

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Fuel Adjustment)	Case No. 10-268-EL-FAC
Clause of Columbus Southern Power)	Case No. 10-269-EL-FAC
Company and Ohio Power Company and)	
Related Matters for 2010.)	

In the Matter of the Application of the Fuel)	
Adjustment Clauses for Columbus Southern)	Case No. 11-281-EL-FAC
Power Company and Ohio Power Company)	
and Related Matters.)	

**INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING
AND MEMORANDUM IN SUPPORT**

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ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO

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INDUSTRIAL ENERGY USERS-OHIO'S APPLICATION FOR REHEARING

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") hereby files this Application for Rehearing from the Public Utilities Commission of Ohio's ("Commission") May 14, 2014 Opinion and Order in the above-captioned matters ("FAC Order") regarding the audits of Ohio Power Company's ("AEP-Ohio") Fuel Adjustment Clause ("FAC") for 2010 and 2011. As demonstrated in additional detail in the attached Memorandum in Support, the FAC Order is unlawful and unreasonable for the following reasons:

The FAC Order is unlawful and unreasonable because the Commission refused to admit and consider relevant evidence that demonstrates AEP-Ohio double-recovered approximately \$200 million in Ohio Valley Electric Corporation ("OVEC") and Lawrenceburg capacity costs through its FAC in 2010 and 2011 based upon an unlawful and unreasonable finding that the scope of admissible evidence in a FAC audit proceeding is dictated by the findings and recommendations in the FAC Audit Report;

The FAC Order is unlawful and unreasonable and violates IEU-Ohio's due process rights because the Commission arbitrarily and capriciously refused to admit and consider relevant evidence for the 2010 and 2011 FAC audits which demonstrates AEP-Ohio double-recovered approximately \$200 million in capacity costs while holding that the same issue is relevant to the 2012 through 2014 FAC audits; and

The FAC Order is unlawful and unreasonable and violates Section 4903.09, Revised Code, because the Commission failed to provide a substantively reasonable explanation for its inconsistent findings that the OVEC and Lawrenceburg double-recovery is not relevant to the 2010 and 2011 FAC audits but is relevant to the 2012 through 2014 FAC audits.

Accordingly, IEU-Ohio requests that the Commission grant IEU-Ohio's Application for Rehearing and provide IEU-Ohio the opportunity to introduce evidence demonstrating AEP-Ohio double-recovered approximately \$200 million in capacity costs in 2010 and 2011, which should be used as an offset to the deferred balance collected through AEP-Ohio's Phase-In Recovery Rider ("PIRR").

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

In 2008, Ohio passed new restructuring legislation that required electric distribution utilities (“EDU”) to offer default service to non-shopping customers through a standard service offer (“SSO”) under either a market rate offer (“MRO”) or an electric security plan (“ESP”).¹ In 2008, AEP-Ohio filed an application to establish its SSO in the form of an ESP, which the Commission modified and approved in March 2009.² Pursuant to Section 4928.143(B)(2)(a), Revised Code, the Commission authorized AEP-Ohio to collect its fuel and purchased power costs through the FAC, subject to an annual prudence and accounting audit.³

¹ Section 4928.141, Revised Code.

² *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*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order (Mar. 18, 2009) (hereinafter referred to as “ESP I” and the Opinion and Order is referred to as the “ESP I Order”).

³ ESP I Order at 15.

These proceedings regard the audit of AEP-Ohio's FAC for the years 2010 and 2011. During the evidentiary hearing in these proceedings, the Attorney Examiner sustained AEP-Ohio's objection preventing IEU-Ohio from introducing evidence that demonstrates that AEP-Ohio had double-recovered approximately \$200 million through its 2010 and 2011 FAC rates.⁴ IEU-Ohio proffered its evidence and, in accordance with Rule 4901-1-15(F), O.A.C., IEU-Ohio raised the Attorney Examiner's incorrect evidentiary ruling with the Commission in IEU-Ohio's Initial Brief. The Commission, however, unlawfully and unreasonably upheld the Attorney Examiner's evidentiary ruling in the FAC Order. As discussed below, the Commission should grant this Application for Rehearing and should reverse its decision affirming the Attorney Examiner's incorrect evidentiary ruling.

