

IN THE SUPREME COURT OF OHIO
On Appeal From the Public Utilities Commission of Ohio

Industrial Energy Users – Ohio, et al.)	Case No. 06-1594
)	
Appellants,)	
)	Appeal from the Public
v.)	Utilities Commission of Ohio
)	Case No. 05-376-EL-UNC
The Public Utilities Commission)	
of Ohio,)	
)	
Appellee.)	

**MERIT BRIEF AND APPENDIX OF APPELLANT,
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FILED
NOV 13 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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I. STATEMENT OF FACTS AND CASE

A. Introduction

The order (“Order”¹) of the Public Utilities Commission of Ohio (“PUCO” or “Commission”) in the case below requires more than 1.3 million customers of the Columbus Southern Power and Ohio Power Companies (“Companies,” subsidiaries of American Electric Power Company, and collectively “AEP”) to pay a total of \$24 million in rate increases to support AEP’s preliminary research into integrated gasification combined cycle (“IGCC”) generation technology. Instead of proceeding in a judicious manner, the PUCO became an advocate for AEP’s development of IGCC generation plants, and also an advocate for an unlawful scheme to support AEP’s research by means of increasing the distribution rates of the Companies customers in Ohio. The Companies’ affiliates (as well as other developers of generation facilities) are free to construct IGCC facilities in Ohio, but these projects may not be subsidized through the regulated distribution rates charged by AEP to its captive distribution customers in Ohio.

The Order states that the Companies failed to justify their plans regarding an IGCC facility relative to other technologies, and states that “the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options.” Order at 19 (Appx. 45.). Nonetheless, the Order approves increased rates from customers to support AEP’s research and states:

¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, PUCO Case No. 05-376-EL-UNC, Opinion and Order (April 10, 2006), 2006 Ohio PUC Lexis 249.

The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies.

Order at 17 (Appx. 43.). The Order argues that AEP's "Application is not about regulating retail electric generation service, but about providing distribution ancillary services," even though AEP's application ("Application") never mentioned "distribution ancillary services" and the record contains no support for rate increases based upon such a rationale. Thus, the Order itself reveals the PUCO's effort to create arguments favoring AEP's position, and an effort to improperly exert jurisdiction over a *generation* function. As a result, the PUCO did not follow (and could not have followed) the ratemaking statutes located in R.C. Chapter 4909 regarding *distribution* ratemaking upon which the PUCO Order must rely.

B. Standard of Review

This Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case. *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Electric Illuminating Co. v. Public Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.* (1994), 68 Ohio St.3d 559, 563; 629 N.E.2d 423, 427; 1194-Ohio-435. The Court should reverse the PUCO's illegal effort to legislate a result rather than abide by Ohio law.

The Court's review of the case below is important because the Commission ignored provisions of R.C. Chapters 4909 and 4928. These chapters contain key rate-setting provisions for electric distribution and generation service in the wake of Ohio's electric restructuring law. This Court has repeatedly stated that the PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes. See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St. 3d 1, 647 N.E.2d 136.

C. Statement of Facts

1. The PUCO initiated the IGCC concept in a 2005 order.

The first mention of an IGCC generator in the PUCO's case law is an order in AEP's post market development period ("MDP"²) service case. *In re AEP Post-MDP Service Case*, Case No. 04-169-EL-UNC, Order (January 26, 2005) (Supp. 180.) ("Post-MDP Service Order" in the "*Post-MDP Service Case*"), 2005 Ohio PUC Lexis 32; vacated and remanded, 109 Ohio St.3d 511, 2006-Ohio-3054; reinstated in Case No. 04-169-EL-UNC, Entry at 2, ¶(4) (August 9, 2006) (Supp. 221.), 2006 Ohio PUC Lexis 443.

We also feel strongly that *electric generators of the future* should be both environment-friendly and capable of taking advantage of Ohio's vast fuel resources. With the recognition that new technologies must be forthcoming to replace the utilities' *aging generation fleet*, we urge AEP to move forward with a plan to construct an integrated gasification combined-cycle (IGCC) facility in Ohio.

Post-MDP Service Order at 37 (emphasis added) (Supp. 216.). The PUCO favored an AEP proposal for the facility's use as an "electric generator[] of the future."

The main issues in the *Post-MDP Service Case* were rates that customers would pay for generation service. Electric generation service is a component of "competitive retail electric service[]," pursuant to R.C. 4928.03. (Appx. 101.). The Post-MDP Service Order determined standard service generation rates for service provided by the Companies, limiting automatic increases to three percent of generation rates for Columbus Southern and by seven percent for Ohio Power. Post-MDP Service Order at 15 (Supp. 194.). The Companies' additional increases for generation service were "effectively capped at four percent" upon application to the

² Pursuant to R.C. 4928.40(A), the market development period for AEP ended no later than December 31, 2005. (Appx. 111.).

PUCO, and these amounts were limited to “environmental requirements, security, taxes, and new generation-related regulatory requirements . . . or . . . customer load switches that materially jeopardize . . . generation revenues.” Post-MDP Service Order at 20 (Supp. 199.). The Order in the case below added IGCC-related costs to the existing categories of costs that could be used by AEP to increase generation rates. Order at 20 (Appx. 46.).

The Post-MDP Service Order also extended the distribution rate freeze for Ohio Power. Post-MDP Service Order at 22 (Supp. 201.). As a result, the distribution rates for both Columbus Southern Power and Ohio Power Company were frozen through the end of 2008. *Id.*

2. AEP responded with an application demanding rate increases in three phases.

On March 18, 2005, the Companies filed their Application with the PUCO regarding certain regulatory approvals associated with the construction of an IGCC electric generating facility. The Companies proposed three phases of charges on residential and other retail customers.

AEP proposed “Phase I” charges -- charges that were ultimately approved by the PUCO and placed into rates in the case below -- that would force customers to pay for AEP’s preliminary research costs for the period before execution of an engineering, procurement, and construction (oftentimes abbreviated as “EPC”) contract. These costs were partly incurred before the Application was filed, partly incurred during the progress of the case, and were partly projections of future expenditures by the Companies. The Application contained \$18 million for Phase I (Application at 5) (Supp. 5.), which increased to \$24 million by the time that AEP testimony was filed on August 3, 2005. Company Ex. 5b at 5 (Jasper Supplemental) (Supp. 67.).

AEP proposed “Phase II” charges that would force customers to pay carrying charges for the period after execution of the engineering, procurement, and construction contract until the proposed plant is placed into production. Application at 8-10 (Supp. 8-9-10.). These charges would run into the hundreds of millions of dollars. Id. at 9 (Supp. 9.).

AEP proposed “Phase III” charges that would force customers to pay for the IGCC generation plant “as if it were a single asset regulated utility.” Application at 10 (Supp. 10.). At the time of the Application, the Companies estimated that the capital costs alone for the new IGCC plant would exceed *\$1 billion*. Application at 9 (Supp. 9.).

3. Elements of AEP’s early planning process were speculative at the time of the hearing

The Companies filed testimony in support of the Application on May 5, 2005, and supplemental testimony on August 3, 2005. The testimony outlined a process by which AEP envisioned that an IGCC facility would be planned, constructed, and financially supported. However, even the early stages of AEP’s vision were speculative at the time of the hearing.

The first step in AEP’s proposed planning process included a “scoping study” to “determine the scope and the cost of a new IGCC plant.” AEP Ex. 5a at 3 (Jasper) (Supp. 51.). The engineering work by the Companies has involved a \$528,000 contract with General Electric (“GE”) and Bechtel (id. at 11) (Supp. 54A.), work that “has been conducted in parallel with their efforts to develop the scope and cost of a standard GE/Bechtel ‘reference’ plant.” Id. at 3 (Supp. 51.). Intended results of the scoping study are “a ‘high level’ project schedule and an indicative cost estimate” for the proposed IGCC facility. Id. at 4 (Supp. 51A). The scoping study was expected to be complete at the beginning of June 2005. Id. at 6 (“eight-week process in early April”) (Supp. 51B.). However, the scoping study was not complete when the Companies filed

supplemental testimony on August 3, 2005, and was not complete at the time of hearing that was mainly conducted during the second week of August 2005. Company Ex. 5b at 1 (Jasper Supplemental) (Supp. 66.). This sequence of events demonstrates that even early elements of the Companies' plans were speculative at the time of the hearing, and cost estimates for the proposed IGCC facility were poorly refined at the time of hearing.³

The second (anticipated) step in the Companies' engineering efforts was a front end engineering and design (oftentimes abbreviated as "FEED") process during which "more detailed engineering and design of the AEP-specific plant" would be expected, along with "development of a definitive cost estimate and a definitive schedule for the AEP-specific IGCC plant." Company Ex. 5a at 8 (Jasper) (Supp. 52.). According to an AEP witness, the "FEED process is expected to have a duration of 12 months." *Id.* Based on statements by GE/Bechtel, "the total cost of FEED will be up to \$20 million." *Id.* at 11 (Supp. 54A.). The AEP witness stated that "based upon communications with GE/Bechtel, AEP has estimated the portion of FEED to be billable to AEP to be just less than one half of the total." *Id.* However, documentation of these communications is absent from the record.

The third (anticipated) step in the Companies' engineering efforts involved the Companies' hope to be able to "negotiate a lump sum, turnkey EPC contract" with GE/Bechtel after completion of the front end engineering and design process. *Id.* at 9 (Supp. 53.). A turnkey engineering, procurement, and construction contract would provide for the completion of the

³ See, e.g., Company Witness Jasper testified that "it is anticipated that the costs of implementing this [IGCC] technology will be substantially reduced from the earlier development facilities." Company Ex. 5a at 9-10 (Jasper) (Supp. 53-54.).

IGCC project through startup and testing. Id. According to the AEP proposal, this third step would initiate the “Phase II” charges described above.

The record revealed that even the early stages of AEP’s vision were speculative. The Commission’s Order stated that AEP’s plans had “no detailed schedules, budgets, designs, feasibility studies or financing options.” Order at 19 (Appx. 45.).

4. AEP’s proposal was widely opposed.

On July 15, 2005, a variety of parties who opposed the Application filed testimony. Testimony was filed on behalf of customer representatives: the Industrial Energy Users – Ohio (“IEU-Ohio”), the OCC, and the Ohio Energy Group. Testimony was also filed on behalf of prospective developers of IGCC facilities and other generation projects as well as marketers who could compete with AEP for power plant construction and energy sales: Baard Generation, Calpine Corporation, and Direct Energy. The testimony of Baard Generation President Baardson stated that his company was exploring two sites in Ohio for IGCC projects (Baard Ex. 1 at 2 (Baardson)) (Supp. 58.). PUCO Staff Witness Wissman stated her concern for any advantage shown to AEP over the efforts of IGCC developers such as Lima Energy. Tr. Vol. V at 202 (Wissman) (Supp. 47.). On August 3, 2005, supplemental testimony was filed on behalf of the OCC that included information gained during discovery showing AEP’s failure to conduct detailed studies regarding special matters that would be important to locating an IGCC generation plant.

On July 25, 2005, three pieces of testimony were filed on behalf of the PUCO’s Staff. According to the PUCO Staff testimony: “Staff [did] not address[] the overall economic issues associated with AEP’s proposed IGCC plant or whether the Commission should grant or deny the application.” Staff Ex. 1 at 2 (Wissman) (Supp. 64.). The scope of the Staff’s testimony was

limited, and the testimony reflected a lack of confidence in the empirical analysis presented by the Companies. PUCO Staff testimony stated: "Staff has stayed away from the economics and numbers because we believe that it is premature. I have very little confidence in what numbers are in this application because everything is subject to change." Tr. Vol. V at 245 (Wissman) (Supp. 49.).

A hearing was commenced on August 8, 2005 and continued for seven business days. At the end of the hearing, discovery that was submitted to the OCC and IEU-Ohio after the last witness appeared was reviewed and several joint OCC/IEU-Ohio post-hearing exhibits were submitted to the Commission in lieu of recalling witnesses for the Companies. These late-filed exhibits were made part of the record pursuant to the terms of an Entry dated September 7, 2005.

A briefing period followed the closing of the record. Parties who filed testimony against the approval of AEP's proposal -- IEU-Ohio, the OCC, the Ohio Energy Group, Baard Generation, Calpine Corporation, and Direct Energy -- were joined in their opposition to AEP's plans by three affiliated Constellation companies, FirstEnergy Solutions Corporation, Global and Lima Energy, Green Mountain Energy, and Ohio Partners for Affordable Energy.

In its brief in the case below, the PUCO Staff continued its statements regarding the speculative nature of AEP's proposals:

But the company proposal is not a plan which could be implemented today. The current proposal has no schedules, budgets, or designs. Feasibility studies have not been done. Financing options have not been fully explored. Economic comparisons have not been adequately developed or evaluated. No purpose is served by belaboring these points. They are obvious.

In re AEP IGCC Proposal, Case No. 05-376-EL-UNC, Staff Initial Brief at 3 (September 20, 2005) (Supp. 17.). Nonetheless, the PUCO Staff supported an increase in customer rates to pay for AEP's Phase I research efforts. *Id.* at 18 (Supp. 32.).

Two briefs were submitted in general support of AEP's Application -- briefs by AEP and one submitted by the International Brotherhood of Electric Workers Local #972 et al. ("Locals #972, #168, and #787"). Locals #972, #168, and #787 never referenced any legal authority.

5. The PUCO's explanation of its interest in construction of an IGCC plant changed, and IGCC rate increases were approved with a condition placed on AEP's retention of the additional revenues.

The PUCO shifted ground, switching its stated concerns about "replac[ing] the utilities' aging generation fleet" (Post MDP Order at 37) (Supp. 216.) to a stated concern over distribution reliability. The PUCO stated:

While Section 4928.03, Revised Code, states that retail electric generation service is competitive and, therefore, not subject to Commission regulation, this Application is not about regulating retail electric generation service, but about providing distribution ancillary services. These services are subject to Commission regulation, as being necessary to support the distribution function.

Order at 17 (Appx. 43.). AEP's Application did not mention the need to provide "distribution ancillary services," and these services were never mentioned during the hearing. Application at 1-14 (Supp. 1-14.). Thus, the PUCO created its own rationale for increasing rates to support AEP's IGCC project -- one that was never contemplated by AEP itself and that has no basis in law.

AEP filed tariffs to collect \$24 million for "Phase I" costs on April 20, 2006. In the Finding and Order dated June 28, 2006 ("Order Approving Tariffs"), the PUCO approved tariffs that increase rates "for bills rendered on or after July 1, 2006 and [to] be collected over a 12-month period." Order Approving Tariffs at 3 (June 28, 2006) (Appx. 50B.).

The PUCO's approval of tariffs that increase distribution rates was accompanied by a condition stated in the Entry on Rehearing:

Although we continue to find that AEP should be permitted to recover the reasonable costs of *further developing and detailing the project proposal*, the Commission believes that there may be elements of the design and engineering that may be transferable to other projects. Therefore, we find that if AEP-Ohio has not commenced a *continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing*, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be *refunded* to Ohio ratepayers with interest.

In re AEP IGCC Proposal, Case No. 05-376-EL-UNC, Entry on Rehearing at 16 (June 28, 2006), 2006 Ohio PUC Lexis 372 (emphasis added) (“Entry on Rehearing”) (Appx. 25.).⁴ Thus, the PUCO further stated that AEP failed to present a sufficiently detailed proposal and that it understood that the benefits of the Phase I charges could be bestowed upon AEP’s customers outside of Ohio. Nonetheless, the full \$24 million is being charged to AEP’s Ohio customers under the PUCO’s orders in the case below. Stopping the PUCO’s approval of the illegal cost recovery scheme in this appeal is the means by which customers will be able to recover the \$24 million that will be improperly charged by mid-2007.

II. ARGUMENT

Proposition of Law No. 1:

The PUCO Lacks Authority to Increase Rates that Customers Pay to an Electric Distribution Utility so that the Utility May Construct a Generating Facility.

A. As a creature of statute, the PUCO may not approve the collection from customers of generation-related costs that are outside the PUCO’s jurisdiction.

The PUCO’s Order engages the Commission in regulation over generation service that violates Ohio law. According to R.C. 4928.05(A)(1) (Appx. 102.):

⁴ The PUCO is not very reassuring regarding the return of the \$24 million, stating that “nothing in this Finding and Order shall be binding upon this Commission in any future proceeding or investigation.” Order Approving Tariffs at 3 (June 28, 2006) (Appx. 50B.).

[A] competitive retail electric service [such as generation service] supplied by an electric utility or electric service company shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code . . . except as otherwise provided in this chapter.⁵

Thus, under Ohio's electric restructuring law, distribution rates and service continue to be regulated and non-bypassable whereas the PUCO no longer has authority to regulate generation rates. Ohio law requires that generation costs be subject to a competitive test in the market and that generation rates be fully bypassable by a customer who switches to an alternative retail electric service provider. Costs associated with the AEP's generating plants were generation costs under rate unbundling in the electric transition plan cases.⁶ The Order transforms generation research costs into distribution-related research costs based solely on the PUCO's search for a means by which AEP's IGCC plans will be promoted. See, e.g., Order at 17 ("issue is where the Commission's jurisdiction to grant cost recovery for the plant lies") (Appx. 43.).

The Order approves charges for a *generation* function, which is revealed within the Order itself. The Order recounts Staff's concern over replacing "AEP's aging *generation* fleet and the upcoming need for base load capacity." Order at 19 (emphasis added) (Appx. 45.). The Order also states that charges to pay for AEP's pre-construction costs will be "tracked so as to reduce the total of additional *generation* increases that the Companies may request under the RSP [i.e., the rate stabilization plan approved in Case No. 04-169-EL-UNC]." Id. at 20 (emphasis added) (Appx. 6.).⁷

⁵ The exceptions listed in R.C. 4928.05 are not important to the OCC's present argument.

⁶ The concept that a 600 megawatt generator is a distribution asset would have been inconceivable as recently as the electric transition plan cases in which rate unbundling by electric service component was required "based upon the record in the most recent rate proceeding of the utility." R.C. 4928.34(A)(2) (Appx. 108.).

⁷ The Order tracks the request contained in AEP's Application. Application at 13 ("will be tracked and those amounts will be considered as reducing the amounts of additional generation rate increases") (Supp. 13.).

The PUCO's Order shows that the Commission understood that it was approving rate increases to support AEP's *generation* plans.

The Order contains additional statements that are inconsistent with the PUCO's characterization of IGCC research as distribution-related. Charges for the generation function of electric service should be avoidable for customers who choose an alternative provider of generation service. Charges for the distribution function in electric service -- for which there is no competition according to the Certified Territories Act, R.C. 4933.81- 4933.90 and especially R.C. 4933.83 ("exclusive right") (Appx. 113.) -- should be unavoidable because customers may not choose an alternative provider for distribution service. In a case that involved an increase in Dayton Power and Light Company ("DP&L") charges, the PUCO agreed with its Staff "that since the [DP&L] rider is unavoidable, its placement in the Distribution Service Tariff is reasonable." *In re DP&L Rate Stabilization Surcharge Rider*, Case No. 05-276-EL-AIR, Order at 12 (December 28, 2005) (Supp. 174.), 2005 Ohio PUC Lexis 694.⁸ However, the PUCO-approved IGCC charges are *avoidable* (i.e. or "bypassable" by customers who switch generation providers). Order at 20 (Appx. 46.). Applying the Commission's reasoning in the DP&L case, the avoidable IGCC charges cannot reasonably be considered distribution charges. The PUCO's treatment of the IGCC-related charges reveals the Commission's knowledge that the case below dealt with charges for a generation function.

The Order makes a directive that is entirely inconsistent with the IGCC costs being distribution-related. The Order states that AEP's next application for additional IGCC charges

⁸ The OCC has appealed the PUCO's order an increase in DP&L's distribution charges, in part because the costs associated with the charges are entirely generation in nature. *Office of the Ohio Consumers' Counsel v. Public Utility Commission of Ohio*, S.Ct. Case No. 06-788, Notice of Appeal (April 21, 2006) (Supp. 223.).

should include the “Companies’ consideration and evaluation of investors in the proposed IGCC facility.” Order at 21 (Appx. 47.). The Order’s directive apparently reflects the concerns stated by PUCO Staff Witness Wissman:

What the [PUCO] staff is suggesting is that in the Commission deliberations they need to make sure that they don’t give AEP some advantage by providing this opportunity without looking at some potential opportunities for others that wish to invest.

Tr. Vol. V at 200-201 (Wissman) (Supp. 45-46.). Ms. Wissman’s concern recognized a problem faced by AEP’s competitors to engage in the competitive *generation* function. The PUCO’s directive regarding other “investors” makes no sense if development of a 600 megawatt IGCC facility was approved to provide adequate *distribution* service that only the Companies can legally provide within their certified territories.

The PUCO’s after-the-hearing rationalization of IGCC-related charges is also inconsistent with other PUCO decisions. The Order states that distribution rates must increase because “[d]istribution reliability is a core concern of the Commission.” Order at 18 (Appx. 44.). As revealed below, the Order’s stated concern over “distribution reliability” in connection with electric utility ownership of generating plants is not revealed elsewhere in the PUCO’s decisions.

The PUCO permitted the separation of generating plants from three electric distribution utilities affiliated with FirstEnergy Corp. without expressing any concern over “distribution ancillary services.” In a 2005 order, the Commission stated:

This transaction to separate the fossil plants from the operating companies is being implemented in accordance with the transition plan, as approved by this Commission. Further, Section 4928.17(E), Revised Code, provides that “an electric utility may divest itself of any generating asset at any time without Commission approval.” In addition, the corporate separation requirement included in the transition plan in accordance with SB3 was one element of the overall policy of the legislation to provide competitive electric service is for the benefit of customers and the economy of the state.

In re FirstEnergy Application for Determinations Under the Public Utility Holding Company Act, Case No. 05-678-EL-UNC, Entry at 2, ¶(9) (September 14, 2005) (Supp. 160.), 2005 WL 2250938. In an earlier order regarding electric service by the Monongahela Power Company, the Commission recognized the “Company transferred, in 2001, its generation assets allocated to its Ohio load as part of its approved ETP [i.e. electric transition plan] to comply with the structural separation requirements of Section 4928.17(A), Revised Code.” *In re Rate Freeze for Monongahela Power Company*, Case No. 04-880-EL-UNC, Opinion and Order at 23 (December 8, 2004) (Supp. 142.), 2004 Ohio PUC Lexis 593. The FirstEnergy and Monongahela Power distribution utilities also had distribution-related responsibilities.⁹ However, these distribution utilities transferred ownership of all their generating plants to other corporate entities, plants the PUCO now contends are needed by distribution companies to provide “distribution ancillary services.” The PUCO’s after-the-hearing discovery that AEP must own generating units (and a new generator exactly the size proposed in AEP’s Application) to serve a distribution function was advocacy for the IGCC generation development that the PUCO itself proposed rather than a concern regarding distribution reliability.¹⁰

The Order is also inconsistent with the Commission’s rulemaking under R.C. 4928.11(A). (Appx. 103.). The Revised Code requires the Commission to promulgate rules that “shall include prescriptive standards for inspection, maintenance, repair, and replacement of the ... distribution

⁹ The FirstEnergy distribution utilities have continuing distribution-related responsibilities. However, Monongahela Power sold its distribution system in Ohio to the Columbus Southern Power Company.

¹⁰ See Section I.C.1, *supra*.

systems of electric utilities [and] shall apply to each substantial type of ... distribution equipment or facility.” R.C. 4928.11(A) (Appx. 103.). The PUCO has not promulgated a single rule that provides standards for the distribution-related services stemming from generation plants. If the charges in this case are not generation in nature, as the PUCO implausibly alleges, then the Commission has abjectly failed to conduct a required rulemaking regarding its “core concern.” In such an event (as show in the quote in Case No. 05-678-EL-UNC), the PUCO has failed to provide for reliable distribution service for customers of other utilities that were served without distribution company ownership of generating plants. The true explanation for the conflict between the Order and the PUCO’s earlier decisions, as well as the conflict between the Order and the PUCO’s rulemaking, is that the PUCO’s Order states an after-the-hearing rationalization that was issued to advance an agenda that cannot be reconciled with Ohio law.

The PUCO does not have jurisdiction over the generation services that would be provided if AEP’s IGCC research results in the construction of a power plant. The Order disingenuously characterizes IGCC development as distribution-related. The PUCO approved additional charges for generation service that are illegal.

B. As a creature of statute, the PUCO may not permit the violation of the corporate separation requirements contained in R.C. 4928.17.

Ohio law prohibits the long-term ownership of generating plants by an electric utility, not just the collection of costs for such generating plants from customers to cover expenditures connected with planning such plants. The PUCO’s acceptance of the initial phase of the Companies’ plan to provide generation service is the antithesis of the corporate separation statutes. The Companies’ corporate separation plan, established pursuant to the requirements of R.C. 4928.17 (Appx. 106.), requires the provision of generation and “wires” services through “fully

separated affiliates.” The Companies’ corporate separation plan was established, in compliance with R.C. 4928.17(A)(3) (Appx. 106.), to “ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service”¹¹ The Commission has delayed the requirement that the Companies structurally separate their distribution and generation functions (via a temporary waiver). Post-MDP Service Order at 35 (January 26, 2005) (Supp. 214.)¹² However, the requirements contained in R.C. 4928.17 (Appx. 106.) remain in place, and cannot be reconciled with the long-term ownership commitment by the Companies to a new generating plant that is the subject of this case.

