close of a rulemaking proceeding cannot present an actual case or controversy. This Court's precedent has not established such a *per se* rule and the Commission is plainly incorrect in claiming that the final orders below do not impose obligations and inflict harm upon AEP Ohio. The Commission's other argument in this regard is that the newly-adopted amendments to the net metering rules are not yet effective, since the pending legislative oversight process remains open for a few more weeks. *See* Motion to Dismiss at 1 ("Unless and until the rule takes effect and applies to AEP Ohio, this challenge remains unripe for review."). However, contrary to the Commission's position, this Court has previously considered appeals as of right from Commission orders issued at the conclusion of rulemaking proceedings. *See, e.g., City of Maumee v. Pub. Util. Comm.*, 101 Ohio St.3d 54, 2004-Ohio-7, 800 N.E.2d 1154. None of the relevant cases upon which the Commission relies articulates a rule barring this Court's review of Commission orders arising out of rulemaking proceedings and raising questions of law

concerning misapplication of multiple statutes. AEP Ohio's appeal is justiciable, and the Commission's motion to dismiss should be denied.

1. The Court has previously exercised its appellate jurisdiction to review Commission orders issued in rulemaking proceedings.

In *City of Maumee*, the cities of Maumee, Oregon and Toledo, Ohio (collectively, "Cities") filed an appeal as of right from Commission orders adopting rules for governmental aggregation service. *City of Maumee*, 101 Ohio St.3d at ¶ 1. Like AEP Ohio in the instant appeal, the Cities participated in a rulemaking proceeding at the Commission by filing comments and sought rehearing of the Commission's order. *Id.* at ¶ 3. On January 14, 2002, the Cities timely filed a notice of appeal asserting, as they had asserted in their applications for rehearing, that the rules issued by the Commission: 1) conflicted with rules adopted in a separate rulemaking proceeding for natural gas governmental aggregation; 2) illegally regulated "municipal home rule aggregators"; 3) erred in assuming that a governmental aggregator necessarily provides competitive retail electric service; and, 4) imposed a discriminatory switching fee. *Id.* at ¶ 4-22. The Court found that it would "consider these issues *de novo*, because they involve matters of law rather than matters of fact and evidence." *City of Maumee*, 101 Ohio St.3d at ¶ 3. Significantly, at the time the Cities filed their appeal, no enforcement or other adjudicatory action had been commenced and no penalty or adverse action had been taken against the Cities. The Cities, however, were subjected to the rules and were complying with them, notwithstanding their objections to the rules' validity.

In *City of Maumee*, the Commission filed a motion to dismiss the Cities' appeal on February 22, 2002. *See* Docket Sheet, App. at 2. The Commission made the very same non-justiciability argument it now makes in this case and relied upon the same cases as it relies upon

here. *See* Commission's Motion to Dismiss the Cities' appeal, App. at 4-21. The Cities responded to that motion to dismiss by pointing out that the governmental aggregation rules were currently in effect and that they were complying with those rules by, among other things, submitting a plan of governance to the Commission, filing quarterly reports detailing their activities as governmental aggregators, complying with the time-consuming and expensive opt-out requirements set forth in the rules, and paying the switching fees. *See* Cities' Brief in Opposition to Commission's Motion to Dismiss at 2 & 8, App. at 22 & 28. The Court denied the Commission's motion to dismiss on March 19, 2002. *See* Docket Sheet, App. at 2.

Although the Court did not render a written opinion explaining why it denied the motion, the unmistakable conclusion is that the Court concluded there was a justiciable controversy, notwithstanding the fact that the Commission's order was issued in a rulemaking proceeding and notwithstanding the Commission's argument that it had not yet attempted to enforce the rules against the Cities in an adjudicatory proceeding. *See* Commission's Motion to Dismiss the Cities' appeal at 4 & 10, App. at 12 & 18. The fact that the Court proceeded to hear the merits of the Cities' challenges to the newly-adopted governmental aggregation rules negates the Commission's argument in this case that there is a *per se* rule that final orders issued in rulemaking proceedings are non-justiciable.

