

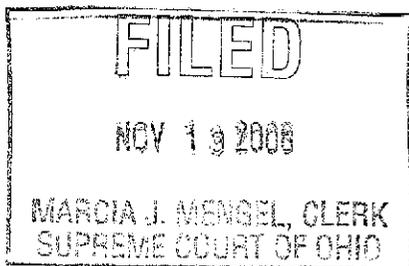
IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

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

AMICUS CURIAE BRIEF OF
OHIO PARTNERS FOR AFFORDABLE ENERGY
IN SUPPORT OF APPELLANT

David C. Rinebolt
(Reg. No. 0073178)
Counsel of Record

James Petro
(Reg. No. 0022096)
Attorney General of Ohio



Duane W. Luckey
(Reg. No. 0023557)
Senior Deputy Attorney General
Thomas W. McNamee
(Reg. No. 0017352)
Counsel of Record
Assistant Attorney General
Public Utilities Section

Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, Ohio 45839-1793
(419) 425-8860 -- Telephone
(419) 425-8862 -- Facsimile
drinebolt@aol.com

Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215-3793
(614) 644-8698 – Telephone
(614) 644-8764 – Facsimile
duane.luckey@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

Attorney for Amicus Curiae
Ohio Partners for Affordable Energy

Attorneys for Appellee
Public Utilities Commission of Ohio

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel

Jeffrey L. Small
Counsel of Record
(Reg. No. 0061488)
Kimberly W. Bojko
(Reg. No. 0069402)

Office of the Ohio Consumers'
Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

*Attorneys for Appellant
Office of the Ohio Consumers'
Counsel*

Samuel C. Randazzo
(Reg. No. 0016386)
Counsel of Record
Lisa G. McAlister
(Reg. No. 0075043)
Daniel J. Neilsen
(Reg. No. 0076377)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

*Attorneys for Appellant Industrial
Energy Users – Ohio, Inc.*

Kathy Kolich
(Reg. No. 0038855)
Counsel of Record
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308

*Attorney for Appellant FirstEnergy
Solutions*

David Boehm
(Reg. No. 0021881)
Counsel of Record
Michael Kurtz
(Reg. No. 0033550)
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, Ohio 45202

*Attorneys for Appellant Ohio Energy
Group*

Marvin I. Resnik
(Reg. No. 0005695)
Counsel of Record
Sandra Williams
(Reg. No. 0022152)
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215

*Attorneys for Intervening Appellees,
Columbus Southern and Ohio Power
Companies*

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	iv
Supplement Table of Contents.....	vi
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS.....	5
III. ARGUMENT.....	6
The Opinion and Order issued by the Public Utilities Commission of Ohio is not in the public interest and is unlawful under Chapter 4928, Revised Code.....	6
IV. CONCLUSION.....	14
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Columbus Southern Power Co. v. Pub. Util. Comm.</i> , (1993), 67 Ohio St.3d 535	12
<i>Ohio Consumers' Counsel, v, Pub. Util. Comm.</i> , (2006), 109 Ohio St.3d 522, 2006-Ohio-3054.....	10, 16
<i>Ohio Consumers' Counsel, v, Pub. Util. Comm.</i> , (2006), 109 Ohio St.3d 328, 2006-Ohio-2110.....	10, 16
<i>Tongren v. Pub. Util. Comm.</i> , (1999), 85 Ohio St.3d 87	12

Entries and Orders of the Public Utilities Commission of Ohio

<i>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, Opinion and Order (April 10, 2006)</i>	3, 10, 11
---	-----------

Statutes

R.C. §4909.15.....	6
R.C. §4909.18.....	10, 13
R.C. §4928.01(A)(1).....	11
R.C. §4928.01(A)(4).....	1, 3, 8, 11
R.C. §4928.01(B).....	1, 3, 8, 11
R.C. §4928.02.....	1, 3, 4, 7, 8, 11
R.C. §4928.02(F).....	13
R.C. §4928.04.....	1, 13
R.C. §4928.05.....	1, 3, 8, 9, 11
R.C. §4928.06.....	3, 8, 11

R.C. §4928.06(B).....	13
R.C. §4928.06(C).....	12
R.C. §4928.06(D).....	12
R.C. §4928.14.....	4, 9, 10, 11, 13
R.C. §4909.15.....	6
R.C. §4928.17(A).....	4, 8
R.C. §4928.31.....	8
R.C. §4928.32.....	8
R.C. §4928.33.....	8
R.C. §4928.34.....	8
R.C. §4928.35.....	8
R.C. §4928.36.....	8
R.C. §4928.37.....	8
R.C. §4928.38.....	8
R.C. §4928.39.....	8
R.C. §4928.40.....	8
R.C. §4928.40(B)(2).....	13

Other

Bonbright, James C., <i>Principles of Public Utility Rates</i> , New York: Columbia University Press (1961).....	6, 13
---	-------

**SUPPLEMENT TO AMICUS CURIAE BRIEF OF
OHIO PARTNERS FOR AFFORDABLE ENERGY
TABLE OF CONTENTS**

	<u>Page</u>
<i>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, Application (March 18, 2005).....</i>	001
<i>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, Opinion and Order (April 10, 2006).....</i>	015
<i>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, Tr. Vol. I (Baker, pgs. 180-181, 185-186, 198, 216-217) (August 8, 2005).....</i>	039
Bonbright, James C., <i>Principles of Public Utility Rates</i> , New York: Columbia University Press (1961) (pgs. 10-11, 92-93).....	048

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE") is an Ohio corporation with a stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans. OPAE includes as members non-profit organizations located in the service territories of Columbus Southern Power Company ("CSP") and Ohio Power Company ("OP"). OPAE members advocate on behalf of CSP and OP's low- and moderate-income customers. OPAE members manage bill payment assistance programs to ensure customer access to electric service from CSP and OP. OPAE members also provide weatherization and energy efficiency services to those same customers. Finally, many of OPAE's nonprofit members are also ratepayers of CSP and OP.

In 1999, Ohio joined a number of other states in deregulating the generation component of electric utility service. The legislative effort defining this new regulatory framework was Amended Substitute Senate Bill 3 ("SB 3") which added Chapter 4928 to the Ohio Revised Code ("R.C."). Electric utility service includes three components: generation; transmission; and, distribution. Transmission rates are overseen by the Federal Energy Regulatory Commission. Distribution service remains a regulated monopoly in Ohio.¹

¹ Generation is defined by SB 3 as a Competitive Retail Electric Service ("CRES"). Other elements of electric service may also be reclassified as CRES. See R.C. §§ 4928.01(A)(4), 4928.01(B), 4928.02, 4928.04, and 4928.05.