The Application stands the Commission’s orders and entries in various post-MDP service cases on their heads, and the Order’s approval of a rate increase to support the Companies’ plans begins a dangerous and illegal process. One of the stated purposes of the Commission’s actions in the post-MDP cases for various electric distribution utilities (including the *Post-MDP Service Case* for the Companies) is the development of the competitive market. Post-MDP Service

¹¹ The Revised Code provides that, “beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state . . . in the business of supplying a noncompetitive retail electric service, or in the business of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, *unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission* under this section” R.C. 4928.17 (emphasis added) (Appx. 106.). Compliance is not optional.

¹² The OCC argued that the Commission permitted the illegal delay of the Companies’ corporate separation obligations. See, e.g., OCC Notice of Appeal, S.Ct. Case No. 05-767 at 3 (April 29, 2005) (Supp. 236.), PUCO order vacated and remanded, 109 Ohio St.3d 511, 2006 Ohio 3054; reinstated in Case No. 04-169-EL-UNC, Entry at 2, ¶(4) (August 9, 2006) (Supp. 221.), 2006 Ohio PUC Lexis 443. R.C. 4928.17(C) permits “an interim period” after January 1, 2001 for functional rather than corporate separation of entities that provide competitive and noncompetitive services. A period that covers the lengthy, useful life of a major generating station would not constitute an “interim period” and would render the statute a nullity.

Order at 5 (January 26, 2005) (Supp. 184.). The subsidization of AEP's research costs is the antithesis of corporate separation. AEP's potential rivals -- such as Beard Generation and Lima Energy that have announced their own IGCC projects in Ohio -- are forced to compete with AEP without rate recovery from captive distribution customers. The purpose of corporate separation is to "ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business." R.C. 4928.17(A)(3) (Appx. 106.). The PUCO's Order increases AEP's distribution rates to pay for the Companies' preliminary IGCC research, and thereby provides an undue preference and advantage to the part of AEP's business that investigates and develops generation projects. This advantage relative to AEP's competitors is one that R.C. 4918.17 was expressly designed to eradicate. This statutory provision underlies and compels the Commission-approved corporate separation plan for the Companies that should be implemented rather than ignored.

The Order's furtherance of the addition of generating plants by the Companies conflicts with both the Companies' obligations under their Commission-approved corporate separation plan and the Commission's recent pronouncements regarding post-MDP service. Further regional concentration of assets under the ownership and control of electric distribution utilities is contrary to both Ohio statutes and the Commission's policy pronouncements.

C. The Order conflicts with the PUCO's rules.

The Order improperly elevates imprecise terminology to the status of law, stating that "the costs of the IGCC plant are costs that the Companies will incur in their position as POLR." Order at 18 (Appx. 44.). "POLR," or "Provider of Last Resort," was a term that presented countless difficulties regarding its intended use during the course of the hearing.

The Post-MDP Service Order referred to financial support for an IGCC facility “given . . . POLR responsibilities.” *Id.* at 38. The term “Provider of Last Resort” was defined by the Commission in Ohio Adm. Code 4901:1-35-03:

Provider of last resort is the statutory responsibility of the EDU to provide electric supply service to its customers on a comparable and nondiscriminatory basis within its certified territory. This responsibility may be fulfilled by the EDU providing standard service offer and by providing all other retail electric service necessary to maintain essential electric service to consumers.

The “responsibility” is that stated in R.C. 4928.14(A) (Appx. 104.). A distribution utility meets this responsibility by offering a “market-based standard service offer” that may be fulfilled (pursuant to R.C. 4928.14(B) and PUCO’s approval of an EDU request) by “the competitive bidding option.” R.C. 4928.14(B) (Appx. 104.). In both cases, R.C. 4928.14 provides that customers receive service priced in a market for generation service.

According to the PUCO, the Companies failed to justify their plans regarding an IGCC facility relative to other technologies and failed to provide details regarding IGCC costs. Order at 19 (Appx. 45.). Therefore, the Order approved an increase in rates to support a generation project that may not be viable in the market. The PUCO may not legally approve such an increase by simply invoking the works “provider of last resort.”

D. As a creature of statute, the PUCO may not approve an application that contravenes the statutory requirements for generation pricing.

The Application was not filed properly pursuant to R.C. 4928.14 (Appx. 104.). That statute requires electric distribution utilities such as the Columbus Southern Power Company and the Ohio Power Company to provide “a market-based standard service offer” that “shall be filed with the public utilities commission under section 4909.18 of the Revised Code.” R.C. 4928.14(A) (Appx. 104.). The Application, however, does not provide “[s]uch offer,” as

required by R.C. 4928.14(A) (Appx. 104.), and was not submitted and treated by the PUCO as an application under R.C. 4909.18 (Appx. 95.). The standard service offer was the subject of the *Post-MDP Service Case*, from which the PUCO departs from without any legal basis or explanation.

An Application filed under R.C. 4928.14(A) (Appx. 104.) must meet the requirements under R.C. Chapter 4909 that are implicated by a filing under R.C. 4909.18 (Appx. 95.). For example, R.C. 4909.43 (Appx. 99.) requires written notice to local authorities “[n]ot later than thirty days prior to the filing of an application pursuant to section R.C. 4909.18” that describes “the proposed rates to be contained therein.” The PUCO failed to require the Companies to comply with these statutory requirements regarding changes to AEP’s standard service offer rates.

Proposition of Law No. 2:

The PUCO May Not Violate Ohio Law to Increase the Distribution Rates Customers Pay to a Utility.

- A. As a creature of statute, the PUCO must adhere to the ratemaking procedures for non-competitive services required pursuant to R.C. Chapter 4909.**

The Order dramatically departs from Ohio’s statutorily required ratemaking methodology for regulated electric functions. Sensing the unlawfulness that is addressed in OCC’s first proposition of law, the PUCO’s Order provided a revisionist history for this case. The Order states that the “Application is not about regulating retail electric generation service, but about providing the distribution ancillary services.” Order at 17 (Appx. 43.). However, AEP’s Application made no mention of “distribution ancillary services.” Application at 1-14 (Supp. 1-14.). The procedures followed by the PUCO did not (and could not) meet the statutory

requirements for increasing distribution rates because the PUCO did not inform the parties (including the applicant Companies) and did not itself determine that the case addressed “distribution ancillary services” until *after* the hearing was conducted.

Having been informed in the Order that the case was about “distribution ancillary services,” the OCC reassessed the case during the post-hearing period and directed the Commission’s attention to numerous violations of statutory requirements regarding the increase in distribution rates. See, e.g., *In re AEP IGCC Proposal*, Case No. 05-376-EL-UNC, OCC Application for Rehearing at 7-18 (Appx. 63-74.). The Order fails to judge the case -- as it must according to Ohio law if the case involves distribution services -- according to the requirements of R.C. 4928.15(A) (Appx. 105.):

Distribution service rates and charges under the [required] schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code” and “filed with the public utilities commission under section 4928.18 of the Revised Code.

As a creature of statute, the Commission is bound by the statutory requirements regarding the fixation of distribution rates.

Whenever a public utility wishes to increase its rates, the utility must file an application with the Commission, pursuant to R.C. 4909.18 (Appx. 95.), to accomplish the change and must adhere to greater notice and procedural requirements than exist under filings with the Commission that do not involve a change in rates or charges. R.C. 4909.18 states:

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission.

* * *

If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing

Public notice must be given regarding a proposed increase in rates at the outset of the case. R.C.

4909.18 requires that when a utility files for an increase in rates, the utility must file:

(E) A proposed notice for newspaper publication *fully disclosing the substance of the application*. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full.

(Emphasis added.) Additionally, R.C. 4909.19 (Appx. 97.) requires:

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once *cause an investigation to be made* of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith.

(Emphasis added.) Finally, R.C. 4909.43 (Appx. 99.) directs the utility:

(B) Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a public utility shall *notify, in writing the mayor and legislative authority of each municipality* included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.

(Emphasis added.)

Although the Commission conducted a hearing, the scope of the issues considered at hearing provided no notice regarding the distribution rate increase that is contained in the PUCO's Order. No investigation was made, and public officials were not notified. The rate-setting procedures located in R.C. 4909.15 for the fixation of rates were not followed. The OCC and other parties did not receive the "ample rights of discovery" regarding an increase in distribution rates because nothing in the Application or the PUCO's procedures hinted that distribution rates were at issue. R.C. 4903.082 (Appx. 88.). The procedural safeguards that

apply to distribution rates cases were sidestepped by the Commission in its desire to support AEP's research into generation technology.

The statutory framework assures that interested persons are provided notice and an opportunity to be heard on the important issue of utility rates and charges. The assurance that all interested parties have an opportunity to participate in such a proceeding, and to meaningfully address the subject matter that the PUCO ruled upon in its Order, is an opportunity that has been denied in these cases. Ohio law does not permit the PUCO's ad hoc development of cost recovery schemes, in this case the PUCO's claimed "authority to approve a mechanism that grants recovery of the costs of the IGCC plant." Order at 18 (Appx. 44.). The PUCO violated statutory mandates for the fixation of distribution rates.

- B. As a creature of statute, the PUCO may not provide *a priori* regulatory approval that violates Ohio law, including R.C. 4909.15 that limits collections from customers for utility plant that is not used and useful for the provision of utility service to customers.**

The Order violates statutory and case law that prohibits an increase in distribution rates in connection with AEP's plans for *future* facilities. The Order provides the Companies with before-the-fact approval of costs for the early planning process associated with the construction of IGCC facilities. Such approval, before the facilities are proven to be used and useful for serving customers, violates Ohio law.

Under Ohio's statutory ratemaking procedures, the value of "used and useful" property must be considered in ratemaking. The General Assembly has barred the PUCO from including costs in the rates consumers pay unless the facility "is used and useful in rendering the public utility service for which rates are to be fixed and determined." R.C. 4909.15(A)(1) (Appx. 91.). This Court reversed an earlier PUCO order in which the PUCO attempted to make consumers

pay for a utility plant that was not yet used and useful for service to consumers. *Ohio Consumers' Counsel v. Public Util. Comm.* (1979), 58 Ohio St. 2d 449, 391 N.E.2d 311.

The "Phase I" cost recovery granted by the PUCO involves charges before any facilities are operational, and before any non-competitive service (or any service, non-competitive or competitive) is provided to customers. Application at 5 (Supp. 5.). Phase I involves charges even before an engineering, procurement and construction contract is executed. *Id.* The Order itself states that the Companies failed to justify their plans regarding an IGCC facility relative to other technologies, and that "the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options." Order at 19 (Appx. 45.). AEP's requested rate increase does not fit within any regulatory framework (present, or past) for serving customers, and violates precedent against such prior approvals.

Looking to the distribution ratemaking statutes, the PUCO can include in rates a "reasonable allowance" for construction costs as construction work in progress ("CWIP"). R.C. 4909.15(A)(1) (Appx. 91.). However, the General Assembly, under R.C. 4909.15(A)(1) (Appx. 91.), specifically constrained the PUCO's authority to include construction costs in rates. Pursuant to R.C. 4909.15(A)(1) (Appx. 91.): "in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete." Even under the PUCO's distribution-related explanation for the rate increases, its approval of the Companies' costs to plan its project -- the subject for the Phase I charges that were approved in the Order -- plainly violates this statutory restriction.

The PUCO's Staff, whose brief first mentioned "distribution ancillary services" in the case below, correctly states the condition of the factual record and incorrectly states the importance of that record:

But the company proposal is not a plan which could be implemented today. The current proposal has no schedules, budgets, or designs. Feasibility studies have not been done. Financing options have not been fully explored. Economic comparisons have not been adequately developed or evaluated. No purpose is served by belaboring these points. They are obvious.

In re AEP IGCC Proposal, Case No. 05-376-EL-UNC, Staff Initial Brief at 3 (September 20, 2005) (Supp. 17.). The speculative nature of AEP's project is correctly recognized by the PUCO's Staff. However, the purpose served by focusing on this important feature of the factual record is that Ohio law prohibits the increase in customer rates that was granted in the Order.

C. As a creature of statute, the PUCO may only approve an adjustment to distribution rates that abides by a legislated cost recovery mechanism.

The ratemaking procedures stated in the Revised Code are comprehensive, and may not be exceeded by the PUCO. This Court has held that the Commission exceeds its authority if it approves an adjustment to rates that is not provided by the General Assembly's regulatory scheme. *Pike Natural Gas v. Public Util. Comm.* (1981), 68 Ohio St. 2d 181, 182; 429 N.E.2d 444. The Court has consistently recognized that the Commission is a creature of statute and may exercise only that jurisdiction that is conferred upon it by statute. See, e.g., *Pike Natural Gas* at 182. The Court explicitly found that the General Assembly has legislated cost recovery mechanisms, but has not invested the Commission with the authority to create such mechanisms. *Id.* at 185-186. The Court found that whether a given mechanism should be adopted is not a question for the Commission or even for the Supreme Court; "rather, its resolution lies with the General Assembly." *Id.* at 186.

This Court recently addressed the means by which distribution rates may be increased. Noting the statutory ratemaking procedures in the Ohio Revised Code, this Court discussed alternative rate treatment involving the resolution of complaints filed against a utility pursuant to

R.C. 4905.26 (Appx. 90.). *Ohio Consumers' Counsel v. Public Util. Comm.* (2006), 110 Ohio St.3d 394, 853 N.E.2d 1153, 2006-Ohio-4706. In the case below, however, AEP's Application states that it was submitted "[p]ursuant to §§ 4928.35(D) and 4928.14, Ohio Rev. Code." Application at 1 (Supp. 1.). These statutes relate to an electric utility's standard service offer of competitive retail electric services, such offer to be filed "with the public utilities commission under section 4909.18 of the Revised Code." R.C. 4928.14(A) (Appx. 104.). Therefore, the alternative rate treatment discussed in *Ohio Consumers' Counsel* (2006) is not applicable.

In violation of this Court's requirement, the Order is not supported by any statute that permits an increase in distribution rates. The PUCO's approval of a "Phase I cost recovery mechanism" to cover the Companies' research activities is unlawful, and should be reversed by this Court.

D. The PUCO may not order an increase in the distribution rates that customers pay based upon plans to develop a generating plant where the order, without explanation, fails to respect the PUCO's own precedents.

The Commission should respect its previous decisions, and not authorize an increase in rates that conflicts with the result announced in AEP's *Post-MDP Service Case*. It is essential that the Commission respect its previous decisions and not depart from them without a clear need. In *Cleveland Elec. Illum. Co. v. Public Util. Comm.* (1975), 42 Ohio St.2d 403, 431; 330 N.E.2d 1, the Court stated:

Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.

In *Ohio Consumers' Counsel v. Public Util. Comm.* (1985), 16 Ohio St. 3d 9, 10; 475 N.E. 2d 782, this Court stated:

These doctrines [of res judicata and collateral estoppel] operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. The doctrine of collateral estoppel has been applied to administrative proceedings.

(Citations omitted). The PUCO must justify any changes from its previous orders on the same subject. See, e.g., *Ohio Consumers' Counsel v. Public Util. Comm.* (2006), 110 Ohio St.3d 394, 399; 853 N.E.2d 1153; 2006-Ohio-4706.

The Order states that “the Phase I surcharge would be tracked so as to reduce the total of additional generation increases that the Companies may request under the RSP [i.e. *Post-MDP Service Case*].” Order at 20 (Appx. 46.). The PUCO previously approved rate adjustments that are “effectively capped at four percent,” and only related to “environmental requirements, security, taxes, and new generation-related regulatory requirements . . . or . . . customer load switches that materially jeopardize . . . generation revenues.” *Post-MDP Service Order* at 20 (Supp. 199.). The Order provides rate increases outside this framework. The Order creates both a new category of costs (i.e. “distribution-related” IGCC research funding) that may be used to increase rates, and fixes costs such that additional rate increases are now certain rather than being set after a Commission hearing to evaluate higher rates based upon the prescribed (non-IGCC) categories of costs. *Id.* at 27 and 37 (Supp. 206 and 216.).¹³ The PUCO should not change the results of the *Post-MDP Service Case* in a manner that increases rates paid by residential and other customers.

¹³ The Order states that “the costs of the IGCC plant are costs that the Companies will incur in their position as POLR,” and that the IGCC plant’s costs are “comparable to the POLR charges that the Commission approved in the Companies’ RSP Order [i.e. the order in the *Post-MDP Service Case*].” Order at 18 (Appx. 44.). The Order therefore makes the OCC’s point that the Companies collaterally attacked the *Post-MDP Service Order*.

The Order, by approving rate increases for IGCC research as payment for “distribution service,” also violates previous orders regarding a freeze in distribution rates. Order at 21 (Appx. 47.). A Commission order in 2000 states that distribution rates shall not be increased until after 2007 for the Ohio Power Company, and after 2008 for Columbus Southern Power. *In re AEP Electric Transition Plan Case*, Case No. 99-1729-EL-ETP, et al., Order at 39 (September 28, 2000) (Supp. 109.), 2000 Ohio PUC Lexis 933. The distribution rate freeze was extended until the end of 2008 for the Ohio Power Company in the *Post-MDP Service Case*. Post-MDP Service Order at 22-23 (January 26, 2005) (Supp. 201-202.). The Order directed the Companies to file tariffs, and the Companies filed such tariffs on April 20, 2006 for an increase in rates to begin in June 2006. Since the distribution rate increase began before the end of 2008, the Order violates the freeze on distribution rates contained within both the electric transition plan and *Post-MDP Service Case*.

The concluding section of the PUCO’s Order provides various rationales for the construction of an IGCC facility that fail to support the PUCO’s conclusion that IGCC construction is required for “a functioning *distribution* system.” Order at 21 (Appx. 47.) (emphasis added). That section discusses the Companies’ Application (Order at 19) (Appx. 45.), which was founded upon the Companies’ response to the PUCO’s request that AEP explore the construction of an IGCC *generator*. Post-MDP Service Order at 27, 37 (January 26, 2005) (Supp. 206 and 216.).¹⁴ The PUCO summarized its considerations, stating:

The Commission agrees that such economic benefits and technological advances are beneficial for the environment, the state of Ohio, the region, and the nation. Further, the Commission finds that, with the recent volatility of natural gas prices, the environmental

¹⁴ The decision in that case stated that it was based on furthering the development of the competitive market, which is inconsistent with the result announced in the Order that favors the use of AEP generation for an extended period of time.

cost of pulverized coal generation facilities, the age of the generating facilities in Ohio, the likely implementation of carbon sequestration legislation, the lead time required to place a generation facility in operation and the life-cycle of generation facilities, the diversification of electric generation facilities is wise.

Order at 20 (emphasis added) (Appx. 46.). These rationales apply to the construction of *generating* facilities, and it is stunning that the PUCO shortly thereafter states that its decision is based upon “ensuring the long-term viability of the *distribution* system.” Id. at 21 (emphasis added) (Appx. 47.). The PUCO did not justify, as required by *Ohio Consumers’ Counsel v. Public Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706 and related cases, a distribution-related need that arose after the conclusion of the *Post-MDP Service Case* that required a change from the Commission-approved freeze on distribution rates.

E. The PUCO demonstrated willful disregard for its duty when it approved a proposal that the PUCO determined was unsupported by the manifest weight of the evidence.

The Order states that Companies failed to justify their plans, yet it authorizes an increase in rates that circumvents any and all valid processes by which the Companies’ plans could result in the establishment of reasonable rates for customers. Pursuant to R.C. 4928.15 (Appx. 105.), “no electric utility shall supply noncompetitive retail electric distribution service in this state ... except pursuant to a schedule for the service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code.” The Revised Code states that it is Ohio policy to “[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.” R.C. 4928.02 (Appx. 100.). The Revised Code also states that “[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law....” R.C. 4905.22 (Appx. 89.). The

Revised Code does not permit the PUCO to approve increased distribution charges to support technology that is favored by AEP when the Companies fail to properly support their Application.

The Order awards millions of dollars to the Companies despite the fact that moving forward with any IGCC facility has not been justified to satisfy any purpose, distribution or otherwise. The utility (in this case, the Companies) must meet its burden of proof regarding rate increases. R.C. 4909.19 (Appx. 97.). The Order states that AEP failed to meet its burden, requiring additional evidence in the event that AEP persists in its plans:

The Commission concludes that AEP should economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application.

Order at 20 (Appx. 46.), also Entry on Rehearing at 15 (Appx. 24.). An increase in rates to support the Companies' favored IGCC technology, despite the lack of evidentiary support for the technology choice relative to other alternatives, violates Ohio law and demonstrates a willful disregard for the PUCO's duty.

The best that the Companies offered regarding the adoption of IGCC technology was speculation regarding future conditions, including "anticipated future emission reduction laws and regulations." Application at 3 (Supp. 3.). However, the Commission again found that the Companies' evidence did not support the Companies' IGCC proposal:

[T]here are other technologies which anticipate removal of carbon dioxide in addition to IGCC (Staff Ex. 3 at 3-4); this technology choice should be explored and subjected to a test of economic comparison in the future phase of this proceeding.

Order at 19 (Appx. 45.). The PUCO's decision was not "about ensuring the long-term viability of the distribution system," but about rewarding the Companies despite their failure to meet their burden of proof.

In the Order's own words, the Companies failed to meet their burden of proof. The Companies have proposed to place Ohio in a race with other states for the implementation of an unproven and unjustified means to provide services to Ohioans. Ohio's General Assembly has prohibited the race, and this Court should reverse the Order that disregards Ohio law.

F. As a creature of statute, the PUCO may only authorize distribution rates that are just and reasonable, and that are consistent with the state policy specified in R.C. Chapter 4928 that requires reasonably priced retail electric service.

The Order failed to satisfy the statutory requirement that charges be “just, reasonable, and not more than the charges allowed by law” R.C. 4905.22 (Appx. 89.). The Order also failed to abide by the requirement that distribution service be “consistent with the state policy specified in section 4928.02 of the Revised Code.” R.C. 4928.15 (Appx. 105.). That policy states that electric customers should have a choice of suppliers and a cost-effective supply of retail electric service (R.C. 4928.02) (Appx. 100.). The policy is supported by the previously mentioned statutes that provide for the competitive supply of generation services (R.C. 4928.05(A)(1)) (Appx. 102.) and that prohibit electric utilities from the long-term ownership of generating plants except through a fully separated affiliate. R.C. 4928.17(A)(1) (Appx. 106.).

1. Customers are charged higher rates but will not receive corresponding benefits from their support of AEP's research.

The Order charges customers for research costs under circumstances where customers will not receive any benefits. Ohio law provides that “an electric utility may divest itself of any generating asset at any time without commission approval.” R.C. Chapter 4928.17(E) (Appx.

106.).¹⁵ The Order charges customers immediately (i.e. the tariffs are already in effect) for costs incurred prior to the engineering, procurement, and construction contract. Order Approving Tariffs at 3 (June 28, 2006) (Appx. 50B.). Production from any resulting IGCC facility could not begin until at least 2010. Application at 5-6 (Supp. 5-6.). AEP based its case in favor of constructing an IGCC plant -- at a premium to the cost of proven technology (Company Ex. 3A at 1 (Braine)) (Supp. 56.) -- on speculation regarding "possible future greenhouse gas legislation." Id. at 3-4. In the event that AEP's speculation proves correct concerning a change in environmental law, the Companies would have a powerful economic incentive to "divest itself . . . without commission approval" (R.C. 4928.17(E)) of its IGCC facility in Ohio. Customers should not be saddled with costs when they could easily be denied all possible benefits by the unilateral action of the Companies to sell the plant. The result is electric service at prices that are not just and reasonable for the Companies' distribution customers.

The Companies cannot be trusted to simply place one or more of the IGCC plants in a specialized rate base for the Columbus Southern Power and the Ohio Power Company for the life of the facilities. At hearing, an AEP witness was asked whether the Companies would willingly waive their ability to sell generation assets without the permission of the Commission, and stated: "There is nothing in this filing that addresses that issue." Tr. Vol. II at 38 (Baker) (Supp. 43.). AEP's witness did not rule out the sale of the IGCC facility, and the Order did not protect customers from being charged for development costs and later being denied any and all benefits

¹⁵ While dealing with a matter that involved the separation of generating units from FirstEnergy's distribution utilities, the Commission emphasized that utilities could divest themselves of their generating assets without PUCO approval. *In re FirstEnergy Application for Determinations Under the Public Utility Holding Company Act*, Case No. 05-678-EL-UNC, Entry at 2, ¶(9) (September 14, 2005) (Supp. 160.). The Entry is quoted elsewhere in this Merit Brief. *Supra* at 13.

from an operational IGCC facility if the plant turned out (with hindsight) to cost less than alternatives.

