

IN THE SUPREME COURT OF OHIO

On Appeal From The Public Utilities Commission of Ohio

Industrial Energy Users – Ohio, et al.,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

Case No. 2006-1594

Appeal From The Public Utilities
Commission of Ohio

Case No. 05-376-EL-UNC

INITIAL BRIEF OF APPELLANT FIRSTENERGY SOLUTIONS CORP.

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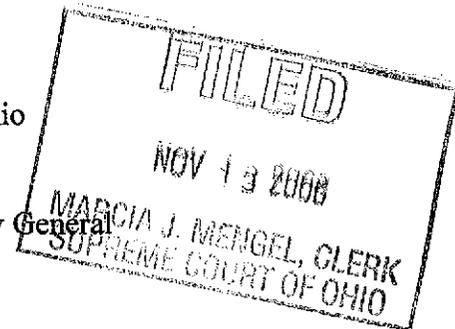
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INITIAL BRIEF OF FIRSTENERGY SOLUTIONS CORP.

Pursuant to its Notice of Appeal (Appx. A1) filed with this Court on August 25, 2006, Appellant, FirstEnergy Solutions Corp., appeals the April 10, 2006 Opinion and Order ("Order") (Appx. A26) issued by the Public Utilities Commission of Ohio ("Commission") in Case No. 05-369-EL-UNC. FirstEnergy Solutions Corp. is both a wholesale and retail electric service provider that offers competitive electric services, including firm supplies of electric generation service, to wholesale and retail electric customers in Ohio. This is an appeal as of right.

I. STATEMENT OF FACTS¹

This appeal arises from the Commission's improper exercise of jurisdiction over an application seeking preapproval to recover through regulated rates the costs to design, build and operate a new electric generating facility that has yet to be built. (Order, p. 3) (Appx. A28); (Tr. I, p. 253) (Supp. S20). When the Ohio General Assembly "deregulated" Ohio's electric generation markets with the passage of Am. Sub. S.B. No. 3, 148 Ohio Laws, Part IV, 7962

¹ FirstEnergy Solutions Corp. generally agrees with the procedural history of the case as summarized by the Commission on pages 3-7 of its Order (Appx. A28-A32) and, therefore, will not reproduce it in this brief.

("Senate Bill 3"), it declared that electric generation service is henceforth a "competitive" electric service (Tr. I, pp. 94-96) (Supp. S16-S19) and therefore beyond the regulation or jurisdiction of the Commission. (Order, p. 17) (Appx. A42). As a consequence, electric generation service in Ohio is no longer subject to traditional, cost-of-service ratemaking. (Tr. V, pp. 151-153) (Supp. S25-S27). Entities that build generation facilities in Ohio must recover their costs through market prices established based on what the market will bear. Generation service providers have no guarantee that they will recover all of their costs. (Tr. V, p. 162) (Supp. S27). This is how competitive markets work.

Despite the General Assembly's clear declaration that generation service in Ohio is a competitive service no longer regulated by the Commission, on March 18, 2005, two Ohio regulated utilities, Columbus Southern Power Company and Ohio Power Company (collectively, "Utilities"), both subsidiaries of American Electric Power Company, Inc., filed with the Commission an Application (Supp. S1-S14) for pre-approval to recover in three phases the design, construction and operating costs of an electric generating station. (Order, p. 3) (Appx. A28). The Application proposed that preconstruction costs be collected in Phase I, interest on funds used to construct the generating station be collected in Phase II, and the actual costs of construction be collected in Phase III. (Order, pp. 11-12) (Appx. A36-37). The generating station is projected to begin producing electricity no earlier than mid-2010. (Tr. III, p. 253) (Supp. S24).

Phase I preconstruction costs are comprised of both internal and external scoping, engineering and design costs. These costs were incurred while the Utilities (i) developed the plant's configuration, internal plant processes and major equipment specifications; (ii) studied fuel and material unloading and handling systems, switchyard and transmission interconnections,

and river front improvements and development, (iii) established high level construction project schedules and costs; (iv) obtained environmental permits; and (v) managed the overall project. (Co. Exh. 5 (Jasper), pp. 10-12) (Supp. S29-S31). Phase II and III costs pertain to the construction and operation of the generating station, as well as any over- or under-recovery of costs collected in previous phases. (Order, pp. 11-12.) (Appx. A36-37).