Regulation of public utilities became common in the early 20th Century because utility service in its entirety was viewed as a natural monopoly. Over the past forty years, there has been a trend to substitute market forces for regulation where possible. Views on the efficacy of using the market to control rates are decidedly mixed. While theoreticians tend to believe 'competition' is working, critics point to the lack of competitive options for residential and small commercial customers in virtually every deregulated state and of the unwillingness of regulation-free generation companies to make needed investments in new powerplants. Couple these factors with the significant price increases in most states which have deregulated and the balance is clearly tipping against the restructuring trend and in favor of return to more traditional regulatory approaches.

The instant case springs from this maelstrom. American Electric Power ("AEP") maintains that at some point in the future – the Company won't say when for certain – it's operating companies, Columbus Southern Power ("CSP") and Ohio Power ("OP") will lack adequate generation capacity to serve their Ohio customers.² No Competitive Retail Electric Suppliers (CRES), commonly referred to as marketers, are selling generation in AEP service territories. No companies have announced construction of a powerplant or a power purchase contract from other sources to serve CSP and OP customers via a competitive offer. The

² Supplement at 46.

AEP position is that because SB 3 reaffirmed the duty of regulated Electric Distribution Utilities (“EDUs”) to provide generation service to any distribution customer that requires it, those ratepayers should pay the Company to build a new powerplant despite the deregulation of the generation component of electric utility service.³

The Application lays out a three phase process, each with separate cost recovery components, covering preliminary research and development; facility engineering and construction.⁴ While the Commission only approved Phase I of the of the construction project in the instant case -- the approval of future cost recovery will be subjected to further review -- the current Commission ruling implicitly holds that an EDU can recover costs associated with constructing a powerplant, in violation of SB 3.⁵

The primary purpose of Chapter 4928, Revised Code, was to stop forcing customers to pay for anything associated with powerplants other than through the price of electricity as determined by a competitive market.⁶ The evidence is accumulating that competitive markets have not evolved, but that does not change the fact that Ohio law prohibits the Commission from requiring customers, even captive customers, from

³ Supplement at 2, 25.

⁴ There is no clearly defined separation for the three phases. Any costs not recovered during the timeframe for collection associated with a particular phase are simply rolled over for collection in subsequent phase. As a result, any engineering-related costs incurred by AEP in phases I and II are simply included in the construction costs to be collected under phase III. Supplement at 5, 25-26.

⁵ Supplement at 33.

⁶ See R.C. §§ 4928.01(A)(4), 4928.01(B), 4928.02, 4928.05, and 4928.06.

paying for the construction of a new powerplant. If CSP and OP project the need for a new powerplant to meet the company's responsibility as Provider of Last Resort (POLR), Ohio law requires the power be purchased from a competitive supplier at a market based price. The statute requires electric distribution utilities to provide a market based standard service offer and a competitive bid offer. R.C. §4928.14. If AEP, the holding company, sees an opportunity to construct a new powerplant to meet market demand, it can do so through an unregulated subsidiary. Investment decisions in generation are to be based on benefits to shareholders.⁷ But there is no legal or regulatory concept under Ohio law that authorizes AEP to charge customers greater of the cost of power from the plant or the market cost of power as requested by the Company.⁸ 'Head's I win and tails you lose' is the best way to characterize AEP's proposal. That pricing scheme is not in the public interest nor does it comply with Ohio law. Moreover, the market, which is to determine prices under Ohio law despite all its failings, is clearly the least cost option for customers under this company proposal.

OPAЕ wants to make clear it is not opposed to utilities financing and constructing Integrated Gasification Combined Cycle powerplants

⁷ R.C. §4928.17(A) prohibits electric utilities from providing both regulated services and competitive retail electric services absent a corporate separation plan that: (1) the competitive retail electric service is provided through a fully separated affiliate of the utility, not the EDU; (2) satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power; or, (3) provides an undue preference to affiliates if the electric utility.

⁸ See R.C. §4928.02, Revised Code and Supplement at 11.

(“IGCC”) without ratepayer guarantees. IGCC is generally viewed as the next generation of coal-fired powerplants and significantly reduces pollution when compared to existing technologies. OPAE would not oppose collecting the reasonable costs of such a plant from ratepayers if Ohio had retained traditional regulation, so long as the expenditures were prudent and the plant was deemed used and useful. OPAE has member organizations providing services to low-income families in the areas where the powerplant would be located; these community groups welcome the additional jobs associated with construction of the plant and the positive economic impact that would result. Nonetheless, the application as approved by the Commission is clearly unlawful and unreasonable.

I. STATEMENT OF FACTS

OPAЕ hereby incorporates the Statement of Facts submitted by the Office of the Ohio Consumers’ Counsel as a part of its Merit Brief in the instant case.

II. ARGUMENT

Proposition of Law

The Opinion and Order issued by the Public Utilities Commission of Ohio is not in the public interest and is unlawful under Chapter 4928, Revised Code.

A. Cost recovery for generation facilities violates the new regulatory compact as defined by Chapter 4928, Revised Code.

The concept of a regulatory compact has been fundamental from the outset of public utilities regulation. Under the regulatory compact, the monopoly franchise holder is responsible for making the required investments necessary to provide essential utility service to customers at just and reasonable prices.⁹ In return, the customers are required to compensate the utilities, through rates, for the cost of providing utility service. Government entities, particularly state public utilities commissions, regulate the utilities to achieve what the free market cannot: the provision of adequate service at reasonable prices.¹⁰ As a part of this responsibility, state regulators are responsible for reviewing the prudence of expenditures and overseeing the design of rates which collect the approved expenditures.¹¹

With the passage of SB 3, the Ohio General Assembly made a determination to remove generation from the confines of the traditional regulatory compact. The legislature made the judgment that generation

⁹ Bonbright, James C., *Principles of Public Utility Rates*, New York: Public University Press (1961), Supplement at 51.

¹⁰ R.C. §4909.15.

¹¹ Id.

technologies had evolved to the point where market forces could substitute for public regulation and produce just and reasonable rates; the underlying assumption was that a competitive generation market would lower prices to marginal cost. The objectives of the General Assembly are defined in R.C. §4928.02:

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 marketers 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.

Thus, the *quid pro quo* that is the regulatory compact was eliminated, at least so far as generation is concerned. No longer are Ohio public utilities required to provide electric generation at regulated rates and customers are freed from the responsibility to compensate utilities for the cost of building generation facilities, the cost of complying with environmental regulations of generation facilities, and operations and maintenance costs of generation facilities. Generators are to recover their costs and make their profit through the price set by a competitive market.¹²

This is the concept behind SB 3. During the transition to competition, ratepayers paid off the costs – regulatory assets – associated with existing plants. Utilities with generation assets that were allegedly uncompetitive in the project market also received generation-related transition costs paid for by ratepayers, designed to render those plant competitive. R.C. §§4928.31 through 4928.40. After January 1, 2006, generation prices were to be based on the market under Ohio law.