The Commission should have rejected the Companies' plan because it contains front-loaded costs that must be paid by AEP's Ohio customers if the Companies' IGCC facility is economically unsuccessful, and requires up-front payments by customers without the benefit of access to the IGCC facilities in the long-term if the Companies' generation project is economically successful. The circumstances in the case below show that charging customers to subsidize AEP's preliminary research efforts cannot result in corresponding customer benefits that would support a finding that distribution rates are just and reasonable. Approval of the Companies' IGCC plans has not resulted in a cost-effective supply of retail electric service.

2. The PUCO may not re-regulate generation service in the guise of the regulation of distribution services.

If the Commission does not permit AEP to sell an IGCC plant without permission, contrary to AEP's position as stated in the testimony mentioned directly above, then the alternative interpretation of the Order is that the PUCO intends the "back door" re-regulation of generation services in Ohio. The Order takes a major step towards re-regulation based upon the PUCO's alleged concern that it must oversee the "distribution-related ancillary services" provided by generating plants. The step towards re-regulation in the case below was coupled with the subsidization of AEP's proposal for a generation project that has increased distribution rates above a level that is just and reasonable and is entirely inconsistent with the policy stated in R.C. 4928.02.

AEP's Application was not based upon the need to provide "distribution ancillary services," and these services were never mentioned during the hearing. Application at 1-14 (Supp. 1-14.). The PUCO illegally trampled upon fundamental provisions in the regulation of

the electric utility industry without any record upon which to base its decision. To the extent that the PUCO based its Order on out-of-record information, this Court has previously stated that such action is improper and the resulting decision should be remanded. *Tongren v. Public Util. Comm.* (1999), 85 Ohio St.3d 87, 706 N.E.2d 1255, 1999-Ohio-2006. Furthermore, no reason exists under the reasoning used in the Order for the PUCO's claimed jurisdiction to be limited to AEP's IGCC plant, or limited to AEP's generating plants. Left undisturbed, the Order could turn R.C. Chapter 4928 on its head by permitting PUCO regulation over the generation function of electric utilities based upon the "ancillary services" that were not defined and never discussed at the hearing.

The Order crudely addresses generation planning, not distribution planning. However, the Order fails to provide an organized explanation regarding the need to construct a new generating unit to provide distribution-related services when existing plants are available to provide far more than 600 megawatts of capacity and any associated services. As stated above, the Order fails to explain any distinction between PUCO authority over the proposed IGCC facility and existing generating plants. The subsidization of AEP's research into generation technologies has forced distribution rates paid by the Companies' customers to increase above those that are just and reasonable, and the PUCO's stride towards the re-regulation of the generation function violates Ohio policy as stated in R.C. 4928.02.

3. The Order ignores the Companies' plans to build plants outside Ohio, resulting in excessive rates.

The Order does not provide a proper allocation of costs, and Ohio's retail customers are therefore unfairly charged for AEP's research costs. The future of IGCC construction by the Companies is uncertain, and the Phase I costs should therefore not be collected in up-front

payments by Ohio customers. In the end, development costs may lead to the construction of an IGCC facility in one of Ohio's neighboring states, and part or all of these costs would not be properly allocated to customers located in Ohio. The Companies have held discussions with regulators in other states regarding the IGCC plant (Tr. Vol. I at 203-204 (Baker)) (Supp. 40-41.), and have asked the PJM regional transmission organization to conduct studies regarding sites in Kentucky and West Virginia. *Id.* at 202 (Baker) (Supp. 39.). Since the Companies seek cost assurances before going forward in Ohio (*Id.* at 200) (Supp. 37.), the Order's funding of only Phase I costs will likely help fund projects in other states.

The condition the PUCO placed on AEP's recovery does not adequately address the aforementioned problem. In the event that AEP embarks on a "continuous course of construction . . . within five years," the Companies will surely argue that they need not refund to their Ohio ratepayers any amounts that were collected even though AEP's research work benefited the planning and construction of IGCC facilities outside of Ohio. Entry on Rehearing at 16 (Appx. 25.). The up-front payments by residential customers in Ohio violates the Revised Code, and the Commission's compliance with Ohio's statutes would have prevented the unreasonably priced electric service that has resulted from collections to support AEP's IGCC project.

III. CONCLUSION

The Commission's Order fails to abide by the treatment of competitive and non-competitive services under the Revised Code. The Order fundamentally contravenes Ohio's electric restructuring law, and is *ultra vires* the PUCO's jurisdiction. The Order takes Ohio down a path not provided for under Ohio law, and towards a new long-term structure for the

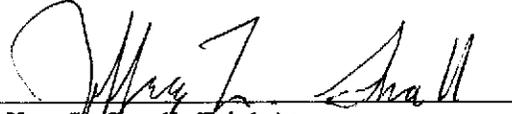
provision of electric generation service for the Companies (if not all of Ohio) that raises many difficult issues that cannot be resolved without legislative action.

For the immediate-term, the PUCO's Order forces customers to pay millions of dollars that will not provide any benefit for customers. By means of a distribution rate increase ordered by the PUCO, AEP's customers have been forced to subsidize the Companies' preliminary research into the construction of an IGCC generation plant that will assist AEP against its potential competitors for the development of generation (IGCC and non-IGCC) projects in Ohio. Ohio law permits developers of generation projects (AEP's affiliates and others) to construct IGCC and other plants in Ohio. However, such generation projects may not lawfully be built using the guarantee provided by the PUCO's approval of higher distribution rates. The fundamental problem with the Commission's Order is that it transfers the risk of planning generating plants from the utility -- where the risk resided both before and after the advent of electric restructuring legislation -- to the consumer without any assurances that a generation plan is least cost or that consumers will not eventually be charged for cost overruns. The Order is illegal on its face (for the myriad of reasons described above), and its findings are unprecedented in the history of Ohio ratemaking.

This Court should reverse the PUCO's decision, and remand this case to the PUCO with instructions that the Commission eliminate rate increases for customers to support for AEP's IGCC proposal. The Commission should be instructed to order refunds of all amounts collected by AEP.

Respectfully submitted,

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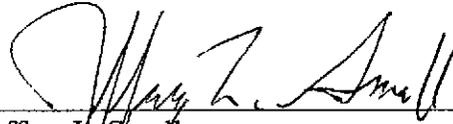


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief and Appendix was served upon the below-listed counsel by first class postage prepaid, U.S. Mail, this 13th day of November 2006.



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IN THE SUPREME COURT OF OHIO
On Appeal From the Public Utilities Commission of Ohio

Industrial Energy Users – Ohio, et al.)	Case No. 06-1594
)	
Appellants,)	
)	
v.)	Appeal from the Public
)	Utilities Commission of Ohio
)	Case No. 05-376-EL-UNC
The Public Utilities Commission)	
of Ohio,)	
)	
Appellee.)	
)	

APPENDIX

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*In the Matter of the Application of Columbus Southern Power Company and Ohio Power
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Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*,
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IN THE SUPREME COURT OF OHIO

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06-1594
PUCO

The Office of the Ohio Consumers' Counsel,)	Case No.
)	
Appellant,)	
)	Appeal from the Public
v.)	Utilities Commission of Ohio
)	
The Public Utilities Commission)	
of Ohio,)	Public Utilities
)	Commission of Ohio
Appellee.)	Case No. 05-376-EL-UNC
)	

**NOTICE OF APPEAL
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FILED
AUG 25 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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Notice of Appeal of Appellant The Office of the Ohio Consumers' Counsel

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11, R.C. 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on April 10, 2006 and Entry on Rehearing entered in its Journal on June 28, 2006 in Case No. 05-376-EL-UNC before the PUCO.¹

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of the Columbus Southern and Ohio Power Companies (the "AEP" companies, or the "Company"). Appellant was a party of record in the case before the PUCO. On May 10, 2006, pursuant to R.C. 4903.10, Appellant timely filed an Application for Rehearing from the April 10, 2006 Opinion and Order. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on June 28, 2006.

Appellant files this Notice of Appeal, complaining and alleging that Appellee's April 10, 2006 Opinion and Order and June 28, 2006 Entry on Rehearing result in a final order that is unlawful and unreasonable, and that Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

¹ The PUCO also issued an interim entry on June 6, 2006 that granted all applications for rehearing (including those of AEP and the OCC) in order to provide the PUCO more time to consider the arguments made for rehearing.

- 1) The PUCO May Not Increase The Rates Customers Pay To A Distribution Utility So That It May, In Its Provider Of Last Resort Capacity, Construct A Generating Facility.
 - A. The PUCO may not approve the collection from customers of amounts for generation-related costs that are not within the PUCO's jurisdiction.
 - B. The PUCO may not permit the violation of the requirement contained in R.C. 4928.17 that an Ohio electric utility may not supply a competitive retail electric service.
 - C. The PUCO may not approve part of an application that did not follow requirements contained in R.C. 4928.14 and R.C. Chapter 4909 regarding the pricing of generation service.
 - D. The PUCO failed to follow its own rules as provided in Ohio Adm. Code 4901:1-35 regarding the provision of competitive retail electric services.

- 2) The PUCO May Not Increase The Distribution Rates Customers Pay To A Utility In Violation of Ohio Law, Including Statutes That Limit The PUCO's Authority Regarding Distribution Rate-Making.
 - A. The PUCO may not provide an *a priori* regulatory approval that violates Ohio law, including R.C. 4909.15 that limits allowances for utility plant that is not used and useful for the provision of utility service to customers.
 - B. The PUCO failed to follow the ratemaking procedures for non-competitive services required pursuant to R.C. Chapters 4905 and 4909.
 - C. The PUCO is a creature of statute and may not approve an adjustment to distribution rates that does not abide by any legislated cost recovery mechanism by which the PUCO is empowered to increase the rates that customers pay.
 - D. The PUCO may not order an increase in the distribution rates that customers pay, based upon AEP's efforts to develop a generating plant, that fails to respect the PUCO's own precedents that froze AEP's distribution rates.

- E. The PUCO may not order an increase in the distribution rates that customers pay, based upon AEP's efforts to develop a generating plant, that fails to recognize the doctrine of collateral estoppel.
- F. The PUCO may not authorize part of a proposal that the PUCO determined was not supported by the evidence, resulting in electric distribution service that is not reasonably priced.
- G. The PUCO may not authorize distribution rate increases that do not properly match customer benefits, resulting in electric service that is not reasonably priced.

WHEREFORE, Appellant respectfully submits that the Appellee's April 10, 2006 Opinion and Order and June 28, 2006 Entry on Rehearing are unreasonable and unlawful. This Court should reverse, vacate or modify Appellee's decision, and remand this case with instructions to correct the errors complained of herein.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL

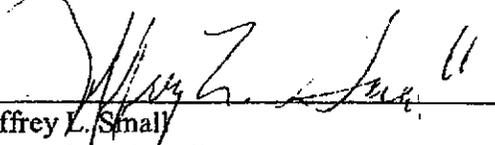


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of the proceedings before the Public Utilities Commission and pursuant to section 4903.13 of the Ohio Revised Code by hand-delivery or regular U.S. Mail this 25th day of August, 2006.



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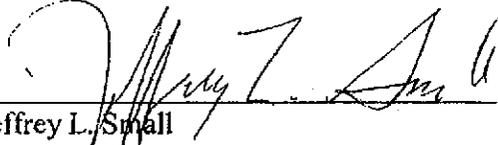
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CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



Jeffrey L. Small
Counsel for Appellant
Office of the Ohio Consumers' Counsel

**APPENDIX E. CASE INFORMATION STATEMENT
IN THE SUPREME COURT OF OHIO**

Case Information Statement

Case Name: The Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.	Case No.: On Appeal from PUCO Case No. 05-376-EL-ATA
--	--

I. Has this case previously been decided or remanded by this Court? No Yes
 If so, please provide the Case Name: _____
 Case No.: _____
 Any Citation: _____

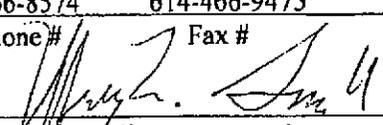
II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes No
 If so, please provide the Case Name and Citation: See attached _____

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes No
 If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:
 U.S. Constitution: Article _____, Section _____ Ohio Revised Code: See attached _____
 Ohio Constitution: Article _____, Section _____ Court Rule: _____
 United States Code: Title _____, Section _____ Ohio Adm. Code: See attached _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):

1) Regulatory law (esp. R.C. Chapters 4903, 4905, 4909, and 4928) _____
 2) Collateral estoppel _____
 3) _____

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes No
 If so, please identify the Case Name: See attached _____
 Case No.: _____
 Court where Currently Pending: _____
 Issue: _____

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Appendix E, Section II (cont.)

Ohio Supreme Court Cases:

Canton Storage and Transfer Co. v. Pub. Util. Comm. (1995), 72 Ohio St.3d 1.

Cleveland Elec. Illum. Co. v. Pub. Util. Comm. (1975), 42 Ohio St.2d 403.

Consumers' Counsel v. Pub. Util. Comm. (1985), 16 Ohio St.3d 9.

Consumers' Counsel v. Pub. Util. Comm. (1984), 10 Ohio St.3d 49.

Consumers' Counsel v. Pub. Util. Comm. (1979), 58 Ohio St.2d 449.

Pike Natural Gas v. Pub. Util. Comm. (1981), 68 Ohio St.2d 181.

Tongren v. Pub. Util. Comm. (1999), 85 Ohio St.3d 87.

Ohio Revised Code Sections:

R.C. 4903.09

R.C. 4905.22

R.C. 4909.15

R.C. 4909.18

R.C. 4909.43

R.C. 4928.02

R.C. 4928.05

R.C. 4928.14

R.C. 4928.15

R.C. 4928.17

Ohio Adm. Code:

Ohio Adm. Code 4901:1-35

Appendix E, Section IV (cont.)

Related Pending Cases:

Case Name: *Office of the Consumers' Counsel v. Pub. Util. Comm.*

Case No.: 2005-0946 and 2005-0518 (consolidated appeals)

Court where Currently Pending: Ohio Supreme Court

Issue: Whether PUCO's Finding and Order was unreasonable and unlawful regarding the PUCO's jurisdiction over competitive electric services, the separation of corporate control over the provision of competitive and non-competitive services, and proper PUCO procedures for dealing with competitive and non-competitive rate setting.

the consolidated memorandum contra no later than May 22, 2006.

- (5) On May 10, 2006, AEP-Ohio filed a request for clarification of the opinion and order in this case. IEU, Solutions, OCC, Ohio Partners for Affordable Energy (OPAE), Direct and OEG filed responses or memorandum contra the request for clarification.
- (6) By entry issued May 10, 2006, AEP-Ohio's motion for an extension to file its memorandum contra the applications for rehearing was granted.
- (7) On May 22, 2006, AEP-Ohio filed a memorandum contra the motions for rehearing. On that same day, IEU filed a motion to strike the memorandum contra filed by AEP-Ohio.
- (8) On June 6, 2006, the Commission found that the AEP-Ohio request for clarification should be treated and considered as an application for rehearing. In that Entry, the Commission granted IEU's, Solutions', Direct's, OEG's, OCC's and AEP-Ohio's applications for rehearing. The Commission stated that sufficient reason had been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing.

Motion to strike

- (9) In its motion to strike, IEU acknowledged that AEP-Ohio was granted a two-day extension of time to file a response to the rehearing applications. However, IEU argues that, with the extension, the memorandum contra was due no later than Friday, May 19, 2006, as Rule 4901-1-35, Ohio Administrative Code (O.A.C.), requires that the memorandum contra be filed "within ten days after the filing of an application for rehearing." IEU states that Rule 4901-1-07, O.A.C.,¹ does not apply to applications for rehearing and memorandum contra applications for rehearing. By entry issued May 10, 2006, IEU argues that AEP-Ohio was granted only "an extension of no

¹ Rule 4901-1-07(A), O.A.C., states: Unless otherwise provided by law or by the Commission:

(A) In computing any period of time prescribed or allowed by the commission, the date of the event from which the period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday, or legal holiday, in which case the period of time shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday.

more than two days" to file its memorandum contra. Therefore, IEU contends the memorandum was filed out of time and should be stricken.

- (10) AEP-Ohio states that its motion was clearly for an extension of time to allow the Companies to file a single memorandum contra by no later than May 22, 2006. AEP-Ohio argues that Rule 4901-1-35, O.A.C., does not make reference to memoranda contra an application for rehearing and, therefore, does not apply to such memoranda. According to AEP-Ohio's rationale the two day extension would have made the memorandum contra due on Saturday, May 20, 2006. Therefore, AEP-Ohio reasons that Rule 4901-1-07, O.A.C., is applicable, and the memorandum is due on the next business day, Monday, May 22, 2006.
- (11) The Commission agrees that the request for an extension of time to file its memorandum was clearly for an extension until Monday, May 22, 2006. We note that the introductory phrase in Rule 4901-1-07, O.A.C., provides that the application of time, as set forth in each paragraph of the rule, is applicable "unless otherwise provided by law or the commission..." Therefore, the entry granting AEP-Ohio's request for a 2 day extension caused the memorandum to be due the next business day, Monday, May 22, 2006. AEP-Ohio's memorandum contra was timely filed and IEU's motion to strike should be denied.

Proprietary Information in the Record

- (12) OCC argues that the attorney examiners and the Commission incorrectly allowed AEP-Ohio and GE/Bechtel to redact certain information from documents ultimately introduced into evidence. In OCC's application for rehearing, OCC acknowledges that GE/Bechtel redacted certain information from documents introduced into evidence but contends that the Commission failed to reduce the amount of information redacted. OCC continues to argue that the pleadings of GE/Bechtel and AEP-Ohio failed to include the requisite specificity. Therefore, OCC argues that the Commission incorrectly shielded large amounts of information from public scrutiny and requests that the Commission correct or modify its decision on rehearing.

- (13) AEP-Ohio responds that nearly one quarter of the Order addressed the treatment of the proprietary information filed in this case. AEP-Ohio acknowledges that Ohio's policy favors public access to information filed with state agencies. However, the Companies argue that OCC's position, that all information should be made available to the public, will have a chilling effect on technology companies that may wish to participate in Ohio markets. AEP-Ohio posits that it is necessary that the Commission carefully balance the competing interest between public access to information and a vendor's right to maintain the confidentiality of commercially valuable trade secret information. The Companies request that the Commission deny rehearing of this issue.
- (14) The Commission notes that OCC is merely reiterating the same arguments raised in its briefs. After consideration of the issues raised, applicable law and the process implemented under the circumstances, we continue to conclude that the redacted information meets the exemption requirements of Section 149.43, Revised Code. Thus, OCC's request for rehearing of this issue is denied.

Request for Administrative Notice

- (15) IEU requests that the Commission take administrative notice of certain pages filed in AEP-Ohio's long-term forecast report (LTFR) docketed at Case No. 05-501-EL-FOR, *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters* and Case No. 05-502-EL-FOR, *In the Matter of the Long-Term Forecast Report of Columbus Southern Power Company and Related Matters* (jointly AEP-Ohio 2005 LTFR) filed on April 15, 2005. More specifically, IEU asks that the Commission take administrative notice of two pages of specific questions from the Special Topics section, including AEP-Ohio's responses thereto.² IEU argues that AEP-Ohio's responses confirm IEU's representations that AEP-Ohio is subject to its regional transmission organization's (RTO) ancillary services. IEU states that, during the course of the proceeding, IEU encouraged the Commission to examine the role of the RTO and the RTO's requirements for reliability and how such ancillary service obligations are met. Further, IEU concludes that the

² AEP-Ohio 2005 LTFR, Special Topics, pp. 8-9.

Companies' responses contradict the Commission's finding that the proposed IGCC facility will provide ancillary distribution services.

- (16) As IEU admits, AEP-Ohio's responses to issues raised in its 2005 LTFR cases were public and available to the parties at the time of the hearing.³ IEU had an opportunity to attempt to introduce into the record AEP-Ohio's responses in the 2005 LTFR before the closing of the record. Therefore, the Commission finds that it is improper to take administrative notice of the Companies' responses in the AEP-Ohio 2005 LTFR, at this point in the proceeding. Accordingly, IEU's request for administrative notice is denied.

Due Process

- (17) IEU claims that the Commission Staff's position in regard to distribution functions and the POLR responsibility was first offered in its reply brief and the Commission based its decision on the position argued by Staff. Accordingly, IEU claims it had no meaningful opportunity to cross-examine Staff or to rebut Staff's position and was deprived of any opportunity to determine what data, information or facts the Staff reviewed or considered in support of its recommendation. IEU argues that the Staff must offer its recommendations to the Commission in the public evidentiary record by report or testimony pursuant to Section 4901.16, Revised Code. Accordingly, IEU argues that it was denied fundamental due process.
- (18) AEP-Ohio counters that IEU cross-examined Staff witnesses as well as AEP-Ohio witnesses Baker and Walker. AEP-Ohio states that Companies' witnesses Baker and Walker specifically presented testimony that the proposed facility was necessary to support AEP-Ohio's distribution function. AEP-Ohio notes that IEU's counsel questioned Staff witnesses about the Companies' POLR obligation. Therefore, AEP-Ohio states that IEU has no due process claims to raise in this matter.
- (19) The Commission finds that IEU's claim, that it was denied fundamental due process, is without merit. Section 4901.16,

³ The evidentiary hearing commenced on August 8, 2005 and continued each business day through August 16, 2005.

Revised Code, is not applicable in this case.⁴ Staff sponsored witnesses and cross-examined the witnesses of other parties. As any other party to this case was permitted to do, Staff filed an initial and reply brief. Staff's brief summarizes significant aspects of the record that support Staff's position. The purpose of any brief is to persuade the Commission. However, as IEU states, briefs are not evidence. While the Commission may be persuaded by a party's arguments presented on brief, the Commission bases its decision on the record evidence. Therefore, IEU's request for rehearing is denied.

Corporate Separation

- (20) Direct, Solutions, and OCC argue that AEP-Ohio's application violates Section 4928.17, Revised Code, which requires that an electric distribution utility (EDU) supply non-competitive retail electric services and competitive retail electric services through separate affiliates. OCC asserts that mere ownership of a generation plant by an EDU is prohibited and further that the Order conflicts with the Companies approved corporate separation plan. Solutions concedes, on brief, that an EDU may own a generation facility; however, Solutions posits that the EDU must offer its retail generation services through a separate business entity. Direct and Solutions state that Section 4928.17, Revised Code, does not include an exemption for "non-competitive generation service" or generation that will be used to serve POLR customers. Therefore, the applicants for rehearing of this issue argue that any provision of generation service must be offered through a separate affiliate, not AEP-Ohio.
- (21) The Commission believes the applicants for rehearing of this issue continue to focus on the type of facility as opposed to the purpose. The primary purpose for the proposed facility is to provide distribution ancillary services and to meet POLR obligations. The Commission agrees, as AEP-Ohio argues, that

⁴ Section 4901.16, Revised Code, states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.

Section 4928.17, Revised Code, does not prohibit the Companies from owning the proposed facility or providing services from the facility to meet the Companies' POLR obligations. The Commission notes that in its memorandum contra the Companies confirm that they "intend to use the power generated to fulfill their POLR obligation." The Commission is not convinced by the rehearing applicants' arguments that the purpose for the facility is irrelevant. The purpose for the proposed facility is to permit CSP and Ohio Power to meet their POLR obligation to customers within the Companies' respective service territory. Therefore, the Commission denies the applicants' requests for rehearing of the Order as to Section 4928.17, Revised Code.

Section 4903.09, Revised Code

- (22) Direct, Solutions and IEU each argue that the Order violates Section 4903.09, Revised Code. Section 4903.09, Revised Code, states:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Direct contends that the record does not contain any testimony or evidence that the proposed IGCC facility is necessary to support the Companies' ancillary services. Further, Direct states that the Order fails to present the Commission's rationale for its conclusion that "[t]he EDU is the POLR for consumers who either fail to choose an alternative supplier or return from another supplier." Solutions argues that the Commission failed to support its characterization of the application in the Order as "providing the distribution ancillary services ... necessary to support the distribution function" as required by Section 4903.09, Revised Code. Similarly, IEU argues that the Order fails to set forth sufficient facts and law to authorize AEP-Ohio to increase customer rates for pre-construction cost of the proposed IGCC facility.

- (23) AEP-Ohio notes that the Ohio Supreme Court has held that "where enough evidence and discussion in an order to enable the PUCO's reasoning to be readily discerned, this Court has found substantial compliance with R.C. 4903.09..." *MCI Telecommunications Corp. v. Pub. Util. Comm'n* (1988), 38 Ohio St.3d 266, 270, 527 N.E.2d 777. Further, AEP-Ohio notes that the Court has stated that the purpose of Section 4903.09, Revised Code, is to provide the Court with sufficient details to determine, upon appeal, how the Commission reached its decision. *Migden-Ostrander v. Pub. Util. Comm'n* (2004), 102 Ohio St.3d 451, 455, 812 N.E.2d 955. AEP-Ohio contends that the Commission's reasoning is readily discernable and the Order includes sufficient details to enable the Court to determine how the Commission reached its decision, if the case is appealed. AEP-Ohio reasons that the interveners object to the decision and how the Commission came to the decision, not that the interveners are unable to determine how the Commission reached its decision.
- (24) The Commission notes that the Order includes six pages of discussion of the Commission's jurisdiction, including the views of the parties, and the Commission's interpretation of the law. The Order includes three findings of fact and conclusions of law that address the Commission's authority over distribution ancillary services, an EDU's POLR obligation and the Commission's authority to establish rates and charges. See findings 7-9 of the Order. Thus, we believe that our Order complies with Section 4903.09, Revised Code, as explained in *MCI Telecommunications Corp.*

Section 4928.14, Revised Code

- (25) Solutions argues, as it did on brief, that approval of the application violates Section 4928.14, Revised Code. Solutions opines that Section 4928.14, Revised Code, requires that POLR services be based on market prices. Solutions argues that the Order approving AEP-Ohio's application does not provide for the POLR service to be based on market prices. The proposed IGCC facility is, by definition, according to Solutions, a generation facility. Solutions reasons that such fact is not distinguishable based on the purpose for the facility - POLR generation service. Solutions and Direct posit that the IGCC

Recovery Factor and the IGCC Adjustment Factor, as proposed by the Companies and approved by the Commission, will not constitute a market-based price.