II. ARGUMENT

- A. The FAC Order is unlawful and unreasonable because the Commission refused to admit and consider relevant evidence that demonstrates AEP-Ohio double-recovered approximately \$200 million in OVEC and Lawrenceburg capacity costs through its FAC in 2010 and 2011 based upon an unlawful and unreasonable finding that the scope of admissible evidence in a FAC audit proceeding is dictated by the findings and recommendations in the FAC Audit Report.**

Energy Ventures Analysis, Inc. ("EVA" or the "Auditor") conducted the 2010 and 2011 audits of AEP-Ohio's FAC. The 2010 and 2011 Audit Reports were submitted to the Commission on May 26, 2011, and May 24, 2012, respectively, over a year and one-half before the hearing in these proceedings was held. The Auditor did not address the OVEC and Lawrenceburg capacity cost double-recovery issue in the 2010 or 2011

⁴ Tr. at 54-63 (IEU-Ohio Exs. 7-12).

Audit Reports.⁵ Subsequent to May 24, 2012, parties discovered that AEP-Ohio was double-recovering the OVEC and Lawrenceburg capacity costs.⁶ Although the Auditor did not address the OVEC and Lawrenceburg capacity cost double-recovery in the 2010 and 2011 Audit Reports, the Auditor (witness Smith) indicated that when a potential double-recovery comes to light after an audit report is issued, at a minimum, the issue should be left open for a future auditor to evaluate the double-recovery: “I think if there’s an issue of a double count such as we seem to have here, it seems like that issue may deserve some further investigation.”⁷

Because the Auditor failed to address the OVEC and Lawrenceburg capacity cost double-recovery in the 2010 and 2011 Audit Reports, IEU-Ohio attempted to introduce and elicit evidence during the evidentiary hearing that demonstrated AEP-Ohio double-recovered approximately \$200 million in OVEC and Lawrenceburg capacity costs through its FAC rates in 2010 and 2011. The Attorney Examiner, however, found that the issue was outside the scope of the audit and precluded IEU-Ohio’s counsel from cross-examining witnesses and introducing exhibits to lay the evidentiary foundation to demonstrate that AEP-Ohio double-recovered its purchased power costs through the FAC during 2010 and 2011.⁸ The Attorney Examiner limited IEU-Ohio’s scope of cross-examination to issues identified by the Auditor in the 2010

⁵ Tr. at 64, 67-68.

⁶ See *In the Matter of the Application of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support Its Standard Service Offer*, Case No. 12-3254-EL-UNC, Opinion and Order at 15-16 (Nov. 13, 2013) (hereinafter the “CBP Case” or “CBP Order”).

⁷ Tr. at 67-68 (emphasis added). Mr. Smith further stated, “I think I would agree with that, and I am aware of the statement to that effect in the current opinion, the order that was just released last week. That seems like an appropriate way of dealing with it; direct a future auditor to review it in a subsequent round of FAC audits.” Tr. at 68-69.

⁸ Tr. at 53. See also *id.* at 49-53.

and 2011 Audit Reports.⁹ To preserve the issue for the Commission's consideration, IEU-Ohio proffered its evidence demonstrating that there was a double-recovery for the Commission's consideration.¹⁰