By approving the cost-recovery proposal advanced by AEP, the Public Utilities Commission of Ohio (PUCO) violated the new regulatory compact as defined by the General Assembly in Chapter 4928, Revised Code. R.C. §4928.17(A), Revised Code, prohibits electric utilities from providing both regulated services and competitive retail electric services absent a corporate separation plan that: (1) the competitive retail electric service is provided through a fully separated affiliate of the utility, not the

¹² R.C. §§ 4928.01(A)(4), 4928.01(B), 4928.02, 4928.05, and 4928.06.

EDU; (2) satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power; or, (3) provides an undue preference to affiliates of the electric utility. Comparing the statutory requirements associated with providing competitive retail electric service with the Application in this case clearly exposes the failings of the AEP plan. First, the power plant is to be owned by CSP and OP – the EDUs, which are forbidden under Ohio law to own the plant. Second, having ratepayers subsidize the construction of the plant in violations of Ohio law results in a competitive advantage and will unlawfully perpetuate or expand AEP’s generation monopoly status. Third, the Application provides an undue preference to CSP and OP, let alone other AEP affiliates who will now have access to at least 600 MW of capacity from AEP’s existing low-cost fleet of power plants, plants already paid for by Ohio ratepayers.¹³

Taken as a whole, the proposal clearly violates the regulatory compact as redefined by SB 3.

- B. Requiring customers to pay the greater of cost or price for power provided by a powerplant owned by an EDU is not in the public interest and violates ratemaking provisions in Title 49, Revised Code.

Chapter 4928, Revised Code, makes clear that customers are to pay market prices for generation after the end of the transition period; i.e. December 31, 2005.¹⁴ The Opinion and Order promulgated by the PUCO authorizes CSP and OP to collect the costs associated with preliminary

¹³ Supplement at 44.

¹⁴ R.C. §§4928.05, 4928.14.

engineering studies for a new powerplant. The Opinion and Order permits these generation costs to be imposed directly on customers, not through the competitive market as required by Ohio law.¹⁵

SB 3 provides a single mechanism to establish default rates at the end of the Market Development Period – R.C. §4928.14. That section of the statute requires an EDU to establish: (1) a market based standard service offer; and, (2) a rate established through a competitive bidding process. The EDU, at its option, can choose to use the price established through competitive bid as the market based standard service offer.¹⁶ A market based standard service offer is required by statute to be established under the provisions of Section 4909.18, Revised Code, which contains specific filing requirements for applications to establish, modify or increase any new or existing rate or charge.¹⁷ Those requirements have not been followed nor met by AEP in this case. The filing is procedurally defective.

AEP has essentially asked the Commission to operate outside its statutory framework, rather than follow the requirements of the law.

The Commission has opted to do so through its Opinion and Order in

¹⁵ Supplement at 32.

¹⁶ SB 3 requires EDUs to offer a price set through competitive bidding under procedures defined in regulations issued by the Commission. This Court recently found the current Rate Stabilization Plan proposed by CSP and OP and approved by the Commission defective for failure to comply with this requirement. The same is true in a recent case involving FirstEnergy Corp. See, *Ohio Consumers' Counsel, v, Pub. Util. Comm.*, (2006), 109 Ohio St.3d 328, 2006-Ohio-2110, and *Ohio Consumers' Counsel, v, Pub. Util. Comm.*, (2006), 109 Ohio St.3d 522, 2006-Ohio-3054.

¹⁷ R.C. §4928.14(A).

this case by stretching the concept of ancillary services far beyond the boundaries of law and reality.¹⁸

This flight of regulatory fancy includes authorizing CSP and OP to charge customers the greater of cost or market for the power produced by the IGCC plant. As previously noted, neither the retail nor wholesale market has evolved to the point where there is competition. Even so, SB 3 requires customers be offered a market based standard service offer and a price set through competitive bid. AEP is attempting to unlawfully add a third option: a price set by the cost of new generation built by itself in its capacity as the monopoly generation provider if it is higher than market or the market, whichever is more.¹⁹ The law makes no provision for a third pricing mechanism.²⁰

- C. There should be no deference to the specialized knowledge of a quasi-judicial regulatory authority when its actions exceed or violate the authority provided by statute.

The decision of the Public Utilities Commission of Ohio (PUCO) in the instant case ignores the decision made by the General Assembly enshrined in Ohio law to rely exclusively on the market to price generation service.²¹ While the PUCO and numerous parties and observers have

¹⁸ Supplement at 17-18. The Commission reinvents the term “ancillary service”, defined in R.C. §4928.01(A)(1) to include generation service which is specifically defined as a competitive service not subject to regulation; ancillary service are specifically subject to regulation unless declared competitive by the Commission. See also R.C. §4928.05.

¹⁹ Supplement at 11.

²⁰ R.C. §4928.14.

²¹ R.C. §§ 4928.01(A)(4), 4928.01(B), 4928.02 and 4928.06.

repeatedly acknowledged the failure of the market, the law is still the law. It is well established that the Commission is a creature of statute and has only those powers granted to it by the General Assembly. *Tongren v. Pub. Util. Comm.*, (1999), 85 Ohio St.3d 87; *Columbus Southern Power Co. v. Pub. Util. Comm.*, (1993), 67 Ohio St.3d 535.

SB 3 fortunately provides a path to be followed in the event that the market failed to evolve to the point where competition can be supported.

R.C. §4928.06(C) requires that the Commission:

...shall monitor and evaluate the provision of retail electric service...for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition....

R.C. §4928.06(D) lays out the elements to be considered in this evaluation, including: 1) the number and size of alternative providers of that service; 2) whether service is available for alternative providers in the relevant market; 3) the ability of alternative suppliers to make service available at competitive prices, terms and conditions; and, 4) other indications of market power such as market share and ease of entry. The results of these evaluations are to be provided to the committees of the House and Senate responsible for overseeing public utilities.

The drafters of the statute clearly envisioned that with proper monitoring and reporting, the General Assembly would serve as the body to alter the regulatory framework for restructuring of the electric utility industry if such alteration became necessary. The PUCO was granted the authority to reduce the length of the Market Development Period (“MDP”)

from five years after the start of competition, but was not granted the authority to extend it.²² The Commission is also specifically authorized to declare retail ancillary, metering, or billing and collection services competitive and can re-regulate those services if there is a loss of effective competition.²³ The only provisions made by the statute for default generation services after the end of the MDP are the market based standard service offer and a price determined by competitive bid as authorized under R.C. §§4928.14(A) and (B). There is no statutory basis for the actions of the Commission in this case. There is no provision allowing the Commission to approve an EDU to collect the costs associated with the design and construction of a new powerplant.