In light of the *City of Maumee* decision, parties subject to final orders in Commission rulemaking proceedings are at risk of losing their right to challenge the Commission's rules if they do not timely appeal the final order adopting the rules. Indeed, the Court has declined to hear the merits of a challenge to a final order issued in a non-adjudicative proceeding when the challenge was delayed until the mechanism established in that order was actually implemented in a subsequent ratemaking proceeding. *See MCI Telecommunications Corp. v. Pub. Util. Comm.*,

38 Ohio St.3d 266, 527 N.E.2d 777 (1988).

MCI Telecommunications arose from the Commission's ongoing proceedings to reconfigure the telecommunications industry following the court-ordered divestiture of AT&T. *MCI Telecommunications*, 38 Ohio St.3d at 266. The order under review (a March 12, 1987 order) was issued at the conclusion of a non-adjudicatory, ratemaking proceeding that established the final transition to an ongoing access charge and toll compensation plan for intrastate interexchange service in Ohio. MCI challenged that order on the grounds, among others, that the Commission violated Due Process and the Ohio statutes by not holding an evidentiary hearing before issuing its ratemaking order. *Id.* at 268. The Court held that MCI waived its right to assert this Due Process challenge because it had not asserted it when the Commission issued an order three years earlier (the May 21, 1984 order) in which it had disclosed its "intended plan" for the basic mechanism it would subsequently use to determine the access charges. *Id.* at 269-270 ("If MCI or anyone else had an objection to [the May 21, 1984 order], an appeal from this order was the appropriate method by which to contest the action. However, no appeals were taken from the order.").

In light of the *City of Maumee* and *MCI Telecommunications* cases, parties subject to a final order issued in a rulemaking proceeding or other generic proceedings that imposes affirmative requirements upon them, like the requirement to file tariffs consistent with the newly-adopted net metering rule imposed on AEP Ohio here, must challenge the validity of the order in a timely appeal, or risk losing their right to challenge the lawfulness of the order or rules altogether. In the case at bar, the Commission's motion to dismiss attempts to place Appellant in a "Catch-22" by dismissing the present appeal without leaving AEP Ohio an adequate legal remedy to challenge the final order below. The Commission's motion to dismiss is improper and

should be denied.

2. There is no *per se* rule barring judicial review of Commission orders arising out of rulemaking proceedings.

The cases relied upon by the Commission do not even remotely suggest that there is a bright-line rule of law that final Commission orders issued in rulemaking proceedings are necessarily non-justiciable. In each of the cases the Commission cites, the Court found the appeal or an issue on appeal non-justiciable for a reason other than, or in addition to, the fact that the final order arose from a non-adjudicatory proceeding.

Of all the cases cited by the Commission, only three involved appeals from rulemaking proceedings. The cases of *Zangerle v. Evatt*, 139 Ohio St. 563, 41 N.E. 369 (1942) and *Fortner v. Thomas*, 22 Ohio St.2d 13, 257 N.E.2d 371 (1970) come close to articulating the type of *per se* rule the Commission desires to extend to this case, but arise under very different statutory schemes. Neither case involved appeals from the Commission or the interpretation of R.C. 4903.13, which gives this Court broad jurisdiction to hear appeals from a “final order” of the Commission and does not limit that jurisdiction based on the type of proceeding from which the order arises, or R.C. 4903.12, which prohibits any court other than this Court from reviewing Commission orders or from enjoining or interfering with the Commission in the performance of its duties. This distinction is significant because, as noted in *Zangerle*, judicial review of administrative orders affecting the rights and property of public utilities is constitutionally required, regardless of the nature of the underlying proceeding. *Zangerle*, 139 Ohio St. at 567-568 (quoting *Hocking Valley Ry. Co. v. Pub. Util. Comm.*, 100 Ohio St. 321, 323, 126 N.E. 397 (1919)). In *Hocking Valley Ry. Co.*, the Court interpreted G.C. § 544, the predecessor of R.C. 4903.13, as providing for “full judicial review of the proceedings and final orders of the Public

Utilities Commission.” *Hocking Valley Ry. Co.*, 100 Ohio St. 321 at syllabus.

Moreover, while the Commission relies on *Zangerle* to support its position that “[t]he Court has consistently rejected rulemaking challenges, like the one presented here, on the grounds that they are non-justiciable” (Motion to Dismiss at 8), it fails to note this Court’s decision in *Ohio Apt. Assn. v. Levin*, 122 Ohio St.3d 1231, 2009-Ohio-3477, 911 N.E.2d 906, in which the Court held that *Zangerle* had been superseded by statute in 1976 by the enactment of a statute permitting review of rulemaking orders by the Board of Tax Appeals (BTA), and subsequent judicial review, so long as the party challenging the rule shows some injury attributable to the operation of the rule. *Levin*, 122 Ohio St.3d 1231 at ¶ 3 (denying motion to dismiss appeal of BTA order issued in a rule-review proceeding). As the Court subsequently noted in *Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 2010-Ohio-4414, 936 N.E.2d 919, when rejecting the appellee’s renewed justiciability arguments, “[t]he injury requirement ensures that rule review at the BTA involves a genuine case or controversy.” *Id.* at ¶ 24.