IEU-Ohio's proffered exhibits (provided by AEP-Ohio in the *Capacity Case*) demonstrate that AEP-Ohio's base generation rates in effect during 2010 and 2011 fully compensated AEP-Ohio for the Lawrenceburg and OVEC capacity costs that AEP-Ohio flowed through the FAC in 2010 and 2011.¹¹ In the *Capacity Case*, AEP-Ohio requested authority to increase the amount of compensation that it receives for the provision of capacity service. AEP-Ohio submitted the testimony of Dr. Kelly Pearce to quantify AEP-Ohio's embedded cost of capacity and purchased power. Dr. Pearce calculated AEP-Ohio's cost of capacity using AEP-Ohio's¹² 2010 Federal Energy Regulatory Commission ("FERC") Form 1¹³ and concluded that AEP-Ohio's fully embedded cost of capacity and purchased power is \$355/megawatt-day ("MW-day").¹⁴ Dr. Pearce included the non-fuel purchased power costs of Lawrenceburg and OVEC in his calculation of the \$355/MW-day price.¹⁵

⁹ *Id.* at 53, 65; *Id.* at 189-90; *Id.* at 194-95.

¹⁰ *Id.* at 54-63 (IEU-Ohio Exs. 7-12).

¹¹ IEU-Ohio Ex. 10-12. See also *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 25 (Jul. 2, 2012). This case is hereinafter referred to as the "*Capacity Case*" and the Opinion and Order is hereinafter referred to as the "*Capacity Case Order*."

¹² In 2010, the merger of Columbus Southern Power Company ("CSP") into Ohio Power Company ("OPCo") had not yet been completed and therefore, technically, Dr. Pearce relied on the separate FERC Form 1's filed by OPCo and CSP. This distinction is immaterial to this document as Dr. Pearce's calculation of capacity costs was presented on a merged basis.

¹³ IEU-Ohio Exs. 8 & 9.

¹⁴ IEU-Ohio Ex. 7. See also *Capacity Case Order* at 24-25.

¹⁵ IEU-Ohio Ex. 7 at KDP-3 (Page 14, Line 11, Column 2); *Id.* at KPD-4 (Page 14, Line 11, Column 2); IEU-Ohio Ex. 9 at 326-327 (Line 1); *Id.* at 326.3-327.3 (Line 2); IEU-Ohio Ex. 8 at 326.3-327.3 (Line 2).

AEP-Ohio witness Allen testified in the *Capacity Case* that AEP-Ohio's base generation rates produced revenue equivalent to \$355/MW-day: "AEP-Ohio contends that its proposed cost-based capacity pricing roughly approximates and is, therefore, comparable to the amount that the Company receives from its SSO customers for capacity through base generation rates. (AEP-Ohio Ex. 142 at 19-20; Tr. II at 304, 350)."¹⁶ As demonstrated by the proffered exhibits, AEP-Ohio's 2010 and 2011 base generation rates provide compensation equal to \$355/MW-day, which fully compensated AEP-Ohio for its capacity costs and non-fuel purchased power costs related to OVEC and Lawrenceburg. But AEP-Ohio also recovered the same Lawrenceburg and OVEC costs through the FAC during 2010 and 2011.¹⁷ Because it is recovering the same costs through both its non-fuel base generation rates and its FAC, AEP-Ohio double-recovered its purchased power costs. The double-recovery is demonstrated in more detail in the table below.

¹⁶ Capacity Case Order at 25.

¹⁷ IEU-Ohio Exs. 1-6.

CSP Capacity Formula Components	CSP Double-Recovery of Purchased Power Costs in FAC
CSP's Annual Fixed Production Costs for 2010 were \$477,093,822. ¹⁸	
The Annual Fixed Production Costs consisted of \$217,843,953 in O&M ¹⁹ expense. ²⁰	
\$106,281,091 of the O&M expense consisted of purchased power costs. ²¹	
<i>Purchased power costs consisted of \$60,734,136 for Lawrenceburg²² and \$13,228,114 for OVEC.²³</i>	<i>FAC also recovers \$61,136,019.53 related to Lawrenceburg²⁴ and \$13,295,243 for OVEC.²⁵</i>

OPCo Capacity Formula Components	OPCo Double-Recovery of Purchased Power Costs in FAC
OPCo's Annual Fixed Production Costs for 2010 were \$660,504,310. ²⁶	
The Annual Fixed Production Costs consisted of \$338,656,260 in O&M expense. ²⁷	
\$59,290,595 of the O&M expense consisted of fixed (demand) purchased power costs. ²⁸	
<i>Purchased power costs consisted of \$46,149,435 for OVEC.²⁹</i>	<i>FAC recovered \$42,631,815 for OVEC.³⁰</i>

¹⁸ IEU-Ohio Ex. 7 at KDP-3 (Page 2).