Notwithstanding Senate Bill 3's clear intent, the Commission nevertheless assumed jurisdiction over the Application, finding that the Application was "not about regulating retail electric generation service, but about providing the distribution ancillary services [, which are] subject to Commission regulation, as being necessary to support the distribution function." (Order, p. 17)(Appx. A42). In other words, the Commission concluded that an application seeking regulated recovery of costs incurred by the Utilities to design a generating station, build a generating station, and operate a generating station was not about generation service, but rather about the Utilities' distribution system. Based on this finding, the Commission approved recovery of approximately \$24 million of Phase I preconstruction costs through a 12-month surcharge that will be added to the Utilities' regulated rates. The Commission left for another day whether Phase II and III costs should also be recovered. (Order, pp. 11, 23) (Appx. A36, A48).

As is more fully discussed below, the Commission erred by setting the Application for hearing. The Application dealt with issues that were beyond the Commission's subject matter jurisdiction to address. However, if this Court determines that the Commission possessed the necessary jurisdiction to review the Application, the Order must still be reversed because the Commission's actions in the proceeding below exceeded its statutory authority. When ruling on

the Application, the Commission violated the most basic principles of cost-of-service ratemaking.

Except for generating assets, a utility is entitled to earn a return on investment for facilities "used and useful" in providing service. R.C. 4909.15. A facility cannot be used or useful until it is placed into service. *See Forest Hills Util. Co. v. Pub. Util. Comm'n* (1972), 31 Ohio St. 2d 46, 51 (and held for future use is neither used nor useful). Assuming for the sake of argument that the generating facility contemplated in the Application is a distribution asset, the generating station does not yet exist, thus making it impossible for it to meet the "used and useful" test.

The law also addresses partially completed construction projects. During the construction process, costs for new facilities not yet complete are accounted for as construction work in progress ("CWIP"). According to R.C. 4909.15, CWIP cannot be placed into rate base (thus allowing a utility to start earning a return on or of its investment) until the project is at least 75% complete. The Utilities' generating station is not 75% complete. It is not even 1% complete. Pursuant to R.C. 4909.15, the Utilities were entitled to *none* of the rate relief requested in the Application. The Application was deficient on its face. Moreover, given the status of the project and the requirements of R.C. 4909.15(A), the Application was also filed prematurely, requesting relief that the Commission could not authorize. Therefore, the Commission should have rejected it out of hand. It was beyond its statutory authority to address the Application.

The Commission's errors of assuming jurisdiction over a generation matter and granting relief that it had no authority to grant are exacerbated by the fact that the Commission's Order is unsupported by the evidentiary record and in violation of R.C. 4903.09. Therefore, in light of

these errors, Appellant, FirstEnergy Solutions Corp., respectfully asks this Court to reverse the Commission's Order.

II. ARGUMENT

Ordinarily this Court will not substitute its judgment for that of the Commission unless the findings are so manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension or mistake, or willful disregard of duty. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n* (1996), 76 Ohio St. 3d 163, 165. However, with regard to questions of law (including the interpretation of statutes), this Court has complete independent power of review. *Consumers' Counsel v. Pub. Util. Comm'n* (1983), 4 Ohio St. 3d 111, 111. This appeal requires an independent review of Senate Bill 3 — in particular, R.C. 4928.01(A), R.C. 4928.03, R.C. 4928.05, R.C. 4928.14 and R.C. 4928.17.²

When the Court is called on to interpret a statute, it must "breathe sense and meaning into it; [] give effect to all of its terms and provisions; and [] render it compatible with other and related enactments whenever and wherever possible." *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App. 2d 4, 6. It should not insert words not included by the legislature, *State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Educ.* (1994), 69 Ohio St. 3d 217, 220, nor should it presume that the General Assembly intended to enact a law that produces an unreasonable or absurd result. *State ex rel. Webb v. Bliss*, 99 Ohio St. 3d 166, 170, 2003-Ohio-3049, ¶ 22. Statutes, when possible, should be construed based on their plain meaning, *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St. 3d 70, 76-77, 2005-Ohio-3807, ¶ 38, consistent with other related statutes, *State ex rel. Choices for South-*

² As discussed, *infra*, in Section III C, the Order is also manifestly against the weight of the evidence.