If, as the Commission argues, *Zangerle* and *Fortner* are read to create a *per se* rule that there can be no appeal from an order issued in a Commission rulemaking proceeding, they conflict with the Court’s decision in *City of Maumee*, which rejected that argument, exercised jurisdiction, and decided the merits of an appeal from an order issued in a non-adjudicatory rulemaking proceeding. Such irreconcilable conflict vanishes, however, if *Zangerle* and *Fortner* are properly read. The *Zangerle* and *Fortner* appeals were not justiciable merely because they arose from rulemaking proceedings; they were not justiciable because the rules at issue had not affected the named appellants in any direct way. *See Zangerle*, 139 Ohio St. at 574-576, 578 (appeal was not justiciable because it was brought by county administrators rather than a party whose property was subject to the rules); *Fortner*, 22 Ohio St.2d at 13-14 (noting that the

appellant had never been directly subject to the amended rule at issue).

While the Commission argues in its Motion to Dismiss (at 8) that the Court followed *Zangerle* in the only other rulemaking case it cites – *Appeal of Buckeye Power, Inc.*, 42 Ohio St.2d 508, 330 N.E.2d 430 (1975) – that is not the case at all. Buckeye Power sought to challenge rules adopted by the Ohio Power Siting Board that required utilities to obtain a certificate of environmental compatibility and public need before construction of a major utility facility. *Id.* at 509. The Court found that appeal non-justiciable, not because the appeal arose from a rulemaking proceeding, but rather because the rules would have no effect on Buckeye Power unless or until it determined to construct a major facility and actually applied for the required certificate.

Here, unlike the appellants in *Zangerle* and *Fortner*, AEP Ohio is directly and automatically subject to the requirements of the Commission’s net metering rules. In the Commission’s Second Entry on Rehearing, it ordered all EDUs in Ohio, including AEP Ohio, to file tariffs incorporating the provisions of the newly-adopted rules. *See In the Matter of the Commission Review of Chapter 4901:1-10, Ohio Administrative Code, Regarding Electric Companies*, Case No. 12-2050-EL-ORD (“*Rule Review Proceeding*”), Second Entry on Rehearing at 26 (May 28, 2014) (“Ordered, that the electric distribution utilities file four complete copies of proposed tariffs consistent with the Commission’s Finding and Order and this Second Entry on Rehearing.”) (Merit Brief App. at 302). Thus, the Commission has placed an affirmative requirement on AEP Ohio to file tariffs consistent with the rules as adopted, notwithstanding the Company’s objections to the rules’ validity. Accordingly, dismissal is not justified under these precedents.

3. The remaining cases upon which the Commission relies are readily distinguishable from the instant case.

The remaining cases upon which the Commission relies to support its motion to dismiss are readily distinguishable because they did not involve appeals from rulemaking proceedings and the appeals were dismissed for other reasons. Two of them involved appeals from contested rate cases in which the Court heard the merits of the appeal but found certain discrete issues non-justiciable. In *Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 433 N.E.2d 923 (1982), the Court declined to entertain the Appellant's argument that the Commission misapplied R.C. 4905.381 and R.C. 4909.26 as its authority to hear Ohio Bell's application for a rate increase because the Commission clearly had jurisdiction over Ohio Bell's application under the general rate-making statutes, R.C. 4909.17 through 4909.19. The Court held that "[u]nder these circumstances, any opinion this court might express regarding the correctness *vel non* of the commission's reliance on R.C. 4905.381 and 4909.26 would be purely advisory, and it is well-settled that this court does not indulge itself in advisory opinions. *Armco*, 69 Ohio St.2d at 406.

Likewise, in *Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 589 N.E.2d 1292 (1992), the Court heard the appeal of Ohio Edison's last traditional rate case but declined to address two of the six issues raised – the Commission's revision to a standard discounted cash flow model and the promulgation of nuclear performance standards to be applied in future rate cases. The Court found the former issue to be non-justiciable because it had no effect on the outcome of the case – the Commission's result was justified whether the standard model or the revised model was followed. The Court stated only that "[i]t is well settled that this court will not reverse an order of the commission on the basis of an error that did not prejudice the party seeking reversal." *Id.* at 561. The Court found the latter issue non-justiciable because the

nuclear performance standard had yet to be applied to Ohio Edison and would be applied to Ohio Edison, if at all, only in a subsequent fuel component proceeding. *Id.* at 566.