¹⁹ Operation and Maintenance is hereinafter referred to as "O&M".

²⁰ IEU-Ohio Ex. 7 at KDP-3 (Page 4, Line 2).

²¹ *Id.* at KDP-3 (Page 14, Column 2, Line 11,).

²² IEU-Ohio Ex. 9 at 326-327 (Line 1).

²³ *Id.* at 326.3-327.3.

²⁴ IEU-Ohio Ex. 1. CSP's response may marginally overstate the amount of non-fuel costs AEP-Ohio recovered through the FAC, as CSP allocated O&M expenses and taxes between SSO and non-SSO sales. See IEU-Ohio Ex. 2; IEU-Ohio Ex. 4. This allocation, however, only affects Accounts 5550046, 55500586, and 5550087 and reduces the amount of these accounts allocated to the FAC by approximately 12 percent. IEU-Ohio Ex. 13 at 1-2 to 1-5; IEU-Ohio Exs. 2 & 4. The allocation process does not impact the \$36 million in depreciation and capacity costs that CSP allocated to the FAC. Tr. at 134. In total, CSP allocated approximately \$58 million to the FAC related to Lawrenceburg for each year. IEU-Ohio Exs. 1 & 3. See also IEU-Ohio Ex. 13 at 1-2 to 1-5.

²⁵ IEU-Ohio Ex. 5.

²⁶ IEU-Ohio Ex. 7 at KDP-4 (Page 2).

²⁷ *Id.* at KDP-4 (Page 4, Line 2).

²⁸ *Id.* at KDP-4 (Page 14, Line 11, Column 2).

²⁹ IEU-Ohio Ex. 8 at 326.3-327.3.

³⁰ IEU-Ohio Ex. 5. The difference between the FAC recovery and capacity formula is related to OPCo's allocation of purchased power costs to Wheeling Power. Tr. at 179. AEP-Ohio recovered \$44,451,633 for OVEC through the FAC in 2011. IEU-Ohio Ex. 6.

Pursuant to Rule 4901-1-15(F), O.A.C., IEU-Ohio “rais[ed] the propriety of [the Attorney Examiner’s ruling] as an issue for the commission’s consideration by discussing the matter as a distinct issue in its initial brief.”³¹ Specifically, IEU-Ohio’s Initial Brief indicated that the evidence IEU-Ohio was prevented from introducing evidence (which IEU-Ohio proffered) that was relevant to the proceeding and demonstrated AEP-Ohio had double-recovered approximately \$200 million in OVEC and Lawrenceburg capacity costs in 2010 and 2011.

In the FAC Order, the Commission upheld the Attorney Examiner’s incorrect evidentiary ruling:

Upon consideration of the parties’ arguments, the Commission affirms the rulings of the attorney examiner sustaining AEP Ohio’s objections and denying the admission of IEU-Ohio Exhibits 7 through 12. Staff witness Ralph Smith, who performed Larkin’s financial audits of AEP Ohio, testified that the 2010 and 2011 audit reports do not contain any findings or recommendations with respect to an over recovery of the Lawrenceburg or OVEC demand charges (Tr. I at 48-49, 64). There is nothing in the audit reports to support IEU-Ohio’s contention that AEP Ohio has recovered its purchased power costs through the FAC as well as through the Company’s base generation rates. As IEU-Ohio acknowledges, Mr. Smith testified that an appropriate way of addressing the double-recovery allegations is for the Commission to direct that the allegations be reviewed in a subsequent FAC audit (Tr. I at 68-69). Given that the alleged over recovery of the Lawrenceburg and OVEC demand charges exceeds the scope of the 2010 and 2011 audits, we find that the exhibits proffered by IEU-Ohio are not relevant to our resolution of these proceedings and that IEU-Ohio’s attempts to supplant the auditor should be rejected.³²

Through the FAC Order, the Commission thus announced an admissibility standard that limits the scope of admissible evidence in a FAC audit proceeding to only matters raised

³¹ IEU-Ohio Initial Brief at 9-16.