Western City Schools v. Anthony, 108 Ohio St. 3d 1, 9, 2005-Ohio-5362, ¶ 46, and legislative intent, *Dircksen v. Greene County Bd. of Revision*, 109 Ohio St. 3d 470, 472, 2006-Ohio-2990, ¶ 16. As discussed below, the Commission assumed jurisdiction over the Application based on an erroneous interpretation of Senate Bill 3 that violates each of these basic rules of statutory interpretation.

Proposition Of Law No. I: The Commission Lacks Subject Matter Jurisdiction To Entertain Applications For Cost Recovery Of Electric Generation Facilities.

On January 1, 2001, Senate Bill 3 declared electric generation service a "competitive retail electric service," thus removing it from Commission regulation. R.C. 4928.03; R.C. 4928.05. This is not in dispute. In its Order, the Commission acknowledged that "Section 4928.03, Revised Code, does state that retail electric generation service is competitive and, therefore, not subject to Commission regulation." (Order, p. 15) (Appx. A40). This Court also noted in *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 531, 2004-Ohio-6767, ¶ 2, that Senate Bill 3 "provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service." Indeed, R.C. 4928.14(A) includes "a firm supply of electric generation service" within the range of "competitive retail electric services" established by Senate Bill 3, while R.C. 4928.05 expressly removed from Commission authority the right to regulate competitive retail electric services.

As the Order notes, the Application "lays out a regulatory mechanism by which [the Utilities] might recover the costs of a coal-fired electric generating facility." (Order, p. 19) (Appx. A44). If the construction and operation of a generating facility does not constitute activities involving "electric generation service" it is difficult to conceive what does. Indeed, as a base load unit, it is beyond dispute that the generating station will generate firm supplies of electric generation. And, because the Application clearly pertains to electric generation service,

which is expressly deemed a competitive service under Senate Bill 3, the Commission should have immediately dismissed the Application. The Commission exceeded its subject matter jurisdiction when it failed to do so.

The Commission assumed jurisdiction over the Application based on its authority "to assure reliable distribution service." (Order, p. 17) (Appx. A42). It links this obligation to the Application by first finding that "the Application is not about regulating retail electric generation service, but about providing [] distribution ancillary services." (Order, p. 17) (Appx. A42). Based on two additional findings — that the distribution ancillary services "are subject to Commission regulation, as being necessary to support the distribution function" (Order, p. 17) (Appx. A42) and that "most of these ancillary services require [a] generating plant" (Order, p. 18) (Appx. A43.) — the Commission makes the incredible leap that the Application deals with provider of last resort ("POLR") service³ the costs of which are recoverable, pursuant to *Constellation New Energy, supra*, through a POLR surcharge that will be added to customers' regulated rates. (Order, p. 18. (Appx. 43).

A. The Application Is Not About Distribution Ancillary Services Or The Viability Of The Distribution System.

The Commission's findings notwithstanding, the Application is *not* about "distribution ancillary services." As a preliminary matter, the Commission contradicts itself several times on this point, first finding that the proposed recovery mechanisms included in the Application "are for the stated *purpose of recover[ing] the costs of the [generating station]*" (Order, p. 17) (Appx. A42) (emphasis added), and, second, that the Application "lays out a regulatory mechanism by

³ R.C. 4928.14 requires the Utilities to provide a firm supply of electric generation service to customers who either do not choose an alternative electric generation supplier, or choose an alternative supplier and then return to the Utilities for electric generation service. This is commonly referred to as provider of last resort ("POLR") service. *Constellation New Energy*, 104 Ohio St. 3d 530, 539 (fn 5).

which [the Utilities] might *recover the costs of a coal-fired electric generating facility.*" (Order, p. 19) (Appx. A44) (emphasis added). Nowhere do the Utilities justify the Application based on the need for distribution ancillary services or the need to support their distribution system. Rather, the Application addresses the benefits of the generating station's fuel technology (App., pp. 2-5) (Supp. S2-S5), the mechanisms to be used to recover the costs of the generating station (App., pp. 5-13) (Supp. S5-S13), and the perceived societal benefits of constructing the generating station (App., pp. 13-14) (Supp. S13-S14). Thus, the Commission's finding that the Application was about "distribution ancillary services" is contrary to the Application itself. This finding is also contrary to the definition of "ancillary service" included in Senate Bill 3.