The remaining cases also are inapplicable because the Court dismissed the appeals, not because they arose out of a rulemaking proceeding, but rather because the appellants had no standing as a real party, a situation that does not exist in this appeal. *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 65 Ohio St.3d 438, 605 N.E.2d 13 (1992), involved an order in a ratemaking case brought under R.C. 4909.18 in which the Commission denied Ohio Bell's application for a tariff amendment but outlined the conditions under which it could re-apply to amend its tariff to add the desired services to which Ohio Domestic Violence Network ("ODVN") objected. The Court dismissed ODVN's appeal on the grounds that it lacked standing to contest the order because the order did not authorize Ohio Bell to implement the contested services, it merely authorized Ohio Bell to submit an application to initiate the services at a future date if Ohio Bell was willing to accept the terms and conditions outlined by the Commission. *Ohio Domestic Violence Network*, 65 Ohio St.3d, at 439-440. Thus, the order did not, and could not, have a real effect on ODVN or the victims of domestic violence it sought to protect unless or until Ohio Bell elected to re-apply for a tariff amendment to add the additional services under the terms proposed by the Commission. *Id.* The final case relied upon by the Commission is readily distinguishable for the same reason. In *Ohio Contract Carriers Assn. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), the appeal was found to be non-justiciable because the appellant trade association lacked standing to pursue the claim because it was not affected by the order, again a situation that does not exist in this appeal.

In sum, a critical reading of the cases relied upon by the Commission demonstrates that there is no *per se* rule barring this Court's review of final Commission orders simply because

they conclude a rulemaking proceeding and no subsequent adjudicatory proceeding has been commenced to enforce the rule or punish the utility for non-compliance. As made clear by the Court's decision in *City of Maumee*, the justiciability test for Commission orders is not whether the orders arise out of an adjudicatory proceeding or a rulemaking proceeding. The test is whether the orders impose requirements by rule or otherwise that take effect automatically such that the utility or other party seeking to contest the rules has had to take the actions required by the rules or administrative order. And, as discussed below, the Company's appeal meets the requirements of this test.

B. In applying this Court's applicable precedents as well as basic logic and fairness, it is evident that the appeal before this court is justiciable.

In the Commission's Second Entry on Rehearing, it ordered all EDUs in Ohio, including AEP Ohio, to file tariffs incorporating the provisions of the newly-adopted net metering rules. *See Rule Review Proceeding*, Second Entry on Rehearing at 26 (May 28, 2014) ("Ordered, that the electric distribution utilities file four complete copies of proposed tariffs consistent with the Commission's Finding and Order and this Second Entry on Rehearing.") (Merit Brief App. at 302). The Commission also ordered that the adopted rules be filed with the JCARR, the Secretary of State, and the Legislative Service Commission, and that the rules "be effective on the earliest date permitted." *Id.* In its Third Entry on Rehearing, the Commission again ordered all EDUs to file tariffs consistent with the adopted rules. *See Rule Review Proceeding*, Third Entry on Rehearing at 9 (July 23, 2014) ("Since there are no remaining issues for rehearing, we find that the rules, as adopted, should be filed with [JCARR] as soon as is reasonably possible. Additionally, we find that the EDUs should file their proposed tariffs consistent with the rules and Orders no later than 30 days after the effective date of the rules.") (Merit Brief App. at 332).

Thus, the extra-statutory regulatory obligations imposed on AEP Ohio under the Commission's final orders are self-executing and will automatically become effective absent affirmative intervention by JCARR. Specifically, under R.C. 4905.54 through 4905.59 and R.C. 4905.99, AEP Ohio, its officers and its employees are bound to follow Commission orders or be subjected to potential civil forfeitures or even conviction of a fifth degree felony criminal offense. App. at 37-43. Absent AEP Ohio subjecting itself to enforcement action or penalties, the Company will not be presented with another opportunity for judicial review of the order below. Such an act of civil disobedience would subject the Company and its employees to the potential of civil forfeitures or even a fifth degree felony conviction.