³² FAC Order at 6 (emphasis added).

by the Auditor in its Audit Report. The Commission's admissibility standard for FAC audit cases is unlawful and unreasonable as discussed in additional detail below.

Section 4903.22, Revised Code, provides that the Commission should generally follow the Ohio Rules of Evidence.³³ The Ohio Rules of Evidence provide that all relevant evidence³⁴ is admissible unless otherwise prohibited.³⁵ Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."³⁶ The rules of evidence further provide that "[c]ross-examination shall be permitted on all relevant matters"³⁷

The "fact" of consequence in this proceeding was whether AEP-Ohio double-recovered its non-fuel purchased power costs in 2010 and 2011 through the FAC. Because the exhibits and cross-examination would have demonstrated that AEP-Ohio double-recovered OVEC and Lawrenceburg capacity costs during the audit periods, the proffered exhibits would have shown that a fact of consequence—a double-recovery—is more probable of occurrence. Thus, the proffered exhibits are relevant under the Ohio Rules of Evidence.

The double-recovery is not a new issue, and is relevant to a financial audit of AEP-Ohio's FAC. In fact, the Commission has held that an audit of whether AEP-Ohio

³³ *In the Matter of the Complaint of S.G. Foods, Inc., Pak Yan Lui, and John Summers v. FirstEnergy Corp., American Transmission Systems, Inc., Ohio Edison Company, and The Cleveland Electric Illuminating Company*, Case Nos. 04-28-EL-CSS, *et al.*, Entry on Rehearing at 6 (Apr. 26, 2006) ("While it is true that the Commission has the leeway to apply evidentiary rules as we think appropriate, the rules are certainly instructive.").

³⁴ Although the Commission is not bound by the Ohio Rules of Evidence, they provide a useful guide to addressing evidentiary issues.

³⁵ R. Evid. 402.

³⁶ R. Evid. 401.

³⁷ R. Evid. 611(B).

double-recovered the OVEC and Lawrenceburg capacity costs through the FAC is relevant and within the scope of AEP-Ohio's FAC Audits for the years 2012 through 2014; directed that an audit of the double-recovery in these years be conducted by an independent auditor; and directed the independent auditor to make appropriate recommendations to the Commission based on the auditor's findings regarding the OVEC and Lawrenceburg capacity cost double-recovery.³⁸ The sole fact that the 2010 and 2011 Audit Reports failed to include a discussion and recommendations regarding the OVEC and Lawrenceburg double-recovery does not make the issue any less relevant in 2010 and 2011 than in 2012 through 2014.

In other non-FAC audits, the Commission also looked to whether utilities were double-recovering costs as part of its annual accounting audits. For example, in the ESP I Order that authorized the FAC rates at issue in these proceedings, the Commission authorized AEP-Ohio to implement a gridSMART program to recover its costs under the program, which were reviewed subject to annual audits.³⁹ During its audit of the gridSMART Rider, the Commission directed AEP-Ohio to remove \$2.22 million of costs from the gridSMART Rider on grounds that AEP-Ohio was compensated for these costs elsewhere.⁴⁰ Incidentally, in this same order on the gridSMART audit, AEP-Ohio conceded that it was inappropriate to double-recover costs through both the gridSMART Rider and its base distribution rates:

³⁸ *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry at 3-4 (Dec. 4, 2013).

³⁹ *In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, Case No 11-1353-EL-RDR, Opinion and Order at 1, 4 (Aug. 24, 2011).