Revised Code Section 4928.01(A)(1) defines "ancillary service" as:

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.

The Application involves recovery of costs incurred by the Utilities while designing, building and operating a generating station. The definition of ancillary services is limited to "function[s] necessary to the provision of electric *transmission or distribution service.*" R.C. 4928.01(A)(1) (emphasis added). The definition makes no mention of the generation function, and, therefore, none should be implied. *Cassels*, 69 Ohio St. 3d at 220. Moreover, the statutory definition of "ancillary service" lists numerous examples of the nature of services intended by the General Assembly to be included within the definition. When interpreting a definitional statute that

includes examples of the statute's meaning, the definition should be interpreted based on the examples expressly listed in the definition. *State v. Hooper* (1979), 57 Ohio St. 2d 87, 89-90. All of the services listed as examples of ancillary services relate to the *flow* of electricity, not the construction of the generating station that will *produce* the electricity. Therefore, based on the canon of *ejusdem generis*, activities related to the design of a generating station, the construction of a generating station and the operation of a generating station do not come within the definition of "ancillary services" as contemplated by the legislature.

The Commission attempts to link the generating station to the ancillary services based on its observation that "most of these ancillary services require [a] generating plant." (Order, p. 18) (Appx. A43). While this is obviously true, it is also irrelevant and ignores the distinct separation of the generation, transmission and distribution functions recognized in the law.⁴ All transmission and distribution services in some way require generating plant. Without the generating plant to produce electricity, there would be no transmission or distribution services. Therefore, if the Commission's rationale is adopted, there would be no jurisdictional boundaries and all three functions could theoretically come under Commission regulation, thus creating an exception that swallows the rule. Likewise, *any* generating station whose output flows over the transmission and distribution lines in Ohio would come within the Commission's jurisdiction — a result that would render Senate Bill 3 meaningless. Clearly an interpretation that creates such an absurd result cannot be correct. *Webb*, 2003-Ohio-3049, ¶ 22.

⁴ The generation function was deregulated upon passage of Senate Bill 3. The distribution and transmission functions continue to be regulated by the Commission and the Federal Energy Regulatory Commission, respectively.

B. Senate Bill 3 Did Not Create An Exception For POLR Service.

The Commission assumed jurisdiction over the Application based on a finding that the Utilities' POLR function "is a distribution-related service" (Order, p. 18) (Appx. A43). This finding, however, confuses POLR service with generation service and reads an exception into Senate Bill 3 that does not exist.

Throughout the Order, the Commission fails to recognize the difference between the Utilities' act of arranging for the generation service necessary to serve POLR customers (which is within the Commission's jurisdiction) and the act of the generation provider producing the generation that will be obtained by the Utilities to serve these customers (which is beyond the Commission's jurisdiction). The failure to make such a distinction is a significant flaw in the Commission's reasoning. Although the Utilities are required, pursuant to R.C. 4928.14, to provide generation service to any customer within their respective service territories that either elects not to participate in the competitive generation market or selects an alternative generation supplier and subsequently returns to the Utilities for generation service. As the Utilities Witness Braine admits, R.C. 4928.14 does not expand this POLR obligation to also require the Utilities to construct and operate the generating stations that produce the electricity (Tr. II, p. 172) (Supp. 523). Senate Bill 3 left this task to unregulated generation suppliers. R.C. 4928.17(A).

Both R.C. 4928.03 and R.C. 4928.14 expressly state that "electric generation service" is a "competitive retail electric service." However, neither of these statutes (nor any other provision in Senate Bill 3 for that matter) creates an exception that removes from the definition of "competitive retail electric service" generation that is used to supply POLR customers. Senate Bill 3 does not distinguish generation service based on the nature of the customers taking the service. In fact, Senate Bill 3 did not distinguish generation service at all. It declared *all*

generation service in Ohio a competitive service. R.C. 4928.03. Therefore, before the Commission's interpretation of Senate Bill 3 can be valid, a non-existent exception to the definition of "electric generation service" would have to be read into Senate Bill 3 — something in direct conflict with basic rules of statutory interpretation. *Cassels*, 69 Ohio St. 3d at 220.