The Commission would be on firmer legal ground to simply require utilities to provide a market based standard service offer based on traditional cost-of-service ratemaking principles. The necessary authority is embedded in R.C. §§4909.18 and 4928.02(F). Given that the wholesale and retail market are immature, cost-of-service principals offer the only established precedent for setting rates.²⁴ If markets did exist, they could substitute for cost-of-service principles in a R.C. § 4909.18 proceeding but

²² R.C. §4928.40(B)(2).

²³ See Sections 4928.04 and 4928.06(B), Revised Code.

²⁴ Bonbright, James C., *Principles of Public Utility Rates*, New York: Public University Press (1961) 93, "Regulation, it is said, is a substitute for competition. Hence its objective should be to compel a regulated enterprise, despite its possession of complete or partial monopoly, to charge rates approximating those which it would charge if free from regulation by subject to the market forces of competition. In short, regulation should be not only a substitute for competition, but a closely imitative substitute." Supplement at 52

they do not. The principles being applied in this case have no statutory foundation.

III. CONCLUSION

The success or failure of deregulation is still being debated industry by industry. But the principals embedded in a century of precedent that customers should pay a just and reasonable rate to a utility providing an essential service which is regulated in the public interest are just as relevant today. Utility deregulation does not inherently abandon the prior commitment to serve the public interest; it merely asserts that market forces can have the same effect that regulatory approaches attempt to mimic.

The AEP proposal as approved by the Public Utilities Commission of Ohio abandons any consideration of the public interest. It ignores the free market principles embodied in SB 3 and the competition mimicking philosophy of traditional regulation. In both approaches there is a check on unfettered profiteering and the potential abuse inherent in monopoly either through an effectively competitive market, or regulation to a just and reasonable standard. The Application as approved by the Commission includes few checks on profits and monopoly status appears enhanced. There is nothing just and reasonable about this outcome.

CSP and OP unlawfully seek to have captive distribution ratepayers responsible for the costs of designing and constructing one of the largest examples of the new generation of coal-fired powerplants constructed to

date. There is no clearly defined need for the facility. There are clearly technology challenges to work through. Major portions of the plant have not even been designed. That is what the ratepayers will pay for.

How much they will pay is a different question. As proposed, and tacitly approved by the Commission, the Companies will be paid the cost of the plant plus interest even if the cost is higher than the market price. The high cost power from the IGCC plant is the first power CSP and OP customers will pay for out of all other plants in the AEP system and all other plants from any other supplier. In fact, Ohio customers continue to pay for the IGCC powerplant even if AEP somehow loses its monopoly and the customer is purchasing power from another supplier.

In the Application, AEP requested a partnership with the Commission to develop a new electric powerplant technology.²⁵ The public interest requires a different partnership. The public interest partnership is between the utility customer who pays the bills and the public utility that provides the power. The public utility provides an essential service at a just and reasonable price that includes a fair return on equity for the utility as determined by an impartial regulatory body. In SB 3, the Ohio General Assembly chose to harness the free market to establish a price customers would pay for generation, determining that competition would produce a just and reasonable result. SB 3 did not sanction the partnership proposed by AEP.

²⁵ Supplement at 42-43.

The desired outcome has not occurred because the retail and wholesale electricity markets have not evolved to the point where there is anything resembling competition. Under Ohio law, the duty of the Public Utilities Commission is to report to the General Assembly and recommend statutory changes in the event that competition failed to serve the public interest. Instead, the Commission has explored a number of unauthorized regulatory responses, at least two of which are of questionable legality.²⁶ The latest Commission order, embodied in this case, is to burden distribution ratepayers with the cost of a powerplant built by a monopoly generation in a state where generation price is supposed to be driven solely by competition.

If the General Assembly wishes to again restructure Ohio's electric generation market it may do so, and ratepayers may then again be required to pay the costs of building powerplants to serve them. In the meantime, Ohio law prohibits the imposition of this sort of burden on captive ratepayers. Customers should pay no more than the 'market' price for power as determined by a free market. If the General Assembly sees fit, customers may again pay for generation through regulation that mimics the market. The price to be paid as a result of the instant case has nothing to do with the market or regulation and everything to do with a monopoly seeking to perpetuate its monopoly on its own terms, which

²⁶ *Ohio Consumers' Counsel, v, Pub. Util. Comm.*, (2006), 109 Ohio St.3d 328, 2006-Ohio-2110, and *Ohio Consumers' Counsel, v, Pub. Util. Comm.*, (2006), 109 Ohio St.3d 522, 2006-Ohio-3054.

have no basis in Ohio statute or regulation. The Opinion and Order of the Public Utilities Commission of Ohio should be reversed.

Respectfully submitted,

A handwritten signature in black ink that reads "David C. Rinebolt". The signature is written in a cursive style with a horizontal line underneath it.

David C. Rinebolt, Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, Ohio 45839-1793
(419) 425-8860 – Telephone
(419) 42508862 – Facsimile
drinebolt@aol.com

*Attorney for Amicus Curiae
Ohio Partners for Affordable Energy*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Amicus Curiae* Brief of Ohio Partners for Affordable Energy, was served upon all parties to this proceeding by hand delivery or regular U.S. Mail this 13th day of November 2006.



David C. Rinebolt
Counsel for *Amicus Curiae*
Ohio Partners for Affordable Energy

PARTIES OF RECORD

Thomas W. McNamee
Assistant Attorney General
Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215-3793

Jeffrey L. Small
Kimberly W. Bojko
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

David Boehm
Michael Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, Ohio 45202

Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

Marvin I. Resnik
Sandra Williams
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215

Kathy Kolich
FirstEnergy Corp.
76 South Main Street
Akron, Ohio 44308

**SUPPLEMENT
AMICUS CURIAE BRIEF OF
OHIO PARTNERS FOR AFFORDABLE ENERGY**

Provider of Last Resort (POLR) obligation (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 (the RSP case) January 26, 2005 Opinion and Order, pp. 27, 29, 37, 38).