- (26) OEG, likewise, postulates that the proposed IGCC facility, does not meet the definition of distribution ancillary services as set forth in Section 4928.01(A)(1), Revised Code.⁵ OEG reasons that, although a small portion of the 629 MW generation facility may be used to provide distribution ancillary services, the vast majority of the facility will be engaged in the generation of electric power which is a competitive service, as defined in Section 4928.03, Revised Code.

Similarly, Solutions postulates that the Commission's conclusion, that the generation facility would provide ancillary services necessary to support distribution reliability and, thus, the EDU's POLR obligations, is flawed. Solutions reasons that the Order fails to recognize the distinction between distribution ancillary services, which fall under the Commission's jurisdiction, and transmission ancillary services, which are within the exclusive jurisdiction of the Federal Energy Regulatory Commission. Further, Solutions argues that the analysis is not supported by the physical structure of the facility. Solutions notes that the proposed facility will interconnect with high voltage transmission lines as opposed to distribution voltage of the distribution system. Solutions reasons, therefore, that the generation facility will support transmission-related ancillary services, not distribution ancillary services.

- (27) The arguments raised by Solutions, Direct and OEG do not persuade the Commission that their requests for rehearing on this aspect of the Order should be granted. The Commission believes that the Order thoroughly sets forth its rationale for concluding that the proposed facility will support ancillary distribution services, the Commission's jurisdiction over distribution services and the necessity to ensure the reliability of

⁵ "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; load following back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

the distribution system. See Order at pp. 17-18. Therefore, we will not repeat our rationale here. Rehearing is denied.

Ratemaking Statutes

- (28) Direct argues that the Commission lacks the authority to establish cost-based rates for retail generation service under Chapters 4905 and 4909 of the Revised Code. Thus, Direct asserts that the Commission unlawfully expanded its scope of authority in this Order. Direct argues that even if Chapter 4909, Revised Code, applied, the Phase I costs do not represent construction work in progress, but pre-construction costs related to preliminary activities. Solutions and OCC argue that the Order fails to comply with Section 4909.15, Revised Code, which requires that a construction project be at least 75 percent complete before a portion of the value of the project is included in rates. OCC and Solutions insist that the Phase I costs are subject to ratemaking statutes at Chapter 4909, Revised Code.

OCC argues that the approved Phase I surcharge is unlawful to the extent that the Order does not comply with Section 4928.15, Revised Code, and the application was not filed pursuant to Section 4909.18, Revised Code. OCC further argues that the Order is unreasonable as to the rates to be imposed on residential customers, especially CSP residential customers, and unlawful as it contradicts the Companies' electric transition plan (ETP) order at Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, (Order issued September 28, 2000) and the Companies' rate stabilization plan (RSP) at Case No. 04-169-EL-UNC, *In the Matter of the Application of Columbus Southern Power company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan* (Order issued January 26, 2005 and Entry on Rehearing issued March 23, 2005). OCC argues the

application is inconsistent with Ohio utility policy set forth in Section 4928.02, Revised Code.⁶

- (29) AEP-Ohio responds that the protracted ratemaking rules and procedural requirements set forth in Chapter 4909, Revised Code, are not applicable to charges incurred to fulfill the Companies' POLR obligation. As discussed in the Order, AEP-Ohio bases its arguments on the Court decision in *Constellation New Energy, Inc. Pub. Util. Comm.* (2004), 104 Ohio St. 3d 530, 539, 2004-Ohio-6767, 820 N.E.2d 885 (*Constellation*).
- (30) The Commission agrees with AEP-Ohio that the ratemaking statutes are not applicable in this proceeding. Further, as we noted in the Order, the IGCC revenues collected through the Phase I surcharge will be tracked and will offset additional generation increases that the Companies would otherwise be permitted to request pursuant to the RSP decisions.⁷ Accordingly, we find that our decision in this case is compatible with our decision in AEP-Ohio's RSP case.

As to OCC's claims of the effect on residential customers, we note that the Phase I charge is bypassable. While percentage of income payment plan (PIPP) customers are not eligible to receive service from a competitive retail electric service (CRES) provider, the PIPP customer's payment is determined by the PIPP customer's income. Accordingly, PIPP customers will not be affected by the institution of Phase I cost recovery in the short-term. The Commission continues to be supportive of electric retail competition in Ohio. It is imperative that Ohio's consumers are ensured that should they select a CRES provider, and the CRES provider defaults, those consumers will continue to receive electric service. EDUs provide the customers in their service area with such electric "insurance" as the POLR. The Commission, by assuring that EDUs are complying with their POLR obligations is supporting the principles of Section 4928.02, Revised Code, and the state's energy policies. Thus, we deny the applications for rehearing on these issues.

⁶ Section 4928.02, Revised Code, in relevant part, sets forth the State policy to:
Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.

⁷ Order at p. 20.

- (31) Direct states that the Order is unlawful to the extent that the Commission found that the EDU is the POLR for consumers who fail to select a CRES provider. Direct argues that Section 4928.14, Revised Code, merely requires the EDU to provide a market-based standard service offer and, at paragraph C, requires that customers returning to the EDU's service be offered a market-based rate. In support of Direct's "risk of return" definition of POLR, Direct cites the Ohio Supreme Court's decision in *Constellation New Energy, Inc. Pub. Util. Comm.* (2004), 104 Ohio St. 3d 530, 539, 2004-Ohio-6767, 820 N.E.2d 885 (Constellation). Footnote number five in *Constellation* states:

POLR costs are those costs incurred by [the EDU] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to DP&L for generation service.

- (32) The Commission notes that the above quoted footnote from which Direct extracts its interpretation of the decision in *Constellation* is part of the discussion of the rate stabilization surcharge (RSS) in which the order states "the Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers." (Emphasis added). The Court found no error in the Commission decision upholding the reasonableness and legality of the RSS mechanism. We believe Section 4928.14, Revised Code, supports this interpretation. Section 4928.14, Revised Code, states, in part:

An electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service ...

Based on the plain meaning of the language used in the statute, the Commission believes that all customers, including those customers that consciously elect to continue to receive electric service from the EDU, in this case CSP or Ohio Power, are entitled to the market-based standard service offer. However, Direct's interpretation of the POLR obligation is one-sided. The Commission views the POLR obligation, as "insurance" for customers returning to the EDU's standard service offer and

encouragement for all customers to participate in Ohio's competitive electric market. For these reasons, the Commission denies Direct's application for rehearing of this aspect of the Order.

- (33) Solutions and OEG assert that approval of AEP-Ohio's application grants AEP-Ohio a competitive advantage. OEG argues that the Order does not comply with Section 4928.38, Revised Code, which requires the utility to terminate receipt of transition revenues and to be self-reliant in the competitive market after the market development period. OEG contends that AEP-Ohio's distribution customers will be forced to pay above-market prices for the proposed facility, which discourages competition and creates undue market power for AEP-Ohio.
- (34) The Commission disagrees that the implementation of the Phase I surcharge will harm competition. The Phase I surcharge is bypassable and will likely induce some customers to shop for electric service. The Commission is encouraged that some customers will enter into new agreements for service from CRES providers. Thus, we were not convinced by the interveners' arguments that approval of Phase I harms competition on brief and the interveners' have not presented any reasons for the Commission to change its position on rehearing. Thus, the request for rehearing is denied.

Issues for the next phase of this proceeding

- (35) OCC argues on rehearing that the Order approves Phase I cost recovery for a facility that the Companies can sell at any time pursuant to Section 4928.17, Revised Code. According to the application, CSP and Ohio Power will jointly own the proposed IGCC plant. As the Order indicated, additional hearings are necessary to consider AEP-Ohio's request for Phase II and III cost recovery. The Commission finds that the transfer of any portion of the ownership of the proposed facility, to any entity other than CSP and/or Ohio Power, is an issue that should be addressed in the next phase of this proceeding. Accordingly, OCC's request for rehearing on this aspect of the Order is denied, at this time.

- (36) Direct asserts that the Order is unreasonable to the extent that it fails to instruct AEP-Ohio to consider alternative means to meet the Companies' long-term POLR obligation. Direct requests that the Companies be instructed to investigate and present, before the next phase of this proceeding, information regarding AEP-Ohio's future need for base load generation, the timeline to fulfill that need and an analysis of future estimated shopping rates and the concurrent POLR obligation. AEP-Ohio already must address, as a part of the next phase of this proceeding, the Companies future need for base load generation, the timeline to fulfill that need an analysis of future estimated shopping rates and the concurrent POLR obligation. Such information is a subset of the directives included in the Order in regards to how the output of the proposed facility would benefit Ohio customers. Direct's remaining requests are to wait until a decision is made on the location of the FutureGen project, to establish a stakeholders working group, and to consider incentives for all industry competitors. We find that such considerations are not directly relevant to consideration of AEP-Ohio's application; the requests for rehearing are denied.
- (37) Direct argues that the Order is unlawful as it fails to determine whether approval of Phase I cost recovery jeopardizes funding under the Energy Policy Act of 2005.⁸ We deny Direct's request for rehearing regarding this single aspect of the funding that is potentially available for the IGCC facility. The Commission's Order specifically directed AEP-Ohio to determine its eligibility for funding from various sources, not just from the Energy Policy Act of 2005. Therefore, we find it inappropriate to make a determination on this single source of funding before AEP-Ohio determines its eligibility for multiple sources of funding.

Request for Clarification

- (38) AEP-Ohio's request for clarification specifically notes four areas that require clarification. The first refers to the statement in the April 10 opinion and order that additional hearings will be

⁸ The Energy Policy Act, Title IV, Subtitle A, Section 414 states:

The Secretary is authorized to provide loan guarantees for a project to produce energy from a plant using integrated gasification combined cycle technology of at least 400 megawatts in capacity that produces power at competitive rates in deregulated energy generation markets and that does not receive any subsidy (direct or indirect) from ratepayers.

necessary. AEP-Ohio requests that any additional hearings be conducted on an expedited basis and be limited to issues delineated in the opinion and order. AEP-Ohio offers that extensive discovery has already been collected, and thereby only needs to be updated; and that AEP-Ohio's contractual rights with the plant's contractors cannot be held indefinitely. AEP-Ohio next requests clarification that it can collect any monies spent subsequent to the conclusion of Phase I activities, and up to the time the IGCC project is shut down, if the outcome of the second round of hearings results in the Companies not constructing the plant. This recovery would include the costs associated with shutting down the project, along with carrying charges. AEP-Ohio asserts that it is likely that it will enter into a contract for a construction plan and move forward with the project during the pendency of this proceeding. AEP-Ohio states that if recovery of these costs is not assured, that construction postponement or termination of the project must be considered due to regulatory uncertainties. AEP-Ohio further requests that the Commission clarify that it will not revisit the decision that AEP-Ohio may recover its reasonable costs through the three-phase recovery plan, if AEP-Ohio goes forward with the construction. Finally, AEP-Ohio requests clarification that any declaration of competitiveness in regard to the provision of ancillary services from generating plant would not impact regulatory authority and cost recovery with this plant.

- (39) In its opinion and order, this Commission approved the Phase I cost recovery mechanism of AEP-Ohio's application. The Commission further found that it has the authority to establish a charge related to the construction and operation of an IGCC generating plant, as described in AEP-Ohio's application, for recovering the costs of fulfilling the POLR obligation. However, the Commission also found that AEP-Ohio must "economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open..." and listed certain issues that needed to be addressed in the next phase of the proceeding. The Commission clearly reserved the right to consider and determine the feasibility and prudence of this project based on a record that included the details of the proposal. Future recovery of sunk costs based on termination of the project will depend on the reasons for the termination and cannot be

decided at this time. AEP-Ohio's first three requests for clarification require determinations beyond the Phase I cost recovery. The Commission remains supportive of an IGCC plant being built in Meigs County, Ohio for POLR purposes, but we believe the best method to expedite and advance the project is for AEP-Ohio to file the details of its proposal as to budgets, designs, feasibility studies and financing options. The first three requests for clarification should be denied. In regard to the fourth request for clarification, the Commission reiterates that although Section 4928.04(A), Revised Code, contemplates that the Commission may consider, at some time, relinquishing its regulatory obligations as to ancillary service, we believe the POLR responsibility cannot be left unregulated, as it must be available if the market option fails. Therefore, the fourth request for clarification should be denied, as this Commission cannot take any further action on this matter at this time.

Summary and Conclusions

- (40) The Commission notes that AEP-Ohio's tariff for collection of Phase I charges is being approved today. All Phase I costs will be the subject of subsequent audit(s) to determine whether such expenditures were reasonably incurred to construct the proposed IGCC facility in Ohio. AEP-Ohio's request for clarification does raise the issue of the status of the Phase I charges that are collected. Although we continue to find that AEP-Ohio should be permitted to recover the reasonable costs of further developing and detailing the project proposal, the Commission believes that there may be elements of the design and engineering that may be transferable to other projects. Therefore, we find that if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest.

It is, therefore,

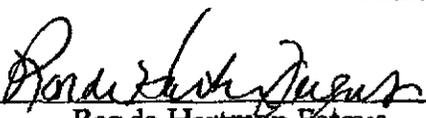
ORDERED, That if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest. It is, further,

ORDERED, That all requests for rehearing and AEP-Ohio's motion for clarification are denied. It is, further,

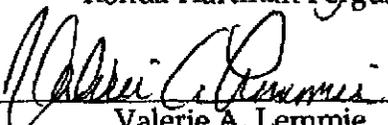
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

Judith A. Jones

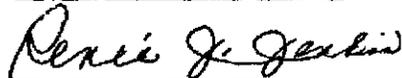

Valerie A. Lemmie

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Entered in the Journal

JUN 28 2006



Renee J. Jenkins
Secretary

John W. Bentine, Joseph C. Pickens and Bobby Singh, Chester, Wilcox & Saxbe, LLP, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of American Municipal Power-Ohio, Inc.

Sally W. Bloomfield and Thomas J. O'Brien, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215-4291; and Joseph Condo, Calpine Corporation, 250 Parkway Drive, Suite 380, Lincolnshire, Illinois 60069, on behalf of Calpine Corporation.

M. Howard Petricoff, Stephen Howard and Michael Settineri, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Constellation Generation Group, LLC, Constellation Energy Commodities Group, Inc., Constellation NewEnergy Inc., and Beard Generation, LLC.

Michael D. Dortch, Baker & Hostetler, Capitol Square, 65 East State Street, Suite 2100, Columbus, Ohio 43215-4260, on behalf of General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation.

David C. Rinebolt, 237 South Main Street, 4th Floor, Suite 5, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

David Boehm and Michael L. Kurtz, Boehm, Kurtz & Lowry, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202-4454, on behalf of Ohio Energy Group.

Thomas L. Rosenberg and Jessica L. Davis, Roetzel & Andress, LPA, National City Center, 155 East Broad Street, 12th Floor, Columbus, Ohio 43215, on behalf of the International Brotherhood of Electrical Workers Local #970, Ironworkers Local #787; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local #168, Parkersburg-Marion Building and Construction Trades Council AFL-CIO.

Thomas Lodge, Thompson Hine, LLP, One Columbus, 10 West Broad Street, Suite 700, Columbus, Ohio 43215-3435, on behalf of Global Energy and Lima Energy Company.

Dane Stinson and William A. Adams, Bailey, Cavaliere, LLC, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC.

Evelyn R. Robinson, 5450 Frantz Road, Suite 240, Dublin, Ohio 43016, on behalf of Green Mountain Energy Company.

OPINIONHistory of the Proceeding

On March 18, 2005, Columbus Southern Power Company (CSP) and Ohio Power Company (Ohio Power) (collectively AEP, AEP Companies or Companies) filed an application with the Commission for approval of a mechanism to recover the costs associated with the construction and operation of an integrated gasification combined cycle (IGCC) electric generation facility in Ohio. The Companies request approval of its proposed cost recovery mechanism to provide for the design, construction and operation of a 629¹ [net] megawatt (MW) electric generation facility in Meigs County, Ohio. The AEP Companies have concluded that the facility is necessary to allow the Companies to provide a firm supply of generation service to the Companies' Ohio customers. The Companies contend that they must be ready and able to provide firm, generation service to customers who have not selected a competitive retail electric service (CRES) provider and any customer who returns to the AEP Companies' service as a result of the CRES provider's default or at the customer's election. The Companies contend that the proposed IGCC facility will allow the companies to help meet their respective obligations as the provider of last resort (POLR). The Companies are proposing to recover the costs of the IGCC facility in three phases to continue throughout the commercial life of the facility. Further details of the Companies' proposal are provided below.

On April 12, 2005, a conference was held to develop the procedural schedule for this case. The procedural schedule was published by entry issued April 19, 2005. The procedural schedule was established as follows: the Companies' testimony was due by May 5, 2005; a technical conference was scheduled for May 16, 2005; motions to intervene were due by July 1, 2005; intervenor testimony was due to be filed by July 13, 2005; all discovery requests were to be submitted by the parties by no later than July 25, 2005; staff testimony was due by July 25, 2005; the Companies supplemental testimony was due by August 1, 2005; and the evidentiary hearing was scheduled to begin on August 8, 2005.

Motions to intervene were timely filed by Industrial Energy Users-Ohio (IEU); Ohio Energy Group (OEG); FirstEnergy Solutions Corporation (FirstSolutions); Ohio Consumers' Counsel (OCC); Calpine Corporation (Calpine); Global Energy and Lima Energy Company (jointly Lima Energy); International Brotherhood of Electrical Workers Local #970, Ironworkers Local #787; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local #168, Parkersburg-Marion Building and Construction Trades Council AFL-CIO, (collectively the Unions); Direct Energy Services, LLC (Direct Energy); Baard Generation, LLC (Baard); Ohio Partners for Affordable Energy (OPAE); Constellation Generation

¹ Subsequent to the filing of the initial application, the Companies revised the facility output from 600 MW to 629 MW. See Company Ex. 5-B at 4.

Group, LLC, Constellation Energy Commodities Group, Inc., and Constellation NewEnergy Inc. (jointly Constellation); and Green Mountain Energy Company (Green Mountain). All of the requests for intervention were granted. American Municipal Power-Ohio, Inc. (AMP-Ohio) filed a late request for intervention. Nonetheless, AMP-Ohio's request was granted. Pursuant to entry issued August 1, 2005, General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation (jointly GE/Bechtel) were granted limited intervention in this matter for the purpose of protecting their interest in certain confidential and proprietary documents exchanged as a part of the discovery process.

On May 5, 2005, the AEP Companies filed testimony in support of the application. The AEP Companies filed the direct testimony of Kevin E. Walker (Company Ex. 1), J. Craig Baker (Companies Ex. 2), Bruce H. Braine (Companies Ex. 3), Michael J. Mudd (Companies Ex. 4), William M. Jasper (Companies Ex. 5), Philip J. Nelson (Companies Ex. 6), David M. Roush (Companies Ex. 7), and Stephen T. Haynes (Companies Ex. 8).

Pursuant to the procedural schedule, intervenor testimony was filed on July 15, 2005. OCC filed the direct testimony of Donald C. Lechnar (OCC Ex. 1) and Michael Haugh (OCC Exs. 2 and 2-A). Baard filed the direct testimony of John Baardson (Baard Ex. 1). Direct Energy filed the direct testimony of Mark R. Frye (Direct Energy Ex. 1). IEU filed the direct testimony of J. Bertram Solomon (IEU Ex. 24). Calpine filed the direct testimony of William J. Taylor, III (Calpine Ex. 1). OEG filed the direct testimony of Kevin C. Higgins (OEG Ex. 10 and OEG 10A). Staff filed, on July 25, 2005, the direct testimony of Kim Wissman (Staff Ex. 1), Klaus Lambeck (Staff Ex. 2), and Richard Cahaan (Staff Ex. 3).

By entry issued May 26, 2005, as supplemented by entry issued June 30, 2005, local public hearings were scheduled in CSP's and Ohio Power's service areas. Public hearings were held in Hilliard, Canton, and Pomeroy, Ohio. The AEP Companies published notice of the hearings and filed proof of publication (Companies Ex. 16). At the public hearing held in Hilliard on August 1, 2005, five witnesses offered testimony: two witnesses testified in opposition to the application, two witnesses testified in favor of the facility, and one witness made comments. A local public hearing was held on August 3, 2005 in Canton, Ohio. At the Canton hearing, three witnesses offered testimony: two persons who are opposed to the application and one person who is in favor of the project.

On August 4, 2005, a local public hearing was held in Pomeroy, Ohio, the same county as the proposed location for the IGCC facility. At the Pomeroy hearing there were over 100 people in attendance of which 30 offered testimony. Twenty-six witnesses testified in favor of the project and four witnesses raised environmental and safety concerns about the project. The witnesses offering testimony in support of the proposed facility included Senator Joyce Padgett and Representative Jimmy Stewart. Senator Padgett endorsed the construction and operation of the proposed facility for its beneficial

effect on the county, the State of Ohio, and the families and businesses in Meigs County and the surrounding areas. Senator Padgett also noted that the facility will support the Ohio coal industry and clean coal technology. Representative Stewart's testimony focused on the overall benefits of IGCC technology and the environmental advantages of IGCC. A statement by Representative Jennifer Garrison endorsing the construction of the IGCC facility was also offered into the record. Also offering testimony at the Pomeroy local hearing were numerous representatives and members of the skilled trades and labor unions in the area. The Unions strongly endorse this project for the 1,250-2,000 construction jobs and 125 permanent jobs that it will bring to the county and the benefit to the local economy.

The evidentiary hearing commenced on August 8, 2005 and continued each business day through August 16, 2005. At the conclusion of the hearing, the Companies and certain other parties to this proceeding had not reached a resolution regarding the recalling of witnesses (Tr. VII at 93). To that end, on September 6, 2005, OCC, IEU-Ohio and the Companies docketed late-filed exhibits in lieu of calling or recalling additional witnesses (Late filed OCC/IEU Exs. 1-2, 4-11, 14-15, 18-26, 28, 29, 31-38, 41 and 44-45). By entry issued September 7, 2005, all parties were directed that, unless the Commission received a motion in opposition to the late-filed exhibits, the exhibits would be admitted into the record. No party filed a motion in opposition to the late-filed exhibits. Initial briefs were filed by the parties on September 20, 2005. Reply briefs were filed by the parties no later than October 11, 2005.

On December 27, 2005, Direct Energy filed a request that the Commission take administrative notice of certain press releases by the AEP Companies. The press releases cited were those issued by the AEP Companies on December 15 and December 20, 2005 and the newspaper article carried by a Cincinnati newspaper, *The Enquirer*. The press releases and article discuss American Electric Power's earnings, 2006 projected earnings and the purchase of a natural gas generation facility. Direct Energy contends that the representations made in the article and press releases support the claims of Direct Energy and the other interveners as to the need for the proposed IGCC facility and the risk to Ohio's ratepayers.

On January 6, 2006, the Companies filed a memorandum contra the request for administrative notice. The AEP Companies ask that the Commission recognize that the nature of the activities noted in the press releases and article were known at the time of the hearing and referenced in the record (Tr. V at 204, 206). The Companies also note that the record in this case has been closed for almost four months.

The Commission agrees that it is improper to take administrative notice of the press releases and newspaper article at this time; the AEP Companies' earnings and the

purchase of a generating facility are issues that could have been addressed during the hearing. Accordingly, Direct Energy's request for administrative notice is denied.

Proprietary Information in this Proceeding

On July 14, 2005, OCC filed a motion to compel discovery and to permit the supplementation of OCC testimony. OCC claimed that the AEP Companies had not fully responded to OCC's request for the production of documents, pending the execution of a protective agreement. The Companies filed a memorandum contra OCC's motion. The Companies represented that OCC was given the opportunity to view any documents requested at the Companies' offices. On July 19, 2005, the Attorney Examiners held an off-the-record conference between OCC and the Companies to discuss the discovery dispute. At the end of the conference, the Attorney Examiners concluded that there were three classes of documents at issue in this discovery dispute: (a) documents which the AEP Companies claimed were confidential; (b) documents that contained or reflected information from GE/Bechtel;² and (c) critical energy infrastructure information (CEII), as determined by the Companies. As OCC and the Companies were informed at the conference, and as confirmed by entry issued July 21, 2005, the AEP Companies were ordered to provide, pursuant to the protective agreement attached to OCC's motion to compel, the documents the Companies claimed to be confidential, the GE/Bechtel documents and the CEII documents identified as responsive to OCC's requests for production of documents. Further, as to the CEII, OCC was directed to review the CEII documents at the Companies' offices to determine which documents were needed by OCC to prepare for the hearing.