C. The Commission Has No Authority To Regulate Resource Planning.

The Commission further justifies its jurisdiction over the Application based on a mistaken belief that it has the responsibility to ensure "adequate capacity for [the Utilities'] POLR obligation." (Order, p. 21) (Appx. A46). Like generation cost recovery, the Commission no longer has the statutory authority to regulate generation resource planning. Revised Code Section 4928.05 is clear on this point: "On and after the starting date of competitive retail electric service, a competitive retail electric service . . . shall not be subject to supervision or regulation by . . . the public utilities commission under Chapters 4901. to 4909. [ratemaking] ... [and] 4935. [resource planning] ... of the Revised Code." Generating facilities are part of electric generation service, which is a competitive retail electric service. Therefore, based on R.C. 4928.05, the Commission cannot regulate generation resource planning. This is confirmed in R.C. 4935.04.

Prior to the enactment of Senate Bill 3, the Commission was responsible for the long term planning of utility resources, including "electric generating plant and associated facilities designed for, or capable of operation at a capacity of, fifty megawatts or more." R.C. 4935.04(C); R.C. 4935.04(A)(1)(a), 146 v H476 (eff. 9-17-96). Upon enactment of Senate Bill 3, however, these provisions were amended and currently exclude from Commission authority the oversight of any resource planning related to generation. R.C. 4935.04(C); R.C. 4935.04(A)(1)(a), 148 v SB 3 (eff. 1-1-2001). Consistent with the policy to make generation

service competitive in Ohio, the General Assembly obviously intended for market forces to dictate when additional generating stations were to be constructed. Therefore, based on the plain meaning of R.C. 4928.05 and R.C. 4935.04, and the principle of *in pari materia*, Senate Bill 3 stripped from the Commission any authority to regulate generation resource planning. *Choices for South-Western City Schools*, 2005-Ohio-5362, ¶ 46.

D. The Commission's Interpretation Of Senate Bill 3 Creates An Anti-Competitive Result That Is Contrary To State Policy.

There is no question that the intent of Senate Bill 3 is to render competitive the generation component of electric service, thus removing it from Commission regulation. The General Assembly codified this in Senate Bill 3. *See, e.g.*, R.C. 4928.02; R.C. 4928.03; R.C. 4928.05; R.C. 4928.14(A). The Court recognized this in recent case law. *Constellation NewEnergy*, 2004-Ohio-6767, ¶ 2. And the Commission noted this in its Order. (Order, p. 17) (Appx. A42).

The Application asked for guaranteed rate relief to recover the costs to design, construct and operate a generating station that will be owned by the Utilities. (Order, p. 3; Appx. A28); Tr. I, p. 253) (Supp. S20). The costs that are the subject of the Application are not unique to the Utilities. They are identical to the costs that would be incurred by *any* generation provider, regulated or not, that opted to source its generation supply through its own generation, rather than through wholesale power purchases. Under the Commission's interpretation of Senate Bill 3, the General Assembly created a competitive advantage for utilities by guaranteeing recovery of their project costs, while requiring non-utility generators to rely solely on market forces to recover identical costs. As Staff Witness Wissman recognized, cost recovery assurance prior to the generating station being built is "something that would be very attractive for any investor" (Tr. V, p. 163) (Supp. S28) simply because, as the Utilities explained in their initial brief below,

"if the [generating station] is placed in a separate corporate entity, there is no apparent way that cost recovery can be assured." (Utilities' Br., p. 23) (Supp. S15). In Senate Bill 3 there is no room for such "regulated competition." The Commission's interpretation of Senate Bill 3 is anti-competitive and therefore contrary to the clear intent of the General Assembly. *Dircksen*, 2006-Ohio-2990, ¶ 16.