5. In its RSP Opinion and Order the Commission authorized the establishment of a POLR charge. (p. 27). Elsewhere in its Opinion and Order the Commission stated that the Companies “will be held forth as the POLR to consumers.... Consistent with Ohio law, the POLR designation places expectations upon EDUs; the companies must have sufficient capacity to meet unanticipated demand.” (p. 37). The Commission urged the Companies “to move forward with a plan to construct an integrated gasification combined-cycle (IGCC) facility in Ohio.” (*Id.*). In that connection, the Commission stated that it “is exploring regulatory mechanisms by which utilities, given their POLR responsibilities, might recover the costs of these new facilities.” (p. 38).
6. As part of their fulfillment of their ongoing POLR responsibility, the Companies are prepared to embark on the path toward construction of a 600 MW IGCC facility at a site in Ohio. On a preliminary basis the Companies have asked the PJM RTO to analyze the impacts of locating a 600 MW facility in Meigs County, Ohio in the Great Bend area. The Companies will share in the costs of the IGCC facility based upon the retail loads of each Company during the expected operating life of the facility.

IGCC technology represents an advanced form of coal-based generation that offers enhanced environmental performance. The integration of coal gasification

technology, which removes pollutants before the gas is burned, with combined cycle technology results in fewer emissions of nitrogen oxide, sulfur dioxide, particulates and mercury, in addition to lower carbon dioxide emissions. The Companies believe that construction of an IGCC facility presents an economical and environmentally effective option for their long-term fulfillment of their POLR obligation. This is particularly true in light of natural gas fuel price projections and volatility, and increasingly restrictive environmental requirements for existing and future coal-fired generation which must be anticipated as a matter of prudent planning, including, for example, the potential of significant capital expenditures related to retrofitting traditionally built pulverized coal fired generating facilities. In addition, IGCC has many financial benefits, including its:

- Superior efficiency with lower priced Eastern bituminous coal,
- Superior environmental performance,
- Adaptability to carbon capture and disposal, to conform to anticipated future emission reduction laws and regulations, and
- Potential for by-product sales opportunities.

The Companies will submit in this docket a more detailed discussion outlining the technological and economic benefits associated with an IGCC facility.

The large investment for IGCC now will yield greater long-term adaptability to many environmental regulatory scenarios of the future. The following chart provides extensive data comparing the cost and operational specifications of IGCC to

traditional pulverized coal (PC) processes, as well as natural gas combined cycle (NGCC) – a parallel process to IGCC, but with a costlier fuel source. The data were compiled by the Electric Power Research Institute, and are based on nationally accepted economic assumptions regarding fuel costs, heat rates and financial expenditures.

Technology	PC Subcritical	PC Supercritical	IGCC (E-Gas) W/ Spare	IGCC (E-Gas) No Spare	NGCC High CF	NGCC Low CF
Total Plant Cost, \$/kW	1,230	1,290	1,350	1,250	440	440
Total Capital Requirement, \$/kW	1,430	1,490	1,610	1,490	475	475
Fixed O&M, \$/kW-yr	40.5	41.1	56.1	52.0	5.1	5.1
Variable O&M, \$/MWh	1.7	1.6	0.9	0.9	2.1	2.1
Avg. Heat Rate, Btu/kWh (HHV)	9,310	8,690	8,630	8,630	7,200	7,200
Capacity Factor, %	80	80	80	80	80	40
Levelized Fuel Cost, \$/Mbtu (2003\$)	1.50	1.50	1.50	1.50	5.00	5.00
Capital, \$/MWh (Levelized)	25.0	26.1	28.1	26.0	8.4	16.9
O&M, \$/MWh (Levelized)	7.5	7.5	8.9	8.3	2.9	3.6
Fuel, \$/MWh (Levelized)	14.0	13.0	12.9	12.9	36.0	36.0
Levelized Cost of Electricity, \$/MWh	16.7	16.7	17.9	17.2	50.3	50.3

Source: Electric Power Research Institute

As shown, the incremental cost difference in the levelized cost of electricity between IGCC and other technologies is relatively small. However, the savings with IGCC in the event of retrofitting for future carbon capture regulations are significant, as will be supported in the Companies' more detailed discussion.

7. In order to proceed, however, the Companies must have an approved mechanism by which costs associated with constructing and operating such a project throughout the life of the facility can be recovered in rates authorized by the Commission. Therefore, consistent with the Commission statements noted above, the Companies submit this application in which they propose a three-phase regulatory mechanism for recovering their costs, including carrying costs, associated with meeting their POLR responsibilities. As described in greater detail below:

In Phase I, the Companies would recover during 2006 the actual dollars they will have spent on the IGCC facility up to the time of the execution of an Engineering, Procurement and Construction (EPC) contract (approximately in June 2006);

In Phase II, beginning in 2007 through the time the IGCC facility goes into commercial operation, the Companies would recover a carrying charge on their construction costs incurred from the execution of the EPC contract until the beginning of Phase III; and

In Phase III, which would last through the commercial life of the IGCC facility, the Companies would collect a return on as well as a return of their investment in the facility, and would collect their operating expenses, including fuel and consumables, through rates authorized by the Commission.

PHASE I RECOVERY

7. The Companies propose to recover certain IGCC costs in 2006 as a temporary generation rate surcharge on the standard service rate schedules authorized in the RSP order. Those costs, which are projected to total approximately \$18 million, are the actual costs incurred through February 28, 2005 (Actual Costs) as well as the costs projected to be incurred from March 2005 until the Companies enter into the EPC

contract which is currently estimated to occur in June 2006 (Projected Costs). To begin recovering these Actual and Projected Costs, the Companies propose that they be authorized to assess a generation rate surcharge on the standard service rate schedules authorized in the RSP order, effective with the first billing cycle in January 2006. The surcharge would remain in effect for 12 billing months. Any customer that receives its generation service from a CRES provider during any portion or all of this period will avoid the surcharge for such period of time.

9. The Actual Costs amount to \$932,000. These costs, which have been deferred, generally relate to the following categories of activities:

Dollars are in \$000s

Category	Actuals Thru February 28, 2005
Scoping Study	\$ 145
Outside Services	\$ 342
New Generation Labor	\$ 80
Engineering Services Labor	\$ 248
Other Internal Labor and Corporate Overhead	\$ 82
Expenses	\$ 35
Total Generation Costs	\$ 932
Interconnection	\$
Total Interconnection Costs	\$
TOTAL COSTS	\$ 932

10. The Projected Costs are estimated to be \$17 million. The costs generally relate to the following categories of activity.

Dollars are in \$000s

Category	March 2005
	Thru June 2006
Scoping Study/Front End Engineering and Design	\$ 9,750
Outside Services	\$ 1,100
New Generation Labor	\$ 2,540
Engineering Services Labor	\$ 1,240
Other Internal Labor and Corporate Overhead Expenses	\$ 1,103
	\$ 890
Total Generation Costs	\$ 16,623
Interconnection	\$ 400
Total Interconnection Costs	\$ 400
TOTAL COSTS	\$ 17,023

11. The proposed Phase I surcharge to the standard service rate schedules, as determined using a peak demand allocation and projected energy, would be as shown in the following chart.