On July 22, 2005, GE/Bechtel filed a motion to intervene in this case for the limited purpose of protecting certain confidential information. GE/Bechtel also filed an interlocutory appeal of the July 21, 2005 entry and a motion for protective order on July 26, 2005. On August 1, 2005, OCC filed a memorandum contra GE/Bechtel's motion for protective order and interlocutory appeal.

By entry issued August 1, 2005, the Attorney Examiners granted GE/Bechtel's motion to intervene. By the same entry, the Attorney Examiners granted GE/Bechtel's request for protective order by issuing a protective order that would protect the documents at issue unless and until OCC and GE/Bechtel executed a negotiated protective agreement. Further, to allow the case to continue in accordance with the schedule established, OCC and GE/Bechtel were directed to develop a proposal on the introduction of exhibits and the redaction of confidential and/or proprietary information. OCC and GE/Bechtel were informed that if they could not agree on the proprietary nature

² GE/Bechtel is a third-party vendor with whom the Companies have contracted to provide certain engineering, procurement and construction services in relation to the proposed IGCC facility.

of information in the documents, the Attorney Examiners would conduct an in-camera review to determine the nature of the documents at issue.

On August 8, 2005, GE/Bechtel and the Companies each filed motions to maintain the confidentiality of their respective confidential documents and the testimony drawn therefrom. OCC subsequently filed a memorandum contra the motions of GE/Bechtel and AEP. During the hearing, on August 9, 2005, after an in-camera review of certain documents, the Attorney Examiners ruled that certain information provided to OCC by GE/Bechtel and AEP, and to other intervenors pursuant to a protective agreement, contained trade secrets and/or confidential or proprietary information that should be protected from public disclosure (Tr. II at 78-80). To avoid the delay of the hearing, the proceedings were periodically closed to facilitate the cross-examination of witnesses in regard to confidential matters. At the conclusion of the hearing, the Companies and GE/Bechtel were directed to review the confidential documents introduced into evidence in the case and to redact confidential and/or proprietary information and file the redacted documents in the public record. The redacted documents were then filed in the docket by the AEP Companies on August 30, 2005 and by GE/Bechtel on September 1, 2005.

In its initial brief, OCC argues that vast amounts of the record in this case have been sealed from public scrutiny in violation of Section 149.43, Revised Code, and Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.). OCC notes that in Case No. 93-487-TP-ALT, *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, entry issued November 25, 2003, the Commission acknowledged that:

All proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to "ensure that governmental records be open and made available to the public and . . . are subject only to a few very limited and narrow exceptions." *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St.3d 544, 549; *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 518.

OCC argues that the Companies and GE/Bechtel have been permitted the "wholesale" removal of documents from the public record. OCC argues that the AEP Companies' and GE/Bechtel's motions filed August 8, 2005 fail to specifically state the contents of each document that each company seeks to protect from public disclosure. OCC asserts that the AEP Companies and GE/Bechtel failed to meet their burden under Ohio law. Therefore, OCC concludes that the Attorney Examiners' ruling granting the Companies' and GE/Bechtel's requests for confidential treatment was in error and should be reversed (OCC Brief at 43-46).

AEP Companies argue that OCC's request to place in the public record the limited amount of confidential information protected under seal in this case overlooks the need to protect the proprietary and confidential information of third-party vendors against the public policy that favors public access to information presented to a public agency (Companies Reply Brief at 41-43). The Companies emphasize that the proposed power plant design relies on proprietary IGCC technology that GE/Bechtel, Battelle and Sargent & Lundy³ seek to protect to retain the commercial value of their investments (*Id.* at 41).

The AEP Companies contend that, at the direction of the presiding Attorney Examiners, they, in consultation with Sargent & Lundy, Battelle and GE/Bechtel, reviewed all the exhibits and testimony included in the confidential portion of the record to reduce the amount of information under seal (*Id.* at 42). ~~The Companies emphasize that releasing~~ such information into the public record, as OCC requests, will have a chilling effect on the deployment of new technologies in Ohio. The Companies assert that significant effort has been expended to protect the confidential nature of certain information in the record and to minimize the confidential portion of the record. The Companies maintain that it is crucial that the Commission carefully balance the release of confidential, proprietary information owned by third-party vendors with the public record requirements for state agencies. For these reasons, the Companies ask that the Commission reject OCC's request to place the limited amount of protected information in the public record.

GE/Bechtel also opposes OCC's request. GE/Bechtel argues that OCC's request misrepresents the facts, is procedurally defective and ignores the exceptions to Ohio's public records law. GE/Bechtel also notes that OCC has mischaracterized the process implemented by the Attorney Examiners and failed to mention that an in-camera examination of the documents was conducted, and that GE/Bechtel, at the direction of the Attorney Examiners, examined the exhibits and the transcripts filed under seal and redacted any GE/Bechtel proprietary information from the documents and filed the redacted copies in the public record (GE/Bechtel Reply Brief at 3-4).⁴

GE/Bechtel further argues that OCC's request to place all documents and exhibits in the public record is untimely. According to GE/Bechtel, OCC's recourse was an interlocutory appeal of the Attorney Examiners' August 9 ruling in accordance with Rule 4901-1-15, O.A.C. GE/Bechtel states that, pursuant to Rule 4901-1-15, O.A.C., OCC had only five days after the August 9, 2005 ruling to file an appeal. GE/Bechtel reasons that

³ Battelle and Sargent & Lundy performed various analyses for the AEP Companies in regards to the proposed IGCC facility.

⁴ Furthermore, GE/Bechtel states that after the close of the hearing, the OCC identified an additional 45 exhibits that it demanded to be filed in the public record as late-filed exhibits. GE/Bechtel examined those exhibits and, consistent with the Attorney Examiners ruling, redacted confidential and proprietary information from copies of those exhibits. GE/Bechtel provided those redacted copies to both OCC and IEU-Ohio on September 1, 2005. OCC and IEU-Ohio subsequently filed those redacted copies as exhibits in the public record, and unredacted copies under seal, on September 6, 2005.

paragraph (A) of Rule 4901-1-15, O.A.C., is not applicable. GE/Bechtel argues that Rule 4901-1-15(A), O.A.C., applies, under the circumstances presented in this matter, when any party's motion for a protective order is denied. The motions of the AEP Companies and GE/Bechtel for protective orders were granted. GE/Bechtel acknowledges that pursuant to Rule 4901-1-15(B), O.A.C., OCC could seek to appeal the August 9, 2005 Attorney Examiners' ruling by requesting that the issue be certified to the Commission. GE/Bechtel notes OCC has not made any such request to certify the record. GE/Bechtel argues that, pursuant to Rule 4901-1-15(C), O.A.C., if OCC wished to take an interlocutory appeal, it was required to file an interlocutory appeal of the Attorney Examiners' August 9, 2005 ruling within five days.⁵ Thus, GE/Bechtel reasons that OCC's request that the confidential information in this case become part of the public record is procedurally defective and should be denied.

Finally, GE/Bechtel posits that, contrary to OCC's claims, GE/Bechtel's July 26, 2005 and August 8, 2005 motions included the affidavits of GE/Bechtel representatives that: (1) detailed the nature and the kinds of information contained in the documents; (2) stated that GE/Bechtel protects the information at issue from disclosure, even internally; (3) noted that the information was provided to the AEP Companies pursuant to a protective agreement; (4) listed the protections undertaken by GE/Bechtel to prevent the disclosure of the information at issue; (5) discussed the value of the information to GE/Bechtel; and (6) stated the potential harm to GE/Bechtel if the information was known to the public. Thus, GE/Bechtel believes it presented sufficient information to justify its request to treat the information as proprietary trade secrets under Ohio law.

With respect to GE/Bechtel's procedural arguments, Rule 4901-1-15, O.A.C., does not require a party to file an interlocutory appeal to an attorney examiner's ruling. Paragraph (A) of the rule states that a party "may" file an interlocutory appeal; it does not require that one be filed. Further, paragraph (B) of the rule permits the filing of interlocutory appeals to certain rulings only if certified by the attorney examiner first. Accordingly, we find that Rule 4901-1-15, O.A.C., does not preclude OCC from raising the issue on brief. Lastly, we also note that the AEP Companies and GE/Bechtel were not requested to determine what information submitted under seal at the hearing would remain under seal until after the hearing had concluded. Accordingly, we find no merit to the procedural arguments made by GE/Bechtel.

With respect to the substantive issue, we find that the record in this case supports the Attorney Examiners' ruling that the documents filed under seal included proprietary trade secret information. First, the Commission notes that, pursuant to Section 4901.12,

⁵ Rule 4901-1-15(C), O.A.C., provides in part:

Any party wishing to take an interlocutory appeal from any ruling must file an application for review with the commission within five days after the ruling is issued.

Revised Code, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code, all proceedings of the Commission and all documents and records in its possession are public records. Section 149.43(A), Revised Code provides that:

"Public record" means records kept by any public office ... "Public record" does not mean any of the following:

- (v) Records the release of which is prohibited by state or federal law.

The Commission recognizes that Ohio's public records law is intended "to be liberally construed to ensure that governmental records be open and made available to the public and that public records are subject only to a few very limited and narrow exceptions." *State ex. rel Williams* at 549. However, one of the exceptions is for trade secrets. See Sections 1333.62 and 1333.63, Revised Code. Section 1333.61(D), Revised Code, defines trade secret as:

Information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁶

⁶ We recognize that the Ohio Supreme Court has adopted several factors to determine whether a trade secret claim meets the statutory definition in Section 1333.61(D), Revised Code. See *State ex. rel The Plain Dealer v. Ohio Dept. of Ins.*, at 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131. *Pyromatics* states the factors are: (a) the extent to which the information is known outside the business; (b) the extent to which it is known to those inside the business, i.e., by the employees; (c) the precautions taken by the holder of the "trade secret" to guard against the secrecy of the information; (d) the savings effected and the value to the holder in having the information as against competitors; (e) the amount of effort or money expended in obtaining and developing the information; (f) the amount of time and expense it would take for others to acquire and duplicate the information.

The Commission finds that the Attorney Examiner's ruling and the confidential record developed in this case are consistent with Ohio public records law and Title 49. We note that in an effort to avoid further delay of the hearing and allow OCC an opportunity to cross-examine the Companies' witnesses, portions of the hearing were closed to any party that did not have a protective agreement, and subsequently the AEP Companies and GE/Bechtel were directed to review and redact the documents introduced into evidence that contained proprietary, trade secret information. Thus, the Commission concludes that the August 9, 2005 ruling is reasonable, in light of the fact that the hearing was in progress and the subsequent directive to the AEP Companies and GE/Bechtel to reduce the amount of proprietary information in the record. Accordingly, OCC's request to overturn the Attorney Examiners' August 9, 2005 ruling is denied. Furthermore, the documents filed under seal in this proceeding should remain under seal for 18 months after the issue date of this order.

Companies' Application

On March 18, 2005, Ohio Power and CSP filed an application for authority to recover costs associated with the construction and operation of an IGCC generating facility (Application). The Companies intend to use the output from this generating station to serve their POLR customers.

The Application proposes that all reasonably incurred costs related to the IGCC facility be recovered in three phases (App. at 5; Tr. I at 200). The first phase will recover preconstruction costs, such as engineering and scoping study. First phase cost recovery will be through a 12-month bypassable generation surcharge, set to commence in January 2006 (App. at 5-8). The surcharge would be applied to the Companies' standard service rate schedules approved in their rate stabilization plan proceeding (RSP) (*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order [January 26, 2005]) (RSP Order). The surcharge is intended to recover the Companies' preconstruction costs; that is, costs incurred prior to the Companies entering into an engineering, procurement and construction (EPC) contract estimated to be \$23.7 million (Companies Ex. 5B, WMJ Ex. 4). The net of the over- and underrecovered revenues during Phase I will be subtracted from or added to the Construction Work in Process (CWIP) accounts for the IGCC facility which will be used in determining the IGCC Recovery Factor during Phase III (App. at 4, 5).

Phase II of the cost recovery mechanism also provides a bypassable temporary generation rate surcharge. Under the Companies' proposal, this surcharge would begin with the first billing cycle in 2007. The level of the surcharge would change each year, until the surcharge terminates after the last billing before the IGCC plant goes into commercial operation, which is currently estimated to occur in mid-2010 (Companies Ex. 2 at 5). Phase II costs are the carrying costs on the cumulative investment in the generating

facility (App. at 8). The carrying costs will include carrying costs deferred after the EPC contract is executed, which is expected to be in approximately July 2006, until the Phase II surcharges begin. As with the Phase I surcharges, the Phase II generation rate surcharges will be applied to the Commission-approved standard service rate schedules.

Phase III covers the operating life of the IGCC facility. Phase III costs are the actual capital costs, carrying costs and operating costs of the plant, all of which the Companies propose will be recovered through surcharges known as the IGCC Recovery Factor and IGCC Adjustment Factor. These surcharges will be included in the Companies' distribution rates once the plant is placed in commercial operation (App. at 10-11). The IGCC Recovery Factor will be based on a return of and a return on the investment in the IGCC facility as well as operating expenses, including fuel and consumables (Tr. I at 242). Under the Companies' proposal, the Commission would consider and approve the IGCC Recovery Factor after a hearing and the Companies' showing that it is reasonable. The IGCC Recovery Factor will be subject to future adjustment throughout Phase III for relevant changes, such as investment level, customer load, appropriate rate of return, life expectancy of the IGCC facility and operating expenses (Companies' Ex. 2, at 9).

The IGCC Recovery Factor would be adjusted annually to reflect changes in the costs of fuel and consumables since the time it was last set, as well as any prior over- or underrecovery of actual fuel costs, including purchased power and consumables. Once an IGCC Recovery Factor is determined, it would be compared to the then-current Commission-approved standard service offer. Based on that comparison an IGCC Adjustment Factor would be calculated to reflect the revenue difference between the Recovery Factor and the then-current Commission-approved standard service offer (*Id.*). The IGCC Adjustment Factor will be either a charge (if there is a revenue deficiency) or credit (if there is a revenue surplus) to the Companies' Commission-approved distribution rate schedules. The IGCC Adjustment Factor would be revised throughout Phase III as the Commission approves changes to the Companies' standard service offer and to the IGCC Recovery Factor (*Id.* at 11, 12).

Jurisdiction Issues

The Companies argue that when enacting Senate Bill 3 (SB 3), the General Assembly contemplated that, even at the end of the five-year Market Development Period (MDP), not all customers will have switched to a competitive retail electric service ("CRES") provider for generation service. To provide a safety net for those customers, the General Assembly imposed the POLR generation service obligation on electric distribution utilities:

After its market development period, an electric distribution utility in this state shall provide consumers...a market-based standard service offer of all competitive retail electric services

necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. (Section 4928.14(A), Revised Code).

The General Assembly also provided a safety net for those customers who did switch to a CRES provider that subsequently failed to supply generation service to those customers. Those customers would default back to their electric distribution utility (EDU) for the provisions of generation service:

After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. (Section 4928.14(C), Revised Code).

The Companies aver that the Commission has recognized that Divisions (A) and (B) of Section 4928.14, Revised Code, require the Companies to fulfill POLR responsibilities after the MDP (RSP Order at 27). The Commission specifically noted in the RSP order that the Companies will be held as the POLR to consumers who either fail to choose an alternative supplier or who choose to return to them after taking service from another generation supplier (*id.* at 37). Consistent with that obligation to serve, the AEP Companies assert that the Companies' responsibility extends beyond ensuring that they have the capacity to serve non-switching or returning customers whose requirements may be readily predicted, that they must also have sufficient capacity to meet unanticipated demand (*id.*). The AEP Companies add that the Commission also has recognized that the EDU's POLR responsibility is one for which it incurs necessary costs and which warrants compensation. (RSP Order at 27; *In Re The Dayton Power and Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order, at page 28 (September 2, 2003); *In Re Ohio Edison Co et al.*, Case No. 03-2144-EL-ATA, Opinion and Order at pages 23-24 (June 9, 2004)).

The AEP Companies note that the Ohio Supreme Court (Court) has confirmed the EDU's POLR responsibility and the lawfulness of establishing a separate charge for recovering the costs of fulfilling that obligation (*Constellation NewEnergy, Inc. v. Pub. Util Comm'n*, 104 Ohio St. 3d 530 (2004)).

In the *Constellation NewEnergy* case, the Court considered the Commission's authorization of a "rate stabilization surcharge" ("RSS") that was imposed on all of a utility's customers. In affirming the Commission's order, the Court noted the Commission's explanation that the utility "will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the RSS . . .

. [T]he Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers" (*Id.* at 539). The Court also included the following observation in footnote 5 as part of its discussion:

POLR costs are those costs incurred by [the electric distribution utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return . . . for generation service (*Id.* at footnote 5).

CSP and Ohio Power argue that it follows that the Court's decision in *Constellation NewEnergy* not only confirms the Companies' POLR obligation but also confirms the Commission's authority to establish a charge on all customers for the costs associated with meeting that obligation (AEP Reply Brief at 4).

The Companies contend that the Commission recognized this inherent authority, in its Opinion and Order approving the Companies' RSP, to empower EDUs to secure sufficient capacity to meet their POLR obligations (AEP Reply Brief at 2).

The Companies postulate the proposition that the EDU's capacity resources that are necessary to fulfill an EDU's POLR obligation may include generation assets that the EDU owns or controls, and that support for that proposition is found in Section 4928.17(E), Revised Code. That provision generally allows the EDU to divest its generation assets without the requirement of Commission approval pursuant to the provisions of Title 49, Revised Code, that might have applied prior to SB 3's enactment, such as Section 4905.48, Revised Code. Section 4928.17(E), Revised Code, specifically notes that the relief from the Commission's jurisdiction is subject to those provisions of Title 49 "relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset." (emphasis added). Therefore, according to AEP, Section 4928.17(E), Revised Code, confirms that there is no blanket requirement in SB 3 that the EDU may not own generation assets and that Section 4928.17(E), Revised Code, confirms that there are circumstances in which ownership and control of generation assets is necessary to support the EDU's distribution function (*Id.* at 36, 37).

AEP reasons that the Commission must have relied upon the law's flexibility when it encouraged the Companies to move forward with plans for the construction of an IGCC facility in Ohio (RSP Order at 37-38). In doing so, according to the Companies, the Commission must have recognized that it is appropriate for an EDU to have access to a portfolio of capacity and energy responses in order to meet its post-MDP POLR obligations. However, under SB 3 and the Companies' RSP, none of the existing generation assets that AEP owns is dedicated to meeting that POLR obligation beyond the end of 2005 except to the extent that the Companies have voluntarily done for 2006-2008 in order to fulfill their RSP commitments (*Id.* at 38).

AEP maintains that access to owned generation that is dedicated to the POLR task during periods subsequent to the RSP is an appropriate component of a portfolio of capacity and energy resources that the EDU uses to satisfy its POLR obligation. AEP further contends that, because it will be owned by the Companies, the commitment of the IGCC plant's output to serve its POLR loads is highly reliable, provides a long-term hedge against the volatility in both the availability and pricing of wholesale capacity and energy supplies, and thereby help to forestall or mitigate market imperfections, to the benefit of the Companies' retail customers (AEP Reply Brief at 18-20).

The Staff concurs that an EDU may own generating facilities in Ohio, but that EDU's do have a limitation if they also provide a competitive service. In that situation, they must have an approved corporate separation plan. Section 4928.17(A), Revised Code. Staff notes that AEP's corporate separation plan was approved as part of the RSP (RSP Order at 35 and RSP Rehearing Entry issued March 23, 2005 at 12). Therefore, Staff argues that since there is no bar to the AEP Companies owning generating plant regardless of whether that plant is used to provide competitive or noncompetitive services, there is similarly no bar to building a generating plant (Staff Reply Brief at 8).

The next issue, according to Staff, is the extent to which the Commission may regulate that plant. Staff asserts that Section 4928.03, Revised Code, does state that retail electric generation service is competitive and, therefore, not subject to Commission regulation, but that this case is not about regulating retail electric generation service. Staff postulates that AEP's application concerns the provision of ancillary services, necessary to support the distribution function. Staff notes that it is the Commission's obligation to assure reliable distribution service, and therefore, noncompetitive retail electric services remain subject to the regulation of this Commission. Section 4928.03, Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission (and no services have been declared competitive) nor declared competitive by statute. Section 4928.01(B), Revised Code. Ancillary service is not listed as competitive by statute and has not been declared competitive by the Commission (*Id.*). Staff concludes that since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission (*Id.* at 3-7).

Ancillary service, as a regulated service, is defined as follows:

"Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service;

energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service. Section 4928.01(A)(1), Revised Code.

Staff contends that these ancillary services require generating plant and, therefore, SB 3 contemplated that the utility would provide services from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness (*Id.* at 4).

Many of the intervenors have argued that Section 4928.14, Revised Code, requires a market-based standard service offer (SSO) in the post MDP, and that precludes the Commission from approving the Companies' application (FirstSolutions Brief at 4-7; see also Calpine's Brief at 4, 5 and note 3; and Beard Brief at 5, 6). IEU argues that AEP's application seeks authority from the Commission to reestablish a utility-friendly form of cost-of-service rate regulation for the purposes of establishing prices under Section 4928.14, Revised Code. IEU contends that the Commission found in the AEP RSP case that cost-of-service regulation has been displaced by a statutory scheme that makes SSO prices subject to the market, not cost-of-service regulation. IEU adds that, in the RSP Order, the Commission held in favor of the Companies' position that the Commission is powerless to set SSO prices after considering the cost of providing SSO service, including a return on and of generating plant, even where there is no market or information on which the Commission may reasonably rely to establish SSO prices. IEU concludes that, notwithstanding the Commission's belief in IGCC technology, or its cost, the Commission does not have the authority to substitute its judgment for the judgment of the General Assembly, to re-write the law or to bypass the requirements of current law (IEU Brief at 9-13). OEG offers that the Companies have proposed to provide a SSO based on the cost of the IGCC plant plus the market price of electric power, not on the market price of electric power alone as Section 4928.14, Revised Code, requires (OEG Brief at 3, 4). Constellation's theory is that the Companies should be required to offer the output of the IGCC plant at market-based rates (Constellation Brief at 20).

The intervenors further assert that the Commission does not have the authority to provide for recovery of the costs of an IGCC plant. FirstSolutions argues that this limitation follows expressly from Section 4928.05(A), Revised Code, which provides that competitive retail electric service "shall not be subject to supervision and regulation...by the public utilities commission under Chapters 4901 to 4909...4935...of the Revised Code..." (FirstSolutions Brief at 9-11). OCC also makes this argument, adding that "[t]he general application of Chapter 4909, Revised Code, ratemaking applies to distribution rate cases, not to the regulation of the generation function" (OCC Brief at 10, 11; see also Direct Energy Brief at 6, 7). In addition, OCC contends that there is no specific authority in Ohio

law for the Commission to adopt the Companies' cost recovery proposal for the IGCC plant (OCC Brief at 16-19). Finally, OCC states that the Companies' corporate separation plan, established pursuant to the requirements of Section 4928.17, Revised Code, mandates that any provision of generation service be through a fully separated affiliate. OCC submits, that although the Commission has granted a temporary waiver of the requirement for AEP to structurally separate their generation and distribution functions, compliance with Section 4928.17, Revised Code, cannot be reconciled with the long-term ownership commitment and cost recovery by the Companies to the generating plant that is the subject of this application (*Id.* at 8, 9).

We believe that the arguments that the AEP Companies' proposal violates Section 4928.14, Revised Code, are not on point because they mischaracterize the Companies' application. The application is not proposing that the Commission use cost-of-service ratemaking to establish pricing for the SSO that Section 4928.14, Revised Code, requires at the end of the MDP; the Companies' Application has no impact on the determination of AEP's market-based SSO. The Commission will establish AEP's SSO in accordance with the market-based standard of Section 4928.14, Revised Code, independent from the cost-recovery mechanism that the Companies have proposed for the IGCC plant. The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies.

While Section 4928.03, Revised Code, states that retail electric generation service is competitive and, therefore, not subject to Commission regulation, this Application is not about regulating retail electric generation service, but about providing the distribution ancillary services. These services are subject to Commission regulation, as being necessary to support the distribution function. It is the Commission's obligation to assure reliable distribution service under Section 4928.02(A), Revised Code, and noncompetitive retail electric service are subject to the regulation of this Commission under Section 4928.05(A)(2), Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission nor declared competitive by statute. The legislature declared retail electric generation, aggregation, power marketing, and power brokerage services to be competitive. Ancillary service is not listed as competitive under Section 4928.03, Revised Code. In fact, although it is included within the list of components which could be declared competitive by this Commission, it has not been declared competitive. Section 4928.05(A), Revised Code. Since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission. Section 4928.01(B), Revised Code.