In sum, the Application dealt with the recovery of generation related costs — the vast majority of which have yet to be incurred — to build and run a generating plant. Activities that pertain to the construction and operation of a facility that generates electricity are part of electric generation service, which is supposed to be competitive in this State. The Commission's Order attempts to regulate it. Although the Commission may view its efforts as well intended, its intentions are not a criterion for determining the extent of the Commission's subject matter jurisdiction or the lawfulness of its actions. Nor is the fact, that the Commission faces issues involving a market that has not yet fully developed as envisioned by the General Assembly. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 109 Ohio St. 3d 328, 340, 2006-Ohio-2110, ¶ 38. Although this Court recognized the Commission's dilemma in *Consumers' Counsel*, it still concluded that this fact "does not empower the [Commission] to create remedies outside the perimeters of the law." *Id.* If the Order is permitted to stand, the Commission has not only created remedies outside the perimeters of Senate Bill 3, but also outside the perimeters of long standing, traditional ratemaking principles set forth elsewhere in Title 49.

Proposition Of Law No. 2: The Commission Lacks The Statutory Authority To Grant Cost Recovery For Generation Facilities Prior To Construction Of Such Facilities.

Not only did the Application raise issues beyond the Commission's jurisdiction to address, it also requested relief that the Commission could not grant — pre-approval to recover

generation-related costs for a generating station that does not exist. In Ohio, it is well settled that cost recovery cannot begin until utility facilities are placed into service and found to be "used and useful." R.C. 4909.15. Assuming for the sake of argument that the generating facility at issue in the Application is a distribution assets as the Commission found, clearly the facility failed to meet this requirement. At the time the Application was filed and the hearing was held, the final design of the generating station had yet to be completed and the Utilities were still negotiating the construction contract with the proposed contractor, a consortium comprised of General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation. (Order, pp. 4, 6 (fn 2), 19) (Appx. A29, A31, A44). For facilities that are not quite complete, R.C. 4909.15 allows a utility to earn a return on and a return of such a project, *provided* that the project is at least 75% complete.⁵ Inasmuch as the construction of the generating station has not yet commenced, the facility obviously fails this requirement as well. As a creature of statute, the Commission has only the authority conferred upon it by the General Assembly. *Canton Storage & Transfer Co. v. Pub. Util. Comm'n* (1995), 72 Ohio St. 3d 1, 5. Because the project was nowhere near 75% complete, the request in the Application for regulated cost recovery was deficient on its face in violation of R.C. 4909.15(A). The Commission exceeded its statutory authority both when it failed to reject the Application out of hand when it authorized recovery of Phase I costs.

⁵ Perhaps the biggest irony in the case below is that the Commission granted rate relief under a scenario that would not have been permitted prior to the passage of Senate Bill 3. *See* R.C. 4909.15, 144 SB 14, which, like the current version of R.C. 4928.15, precluded rate recovery for any project, including generation projects, that were not at least 75% complete.

Proposition Of Law No. 3: The Commission Is Without Authority To Order Relief That Is Not Supported By The Evidentiary Record.

The Commission's entire analysis is based on a threshold finding that the Application was about distribution services. As already demonstrated, this finding, as a matter of law, is erroneous and contrary to both the letter and spirit of Senate Bill 3. If this Court should disagree and find that the Application's subject matter is a question of fact for the Commission to decide, the Order must still be reversed because the Order is manifestly against the weight of the evidence and in violation of R.C. 4903.09.

Revised Code Section 4903.09 requires that the Commission file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." As this Court explained in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n* (1983), 4 Ohio St. 3d 107, 110, the purpose of this statute is to provide this Court with sufficient details to enable it to determine, upon appeal, how the Commission reached its decision. The details need to be sufficient to determine the basis for the Commission's reasoning, *Payphone Ass'n. of Ohio v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 461, 2006-Ohio-2998, ¶ 32, setting forth "some factual basis and reasoning based thereon in reaching its conclusion." *Allnet Communications Serv., Inc. v. Pub. Util. Comm'n* (1994), 70 Ohio St. 3d 202, 209.

In its analysis, the Commission notes that the 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." (Order, p. 17) (Appx. A42). This analysis, in essence, makes two findings: (1) that the Application is about distribution ancillary services; and (2) that these ancillary services support the distribution function. Yet, there is no discussion as to how the Commission reached either of these conclusions.