⁴⁰ *Id.*

In re AEP-Ohio rate distribution case, Case No. 11-351-EL-AIR et al. The Company admits that an error in the calculation of the amount of incremental gridSMART employee payroll was discovered by the Company and brought to the Staff's attention. AEP-Ohio commits to correcting the amount of labor expense reflected in the distribution rate case to assure no double recovery of such costs.⁴¹

Further, in the first audit of AEP-Ohio's FAC, the Commission held that the scope of AEP-Ohio's annual FAC audits included a review of the true economic cost to AEP-Ohio. The Commission held that the annual audit specified in the ESP I Order required the Commission to look to "the real economic cost" of the costs flowed through the FAC during the audit period:

to determine the real economic cost of coal during the audit period, the Commission must consider both the revenues and the benefits received by the Companies pursuant to the Settlement Agreement and not rely solely on the price paid for coal during 2009.⁴²

In these proceedings, the determination of AEP-Ohio's real economic cost of OVEC and Lawrenceburg capacity costs must take into account the capacity costs AEP-Ohio incurs through its purchased power agreements and AEP-Ohio's compensation it is provided for these costs from whatever source, *i.e.* base generation rates and the FAC.⁴³

The Commission also rejected the narrower audit scope recommended by AEP-Ohio that would have limited the audit to only a mathematical audit of the "price"

⁴¹ *Id.* at 4, n.5.

⁴² *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order at 13 (Jan. 23, 2012) ("2009 FAC Audit Order").

⁴³ Beginning in 2012, the determination of AEP-Ohio's real economic costs of the OVEC and Lawrenceburg capacity costs must also take into account the deferred capacity revenue authorized in the *Capacity Case* and authorized for recovery through non-bypassable riders in Case Nos. 11-346-EL-SSO, *et al.*

AEP-Ohio paid for fuel and purchased power.⁴⁴ The Commission held that AEP-Ohio's proposed narrow audit scope would eliminate the need for "undertaking an annual audit."⁴⁵

Based on the foregoing, it is clear that the Auditor missed an issue and the effect of the error permits AEP-Ohio to double-recover approximately \$200 million of OVEC and Lawrenceburg capacity costs. The Commission may not exclude evidence relevant to AEP-Ohio's real economic costs. Further, the Commission has already determined that issues that were not raised by the Auditor (*i.e.* the OVEC and Lawrenceburg capacity cost double-recovery issue raised by parties including IEU-Ohio in the *CBP Case*) can frame the scope of relevant evidence in a FAC audit (*i.e.* the 2012 through 2014 FAC audits).⁴⁶ These same issues arise in the 2010 and 2011 FAC recoveries of AEP-Ohio. Accordingly, IEU-Ohio must be permitted to present relevant evidence on AEP-Ohio's real economic cost and double-recovery of OVEC and Lawrenceburg capacity costs.

In sum, IEU-Ohio's proffered exhibits and cross-examination are relevant and admissible under the Ohio Rules of Evidence and Commission precedent. Therefore, the Commission unlawfully and unreasonably affirmed the Attorney Examiner's evidentiary ruling which prevented IEU-Ohio from introducing IEU-Ohio Exhibits 7

⁴⁴ 2009 FAC Audit Order at 13.

⁴⁵ *Id.*

⁴⁶ CBP Order at 16 (the Commission identified that parties raised the double-recovery issue in the *CBP Case*); *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry at 3-4 (Dec. 4, 2013) (directing the auditor to audit the double-recovery issue raised by parties in the *CBP Case*).

through 12 and which prevented IEU-Ohio from cross-examining witnesses on the relevant evidence contained in these exhibits.