It is clear to this Commission that most of these ancillary services require generating plant. Thus, we find that SB 3 contemplates that the EDU would provide ancillary service from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness. The Commission could then relinquish its regulatory obligations as to retail ancillary service if there is effective competition and available alternatives. Section 4928.04(A), Revised Code. However, the POLR responsibility cannot be left unregulated, as it must be available if the market option fails. Therefore, we find that the statutory scheme of SB 3 does contemplate that the EDU would provide services from generating plant to provide "ancillary service" as it relates to POLR service. Consequently, there is no conflict between the market-based standard that Section 4928.14(A), Revised Code, requires for post-MDP SSOs and the Companies' proposal for assuring recovery of the costs of the IGCC plant.

Distribution reliability is a core concern of the Commission and the EDU's POLR function is a distribution-related service. The EDU is the only entity that can fill the POLR obligation. Neither a CRES provider nor a regional transmission organization (RTO), such as PJM, can provide POLR service. RTOs have a role at the wholesale, not retail level, to facilitate market transactions and indirectly promote reliability; but RTOs do not have direct responsibility to the customers of a particular EDU. Even though a CRES provider does have a retail relationship and direct responsibility to customers, the EDU still stands as the backup POLR provider and that standby duty is distinct from the CRES function of fulfilling day-to-day or minute-to-minute power requirements. The EDU is the entity that operates the distribution wires and these wires must remain charged for connected customers to receive service; the EDU must have capacity available ancillary to the provision of the distribution service.

In addition, the Ohio Supreme Court has confirmed the Commission's authority to establish a mechanism that assures recovery of costs that the EDU incurs in its position as the POLR. *Constellation NewEnergy, supra*. As was the case in the rate stabilization surcharge addressed in *Constellation NewEnergy*, the costs of the IGCC plant are costs that the Companies will incur in their position as POLR; they are costs that will be incurred to assist them in meeting their POLR obligation to all consumers in their certified territory; they are costs the recovery of which can be assured through the recovery mechanism that the IGCC Cost Recovery and Adjustment Factors provide; and the existence of these costs makes it reasonable to recover them through a POLR cost recovery mechanism that applies to all customers. Therefore, the Companies' proposed mechanism for assuring recovery of the IGCC plant's costs is comparable to the Rate Stabilization Surcharge that the Ohio Supreme Court confirmed when it affirmed the Commission decision in *Constellation NewEnergy, supra*. It is also comparable to the POLR charges that the Commission approved in the Companies' RSP Order, *supra*, at 27, 29, and 37. We find that this Commission has the authority to approve a mechanism that grants recovery of the costs of the IGCC plant.

Conclusion

The AEP Application lays out a regulatory mechanism by which it might recover the costs of a coal-fired electric generating facility, to address the long-term reliability and security of the energy supply for the POLR obligation. However, the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options. AEP stated that it is presently negotiating a "wrap" agreement with GE/Bechtel that would provide for construction of, and performance guarantees associated with, the IGCC unit in exchange for AEP's agreement to pay a firm price (Tr. III at 268-269; Tr. II at 45). The AEP Companies recognize that they will need to subsequently bring a rate-case-style application before the Commission in a subsequent phase of litigation (Tr. II at 52). At issue in that subsequent phase will be the appropriate level of cost recovery as well as the method of recovery (rate design) (*Id.*).

The Staff stated its continuing interest in the clean coal technology of the IGCC plant. Staff witness Wissman documented AEP's aging generation fleet and the upcoming need for base load capacity. Discussing the increasingly stringent environmental requirements, Ms. Wissman concluded that "there does appear to be a need to invest in new clean coal technology given the aforementioned circumstances" (Staff Ex. 1 at 3). Staff witness Lambeck also observed that IGCC technology is "very attractive for high sulfur bituminous coals" and concluded that "the value of IGCC may be its importance as a hedging strategy - a way to keep using the nation's most abundant energy resource while providing options to deal with long-term environmental demands" (Staff Ex. 2 at 3-4). Staff argued that the Companies should be permitted to recover the relatively small costs, compared to the risks of not exploring further the IGCC proposal (i.e., the Phase I costs).

The AEP Companies contend that the proposed IGCC plant will advance the commercialization of IGCC technology and greatly reduce the emissions of nitrogen oxide, sulfur dioxide, carbon dioxide, particulates and mercury. The IGCC facility will be designed to incorporate carbon sequestration equipment for future installation (Tr. 3 at 270-271). It was generally agreed among the expert witnesses in this case that the key advantage offered by the IGCC technology is its potential to sequester carbon as part of the gasification process, in order to virtually eliminate the carbon dioxide emissions normally associated with a coal plant. Although it cannot be stated for certain whether carbon sequestration regulations will be passed during the operational life of the plant (or what the content and timing of such requirements may be), no expert witness stated a belief that carbon sequestration regulations would not be passed during the life of the plant. In addition, there are other technologies which anticipate removal of carbon dioxide in addition to IGCC (Staff Ex. 3 at 3-4); this technology choice should be explored and subjected to a test of economic comparison in the future phase of this proceeding.

As was clear from the public testimony offered at the Meigs County hearing, the local residents support the project for the jobs that the proposed facility will bring to the area. In addition to the direct economic and environmental impact of building an IGCC unit in Ohio, there are also significant secondary or indirect benefits including generation of new tax revenue and promotion of advanced technology. Therefore, the Staff recommends that the Commission allow the AEP Companies to recover the costs of the first phase of its proposal (the pre-construction costs). The Commission agrees that such economic benefits and technological advances are beneficial for the environment, the state of Ohio, the region, and the nation. Further, the Commission finds that, with the recent volatility of natural gas prices, the environmental cost of pulverized coal generation facilities, the age of the generating facilities in Ohio, the likely implementation of carbon sequestration legislation, the lead time required to place a generation facility in operation and the life-cycle of generation facilities, the diversification of electric generation facilities is wise. The Commission is not opposed to the consideration of an IGCC facility, and we, therefore, believe it is appropriate to take the initial step of approving Phase I cost recovery mechanism of the application.

It should be noted that the Companies have proposed that IGCC-related revenues collected through the Phase I surcharge would be tracked so as to reduce the total of additional generation increases that the Companies may request under the RSP. Therefore, with the approval of Phase I cost recovery, the Companies will have the funds to investigate, analyze, evaluate, and develop a realistic plan to address the very real concerns presented in this case. The Companies propose that the Phase I surcharge be collected for 12 consecutive months. Given that this Order directs the Companies to file additional information and anticipates that additional evidentiary hearings will be necessary, the Phase II and Phase III surcharges shall not become effective 90 days after the filing of the application as proposed by the Companies. Further, the Commission notes that the Phase I surcharge is bypassable. Therefore, the arguments raised by certain intervenors in regard to the non-bypassable nature of the proposed Phase III surcharge and the affect on competition are not applicable. Accordingly, the Commission will not address such arguments at this time.

OPAE argues that because the Companies' application will increase residential rates, approving the application will exacerbate a difficult financial situation for low income and percentage of income payment plan (PIPP) customers. OPAE requests that the Companies be required to fund a program to reduce the energy burden on CSP's and Ohio Power's low income customers (OPAE Brief at 15-21). The Commission will consider this issue in the next phase of the proceeding.

The Commission concludes that AEP should economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application. The reasonable costs to

develop that plan and supporting analyses should be recoverable from ratepayers as a proper cost of providing distribution service. In addition to the level of cost recovery and rate design issues, there are certain specific issues that the Commission believes should be addressed in the next phase of this proceeding which are enumerated below:

1. The details of how the output of the proposed facility would flow to the benefit of Ohio customers either through or despite any interconnection or pooling agreements.
2. The delineation of the means, including transportation, through which Ohio coal would be used in the project.
3. The multiple issues concerning the production and sale of by-products from an IGCC unit.
4. The Companies are aware of and have committed to pursue financing opportunities available under the Energy Policy Act of 2005. The Energy Policy Act of 2005 provides significant incentives for deployment of clean coal technologies, including IGCC. The Companies are directed to determine its eligibility for and develop a proposal to obtain federal, state and other funding and/or tax incentives available to construct, operate and maintain the proposed IGCC facility. The Companies shall include, as a part of the detailed information provided in the next phase of this proceeding, a list of the potential funding sources considered and an explanation of whether or not such sources of funding were pursued by the Companies.
5. The Companies' consideration and evaluation of investors in the proposed IGCC facility.

Adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service cannot be provided to consumers in Ohio unless there is a functioning distribution system. The Commission's decision in this case is about ensuring the long-term viability of the distribution system and adequate capacity for AEP's POLR obligation. The AEP Companies should be permitted to recover the reasonable costs of further developing and detailing their proposal, to be considered by this Commission in a future proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) CSP and Ohio Power are electric distribution utilities as defined in Section 4928.01(A), Revised Code, and, therefore, the provider of last resort to electric consumers in their respective service areas.
- (2) On March 18, 2005, the Companies filed an application for approval of a cost recovery mechanism for a proposed IGCC electric generation facility. The Companies propose a three phase cost recovery process to commence prior to the construction of the IGCC facility and continue during the operating life of the IGCC facility.
- (3) Fourteen entities filed for intervention in this proceeding. All requests for intervention were granted.
- (4) Local public hearings were held in Hilliard, Canton, and Pomeroy, Ohio. The evidentiary hearing was held in Columbus, Ohio, August 8, 2005 through August 16, 2005.
- (5) OCC's request to overturn the Attorney Examiners' ruling and place certain confidential and proprietary information in the public record should be denied.
- (6) The confidential, proprietary information filed under seal in this proceeding shall remain under seal for 18 months from the date this order is issued.
- (7) The Commission is vested with the authority to oversee distribution ancillary services, pursuant to Section 4928.01(A), Revised Code, and vested with the obligation to ensure Ohio consumers with an adequate, reliable and reasonably priced electric service, pursuant to Section 4928.02(A), Revised Code.
- (8) The EDU is the POLR for consumers who either fail to choose an alternative supplier or return from another supplier.
- (9) The Commission has the authority to establish a charge for recovering the costs of fulfilling the POLR obligation.

- (10) The AEP Companies should provide additional detailed information, as enumerated above, for the Commission to consider the Companies' proposed Phase II and Phase III costs recovery.

ORDER

It is, therefore,

ORDERED, That OCC's request to overturn the Attorney Examiners' ruling and place certain confidential and proprietary documents in the public record is denied. The unredacted documents filed under seal in this phase of the proceeding shall remain under seal for 18 months after the date this order is issued. It is, further,

ORDERED, That should the AEP Companies and/or GE/Bechtel want the unredacted documents to remain under seal after the 18 months have elapsed, the Companies or GE/Bechtel must file a motion for a protective order pursuant to Rule 4901-1-24(F), O.A.C., in this docket. It is, further,

ORDERED, That the Companies' request for a cost recovery mechanism is granted, as modified herein, as to Phase I preconstruction costs. It is, further,

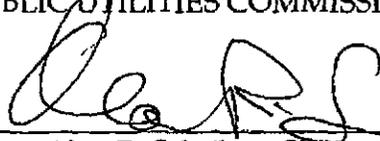
ORDERED, That the Companies file, for Commission approval in this docket, tariffs and customer notices to recover costs associated with Phase I. It is, further,

ORDERED, That the Companies' request for a cost recovery mechanism as to the proposed Phase II and Phase III cost is deferred to the next proceeding. It is, further,

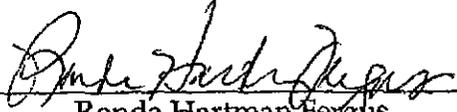
ORDERED, That the Companies submit in this case the additional detailed information set forth above for the Commission's consideration. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon the AEP Companies and their counsel, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

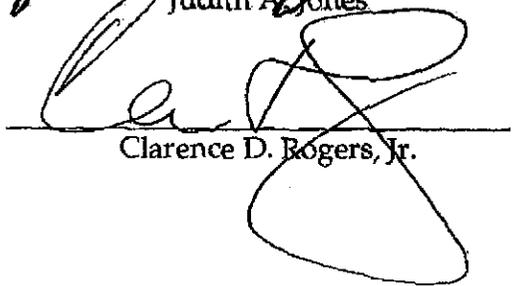


Ronda Hartman Fergus



Judith A. Jones

Donald L. Mason

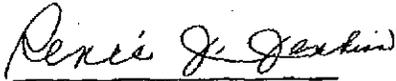


Clarence D. Rogers, Jr.

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Renee J. Jenkins
Secretary

- (6) On April 21, 2006, Industrial Energy Users-Ohio (IEU-Ohio) filed objections to the tariff filing. IEU-Ohio argued that the tariff should be rejected, as the Opinion and Order is both unreasonable and unlawful. IEU-Ohio also stated eight additional grounds for rejection of the tariffs. On May 10, 2006, the Ohio Consumers' Counsel (OCC) filed an application for rehearing and a protest regarding tariff implementation filing. We believe that IEU's general and specific objections and OCC's protest all relate to the underlying Opinion and Order, and not to the tariff. Since this case is in the rehearing stage, these issues may be better addressed in that more appropriate forum. The objections and protest should be denied.
- (7) The Commission finds that the proposed compliance tariff is in compliance with and reflects the Commission's Opinion and Order. Therefore, the proposed tariff should be approved.
- (8) The Commission notes that the rehearing entry in this proceeding is being issued today. All Phase I costs will be the subject of subsequent audit(s) to determine whether such expenditures were reasonably incurred to construct the proposed IGCC facility in Ohio. Although we continue to find that AEP should be permitted to recover the reasonable costs of further developing and detailing the project proposal, the Commission believes that there may be elements of the design and engineering that may be transferable to other projects. Therefore, we find that if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest.

It is therefore,

ORDERED, That the proposed tariff revisions of the Applicants are approved. It is, further,

ORDERED, That IEU's and OCC's objections are denied. It is, further,

ORDERED, That actual Phase I costs will be subject to review at a subsequent date. It is, further,

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ORDERED, That the Applicants are authorized to file in final form four complete copies of the tariff consistent with this Finding and Order. One copy shall be filed with this case docket, one shall be filed with the Applicant's TRF docket and the remaining two copies shall be designated for distribution to the Rates and Tariffs Division of the Commission's Utilities Department. The Applicant shall also update its tariff previously filed electronically with the Commission's Docketing Division. It is, further,

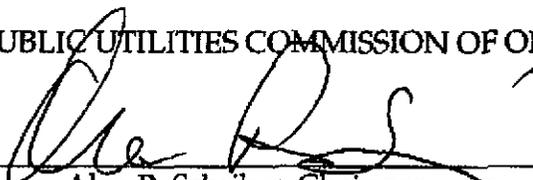
ORDERED, That the effective date of the new tariff shall be for bills rendered on or after July 1, 2006 and be collected over a 12-month period. It is, further,

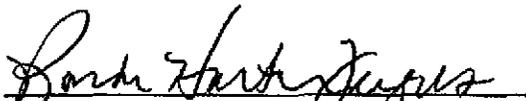
ORDERED, That the Applicants shall notify all affected customers via a bill message or via a bill insert within 30 days of the effective date of the tariff. It is, further,

ORDERED, That nothing in this Finding and Order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule or regulation. It is, further,

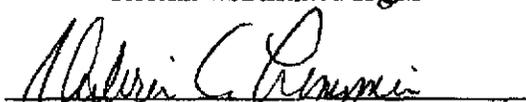
ORDERED, That a copy of this Finding and Order is served upon the Applicants and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

Judith A. Jones

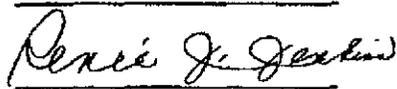

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Donald L. Mason

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Entered in the Journal

JUN 28 2006


Renee J. Jenkins
Secretary

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application)
of Columbus Southern Power Company and)
Ohio Power Company for Authority to)
Recover Costs Associated with the)
Construction and Ultimate Operation of an)
Integrated Gasification Combined Cycle)
Electric Generating Facility.)

PUCO

Case No. 05-376-EL-UNC

**APPLICATION FOR REHEARING
AND
PROTEST REGARDING TARIFF IMPLEMENTATION FILING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 1.2 million residential electric customers of the Columbus and Southern Power ("CSP") and Ohio Power Company ("OPC," and collectively with CSP, the "Companies"¹) applies for rehearing of the Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") issued on April 10, 2006.

The Commission approved the collection of expenditures by the Companies for research and development in connection with an integrated gasification combined-cycle ("IGCC") generating facility that was the subject of the Companies' March 18, 2005 application ("Application"). The OCC asserts that the Order was unjust, unreasonable and unlawful in the following particulars:

¹ The Companies are also identified in quotes as "AEP," an abbreviation for "American Electric Power Company," an affiliate of CSP and OPC. For the ease of notation, this pleading also uses "Company" to refer to the exhibits, witnesses, and briefs submitted by the Companies.

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician *TP* Date Processed 5-11-06

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- A. The PUCO May Not Act To Increase Rates Associated With The Promotion Of A Generating Plant Concept That Violates Ohio Law, Including Statutes That Limit The PUCO's Authority Regarding The Treatment Of Non-Competitive Services.**
- 1. The PUCO erred when it ordered an increase in rates that fails to respect the Commission's own precedents where the Commission found no clear need for a change and where it found no basis upon which its prior decisions were in error.**
 - 2. The PUCO erred when it ordered an increase in rates that fails to recognize the doctrine of collateral estoppel, which bars relitigation of issues in a second administrative proceeding where the administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding.**
 - 3. The PUCO erred when it provided an *a priori* regulatory approval that violates Ohio law.**
 - 4. The PUCO erred when it approved an adjustment to rates that is not permitted by statute.**
 - 5. The PUCO erred when it authorized part of a proposal that the Commission determined was not supported by the evidence, resulting in electric service that is not reasonably priced.**
 - 6. The PUCO erred when it authorized rate increases that are not properly structured, resulting in electric service that is not reasonably priced.**
 - 7. The PUCO erred when it failed to follow the procedural requirements contained in the Revised Code.**

B. The PUCO May Not Act To Increase Rates Associated With The Promotion Of A Generating Plant Concept That Violates Ohio's Statutes And Exceeds The PUCO's Authority Regarding The Provision Of Competitive Generation Services.

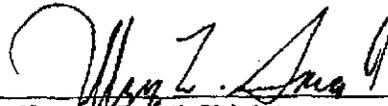
1. The PUCO erred when it approved the recovery of amounts for generation-related costs that are not within the PUCO's jurisdiction.
2. The PUCO erred when it permitted the violation of the corporate separation requirements contained in R.C. 4928.17.
3. The PUCO erred when it failed to follow its own rules.
4. The PUCO erred by approving part of an application that did not follow procedural requirements for generation pricing.

C. The PUCO May Not Protect Information From Public Scrutiny By Designating The Contents Of Documents "Trade Secret" And Shielding The Entirety Of The Documents From Public Scrutiny.

The Commission should abrogate or modify its Order, pursuant to R.C. 4903.10(B) and consistent with the OCC's assignments of error stated above. The reasons for granting this Application for Rehearing and Protest Regarding Tariff Implementation are set forth in the attached Memorandum in Support.

Respectfully submitted,

Janine L. Migden-Ostrander
Consumers' Counsel



Jeffrey W. Small, Trial Attorney
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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application)
of Columbus Southern Power Company and)
Ohio Power Company for Authority to)
Recover Costs Associated with the)
Construction and Ultimate Operation of an)
Integrated Gasification Combined Cycle)
Electric Generating Facility)

Case No. 05-376-EL-UNC

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The PUCO granted, in part, the Companies' request that their Ohio customers pay for expenditures they voluntarily made regarding research and development for an IGCC power plant. The PUCO's approval means that customers now will pay millions of dollars with the prospect of paying many hundreds of millions of dollars in the future. The PUCO's Order states that the Commission is "not opposed to the consideration of an IGCC facility."² However, the PUCO takes the immediate leap towards paying for the Companies' research spending by increasing the distribution rates paid by the Companies' Ohio customers according to the Companies' request for "Phase I" cost recovery.³ The Companies' proposal violated Ohio law, and the Order that authorized increases in distribution rates is unlawful.

² Order at 20.

³ Id.

Ohio's electric restructuring legislation does not permit either the result sought by the Companies or the portion approved by the Commission for collection from customers. The failings of the Companies' proposal are revealed by the many comments in opposition to Companies' IGCC proposal submitted by the customer and marketer/supplier representatives involved in this proceeding. The Commission will not be able to quell this opposition by the further review and modification of the Companies' proposal for advance phases of an IGCC project that are anticipated by the Commission's Order.

The Commission found that the Companies' proposals and its evidentiary support for those proposals were lacking, but failed to entirely reject the Companies' proposals. The Order states that the Companies failed to justify its plans regarding an IGCC facility relative to other technologies,⁴ and states that "the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options."⁵ Nonetheless, the Order states:

The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies.

The funding of the Companies' IGCC research activities was apparently pre-judged as desirable, and the Order reveals an effort to create some legal basis upon which the PUCO could authorize rate increases. Instead, the Commission should have determined whether it has jurisdiction over the subject matter of the Application and whether the Companies met their burden of proof to justify the proposed increases in rates. The

⁴ Order at 19.

⁵ Id.

Order approves Phase I of the Companies' proposal to raise customer rates, but fails to state any basis under Ohio law that supports its holding regarding an increase in rates.

On behalf of the Companies' 1.2 million residential electric customers, the OCC requests that the Commission reject the Application in its entirety in an entry on rehearing. The OCC also protests the Companies' implementation of the PUCO's Order in this combined Application for Rehearing and Protest Regarding Tariff Implementation, noting that the rates proposed for the Companies' "IGCC Cost Recovery Rider" would impose an unreasonable burden upon residential customers, especially CSP residential customers who would be charged more than OPC residential customers.⁶ However, no charge is legal based upon Ohio's electric restructuring law, the Companies' electric transition plan ("ETP") order ("ETP Order" in the "ETP Case"⁷), the post market development period service order ("Post-MDP Service Order" in the "Post-MDP Service Case"),⁸ and other Ohio law.

⁶ See especially Section II.A.6 of OCC's Application for Rehearing.

⁷ *In re CSP and OPC ETP Case*, Case Nos. 99-1729-EL-ETP, et al., Opinion and Order (September 28, 2000) ("ETP Order" in the "ETP Case").

⁸ *In re Post-MDP Service Case*, Case No. 04-169-EL-UNC, Order at 38 (January 26, 2005) ("Post-MDP Service Order" in the "Post-MDP Service Case").

II. ARGUMENT

A. The PUCO May Not Act To Increase Rates Associated With The Promotion Of A Generating Plant Concept That Violates Ohio Law, Including Statutes That Limit The PUCO's Authority Regarding The Treatment Of Non-Competitive Services.

1. The PUCO erred when it ordered an increase in rates that fails to respect the Commission's own precedents where the Commission found no clear need for a change and where it found no basis upon which its prior decisions were in error.

The Commission should respect its previous decisions, and not authorize an increase in rates that conflicts with the result announced in the recently completed Post-MDP Service Case. It is essential that the Commission respect its previous decisions and not depart from them without a clear need. In *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St. 2d 403, 431, the Ohio Supreme Court stated:

Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.

The Companies' requests were not based on any legal or regulatory principle, but was founded upon the Companies' claimed need to "fulfill [their] * * * ongoing POLR responsibility."⁹ This topic was one of the major subjects addressed in the Post-MDP Service Case, and should not have been revisited in the PUCO's Order.¹⁰ The record

⁹ Id. at 2.

¹⁰ *Post-MDP Service Case*, Order at 27, 37 (January 26, 2005). The decision in that case stated that it was based on furthering the development of the competitive market, which is inconsistent with the result announced in the Order that favors the use of CSP and OPC generation for an extended period of time. The Order provides no legal or policy explanation -- whether distribution, generation, or some combination/hybrid service is the subject of the PUCO's review -- for a change in the PUCO's decision in the Post-MDP Service Case.

does not support any distribution-related need (or any other need) that has arisen since the conclusion of the Post-MDP Service Case that would be served by locating an IGCC facility in Ohio.¹¹

The Order states that “the Phase I surcharge would be tracked so as to reduce the total of additional generation increases that the Companies may request under the RSP [i.e. Post-MDP Service Case].”¹² The PUCO previously approved rate adjustments that are “effectively capped at four percent,” and only related to “environmental requirements, security, taxes, and new generation-related regulatory requirements . . . or . . . customer load switches that materially jeopardize . . . generation revenues”¹³ The Order provides rate increases outside this framework. The Order creates both a new category of costs (i.e. “distribution-related” IGCC research funding) that may be used to increase rates, and fixes costs such that “additional” rate increases are now certain rather than being set after a Commission hearing to evaluate higher rates based upon the prescribed categories of costs.¹⁴ The PUCO should not change the results of the Post-MDP Service Case in a manner that increases rates paid by residential and other customers.

The Order, by approving rate increases for IGCC research as payment for “distribution service,”¹⁵ also violates the Companies’ ETP Order that adopted (in principal part) the ETP Stipulation. The ETP Stipulation states that distribution rates

¹¹ Indeed, the Companies’ “Need Statement” in their application before the Power Siting Board merely alleges that there is a “need for additional generating capacity in the eastern portion of the AEP system. . . .” In re AEP Site Proposal for an IGCC Generating Plant, PSB Case No. 06-30-EL-BGN, Application at 02-2 (March 24, 2006) (emphasis added).