The Commission does not cite the Application in support of its finding that the Application is about "distribution ancillary services," nor does it point to even a single statement in the Application that mentions these services. The same is true with regard to the expert testimony, the transcript and the exhibits. There are no citations to any of these evidentiary sources in the Order. In fact, the Commission fails to include any reference to "distribution ancillary services" in its Findings of Fact and Conclusions of Law. (*See generally*, Order, pp. 22-23) (Appx. A47-A48). In light of this, it is virtually impossible to determine the factual basis on which the Commission relied when making this threshold finding.

Likewise, the Commission's second finding — that the distribution ancillary services support the Utilities' distribution function — also lacks any analysis or evidence in support of this finding. Again, the Commission fails to cite the Application, expert testimony, transcripts or exhibits; and, again, there is no reference to this finding in its Findings of Fact and Conclusions of Law. This is for good reason. The evidentiary record is void of any evidence to support such a finding. As the Commission correctly notes, "[t]he current [Application had] no detailed schedules, budgets, designs, feasibility studies or financing options." (Order, p. 19) (Appx. A44). Because of this, the Commission indicated that the Utilities still needed to "economically justify [their] construction choices, [their] technology choices, [their] timing, [their] financing structure, and the various other matters that have been left open in the current application." (Order, p. 20) (Appx. A45).

This lack of evidence presented by the Utilities is not surprising given the fact that at the time of the hearing, the final designs of the generating station and the transmission interconnection studies had yet to be completed, and not a single shovel of dirt had been turned in the construction phase of the project. There is no evidence to support the Commission's

findings simply because the project was not far enough along to produce such information. Given the status of the project, and the Utilities' inability to present a prima facie case, the Application should never have been filed, nor addressed by the Commission.

As part of its justification for concluding that the Application is about distribution services, the Commission noted that the Utilities are responsible for the operation of the distribution wires that "must remain charged for connected customers to receive service." (Order, p. 18) (Appx. A43). Again, however, the Commission fails to explain how this statement relates to a non-existent generating station that is not scheduled to produce a single kilowatt of electricity for at least four more years. Moreover, there is nothing in the record that demonstrates the flow of electricity from this generating plant that is obviously needed before the Commission could reach this conclusion

In sum, the Commission makes the general conclusions discussed above, none of which are explained or supported by the record. There is absolutely nothing on which to determine how the Commission reached any of these conclusions. Accordingly, the Order, if found to be based on questions of fact, must be reversed as being manifestly against the weight of the evidence and in violation of R.C. 4903.09.

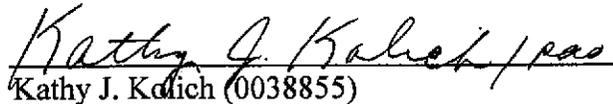
III. SUMMARY AND CONCLUSION

Appellant, FirstEnergy Solutions Corp., does not object to the construction of the generating station by the Utilities. It does, however, object to the Commission's Order that creates subsidized competition in favor of regulated utilities through regulated cost recovery while all other generation suppliers must rely on the market in order to recover identical costs. Senate Bill 3 declared all electric generation service competitive, without exception. Until the General Assembly amended or repeals Senate Bill 3, this is the law in Ohio. The Commission

and therefore, its Order, must comply — something the Order in this proceeding clearly fails to do. Therefore, based upon the foregoing, Appellant, FirstEnergy Solutions Corp., respectfully asks this Court to reverse the Commission's Order.

Dated: November 13, 2006

Respectfully submitted,


Kathy J. Kolich (0038855)

FIRSTENERGY SERVICE COMPANY

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Counsel for Appellant

FIRSTENERGY SOLUTIONS CORP.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of Appellant FirstEnergy Solutions Corp. was served by regular U.S. mail, with a courtesy copy by e-mail, to the following this 13th day of November, 2006:

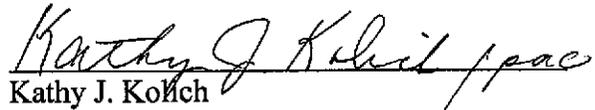
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APPENDIX

FILE

8

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IN THE SUPREME COURT OF OHIO

On Appeal From The Public Utilities Commission of Ohio

FUCO

FirstEnergy Solutions Corp.,)	Case No. _____
)	
Appellant,)	
)	Appeal From The Public
v.)	Utilities Commission of Ohio
)	Case No. 05-376-EL-UNC
The Public Utilities Commission)	
Of Ohio,)	
)	
Appellee.)	