Under the Commission's misguided theory of justiciability, there is no right of appeal unless or until a public utility can prove economic harm or risks incurring a penalty for violating the law. The Commission argues that there is a bright-line rule of law that precludes an EDU or any other entity subject to its jurisdiction from challenging its administrative rules unless or until there is a later adjudicatory proceeding in which the rule is applied. This Court actually declined to adopt such bright-line rule in *Appeal of Buckeye Power, Inc.*, 42 Ohio St.2d 508, 330 N.E.2d 430 (1975). And this Court has permitted Commission-regulated entities to appeal final orders imposing administrative rules, even in the absence of pecuniary harm or regulatory penalty, where the rules would require immediate compliance by the entity. *City of Maumee v. Pub. Util. Comm.*, 101 Ohio St.3d 53, 2004-Ohio-7, 800 N.E.2d 1154. The Court should hold that forced compliance with an administrative rule that imposes limitations on a public utility's ability to comply with statutory requirements is a type of harm or prejudice that gives rise to a justiciable controversy.

Just like the Cities in *City of Maumee*, the Company is directly subject to the Commission's net metering rules. The Company has been ordered to file compliance tariffs consistent with the rules even though it challenges the rules' validity and even though the adopted rule imposes requirements beyond that which the net metering statute requires or permits. In addition, the adopted rule requires the Company to provide an overbroad monetary credit to net excess customer-generators, including the obligation to provide such a monetary credit to shopping customers that do not even receive generation service from AEP Ohio. Thus, the rules will clearly have the effect of causing financial harm to AEP Ohio.

Further, as this case and *City of Maumee* illustrate, in this highly regulated area of public utility law, the risk of noncompliance with a new Commission rule, even one clearly in conflict with the plain language of the enabling statute, is so great that there may never be a subsequent enforcement action because the utility or party must necessarily comply with the Commission's orders to avoid the possibility of severe penalties or sanctions. If the Court were to grant the Commission's motion to dismiss, the AEP Ohio would be left with two equally unsatisfactory choices: comply with the newly-adopted rule and suffer the potentially significant financial harm of providing an overbroad monetary credit to all net excess customer-generators (including those not receiving their electricity supply from the Company) or purposefully violate the Order and risk penalties and sanctions.

The Commission's misguided theory of the requirements for a justiciable issue would put AEP Ohio to the hapless choice of acquiescing to an invalid rule or purposefully violating the rule so as to trigger an adjudicatory proceeding with its attendant risks and sanctions, which may mean that the Company's right to challenge the rule will be forfeited for a period of time or even permanently. Yet, in all other contexts administrative rules are subject to immediate judicial

review by means of civil actions for declaratory and injunctive relief or appeal. *See, e.g., Hoffman v. State Med. Bd.*, 113 Ohio St.3d 376, 2007-Ohio-2201, 865 N.E.2d 1259 (affirming trial court's order in action for declaratory and injunctive relief that state medical board rule prohibiting anesthesiologist assistants from performing epidural and spinal anesthetic procedures, is invalid because it conflicts with R.C. 4760.09); *Ohio Licensed Bev. Assn. v. Ohio Dep't of Health*, 10th Dist. No. 07-AP-490, 2007-Ohio-7147 (affirming permanent injunction enjoining enforcement of administrative rule one month after its promulgation on grounds that created an exception not authorized in law); *Sierra Club v. Koncelik*, 2013-Ohio-2739, 991 N.E.2d 1240 (10th Dist.) (rule promulgated by Ohio Environmental Protection Agency subject to immediate review through appellate process); *Steinhour v. Ohio State University*, 62 Ohio App.3d 704, 577 N.E.2d 413 (10th Dist. 1989) (civil action for declaratory and injunctive relief to challenge validity of university's sick leave as violative of state statute).

Declaratory and injunctive relief, however, are not remedies available to public utilities because R.C. 4903.12 provides that “[n]o court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties.” *See, also State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St.3d 340, 2008-Ohio-849, 884 N.E.2d 1, ¶ 27. Thus, AEP Ohio's only vehicle for challenging the promulgation of an invalid administrative rule is through an appeal to this Court under R.C. 4903.13, which is the remedy AEP Ohio has pursued in filing this appeal as of right.

The Commission's position that an appeal from a final order issued in a rulemaking proceeding is unripe for review by this Court because a proposed rule may be invalidated as a result of the JCARR review process is also unreasonable for obvious practical reasons. There is

an inherent discrepancy between the period of time in which a party is required to appeal a final Commission order and the period of time in which the adopted rules are filed at JCARR.