¹² Order at 20.

¹³ Post-MDP Service Case Order at 20.

¹⁴ Id.

¹⁵ Order at 21.

shall not be increased until after 2007 for OPC, and after 2008 for CSP.¹⁶ The distribution rate freeze was extended until the end of 2008 for OPC in the Post-MDP Service Case.¹⁷ The Order in the above-captioned case directed the Companies to file tariffs, and the Companies filed such tariffs on April 20, 2006 for an increase in rates to begin in June 2006. Since the distribution rate increase would begin before the end of 2008, the Order violates the freeze on distribution rates contained within both the ETP and Post-MDP Service Cases and is thus illegal.

On rehearing, the Commission should hold that the Companies' rate increases are limited as previously provided for in the ETP and Post-MDP Service Cases.

2. **The PUCO erred when it ordered an increase in rates that fails to recognize the doctrine of collateral estoppel, which bars relitigation of issues in a second administrative proceeding where the administrative proceeding is of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding.**

The Commission's approval of "surcharges" different than those authorized in the Post-MDP Service Case is illegal.¹⁸ The Application constitutes an impermissible collateral attack on the final disposition of the Post-MDP Service Case. *Tedesco v. Glenbeigh Hospital of Cleveland* (1989), 1989 Ohio App. LEXIS 899, 903. The doctrine of collateral estoppel applies to administrative decisions as well as to judicial decisions. See *Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 9. The Order states that "the costs of the IGCC plant are costs that the Companies will incur in their position

¹⁶ *In re CSP and OPC ETP Cases*, Case Nos. 99-1729-EL-ETP, et al., Stipulation at 3 (May 8, 2000).

¹⁷ *Post-MDP Service Case*, Order at 22-23 (January 26, 2005).

¹⁸ Application at 5 ("Phase I").

as POLR,"¹⁹ and that the IGCC plant's costs are "comparable to the POLR charges that the Commission approved in the Companies' RSP Order [i.e. the Post-MDP Service Case]"²⁰ The Commission should have held that the Companies were collaterally estopped from relitigating matters from the Post-MDP Service Case.

Furthermore, the Order states that the PUCO approved rate increases for a "distribution-related service."²¹ As such, the Order violates the distribution rate freeze provisions contained in the ETP and Post-MDP Service cases. The Commission should have held that the Companies were collaterally estopped from relitigating the rate freeze provisions that were resolved in the ETP and Post-MDP Service Cases.

3. The PUCO erred when it provided an *a priori* regulatory approval that violates Ohio law.

The Order provides the Companies with before-the-fact approval of early costs associated with the construction of IGCC facilities. Such approval, before the plant is proven to be used and useful for serving customers, is impermissible under Ohio law. The cost recovery for Phase I of the Companies' plans involves charges before any plant is operational and before any non-competitive service (or any service) is provided to customers.²² Phase I involves charges even before an engineering, procurement and construction ("EPC") contract is executed.²³ The request does not fit within any past or

¹⁹ Order at 18.

²⁰ Id. The Order therefore makes the OCC's point that -- whether distribution, generation, or some combination/hybrid service is the subject of the PUCO's review -- the Companies have collaterally attacked the Post-MDP Service Case Order.

²¹ Order at 18.

²² Application at 5.

²³ Id.

present regulatory structure for serving customers, and violates Commission precedent against such prior approvals.

Under Ohio's statutory ratemaking procedures, the value of "used and useful" property must be considered in ratemaking.²⁴ In R.C. 4909.15(A)(1), the General Assembly barred the PUCO from including costs in the rates consumers pay unless the facility "is used and useful in rendering the public utility service for which rates are to be fixed and determined."²⁵ In this regard, the PUCO can include in rates a "reasonable allowance" of construction costs as construction work in progress ("CWIP").²⁶ However, the General Assembly under R.C. 4909.15(A)(1) has specifically constrained the PUCO's authority to include construction costs in rates.²⁷ Approval of the Companies' research activities, the subject for the Phase I charges that were approved in the Order, plainly violates this restriction. The Phase I charges are not permitted under Ohio law, and should be rejected on rehearing.

4. The PUCO erred when it approved an adjustment to rates that is not permitted by statute.

The Supreme Court of Ohio has found that the Commission exceeds its authority if it approves an adjustment to rates that is not provided by the General Assembly's regulatory scheme.²⁸ The Court has consistently recognized that the Commission is a creature of statute and may exercise only that jurisdiction that is conferred upon it by

²⁴ See, e.g., R.C. 4909.15(A)(1), which applies to ratemaking for distribution services after the effective date of Ohio's electric restructuring law.

²⁵ The Ohio Supreme Court reversed a PUCO order in which the PUCO attempted to make consumers pay for a utility plant that was not yet used and useful for service to consumers. *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 449.

²⁶ R.C. 4909.15(A)(1).

²⁷ Pursuant to R.C. 4909.15(A)(1), at least seventy-five percent of construction must be complete.

²⁸ *Pike Natural Gas v. Pub. Util. Comm.* (1981), 68 Ohio St. 2d 181, 182.

statute.²⁹ The Court explicitly found that the General Assembly has legislated cost recovery mechanisms, but has not invested the Commission with the authority to create such mechanisms.³⁰ The Supreme Court found that whether a given mechanism should be adopted is not a question for the Commission or even for the Supreme Court; “rather, its resolution lies with the General Assembly.”³¹ Therefore, the PUCO’s approval of a “Phase I cost recovery mechanism” to cover the Companies’ research activities is unlawful, and should be eliminated on rehearing.

5. **The PUCO erred when it authorized part of a proposal that the Commission determined was not supported by the evidence, resulting in electric service that is not reasonably priced.**

The Order states that Companies failed to justify their plans, yet it authorizes an increase in rates that circumvents any and all valid processes by which the Companies’ plans could be judged least cost and directed towards the establishment of reasonable rates in the best interest of consumers. Pursuant to R.C. 4928.15, “no electric utility shall supply noncompetitive retail electric distribution service in this state ... except pursuant to a schedule for the service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code.” R.C. 4928.02 states that it is Ohio policy to “[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.” R.C. 4905.22 states that “[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not

²⁹ See, e.g., *Pike Natural Gas* at 182.

³⁰ *Id.* at 185-186.

³¹ *Id.* at 186.

more than the charges allowed by law....” The Revised Code does not permit the PUCO to approve charges to support technology that is favored by utilities such as the Companies, but results in unnecessarily high prices for distribution service.

The Order awards millions of dollars to the Companies despite the fact that moving forward with any IGCC facility has not been justified to satisfy any purpose, distribution or otherwise. In the Commission’s words: “The Commission concludes that AEP should economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application.”³² An increase in rates to support the Companies’ favored IGCC technology, despite the lack of evidentiary support for the technology choice relative to other alternatives, violates Ohio law.

The best that the Companies offered regarding the adoption of IGCC technology was speculation regarding future conditions, including “anticipated future emission reduction laws and regulations,”³³ that could help the proposed plant compete with better-established technologies. However, the Commission again found that the Companies’ evidence did not support the Companies’ IGCC proposal: “[T]here are other technologies which anticipate removal of carbon dioxide in addition to IGCC (Staff Ex. 3 at 3-4); this technology choice should be explored and subjected to a test of economic comparison in the future phase of this proceeding.”³⁴ The PUCO’s decision was not “about ensuring the

³² Order at 20.

³³ Application at 3.

³⁴ Order at 19. R.C. 4903.09 requires that the PUCO’s orders must state the “reasons prompting the decision arrived at, based upon . . . findings of fact.” Emphasis added. The Order grants rate increases to cover “costs of further developing and detailing [the Companies’] proposal....” Order at 21. In other words, rate increases were granted in spite of the Companies’ failure to justify its plans, rather than based upon the PUCO’s findings of fact.

long-term viability of the distribution system," but about rewarding the Companies for their inability to support their Application.

The Companies failed to support the need to construct any facility, not just the selection of their favored technology. The proposed IGCC facility would start service after the "rate stabilization period" that extends through 2008, pursuant to the Post-MDP Service Case.³⁵ The record does not support any connection between the Companies' requirement to provide service and the IGCC proposal.³⁶ Even if the PUCO does not remain "strongly committed to encouraging the competitive market in AEP's service territories," as stated in the Post-MDP Service Order,³⁷ the Companies made no record in support of the need to construct any facility to meet the generation service needs of some or all of its customers.

The Companies have proposed to place Ohio in a race with other states for the implementation of an unproven means to provide services to Ohioans. Ohio's General Assembly has prohibited the race, one that Ohio cannot afford to win.

- 6. The PUCO erred when it authorized rate increases that are not properly structured, resulting in electric service that is not reasonably priced.**
 - a. Rates assessed under the Order fail to make the Companies accountable for amounts collected.**

The Order fails to require the Companies to be accountable for the amounts spent on investigating its favored IGCC plans. Phase I costs were the subject of considerable

³⁵ Post-MDP Service Order at 14 (January 26, 2005).

³⁶ According to OCC Witness Haugh, implementation of the PUCO's post-MDP rules will leave the Companies with the responsibility to provide generation service only in the event that a "CRES supplier to the customer fails to make deliveries" for which "the Companies will not likely need a 600 MW facility." This is especially true since "[t]here is no requirement that any generation service . . . be provided by the Companies' ownership of generation assets." OCC Ex. 2 at 10-11 (Haugh).

³⁷ Post-MDP Service Order at 18 (January 26, 2005).

escalation during the course of the hearing, increasing from an estimated \$18 million in the Application³⁸ to \$24 million just months later in testimony filed on August 3, 2005. Even with this increased spending, the Companies were unsuccessful in moving forward to the front-end engineering and design ("FEED") process within their expected timeframe.³⁹ The Order approves increases without verification of costs or any investigation into the prudence of the escalating expenditures that did not achieve their desired results. Under such outward circumstances, true-up and refund provisions for amounts that are subject to an independent audit are appropriate.

The Companies' responses to IEU-Ohio's concerns regarding these matters were *disingenuous*. The Companies stated that their method for reconciling estimated and actual Phase I costs and recoveries would be to "subtract[] [Phase I revenues] from ... the Construction Work in Process {sic} accounts which will be used in determining the IGCC Recovery Factor in Phase III."⁴⁰ However, the Companies state in the next paragraph of their response to IEU-Ohio's objections that the Companies will not provide refunds because "Phase I recovery is not dependent on the eventual construction and operation of the Companies proposed IGCC facility."⁴¹ The second statement means that customers of the Companies receive no benefits -- no service, distribution or otherwise -- from their payments, and also that no actual true-up mechanism exists since the Phase III recovery mechanism does not exist.

³⁸ Application at 5.

³⁹ Company Ex. 5b at 5 (Jasper Supplemental).

⁴⁰ Response to IEU-Ohio's Objections to Tariff Filing at 2 (April 28, 2006).

⁴¹ *Id.*

Any increase in distribution rates without corresponding benefits for customers and without normal regulatory oversight regarding expenditures results in service that is not reasonably priced. The Order should correct these violations of R.C. 4905.22 and 4928.15 on rehearing.

- b. Customers will not receive benefits from expenditures to support a plant that will not be available to provide service.**

R.C. Chapter 4928.17(E) provides that “an electric utility may divest itself of any generating asset at any time without commission approval.” The recovery plan proposed by the Companies, the first part of which was approved in the Order, front-loads costs that would be charged to customers by charging them for costs incurred prior to the EPC contract starting in 2006.⁴² Production from any resulting IGCC facility could not begin until at least 2010.⁴³ The Companies economic case for IGCC implementation, according to Company Witness Braine, recognizes that “IGCC has higher capital and operating costs today compared to P[ulverized]C[coal] or N[atural]G[as]C[ombined]C[ycle],”⁴⁴ and could only be justified after taking into account speculation regarding “possible future greenhouse gas legislation.”⁴⁵ The Companies begin to receive cost recovery under the Order, but the Companies would have a powerful economic incentive to sell any IGCC facility if environmental restrictions turn in favor of generation using an IGCC plant. Customers should not be saddled with costs when they could easily be denied possible benefits from construction of an IGCC facility. The result is not reasonably priced electric service.

⁴² Application at 5-6.

⁴³ Id. at 10.

⁴⁴ Company Ex. 3 at 3 (Braine).

⁴⁵ Id. at 3-4.

The Companies cannot be trusted to simply place one or more of the high cost IGCC plants in a specialized rate base for CSC and OPC for the life of the facilities. Company Witness Baker was asked whether the Companies would willingly waive their ability to sell generation assets without the permission of the Commission, and stated: "There is nothing in this filing that addresses that issue."⁴⁶ Had the Companies' plans only included specialized recovery of generation costs over the life of any facilities' life, Company Witness Baker should have been prepared to state so on the stand. The Commission should reject the Companies' filing that would provide front-loaded costs for Ohio's customers if the Companies' IGCC facility is economically unsuccessful, and provides costs without the corresponding benefit of access to the IGCC facilities in the long-term if the Companies' generation project is economically successful.

The Order is not clear regarding whether the Commission intends to restrict the Companies' ability to transfer or sell their existing generating units (presumably over the objections of the Companies) in support of the provision of distribution-related ancillary services. The Order states that electric restructuring "contemplates that the EDU would provide ancillary service from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness."⁴⁷ The Commission thereby recognizes the temporary state of its newly claimed authority over generating units, and again customers are left paying the front-loaded costs associated with the Companies' IGCC facility without obtaining any corresponding

⁴⁶ Tr. Vol. II at 38 (Baker).

⁴⁷ Order at 18.

benefit that could only be received in the long-term. The result is not reasonably priced electric service.

The Order provides no explanation for the need to construct a new generating unit to provide distribution-related services when existing plants are available to provide far more than 600 megawatts of capacity and associated services. The Companies' existing plants in this capacity size will be available well beyond the possible start date for the proposed IGCC facility.⁴⁸ Indeed, as stated above, the Order does not explain any distinction that it has made regarding its authority over existing generating plants and the proposed IGCC facility. The record does not support the need for, and expense of, the technology selected by the Companies,⁴⁹ and also does not support the need for the construction of a new facility. The added expense of the IGCC plant favored by the Companies will increase prices for electric service above a reasonable level.

c. Rates that fail to recognize the Companies' plans to build plants outside Ohio are excessive.

The Order does not provide a proper allocation of costs such that residential customers are not unfairly charged for development costs. Because the future of IGCC construction by the Companies is uncertain, the Phase I costs should not be collected up-front from customers. In the end, development costs may lead to the construction of an IGCC facility in one of Ohio's neighboring states, and part or all of these costs would not be properly allocated to customers located in Ohio. The Companies have held

⁴⁸ The Order refers to replacing "AEP's aging generation fleet," but no evidence was presented that such replacement was needed to provide 600 megawatts of capacity during the period with which the Commission is concerned about the provision of "safety net" service by the Companies.

⁴⁹ Order at 19.

discussions with regulators in other states regarding the IGCC plant⁵⁰ and have asked the PJM RTO to conduct studies regarding sites in Kentucky and West Virginia.⁵¹ Since the Companies seek cost assurances before going forward in Ohio,⁵² the Order's funding of only Phase I costs will likely help fund projects in other states. If the collection of development costs withstands legal challenges, they should undergo PUCO review at a later date to determine whether the costs were reasonable and justifiable as well as whether they should be collected from any Ohio customers. The up-front payments by residential customers in Ohio results in unreasonably priced electric service.

- d. Rates should properly recognize the situations faced by customers in various customer classes and by the circumstances faced by customers of the two distribution companies in this case.**

The Companies show no concern over who pays more in response to their demands for higher rates. However, the Commission must be concerned with whether all customers receive reasonably priced electric service. The Commission is required to provide "reasons prompting the decision arrived at, based upon ... findings of fact."⁵³ The record contains no support, and the Order contains no explanation, for charging residential customers more per kilowatt-hour as part of an "IGCC Cost Recovery Charge" (sometimes many times greater) than would be paid by other types of customers.⁵⁴

⁵⁰ Tr. Vol. I at 203-204 (Baker).

⁵¹ Id. at 202 (Baker).

⁵² Id. at 200 (Baker).

⁵³ R.C. 4903.09.

⁵⁴ Tariff Compliance Filing, IGCC Cost Recovery Charge Rider (proposed CSP Tariff P.U.C.O. No. 6, Original Sheet No. 76-1; proposed OPC Tariff P.U.C.O. No. 18, Original Sheet No. 76-1) (April 20, 2006).

Furthermore, proposed increases in residential rates for CSP's residential customers are nearly 50 percent higher than those for OPC's residential customers.⁵⁵ The PUCO's Order fails to provide any guidance or explanation for the differential rates that appear in the Companies' proposed tariffs. No argument has been made, by the Companies or the PUCO Staff, that CSP's residential customers receive greater benefits from the distribution service that the PUCO claims are provided by research on IGCC generating plants. The proposed tariffs are either non-compliant with the Order, or the PUCO has failed to provide "reasons prompting the decision arrived at, based upon ... findings of fact."

The differential payments by different types of customers under the Order result in unreasonably priced electric service, and should be corrected on rehearing.

7. The PUCO erred when it failed to follow the procedural requirements contained in the Revised Code.

The Order dramatically departs from Ohio's statutorily required ratemaking methodology for regulated electric functions. The Order provides a revisionist history for this case, stating that the "Application is not about regulating retail electric generation service, but about providing the distribution ancillary services."⁵⁶ However, the Order does not reach the only defensible legal determination, required by R.C. 4928.15(A), that "[d]istribution service rates and charges under the [required] schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code" and "filed with the public utilities commission under section 4928.18 of the Revised Code."

⁵⁵ The Companies propose a rate of .0767 cents per kilowatt-hour for CSP customers, but .0520 cents per kilowatt-hour for OPC customers. *Id.*

⁵⁶ Order at 17.

Chapters 4905 and 4909 of the Revised Code contain, for example, strict notice provisions for rate increases, extensive filings regarding the utility's total distribution plant assets and total expenses, a PUCO Staff report, and hearings regarding the fixation of rates as dictated by Chapter 4909 of the Revised Code. Even if the Commission has jurisdiction regarding some noncompetitive service under discussion in this case, the Order does not support the Commission's claimed "authority to approve a mechanism that grants recovery of the costs of the IGCC plant."⁵⁷ Statutory mandates for the fixation of distribution rates have not been followed.

The Companies' proposed charges come in three phases -- Phase I for the period before execution of an EPC contract, Phase II for the period after execution of the EPC contract until the proposed plant is placed into production, and Phase III for the period covering the operation of the plant to serve the Companies' retail load (i.e. the life of the plant).⁵⁸ This plan is best described as the Companies' attempted rejuvenation of "rolling prudence" that the Companies championed in the late 1980s and early 1990s. Until this case and the award of plant development costs, that doctrine has been recognized as non-compliant with Ohio ratemaking law. The PUCO's approval of charges for Phase I of the Companies' proposal is not permitted by statute, and should be eliminated on rehearing.

⁵⁷ Order at 18.

⁵⁸ Id. at 5.

B. The PUCO May Not Act To Increase Rates Associated With The Promotion Of A Generating Plant Concept That Violates Ohio's Statutes And Exceeds The PUCO's Authority Regarding The Provision Of Competitive Generation Services.

- 1. The PUCO erred when it approved the recovery of amounts for generation-related costs that are not within the PUCO's jurisdiction.**

The Commission has engaged in a type of regulation over generation service that violates Ohio law. The PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1. According to R.C. 4928.05(A)(1):

[A] competitive retail electric service [such as generation service] supplied by an electric utility or electric service company shall not be subject to supervision and regulation . . . by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code . . . except as otherwise provided in this chapter.⁵⁹

The generation nature of the approved charges is partly revealed by the difficulty shown in the Order to explain how the charges could be for anything else.⁶⁰ Costs associated with the Companies' generation plant were generation costs under rate unbundling in the ETP Cases,⁶¹ but now these generation costs appear to have been somehow transformed into distribution-related charges upon the proposal of an IGCC facility.

⁵⁹ Certain exceptions are listed in R.C. 4928.05 that are not key to the OCC's present argument and that do not mention provisions in R.C. Chapter 4909.

⁶⁰ Order at 17 ("issue is where the Commission's jurisdiction . . . lies").

⁶¹ The concept that a 600 megawatt generator is a distribution asset would have been inconceivable as recently as the ETP cases in which rate unbundling by electric service component was required "based upon the record in the most recent rate proceeding of the utility." R.C. 4928.34(A)(2).

The Order recounts Staff's concern over replacing "AEP's aging *generation* fleet and the upcoming need for base load capacity."⁶² The Order states that Phase I charges will be "tracked so as to reduce the total of additional *generation* increases that the Companies may request under the RSP."⁶³ The Phase I surcharge is bypassable,⁶⁴ which is appropriate for *generation* charges. The Order states that the next proceeding should include the "Companies' consideration and evaluation of investors in the proposed IGCC facility,"⁶⁵ a directive that makes no sense if the facility would provide a regulated distribution service that only the Companies can legally provide.⁶⁶ The PUCO provides no explanation for its apparent failure to promulgate minimum service quality and safety requirements under R.C. 4928.11(A) for the Companies' existing or planned generators if "[d]istribution reliability is a core concern of the Commission" in this case. R.C. 4928.11(A) states that these rules "shall include prescriptive standards for inspection, maintenance, repair, and replacement of the ... distribution systems of electric utilities [and] shall apply to each substantial type of ... distribution equipment or facility." If the charges in this case are not generation in nature, then the Commission has abjectly failed to conduct required rulemaking regarding its "core concern."

The Commission should acknowledge its jurisdictional limitations, and eliminate the charges that the Order approved.

⁶² Order at 19 (emphasis added).

⁶³ Id. at 20 (emphasis added).

⁶⁴ Id. at 20.

⁶⁵ Id. at 21.

⁶⁶ Staff Witness Wissman stated that "what the staff is suggesting is that in the Commission deliberations they need to make sure that they don't give AEP some advantage by providing this opportunity without looking at some potential opportunities for others that wish to invest." Tr. Vol. V at 200-201 (Wissman). The concern relates to the generation function, not a regulated distribution-related function.

2. **The PUCO erred when it permitted the violation of the corporate separation requirements contained in R.C. 4928.17.**

Ohio law prohibits the proposed ownership of a generating asset by a distribution company, as well as the proposed regulatory treatment of cost recovery for expenditures connected with a newly constructed power plant. The PUCO's acceptance of the initial phase of the Companies' plan to provide generation service is the antithesis of the corporate separation statutes, and contravenes the ratemaking statutes that were designed by the General Assembly. The Companies' corporate separation plan, established pursuant to the requirements of R.C. 4928.17, requires the provision of generation and "wires" services through "fully separated affiliates." The Companies' corporate separation plan was established, in compliance with R.C. 4928.17(A)(3), to "ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service"⁶⁷

While the Commission has unlawfully delayed the requirement that the Companies structurally separate their distribution and generation functions (via a temporary waiver),⁶⁸ the requirements of R.C. 4928.17 remain and cannot be reconciled with the long-term

⁶⁷ R.C. 4928.17 provides that, "beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state . . . in the businesses of supplying a noncompetitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, *unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section*" Emphasis added. Compliance is not optional.

⁶⁸ Post-MDP Service Order at 35 (January 26, 2005). The OCC's applications for rehearing in that case argue that the Commission permitted the illegal delay of the Companies' corporate separation obligations. See, e.g., OCC Application for Rehearing at 40-44 (February 25, 2005). R.C. 4928.17(C) permits "an interim period" after January 1, 2001 for functional rather than corporate separation of entities that provide competitive and noncompetitive services. A period that covers the lengthy, useful life of a major generating station would not constitute an "interim period" and would render the statute a nullity.

ownership commitment by the Companies to a new generating plant that is the subject of the Application.

The Application stands the Commission's orders and entries in various post-MDP service cases on their heads, and the Order's approval of a rate increase to support the Companies' plans begins a dangerous and illegal process. One of the stated purposes of the Commission's actions in the post-MDP cases for various electric distribution utilities (including the Post-MDP Service Case for the Companies) is the development of the competitive market.⁶⁹ The purpose of corporate separation is to "ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business."⁷⁰ This statutory provision underlies and compels the Commission-approved corporate separation plan for the Companies.⁷¹

The Order's furtherance of the addition of generating plants by the Companies conflicts with both the Companies' obligations under their Commission-approved corporate separation plan and the Commission's recent pronouncements regarding post-MDP service. Further regional concentration of assets under the ownership and control of electric distribution utilities is contrary to both Ohio statutes and the policy pronouncements of the Commission.

3. The PUCO erred when it failed to follow its own rules.

The Order improperly elevates imprecise terminology to the status of law, stating that "the costs of the IGCC plant are costs that the Companies will incur in their position

⁶⁹ Post-MDP Service Order at 5 (January 26, 2005).

⁷⁰ R.C. 4928.17(A)(3).