- B. The FAC Order is unlawful and unreasonable and violates IEU-Ohio's due process rights because the Commission arbitrarily and capriciously refused to admit and consider relevant evidence for the 2010 and 2011 FAC audits which demonstrates AEP-Ohio double-recovered approximately \$200 million in capacity costs while holding that the same issue is relevant to the 2012 through 2014 FAC audits.**
- C. The FAC Order is unlawful and unreasonable and violates Section 4903.09, Revised Code, because the Commission failed to provide a substantively reasonable explanation for its inconsistent findings that the OVEC and Lawrenceburg double-recovery is not relevant to the 2010 and 2011 FAC audits but is relevant to the 2012 through 2014 FAC audits.**

As discussed above, the Commission unlawfully and unreasonably prevented IEU-Ohio from introducing relevant evidence that demonstrated that AEP-Ohio had double-recovered approximately \$200 million through its FAC in 2010 and 2011 related to OVEC and Lawrenceburg capacity costs. The Commission further acted unlawfully and unreasonably by finding that the OVEC and Lawrenceburg capacity cost double-recovery was not relevant to the 2010 and 2011 FAC audit, but was relevant to the 2012 through 2014 FAC audit periods. The Commission failed to provide a substantively reasonable explanation for these inconsistent findings. As a result, the Commission's actions were unreasonable, arbitrary, and capricious such that they violate the requirements of due process and Section 4903.09, Revised Code.

On December 3, 2013, the Commission found that an audit of AEP-Ohio's OVEC and Lawrenceburg capacity cost double-recovery is relevant to and within the scope of the FAC audits for 2012 through 2014. But, on May 14, 2014, the Commission issued the FAC Order and upheld that Attorney Examiner's ruling which prevented IEU-Ohio from addressing the same issue in the 2010 and 2011 audits.

The Commission failed to provide any justification for its inconsistent, arbitrary, and capricious findings. Under the Commission's prior orders, the FAC is subject to an annual financial audit that looks to AEP-Ohio's "real economic costs" and the Commission found that the 2012 through 2014 financial audits of the FAC should examine whether AEP-Ohio is double-recovering the OVEC and Lawrenceburg capacity costs. Further, the Commission directed the auditor to make appropriate recommendations regarding the double-recovery to the Commission based upon the auditor's findings. Despite its prior determination, the Commission affirmed the Attorney Examiner's decision that the same issue could not be pursued during the hearing on the 2010 and 2011 FAC audits. The only rationale provided by the Commission to explain such an inconsistency is that the Auditor did not address the issue in the 2010 and 2011 Audit Reports. As discussed above, the matters addressed or omitted by the Auditor in the Audit Reports do not impact whether or not an issue is relevant and admissible in a FAC audit proceeding. Accordingly, the Commission's basis for excluding evidence of AEP-Ohio's double-recovery of OVEC and Lawrenceburg capacity costs in 2010 and 2011 is arbitrary, and capricious.

Due process in a Commission proceeding occurs **when** parties are given: (1) "ample notice;" (2) "permitted to present evidence through the calling of its own witnesses;" (3) permitted to "cross-examin[e] the other parties' witnesses;" (4) introduce exhibits; (5) "argue its position through the filing of posthearing briefs;" and (6) "challenge the PUCO's findings through an application for rehearing."⁴⁷ The United

⁴⁷ *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599; 2007-Ohio-1386 at ¶ 53.

States Supreme Court has held that this Commission must adhere to the requirements of due process when it conducts hearings.⁴⁸ The Commission must also:

“respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.” This does not mean that the commission may never revisit a particular decision, only that if it does change course, it must explain why. The new course also must be substantively reasonable and lawful.⁴⁹

The Commission’s deviation may not be arbitrary and capricious.⁵⁰ Arbitrary and capricious actions by the Commission violate parties’ due process rights.⁵¹ Because IEU-Ohio’s proffered evidence was relevant, and because the Commission’s decision to exclude the relevant evidence was arbitrary and capricious, the Commission violated IEU-Ohio’s due process rights.

Section 4903.09, Revised Code, further requires the Commission to address all matters raised by the parties.⁵² In its Initial Brief, IEU-Ohio raised the arbitrary and capricious inconsistency between the Attorney Examiner’s evidentiary ruling excluding evidence related to the OVEC and Lawrenceburg capacity cost double-recovery for the 2010 and 2011 audits and the Commission’s finding that that issue was relevant to the 2012 through 2014 audits.⁵³ In the FAC Order, the Commission failed to address its inconsistent, arbitrary, and capricious finding that the double-recovery issue is not relevant in these proceedings regarding the 2010 and 2011 FAC audits, but the issue is

⁴⁸ *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300 (1937).