Pursuant to R.C. 4903.11, a notice of appeal of must be filed within sixty days after a final order of the Commission. App. at 35. But the Commission can, as it did here, delay the filing of the rules at JCARR until after or close to the end of the time in which to file an appeal. Here, the Commission's final rehearing decision was issued on July 23, 2014, but the adopted rules were not filed at JCARR until September 30, 2014 – well after the 60-day period following the final Commission order. *See Appellee App.* at 80. Significantly, AEP Ohio does not even receive notice when the adopted rules will be filed with JCARR or when JCARR's review process will be complete (whereas the Commission did require that its order be served upon AEP Ohio). As the Commission notes, JCARR must be given at least 65 days to review the rules before the Commission can proceed to file them in final form (Motion to Dismiss at 6). *Appellee App.* at 2. If, as the Commission argues, parties must wait until the JCARR process is complete, they risk missing the 60-day deadline set forth in R.C. 4903.11 and forfeiting their ability to challenge the legality of the adopted rules at the Court. As discussed above, the Court has declined to hear the merits of a challenge to a final order issued in a non-adjudicative proceeding when the challenge was delayed until the mechanism established in that order was actually implemented in a subsequent ratemaking proceeding. *See MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 527 N.E.2d 777 (1988). Without intervention from this Court, AEP Ohio is left with no timely recourse that would allow it to challenge the Commission's unlawful actions. Not only does the Commission's position lack a basis in this Court's precedents, it also is simply unreasonable, unfair and impractical.

Although it is true that the adopted rules could be modified or invalidated during the JCARR process, the Commission has placed an affirmative requirement on EDUs to file tariffs consistent with the rules as adopted and has ordered that the rules become effective on the earliest date possible. Consequently, AEP Ohio has no further opportunity to challenge the adopted rules at the Commission. As shown in *City of Maumee*, and as evident here, rules are often applied immediately and unconditionally and may affect the rights and obligations of those subjected to them well before the rules become officially effective. Here, the Company is obligated to comply with the Commission's order adopting the rules, as required by R.C. 4903.15, and to file its tariff consistent with the rules as adopted. *See App. at 36.*

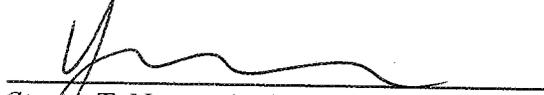
In short, this appeal easily meets the test for justiciability under *Appeal of Buckeye Power* and is very much akin to the *City of Maumee*. AEP Ohio must comply with the Commission's orders below and the requirements imposed by the rules despite its strenuous objections being repeatedly denied in applications for rehearing. They have filed plans and reports as required by the rules, and they have suffered the increased costs imposed upon them by the rules. AEP Ohio's appeal is justiciable.

III. CONCLUSION

AEP Ohio filed this appeal because it is interested in complying with rules promulgated by the Commission that comply with Ohio law; it has not brought this appeal to solicit an advisory opinion from the Court. If the net metering rules are appropriately modified or invalidated, AEP Ohio will withdraw its appeal. Thus, AEP Ohio respectfully submits that the Court can take one of two actions in ruling on the Commission's motion to dismiss. First, the Court could deny the motion to dismiss without prejudice, permitting the Commission to re-file its motion if Rule 4901:1-10-28(B)(9)(c), O.A.C., is modified to address the Company's

concerns or invalidated as a result of JCARR's review process. The other action the Court could take on the Commission's motion to dismiss is to delay ruling on the motion and postpone the briefing process in this case until the conclusion of JCARR's review process. AEP Ohio invites and expects the Court to rule on the motion to dismiss after the December 14, 2014 effective date scheduled for the adopted rule (in order to confirm that the adopted rule has not been invalidated) and the Company commits to voluntarily withdraw its appeal if JCARR invalidates the adopted net metering rule. But the action the Court should not take is to grant the motion to dismiss, as doing so would leave AEP Ohio no avenue to challenge the rule imposed by the Commission, short of an intentional violation of the rule and the severe consequences that could arise from an intentional violation of a Commission rule.

Respectfully submitted,



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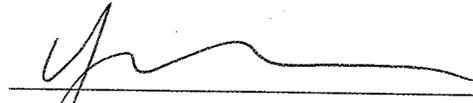
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Appellant's Memorandum Opposing Appellee's Motion to Dismiss was served via electronic mail upon the following counsel of record this 20th day of October, 2014.

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