⁷¹ *In re CG&E Post-MDP Service Case*, Case No. 03-93-EL-ATA, et al., Entry on Rehearing at 15 (November 24, 2004).

as POLR.”⁷² “POLR,” or “Provider of Last Resort,” was a term that presented countless difficulties regarding its proper use during the course of this case. The Post-MDP Service Order referred to financial support for an IGCC facility “given . . . POLR responsibilities,”⁷³ a theme picked up by Staff Witness Wissman when she referred to “[t]he proposed Provider of Last Resort mechanism”⁷⁴ to provide an incentive for IGCC development. Staff Witness Wissman may have been noting the absence of POLR in the provisions of R.C. Chapter 4928 when she stated on cross-examination that “POLR is not legally defined.”⁷⁵ However, the term is defined in Ohio Adm. Code 4901:1-35-03:

Provider of law resort is the statutory responsibility of the EDU to provide electric supply service to its customers on a comparable and nondiscriminatory basis within its certified territory. This responsibility may be fulfilled by the EDU providing standard service offer and by providing all other retail electric service necessary to maintain essential electric service to consumers.

The “responsibility” is that stated in R.C. 4928.14(A), and is met by offering a “market-based standard service offer” that may be fulfilled, pursuant to R.C. 4928.14(B) and PUCO approval of an EDU request, by “the competitive bidding option.”⁷⁶ In both cases, the statutes lead to customers receiving service priced in a market for generation service and not to regulatory approval of proposals that are not viable in the market.

The Commission’s rules provide the method by which POLR service (as defined in the rules) should be provided. Ohio Adm. Code 4901:1-35 contains rules by which an EDU

⁷² Order at 18.

⁷³ Id. at 38.

⁷⁴ Staff Ex. 1 at 7 (Wissman).

⁷⁵ Tr. Vol. V. at 170.

⁷⁶ The Companies’ submissions to the Ohio Power Siting Board bears witness to the Companies’ position that this case was based upon service under R.C. 4928.14. *In re AEP Site Proposal for IGCC Generating Plan*, PSB Case No. 06-30-EL-BGN, Application at 02-2 (March 24, 2006).

(CSP and OPC in this instance) may provide service that satisfies the requirements contained in R.C. 4928.14 after a filing pursuant to R.C. 4909.18. The Order departs from the definitions and requirements contained in the Commission's rules. The recovery of IGCC-related costs are additional to established rates for the market-based standard service offer,⁷⁷ thereby rendering the Companies' rates in violation of R.C. 4928.14(A) because the rates would clearly be above a market-based rate.

The result in this case should be consistent with the Commission's rules, and the Companies should be ordered to comply with those rules.

4. The PUCO erred by approving part of an application that did not follow procedural requirements for generation pricing.

The Application is not properly filed pursuant to R.C. 4928.14. R.C. 4928.14(A) requires an EDU such as CSP and OPC to provide "a market-based standard service offer" that "shall be filed with the public utilities commission under section 4909.18 of the Revised Code." The Application, however, does not provide "[s]uch offer," as required by R.C. 4928.14(A), and was not submitted and treated by the PUCO as an application under R.C. 4909.18. The standard service offer was the subject of the Post-MDP Service Case, the results of which the PUCO departs from without any legal basis or explanation.

An Application filed under R.C. 4928.14(A) must meet the requirements under R.C. Chapter 4909 that are implicated by a filing under R.C. 4909.18. For example, R.C. 4909.43 requires written notice to local authorities "[n]ot later than thirty days prior to

⁷⁷ "[T]hey would be paying the market plus surcharge if they chose not to shop, and in Phase III they would be paying market plus either a charge or a credit based on the recovery factor." Tr. Vol. I at 181 (Baker). Such rates violate Ohio law.

the filing of an application pursuant to section R.C. 4909.18” that describes “the proposed rates to be contained therein.” The Application fails to meet the requirements contained in R.C. Chapter 4909, and also fails to meet the requirements under rules promulgated by the Commission regarding post-MDP service that implement the provisions contained in R.C. 4928.14.⁷⁸

C. The PUCO May Not Protect Information From Public Scrutiny By Designating The Contents Of Documents “Trade Secret” And Shielding The Entirety Of The Documents From Public Scrutiny.

The Order incorrectly affirmed the rulings of the presiding officers to keep information from the public domain in this case.⁷⁹ The rulings that the OCC asked the PUCO to overturn were delivered on August 9, 2005 during the course of the hearing.⁸⁰ The OCC herein incorporates by reference its arguments, filed on August 9, 2005, contained in its Memorandum Contra Motions of Columbus Southern Company/Ohio Power Company and GE/Bechtel to Maintain Documents Under Seal (“Memo Contra”). The OCC’s Memo Contra responded to motions by the Companies and GE/Bechtel, dated August 8, 2005, that sought to prevent public disclosure of certain documents that were obtained by the OCC in discovery. The initial challenges and notices regarding the documents at issue were copied as part of the motions. The ultimate rulings of the presiding officers, affirmed in the Order, conflict with Ohio law and the prior decisions of the Commission.

⁷⁸ The Commission’s post-MDP service rules are contained in Ohio Adm. Code 4901:1-35.

⁷⁹ Order at 9, 11.

⁸⁰ Tr. Vol. II at 80.

R.C. 149.43 is Ohio's public records law that has been addressed in numerous proceedings before the Commission. R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43. Ohio Adm. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure."⁸¹ The Commission stated in a 2004 case:

The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:

[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public ... subject to only a few very limited exceptions.' *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].⁸²

Faced with demands for "wholesale removal of the document from public scrutiny,"⁸³ the Commission reviewed several documents in the above-cited telephone case and determined in each circumstance how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."⁸⁴

⁸¹ Emphasis added.

⁸² *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS et al., Entry at (3) (September 7, 2004) (notations in original).

⁸³ *Id.* at 3.

⁸⁴ *Id.*

In this case before the PUCO, the OCC received redacted versions of the disputed documents from GE/Bechtel (i.e. in addition to the unredacted documents) that addressed the confidentiality concerns of GE/Bechtel. This fact (with an example) was presented to a hearing officer by counsel for GE/Bechtel during the course of the proceedings. Nonetheless, and in clear violation of Ohio law as well as Commission precedent cited above, *every single word* in the disputed GE/Bechtel documents was prevented from entering the public domain. During the hearing, the same "wholesale" treatment was provided to all documents over which the mere claim of "confidentiality" was made by the Companies and/or GE/Bechtel. A "reduc[tion] [in the] amount of proprietary information"⁸⁵ may have been the direction from the PUCO, but the PUCO made no effort to reduce the amount of information shielded from public scrutiny even under circumstances where redaction was conducted by GE/Bechtel. PUCO scrutiny, not simply volunteered effort on the part of self-interested litigants, is required by Ohio law.

The GE/Bechtel Motion stated outright that it sought protection of the documents identified in an OCC letter dated August 3, 2005 (attached to the GE/Bechtel Motion as Attachment A) as trade secrets,⁸⁶ while that same claim is implied by the Companies' Motion. The Ohio Supreme Court has addressed the test for this claimed protection from disclosure under R.C. 149.43, evaluated under the "state or federal law" exemption to the public records law.

We have also adopted the following factors in analyzing a trade secret claim:

- (1) The extent to which the information is known outside the business;
- (2) the extent to which it is known to those inside the business, *i.e.*, by the employees;
- (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;
- (4) the savings effected and the value to the holder in having the

⁸⁵ Order at 11.

⁸⁶ See, e.g., Motion for Seal, Attachment B, ¶5.

information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.⁸⁷

The analysis of these factors was missing in both the motions by the Companies and by GE/Bechtel. Not surprisingly, therefore, such an analysis is also absent from the PUCO's Order.

The Commission requires specificity from those that seek to keep information from the public record. Ohio Adm. Code 4901-1-24(D)(3) requires movants for confidentiality to file a pleading "setting forth the *specific* basis of the motion, including a *detailed* discussion of the need for protection from disclosure...."⁸⁸ The specificity required by law was missing from the pleadings submitted by the Companies and by GE/Bechtel.⁸⁹ A remarkable feature of the motions by the Companies and by GE/Bechtel was that both failed to address the individual contents of the documents that these companies sought to conceal from the public. The Companies and GE/Bechtel therefore failed to meet their burden under Ohio law. In its Order, the PUCO failed to conduct an analysis that would explain its decision to the public or to a court in review.⁹⁰

For these reasons, the Order incorrectly shielded from public view large amounts of information, and the decision should be corrected or modified upon rehearing to permit public scrutiny of the information.

⁸⁷ *Besser v. Ohio State University* (2000), 89 Ohio St. 3d 396, 399-400.

⁸⁸ Emphasis added.

⁸⁹ The OCC's position is also supported by the terms of both the "Protective Agreement" that was approved in a July 1, 2005 Entry granting the OCC's Motion to Compel as well as an attachment ("Protective Attachment") to an August 1, 2005 Entry granting a GE/Bechtel motion for further protection of certain documents. Protective Agreement at 9 ("precise nature and justification for the injury"); Protective Attachment at 9.

⁹⁰ See *Trongren v. Public Util. Comm.* (1999), 85 Ohio St. 3d 87.

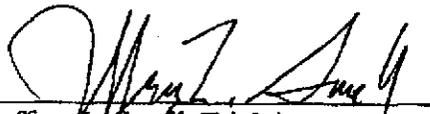
III. CONCLUSION

The Commission's Order fails to abide by the treatment of non-competitive and competitive services under the Revised Code. The Order fundamentally contravenes Ohio's electric restructuring law, and is *ultra vires* the PUCO's jurisdiction. The Order takes Ohio down a path not provided for under Ohio law towards a new long-term structure for the provision of electric generation service for the Companies (if not all of Ohio) that raises many difficult issues under Ohio's regulatory framework. For the immediate-term, the PUCO's Order provides for the collection of millions of dollars in unmonitored and unsubstantiated expenditures directed at sunk costs that will not provide any benefit for customers.

In the interests of the Companies' 1.2 million residential electric customers, the Commission should reject the Companies' proposal to collect Phase I costs.

Respectfully submitted,

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Consumers' Counsel

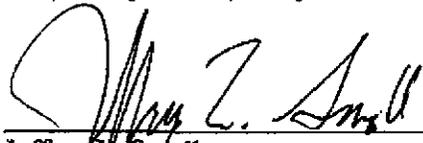


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CERTIFICATE OF SERVICE

I hereby certify that the OCC's Application for Rehearing and Protest was served on the persons listed below, via electronic transmission (when possible) or by first class U.S. Mail, prepaid, this 10th day of May 2006.



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[§ 4903.08.2] § 4903.082. Discovery rights.

All parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.

HISTORY: 139 v S 378. Eff 1-11-83.

The effective date of S 378 is set by section 3 of the act.

§ 4905.22. Service and facilities required; unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

HISTORY: GC §§ 614-12, 614-13; 102 v 549, §§ 14, 15; Bureau of Code Revision. Eff 10-1-53.

§ 4905.26. Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange, whichever number be smaller, or by the legislative authority of any municipal corporation served by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by the telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory, or preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall fix a time for the hearing of such complaint.

The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the date, time of day, and location of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by the telephone company in the county or counties affected, and shall be published for not less than two consecutive weeks in a newspaper of general circulation in the county or counties affected.

Such hearing shall be held not less than fifteen nor more than thirty days after the second publication of such notice.

HISTORY: GC § 614-21; 102 v 549, § 23; Bureau of Code Revision, 10-1-53; 125 v 613 (Eff 10-26-53); 139 v S 378 (Eff 1-11-83); 147 v H 215. Eff 9-29-97.

The effective date is set by section 222 of HB 215.

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§ 4909.15. Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (J) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission

immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 [5727.39.1] of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 [5727.39.1] of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost of rendering the public utility service for the test period under division (A)(4) of this section.

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date

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certain shall be not later than the date of filing.

(D) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (F) and (G) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(E) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

HISTORY: GC § 614-23; 102 v 549, § 25; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 137 v H 230 (Eff 10-9-77); 138 v H 657 (Eff 9-24-79); 138 v H 736 (Eff 10-16-80); 139 v S 378 (Eff 1-11-83); 140 v H 250 (Eff 7-30-84); 140 v H 655 (Eff 6-8-84); 140 v S 27 (Eff 4-10-85); 141 v H 750 (Eff 4-5-86); 144 v S 143 (Eff 7-10-91); 148 v S 3 (Eff 1-1-2001; 1-1-2002^Å); 148 v H 384. Eff 11-24-99.

Å The provisions of § 5 of SB 3 (148 v -) read as follows:

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/DÅ Division (A)(4)(c) was changed to division (A)(4)(b) in SB 3 (148 v -), to become effective 1-1-2002. See additional information in provisions of § 5 of SB 3, following the history for RC § 4909.15.

SECTION 5. Sections * * * 4909.15 * * * of the Revised Code, as amended by this act, shall take effect on January 1, 2001, but if the Public Utilities Commission issues an order under division (C) of section 4928.01 [see division (C) of RC § 4928.01 set out in note following RC § 4909.15.7] of the Revised Code, as enacted by this act, the amendments to such sections shall be applied accordingly. In addition, the amendment of division (A)(4)(b) of section 4909.15 of the Revised Code, as amended by this act, shall not be applied until January 1, 2002. [The replacement of RC § 5727.39.1 by RC § 5733.39 does not become effective until 1-1-2002, as amended by SB 3 (148 v -). The new wording "for Ohio coal burned prior to January 1, 2000. . ." is enacted by HB 384 (148 v -), effective 11-24-99.]

The provisions of § 2 of HB 384 (148 v -) read in part as follows:

SECTION. * * * and section 4909.15 of the Revised Code as amended by Am. Sub. S.B. 3 of the 123rd General Assembly are hereby repealed.

The provisions of §§ 4, 5, 6 of HB 384 (148 v -) read as follows:

SECTION 4. (A) The amendment by this act of section 5727.391 of the Revised Code increasing the per-ton credit for burning Ohio coal applies to Ohio coal burned on or after January 1, 2000, and on or before April 30, 2001. The tax credit claimed for the twelve-month period ending April 30, 2000, shall be adjusted so that the credit equals one dollar per ton for Ohio coal burned on or before December 31, 1999, of that twelve-month period, and three dollars per ton for Ohio coal burned on or after January 1, 2000.

(B) The amendment of section 5727.391 of the Revised Code and the repeal of the existing version of that section by this act does not affect the delayed repeal of that section by Section 8 of Am. Sub. S.B. 3 of the 123rd General Assembly. Section 5727.391 of the Revised Code, as amended by this act, shall be repealed as provided in Section 8 of Am. Sub. S.B. 3 of the 123rd General Assembly.

SECTION 5. The repeal and reenactment by this act of section 5733.39 of the Revised Code takes effect January 1, 2002, and applies to Ohio coal burned after April 30, 2001, but before January 1, 2005, notwithstanding Section 12 of Am. Sub. S.B. 3 of the 123rd General Assembly.

SECTION 6. The amendment by this act of section 4909.15 of the Revised Code, as amended by Am. Sub. S.B. 3 of the 123rd General Assembly, is contingent on Am. Sub. S.B. 3 of the 123rd General Assembly becoming law.

§ 4909.18. Application for establishment or change in rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall

further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

HISTORY: GC § 614.20; 102 v 549, § 22; 108 v PtII, 1094; 110 v 366; 113 v 16; 119 v 275; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 139 v S 378. Eff 1-11-83.

§ 4909.19. Publication; investigation.

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the

testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

HISTORY: GC § 614-20; 102 v 549, § 22; 108 v PtII, 1094; 110 v 366; 113 v 16; 119 v 275; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 139 v S 378. Eff 1-11-83.

The effective date of S 378 is set by section 3 of the act.

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§ 4909.43. When application may not be filed; notice to municipality.

(A) No public utility shall file a rate increase application covering a municipal corporation pursuant to section 4909.18 or 4909.35 of the Revised Code at any time prior to six months before the expiration of an ordinance of that municipal corporation enacted for the purpose of establishing the rates of that public utility.

(B) Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.

HISTORY: 136 v S 94 (Eff 9-1-76); 139 v S 378. Eff 1-11-83.

The effective date of S 378 is set by section 3 of the act.

§ 4928.02. State policy commencing with start of competitive retail electric service.

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;
- (F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (G) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa;
- (H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (I) Facilitate the state's effectiveness in the global economy.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

À The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

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§ 4928.03. Identification of competitive services access to noncompetitive services.

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.

Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

Å The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

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§ 4928.05. Extent of exemption from municipal and state supervision and regulation.

(A) (1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except section 4905.10, division (B) of 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX [49] of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

Å The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

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§ 4928.11. Minimum requirements for noncompetitive services; annual compliance reports.

(A) For the protection of consumers in this state, the public utilities commission shall adopt rules under division (A) of section 4928.06 of the Revised Code that specify minimum service quality, safety, and reliability requirements for noncompetitive retail electric services supplied by an electric utility in this state, to the extent such authority is not preempted by federal law. The rules shall include prescriptive standards for inspection, maintenance, repair, and replacement of the transmission and distribution systems of electric utilities; shall apply to each substantial type of transmission or distribution equipment or facility; shall establish uniform interconnection standards to ensure transmission and distribution system safety and reliability and shall otherwise provide for high quality, safe, and reliable electric service; shall include standards for operation, reliability, and safety during periods of emergency and disaster; and shall include voltage standards for efficient operation of single-phase motors. The rules regarding interconnection shall seek to prevent barriers to new technology and shall not make compliance unduly burdensome or expensive. When questions arise about specific equipment to meet interconnection standards, the commission shall initiate proceedings open to the public to solicit comments from all interested parties. Additionally, rules under this division shall include nondiscriminatory metering standards.

(B) The commission shall require each electric utility to report annually to the commission on and after the starting date of competitive retail electric service, regarding its compliance with the rules required under division (A) of this section. The commission shall make the filed reports available to the public. Periodically as determined by commission rule under division (A) of section 4928.06 of the Revised Code and in a proceeding initiated under division (B) of section 4928.16 of the Revised Code, the commission shall review a utility's report to determine the utility's compliance and may act pursuant to division (B) of section 4928.16 of the Revised Code to enforce compliance.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

§ 4928.14. Market-based standard service offer; competitive bidding process; failure to provide service.

(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(2) The supplier is no longer capable of providing the service.

(3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

Å The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

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§ 4928.15. Schedules for providing noncompetitive service; access of self-generator to back-up electricity supply.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code. The schedule shall provide that electric distribution service under the schedule is available to all consumers within the utility's certified territory and to any supplier to those consumers on a nondiscriminatory and comparable basis. Distribution service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code. The schedule shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(B) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and except as preempted by federal law, no electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the commission under section 4909.18 of the Revised Code. The schedule shall provide that transmission or ancillary service under the schedule is available to all consumers and to any supplier to those consumers on a nondiscriminatory and comparable basis. Service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code.

(C) A self-generator shall have access to backup electricity supply from its competitive electric generation service provider at a rate to be determined by contract.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

Å The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

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§ 4928.17. Corporate separation plan.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refile of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies

with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) Notwithstanding section 4905.20, 4905.21, 4905.46, or 4905.48 of the Revised Code, an electric utility may divest itself of any generating asset at any time without commission approval, subject to the provisions of Title XLIX [49] of the Revised Code relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

Â The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

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§ 4928.34. Determinations necessary for approval or prescribing of plan; approval of abandonment.

(A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 [5727.11.1] of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd general assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate

cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with section 4928.12 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code.

In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D/D

Â So in enrolled bill, division (A)(6).

/DÂ The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

§ 4928.40. Commission to establish transition charge for each customer class; expiration of utility's market development period; periodic reviews; residential rate reduction; resale provisions; status as retail customer.

(A) Upon determining under section 4928.39 of the Revised Code the allowable transition costs of an electric utility authorized for collection as transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section 4928.37 of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility's recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010. The commission shall not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and shall not increase the charge recovering such revenue requirements associated with regulatory assets.

Factors the commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to, the total allowable amount of transition costs of the electric utility as determined under section 4928.39 of the Revised Code; the relevant market price for the delivered supply of electricity to customers in that customer class and, to the extent possible, in each rate schedule as determined by the commission; and such shopping incentives by customer class as are considered necessary to induce, at the minimum, a twenty per cent load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case shall the commission establish a shopping incentive in an amount exceeding the unbundled component for retail electric generation service set in the utility's approved transition plan under section 4928.33 of the Revised Code, and in no case shall the commission establish a transition charge in an amount less than zero.

(B) (1) The commission may conduct a periodic review no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility as initially established under division (A) of this section or subsequently adjusted under this division. Any such adjustment shall be in accordance with division (A) of this section and may reflect changes in the relevant market.

(2) For purposes of this chapter, the market development period shall not end earlier than December 31, 2005, unless, upon application by an electric utility, the commission issues an order authorizing such earlier date for one or more customer classes as is specified in the order, upon a demonstration by the utility and a finding by the commission of either of the following:

(a) There is a twenty per cent switching rate of the utility's load by the customer class.

(b) Effective competition exists in the utility's certified territory.

(C) Notwithstanding any provision of this chapter, the commission shall issue an order under section 4928.33 of the Revised Code approving a transition plan for an electric utility that contains a rate reduction for residential customers of that utility, provided that the rate reduction shall not increase the rates or transition cost responsibility of any other customer class of the utility. The rate reduction shall

be in effect only for such portion of the utility's market development period as the commission shall specify and shall be applied to the unbundled generation component for retail electric generation service as set in the utility's approved transition plan under section 4928.33 of the Revised Code subject to the price cap for residential customers required under division (A)(6) of section 4928.34 of the Revised Code. The amount of the rate reduction shall be five per cent of the amount of that unbundled generation component, but shall not unduly discourage market entry by alternative suppliers seeking to serve the residential market in this state. The commission, after reasonable notice and opportunity for hearing, may terminate the rate reduction by order upon a finding that the rate reduction is unduly discouraging market entry by such alternative suppliers. No such termination of the rate reduction shall take effect prior to the midpoint of the utility's market development period.

(D) Beginning on the starting date of competitive retail electric service, no electric utility in this state shall prohibit the resale of electric generation service or impose unreasonable or discriminatory conditions or limitations on the resale of electric generation service.

(E) Notwithstanding any provision of Title XLIX [49] of the Revised Code to the contrary, any customer that receives a noncompetitive retail electric service from an electric distribution utility shall be a retail electric distribution service customer, irrespective of the voltage level at which service is taken.

HISTORY: 148 v S 3. Eff 7-6-99; 10-5-99./D

Å The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution art II, §§ 1c and 1d.

000112

§ 4933.83. Exclusive right to furnish electric service; adequate service required; reallocation of territories.

(A) Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier; provided that nothing in sections 4933.81 to 4933.90 of the Revised Code shall impair the power of municipal corporations to require franchises or contracts for the provision of electric service within their boundaries, and provided that any electric supplier may extend its facilities through the certified territory of another electric supplier to connect any of its facilities, to serve electric load centers within its own certified territory or to interconnect with other electric suppliers. In the event that a new electric load center should locate in an area that is composed of two or more adjacent certified territories, the electric supplier in whose certified territory the greater portion of the land area covered by the electric load center is located shall serve that electric load center. In the event that a municipal corporation refuses to grant a franchise or contract for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality, any other electric supplier may serve the municipal corporation under a franchise or contract with the municipal corporation.

(B) Electric suppliers shall furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories that they are authorized and required to serve pursuant to sections 4933.81 to 4933.90 of the Revised Code. The public utilities commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any electric supplier operating in a certified territory, or providing electric service pursuant to division (C) of this section, is rendering or proposes to render physically adequate service to an electric load center and in the event the commission finds that such electric supplier is not rendering and does not propose to render physically adequate service, the commission may enter an order specifying in what particulars such electric supplier has failed to render or propose to render physically adequate service and order that such failure be corrected within a reasonable time to be fixed in such order. If the electric supplier so ordered to correct such failure fails to comply with such order, the commission may authorize another electric supplier to furnish electric service to such electric load center and shall appropriately amend the maps of the certified territory of such electric suppliers.

(C) Except as provided in division (B) of this section and Article XVIII of the Ohio Constitution, each electric supplier has the obligation and exclusive right to furnish electric service to electric load centers, wherever located, which it was serving on January 1, 1977, or which it had agreed to serve under lawful contracts in effect on or resulting from written bids submitted under bond prior to January 1, 1977, and no other electric supplier shall furnish, make available, or extend electric service to any such electric load centers.

(D) Sections 4933.81 to 4933.90 of the Revised Code shall not prevent an electric supplier from extending its electric service after the effective date of this section to its own property or facilities.

(E) Notwithstanding the effectuation of certified territories established by or pursuant to sections 4933.81 to 4933.90 of the Revised Code, and the exclusive right of electric suppliers to serve within such territory, and notwithstanding any other provisions of such sections establishing rights of electric suppliers to furnish electric service, any two or more electric suppliers may jointly petition the commission for the reallocation of their own territories and electric load centers among them and designating which portions of such territories and electric load centers are to be served by each of the electric suppliers. The commission, if it finds that granting the petition will promote the purposes of

sections 4933.81 to 4933.90 of the Revised Code and will provide adequate service to all territories and electric load centers affected thereby, shall approve such a petition, appropriately modify the territorial boundaries of the petitioning electric suppliers, and amend the maps of the certified territory of such electric suppliers accordingly.

HISTORY: 137 v H 577. Eff 7-12-78.