Columbus Southern Power Company

<u>Rate Schedule</u>	<u>Surcharge</u> (¢/kWh)
R-R, R-R-1, RLM, RS-ES and RS-TOD	0.05801
GS-1	0.04987
GS-2	0.05083
GS-3	0.03935
GS-4, IRP-D	0.03337
SBS	0.04070
SL	0.01661
AL	0.01893

Ohio Power Company

<u>Rate Schedule</u>	<u>Surcharge</u> (¢/kWh)
RS, RS-ES, RS-TOD and RDMS	0.03933
GS-1	0.04441
GS-2 and GS-TOD	0.04543
GS-3	0.03262
GS-4, IRP-D	0.02664
EHG	0.04838
EHS	0.06258
SS	0.04965
OL	0.00961
SL	0.00958
SBS	0.03174

For residential customers using 1,000 Kwh per month, the monthly surcharge would amount to 58¢ and 39¢ for CSP and OP, respectively.

PHASE II RECOVERY

12. Beginning with the first billing cycle in 2007 and through the last billing cycle before the IGCC plant is in commercial operation (currently estimated to occur in mid-2010), the Companies propose that they be authorized to collect an annually levelized carrying charge on the cumulative construction costs (including the carrying costs deferred after the EPC contract is executed and through the end of 2006) through a generation rate surcharge on the standard service rate schedules authorized by the Commission. The carrying charge would be based on each Companies' respective weighted average cost of capital, using an 11.75% return on equity, applied to each company's Construction Work in Process for the IGCC facility at the end of each month. During this period the Companies would not capitalize any carrying charges recovered pursuant to the Phase I and Phase II recovery provisions.

The generation rate surcharge will be in addition to the standard service offer generation rates authorized in the RSP order during the first portion of this recovery phase, i.e. from the first billing cycle in 2007 until the last billing cycle of 2008. From the first billing cycle of 2009 until the next phase of recovery (Phase III) begins with commercial operation of the IGCC facility, the surcharge will be in addition to the standard service offer generation rates authorized by the Commission for that period of time. Any customer that receives its generation service from a CRES provider during any portion or all of these periods will avoid the surcharge for such period of time. The current projection of the total cost of construction of the IGCC facility, without carrying costs, is \$1,033,000,000. The estimated carrying costs are \$237,488,000. The surcharges, based on those estimated carrying costs, calculated in the same manner as the Phase I surcharges for each company for 2007, 2008, 2009 and 2010 are estimated to be:

<u>Rate Schedule</u>	<u>Columbus Southern Power Company</u>			
	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>
R-R, R-R-1, RLM, RS-ES and RS-TOD	0.03553	0.16667	0.32329	0.38721
GS-1	0.03054	0.14326	0.27789	0.33282
GS-2 and GS-TOD	0.03113	0.14603	0.28325	0.33924
GS-3	0.02410	0.11306	0.21929	0.26265
GS-4, IRP-D	0.02043	0.09586	0.18593	0.22269
SBS	0.02492	0.11693	0.22680	0.27164
SL	0.01017	0.04773	0.09258	0.11088
AL	0.01159	0.05439	0.10551	0.12637

<u>Rate Schedule</u>	<u>Ohio Power Company</u>			
	<u>Surcharge (¢/kWh)</u>			
	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>
RS, RS-ES, RS-TOD and RDMS	0.02420	0.11423	0.22298	0.26432
GS-1	0.02733	0.12898	0.25177	0.29846
GS-2	0.02795	0.13193	0.25753	0.30529
GS-3	0.02008	0.09475	0.18495	0.21924
GS-4, IRP-D	0.01640	0.07738	0.15104	0.17905
EHG	0.02977	0.14050	0.27425	0.32511
EHS	0.03851	0.18173	0.35475	0.42053
SS	0.03055	0.14418	0.28145	0.33364
OL	0.00591	0.02790	0.05447	0.06456
SL	0.00589	0.02781	0.05429	0.06436
SBS	0.01953	0.09219	0.17996	0.21333

The Companies also request specific accounting authority to defer on their books the carrying cost accrued during the period of time from the execution of the EPC contract and the commencement of carrying cost recovery in the second phase of cost recovery (first billing cycle of 2007) and to amortize those carrying costs over the twelve months in 2007.

PHASE III RECOVERY

13. Prior to the Companies placing the IGCC facility in commercial operation, the Companies will file with the Commission an IGCC Recovery Factor that would be based on a return on as well as a return of the investment in the facility, as well as operating expenses, including fuel and consumables. In other words, the IGCC facility would be treated as if it were a single asset regulated utility. After a hearing and showing that costs are reasonable, the Commission will approve the IGCC Recovery Factor. The IGCC Recovery Factor would be subject to future Commission-approved adjustment for changes in relevant factors, such as IGCC

investment level, customer load, appropriate rate of return, life expectancy of the facility and operating expenses. Moreover, the IGCC Recovery Factor will be adjusted annually to reflect changes in the costs of fuel and consumables since the IGCC Recovery Factor was most recently set, and any prior over-or under-recovery of actual costs of fuel, which include purchased power, and consumables. In this regard, the Companies request accounting authority to practice deferred accounting for over/under recoveries of the costs of fuel and consumables.

The Commission-approved IGCC Recovery Factor will be compared to the Commission-approved standard service offer for the applicable period and an IGCC Adjustment Factor will be calculated to reflect the revenue difference between the IGCC Recovery Factor and the Commission-approved standard service offer. The IGCC Adjustment Factor will be reflected as a charge or credit to the Companies' approved distribution rate schedules and will continue for the period that the particular standard service offer and IGCC Recovery Factor are in effect. The IGCC Adjustment Factor and resulting charge or credit will be revised throughout the life of the IGCC facility as the Commission approves a change to the Companies' standard service offer and as the IGCC Recovery Factor changes.

If the Commission has not issued a final order concerning an IGCC Recovery Factor filing within 90 days of the Companies' filing, the proposed IGCC Recovery Factor will become effective on an interim basis and will remain in effect until such time as the Commission's final order is implemented. The Commission's final order

will provide for a reconciliation of the authorized IGCC Recovery Factor as compared to the interim IGCC Recovery Factor that had been in effect.

14. The Companies recognize that the actual revenues collected during the first and second phases of cost recovery are likely to result in either an over- or under-recovery of the actual revenues intended to be recovered. This is due to variations in actual customer loads and actual expenditure levels from projections used in establishing the surcharges in those two phases. Therefore, the Companies propose that monthly, throughout Phases I and II, the net of the over- and under-recovered revenues be subtracted from or added to the Construction Work in Process accounts for the IGCC facility which upon commercial operation will be used in determining the IGCC Recovery Factor during the third phase of recovery.