⁴⁹ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 52 (internal citation omitted).

⁵⁰ *International Telepost Co. v. Pub. Util. Comm.*, 119 Ohio St. 632, 642, 165 N.E. 528, 531 (1929).

⁵¹ *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 465 (1952).

⁵² See *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 71.

⁵³ IEU-Ohio Initial Brief at 10-11; *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC, *et al.*, Entry at 3-4 (Dec. 4, 2013).

relevant in the 2012 through 2014 FAC audits. The Commission's failure to address this inconsistency that was raised by IEU-Ohio in its Initial Brief is unlawful and unreasonable.

In sum, the FAC Order is unlawful and unreasonable because the Commission arbitrarily and capriciously held that evidence regarding the OVEC and Lawrenceburg capacity cost double-recovery is not relevant to the 2010 and 2011 FAC audits but is relevant to the 2012 through 2014 FAC audits. The FAC Order is further unlawful and unreasonable because the Commission failed to address the inconsistent, arbitrary and capricious holdings, despite IEU-Ohio raising the issue in its Initial Brief. The Commission's actions violate IEU-Ohio's due process rights and Section 4903.09, Revised Code.

III. INJURY

At issue in the audits are \$200 million that AEP-Ohio unlawfully double-recovered through the FAC in 2010 and 2011. Although the auditor was not aware of the double-recovery when it conducted its audits, its witness supporting the audit at the hearing made clear that the issue needed to be addressed when he became aware of it. The Commission, by the ruling challenged in this application for rehearing, has not only unlawfully restricted the scope of the hearing, but has provided AEP-Ohio a \$200 million windfall at the expense of customers.

Through the FAC audit process, the Commission has the authority to prevent the unlawful and unreasonable windfall. As it has done in the past, the Commission can adjust the deferred balance AEP-Ohio is currently collecting under the PIRR to remove the double-recovery. The Commission can prevent that windfall, however, only by

granting rehearing and reversing the unlawful order that prevented IEU-Ohio from demonstrating the double-recovery.

IV. CONCLUSION

For the reasons described herein, the Commission unlawfully and unreasonably prevented IEU-Ohio from introducing relevant evidence on the basis that the evidence was beyond the scope of what was addressed in the FAC Audit Reports and was therefore irrelevant. This unlawful and unreasonable finding is contrary to Commission precedent and the Ohio Rules of Evidence. The Commission's action are also unlawful and unreasonable and violate IEU-Ohio's due process rights because the Commission arbitrarily and capriciously refused to admit and consider relevant evidence for the 2010 and 2011 FAC audits which demonstrates AEP-Ohio double-recovered approximately \$200 million in capacity costs while holding that the same issue is relevant to the 2012 through 2014 FAC audits. The Commission's inconsistent, arbitrary, and capricious finding also violates Section 4903.09, Revised Code, because the Commission failed to provide a substantively reasonable explanation for its inconsistent findings that the OVEC and Lawrenceburg double-recovery is not relevant to the 2010 and 2011 FAC audits but is relevant to the 2012 through 2014 FAC audits.

Accordingly, the Commission should grant rehearing and provide IEU-Ohio an opportunity, either in a separate hearing held in these proceedings or in a future FAC audit proceeding, to present evidence demonstrating that AEP-Ohio double-recovered approximately \$200 million through its FAC in 2010 and 2011. If the Commission fails to grant rehearing, IEU-Ohio's members and other customers of AEP-Ohio will never

have an opportunity to argue their case on the merits and receive a credit for the \$200 million that customers unlawfully paid to AEP-Ohio in 2010 and 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing and Memorandum in Support* was served upon the following parties of record this 13th day of June 2014, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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