OTHER RSP IMPACTS

15. The portion of the Companies' request in this application for IGCC-related revenues during the three-year rate stabilization period (2006-2008) is not being submitted pursuant to the provision of the RSP order which permits the Companies to request additional generation rate increases above the fixed generation increases. (See Opinion and Order, January 26, 2005, Case No. 04-169-EL-UNC, pp. 21,22). Nonetheless, in light of the environmental compliance capabilities of the IGCC facility, some parties might believe that the revenues collected pursuant to this application during the rate stabilization period should be used to reduce the amounts of additional generation rate increases the Companies can request under the RSP. In recognition of that concern, the Companies propose that the IGCC-related revenues

collected through surcharges during the rate stabilization period will be tracked and those amounts will be considered as reducing the amounts of additional generation rate increases that each Company can request under the RSP.

Further, additional revenues collected pursuant to this application during 2006 and 2007 will not be considered as part of the generation rate levels which will be increased by 3% and 7%, for CSP and OP respectively, in 2007 and 2008 pursuant to the RSP order.

In light of the POLR obligation resting on EDUs in Ohio and the fact that the Companies do not have an affiliated CRES provider, the Companies do not believe that they are required to corporately separate. Since corporate separation might be required after the rate stabilization period, the Companies request, as part of this application, any waiver that would be needed to permit the Companies, as EDUs, to retain ownership of the IGCC facility.

CONCLUSION

16. The Companies' construction and operation of an IGCC facility in Ohio, with assured cost recovery, are consistent with the Governor's charge to the Commission and other state agencies "to enhance the business climate in Ohio as it competes on a regional, national and global basis for economic development projects." (RSP Opinion and Order, p. 37). It also is consistent with the Commission's observation that the state's policy is to provide customers a "future secure in the knowledge that electricity will be available at competitive prices." (*Id.*). This facility will help fulfill the Companies' POLR obligation, and thereby encourage business development in their

service areas. Moreover, the facility itself will create valuable jobs in an economically depressed area of Ohio. It is expected that construction employment will peak at about 1900 jobs. Ongoing operation of the IGCC facility should result in about 125 permanent jobs. The IGCC facility is expected to produce about \$10 million per year in state and local tax revenue. All the while, Ohio's environment will be improved by having this new "environmentally friendly" generating facility which will be capable of using competitively priced Ohio high sulfur coal to meet the Companies' customers' default demand for electric energy.

17. Cost recovery throughout the life of the IGCC facility needs to be addressed at the outset for the Companies to pursue construction of the facility. Therefore, the Companies request that the Commission expeditiously approve this application so that they can proceed with bringing IGCC technology to their customers and to Ohio. In this regard, the Companies request that the Commission establish a procedural schedule to consider this application.

Respectfully submitted,



Marvin L. Resnik (614) 716-1606
 Sandra K. Williams (614) 716-2037
 American Electric Power Service
 Corporation
 1 Riverside Plaza, 29th Floor
 Columbus, Ohio 43215
 Fax: (614) 716-2950
miresnik@aep.com
swilliams@aep.com

Daniel R. Conway (614) 227-2270
 Porter Wright Morris and Arthur LLP
 41 South High Street
 Columbus, Ohio 43215-6194
 Fax: (614) 227-2100
dconway@porterwright.com

Counsel for Columbus Southern Power Company and Ohio Power Company

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 Ultimate) Case No. 05-376-EL-UNC
 Construction and Operation of an)
 Integrated Gasification Combined Cycle)
 Electric Generating Facility.)

OPINION AND ORDER

The Public Utilities Commission of Ohio (Commission), having considered the testimony and all other evidence presented in this matter and relevant provisions of the Revised Code, hereby issues its Opinion and Order.

APPEARANCES

Marvin I. Resnik and Sandra K. Williams, 1 Riverside Plaza, Columbus, Ohio 43215-2373; and Daniel Conway, Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

Jim Petro, Attorney General of the state of Ohio, Duane W. Luckey, Senior Deputy Attorney General, Steven T. Nourse, Werner L. Margard III, and Thomas W. McNamee, Assistant Attorneys General, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Kimberly J. Bojko and Jeffery L. Small, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, on behalf of the residential customers of Columbus Power Company and Ohio Power Company.

Kathy J. Kolich, 76 South Main Street, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corporation.

Samuel C. Randazzo and Lisa Gatchell McAlister, McNees Wallace & Nurick LLC, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

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 JKS Date Processed 4-10-06

05-376-EL-UNC

-2-

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, Cavalieri, 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); Beard Generation, LLC (Beard); 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 Baard 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.

SDL/GNS:ct

Entered in the Journal

APR 10 2006

Renee J. Jenkins
Secretary

1 longer be part of the pool."

2 Does that mean that the generating
3 capacity owned by Ohio Power and Columbus
4 Southern would be devoted to the market and then
5 ratepayers would have no entitlement or call to
6 that low-cost power?

7 MR. CONWAY: I would like to clarify
8 that the recitation of the testimony was a
9 little bit off. The word on line 10 is not
10 "substantially." It's "substantively," so the
11 testimony does not say is not substantially
12 modified; it says is not substantively modified,
13 just that clarification.

14 Q. Does that mean in power plants that
15 were in rate base are going to be devoted to the
16 market and the ratepayers will have no
17 entitlement to that low cost power?

18 A. The words in that assume that it
19 would be part of the market and no longer in the
20 pool.

21 Q. So after the rate stabilization plan
22 ends at the end of 2008, your ratepayers would
23 be paying market for their generation plus these
24 Phase I, Phase II, Phase III surcharges.

1 A. In -- I believe that Phase I is over
2 before 2009. And so Phase II there would be the
3 surcharge, which was bypassable, so they would
4 be paying the market plus surcharge if they
5 chose not to shop, and in Phase III they would
6 be paying market plus either a charge or a
7 credit based on the recovery factor.

8 Q. If they stayed with AEP and did not
9 shop, they would pay a market-based standard
10 offer provided by AEP plus the Phase II
11 surcharge; correct?

12 A. I believe that's what I just said.

13 Q. So those customers who are buying
14 from AEP at a market-based standard offer would
15 be paying the market-based rate plus Phase II
16 surcharge. That's what you just said.

17 A. Anybody that didn't shop, yes.

18 Q. Okay. Now one of the selling points
19 of this proposal is it's going to create -- how
20 much is this whole plant going to cost, plus
21 interest on construction; do you remember?

22 A. I don't. I believe it's someone's
23 supplemental testimony, but I don't remember the
24 specific number.

1 knowledge, that a pulverized coal unit would
2 have a lower capital cost than the IGCC, and
3 based on the same expected output, it would have
4 a lower unit cost.

5 Q. As I understand your case, you're
6 basically saying you're not going to build this
7 plant unless you get full recovery. One of
8 reasons you won't build it is because it's not
9 economic. It's higher risk. Your shareholders
10 don't want to take this exposure. Am I wrong
11 with that understanding?

12 A. I think you put too much into that
13 question. I don't think we said that it is not
14 economic. I do agree we said it is a
15 proposition that has some degree of risk, as new
16 technology generally does, and that we are
17 looking to have ownership where we can find a
18 commission which is interested in working, in
19 effect, in partnership with us to promote this
20 new technology.

21 Q. Is there a dollar limit that you can
22 place that would be the maximum amount of
23 subsidy that ratepayers would have to pay or
24 maximum amount of IGCC surcharge?

1 A. You're making an assumption that I
2 can't agree with you, and that is, it will
3 always be a subsidy, because subsidy relative to
4 what?

5 Q. Relative to markets, which is what
6 ratepayers would otherwise have paid.

7 A. Then I can't accept it is
8 necessarily less economic than the market. We
9 don't know what the price of power will be in
10 the market in 2011.

11 Q. AEP shareholders are certainly not
12 willing to take that risk; isn't that correct?

13 A. I indicated it was a -- new
14 technology has a level of risk, and we are
15 looking for a commission who wants to share the
16 risk.

17 Q. Let's assume there is some level,
18 some dollar amount of IGCC surcharge that
19 customers should be capped out at. Should there
20 be a limit on it, or should it's open-ended,
21 whatever it is, it is?

22 A. I don't see how you create that
23 because there are so many variables that could
24 be looked at, so, no we wouldn't be interested

1 COST or if we use FTRs to settle the congestion.

2 A. There can be a case where there is a
3 separation between generation costs in a region
4 and all the load. And that's when you have
5 congestion, but that's the design of FTRs, is to
6 provide you insurance against such congestion.

7 Q. And I believe you also stated on
8 page 16 that after the end of the rate
9 stabilization plan, the companies do not expect
10 Columbus Southern Power and Ohio Power to be in
11 the capacity pool -- I'm sorry. I asked you
12 that already. Isn't that right?

13 A. It's still correct.

14 Q. I apologize. The company's existing
15 generating capacity would be devoted to the
16 market at that point; correct?

17 A. As described here, that's what it
18 says, the existing generation will be devoted to
19 the market.

20 Q. And one more item I'd like to
21 clarify, because I didn't intend this in my
22 questioning to Mr. Walker, but I think that this
23 occurred. The PJM feasibility studies, they
24 occur, and there's a result, obviously, from the

1 territories?

2 A. There's a very small amount of
3 shopping, has been a very small amount of
4 shopping in Columbus Southern. I don't believe
5 there has been any shopping in Ohio Power.

6 Q. And you believe -- are you assuming
7 there will be shopping and thus there will be
8 this market to base the rates on in 2010? Is
9 that your assumptions in your statement?

10 THE WITNESS: Could I have the
11 question read back?

12 (Question read.)

13 A. My assumption is that -- the rates
14 set in the two customers -- in the Ohio Power
15 and Columbus Southern area will be set by the
16 market, and there may or may not be shopping,
17 dependent on how successful various marketing
18 companies are in coming in and acquiring load.

19 Q. Mr. Baker, I believe it was at the
20 technical conference we discussed this issue,
21 and we're talking about the 2010 and what the
22 world would be like, and in 2010 isn't it true
23 that one option, as you stated at the technical
24 conference, could be that you would subtract the

1 IGCC load, the 600 megawatts, from the total
2 load on AEP's, the operating company's, system,
3 and then you could bid out, competitively bid
4 out, the remaining load?

5 A. That was one of the scenarios we
6 talked about around post 2008.

7 Q. Is that the most likely scenario?

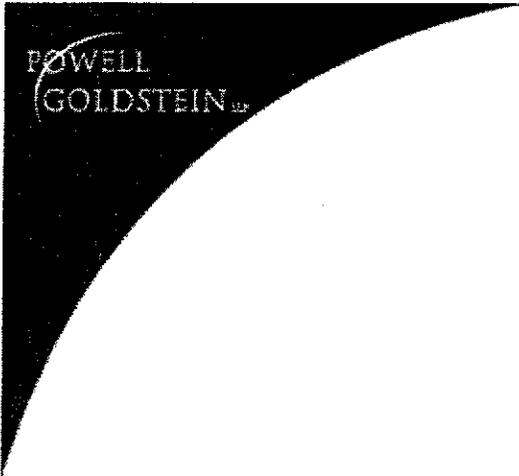
8 A. We haven't made any final
9 determination.

10 Q. And for the purposes of your
11 testimony, did you assume that the companies'
12 POLR obligation in 2010 would be equal to,
13 greater than, or less than if the 600 megawatt
14 IGCC plant?

15 A. My assumption when we laid this out
16 was that it was likely that the obligation that
17 these two companies would have to serve load
18 would likely exceed 600 megawatts.

19 Q. And are there any other scenarios
20 besides the one mentioned of subtracting the 600
21 megawatts and bidding out the remainder of the
22 load that the company has considered doing at
23 that point in time?

24 A. There are other ways you could go



Principles of Public Utility Rates by James C. Bonbright

Reprinted by permission



© 2002 Powell Goldstein LLP. All rights reserved.

www.terry.uga.edu/bonbright/pdfs/principles_of_public_utility_rates.pdf

The following electronic copy of the work entitled
"Principles of Public Utility Rates"

by James C. Bonbright,
first published by the Columbia University Press in 1961,
is reproduced here in its entirety with the authorization and permission of the
copyright holder.

This electronic copy is made available to the public by Powell Goldstein LLP, with the
permission of the copyright holder, for further electronic copying or printing for any
and all educational and/or non-commercial purposes.

Please note that some pages have notations that were not
in the original printed document.

We could not remove these marks and notes
from the source material of this rare book.

Powell Goldstein LLP is not responsible for these changes to the original printed text.

Commercial, for-profit, sales of this work are not permitted
without the written consent of the copyright holder.

00049

Principles of
Public Utility Rates

By JAMES C. BONBRIGHT



NEW YORK
COLUMBIA UNIVERSITY PRESS

00003

Classical edition of Chinese history, Part 2nd:
for English use and printed on parchment
and Arabic vellum paper.

00050

To Martin

ISBN 24142441 X
Library of Theology, Church and Studies, 2009
Copyright © 2009 Christian University Press
Printed in the United States of America
10 9 8

00004