**NOTICE OF APPEAL OF
FIRSTENERGY SOLUTIONS CORP.**

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NOTICE OF APPEAL OF FIRSTENERGY SOLUTIONS CORP.

Pursuant to R.C. 4903.11 and R.C. 4903.13, Appellant, FirstEnergy Solutions Corp., hereby gives notice of its appeal to the Supreme Court of Ohio, from an Opinion and Order of The Public Utilities Commission of Ohio ("Commission" or "Appellee"), entered into the Commission's journal on April 10, 2006, in PUCO Case No. 05-376-EL-UNC.

Appellant was and is a party of record in PUCO Case No. 05-376-EL-UNC, and timely filed its Application for Rehearing of the Commission's April 10, 2006 Opinion and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing with respect to the issues on appeal herein was denied by the Commission by entry entered in its journal on June 28, 2006.

As also set forth in Appellant's Application for Rehearing, Appellant complains and alleges that Appellee's April 10, 2006 Opinion and Order and related June 28, 2006 Entry on Rehearing in PUCO Case No. 05-376-EL-UNC are unlawful, unjust and unreasonable in the following respects:

1. Inasmuch as the Application before the Commission involves the recovery of costs incurred to construct an electric generating station, the output of which is to be used to serve retail electric service customers, the Commission lacked the jurisdiction necessary to entertain the Application in violation of R.C. 4928.05 and R.C. 4935.04.
2. The Commission's findings that the proposed generating station is being built to support distribution related ancillary services is unsupported by the record in violation of R.C. 4903.09.
3. The Commission's failure to recognize the generation produced by the proposed generating station as a competitive retail electric service violates R.C. 4928.01(A)(4), R.C. 4928.01(B) and R.C. 4928.14(A).

4. The Commission's approval of a return on and return of pre-construction costs is in violation of R.C. 4928.14, which requires such costs to be recovered through market prices.
5. The Commission's approval of the concept of allowing regulated utilities to offer competitive retail electric services through a regulated entity violates R.C. 4928.17, which requires that such services be offered through an unregulated affiliate.
6. The Commission's authorization to recover pre-construction costs incurred to build an electric generating station, when such generating station is not at least 75% complete, violates R.C. 4909.15.
7. The Commission's authorization to recover pre-construction costs through regulated rates results in subsidized competition for one entity to the detriment of all other competitors in violation of R.C. 4928.06.

WHEREFORE, Appellant respectfully submits that the Appellee's April 10, 2006 Opinion and Order and the related June 28, 2006 Entry on Rehearing in PUCO Case No. 05-376-EL-UNC are unlawful, unjust and unreasonable and should be reversed.

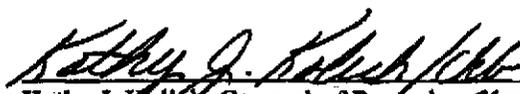
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Counsel for Appellant,
FirstEnergy Solutions Corp.

CERTIFICATE OF FILING

I hereby certify that a Notice of Appeal has been filed on August 25, 2006, with the docketing division of The Public Utilities Commission of Ohio in accordance with Sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.


Kathy J. Kolich, Counsel of Record *for telephone*
Counsel for Appellant, *authorizations*
FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of FirstEnergy Solutions Corp. was served upon the Chairman of The Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and sent by ordinary and electronic mail to all parties to the proceedings before The Public Utilities Commission of Ohio listed below, pursuant to Section 4903.13 of the Ohio Revised Code, on this 25th day of August, 2006.


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In The Supreme Court of Ohio

Case Information Statement

Case Name: FirstEnergy Solutions Corp. v. The Public Utilities Commission of Ohio	Case No.: Appeal of PUCO Case No. 05-376-EL-UNC
--	--

I. Has this case previously been decided or remanded by this Court? Yes No

If so, please provide the Case Name: _____
Case No.: _____
Any Citation: _____

II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes No

If so, please provide the Case Name and Citation: See attached

Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes No

If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:

U.S. Constitution: Article _____ Section _____ Ohio Revised Code: R.C. See attached
Ohio Constitution: Article _____ Section _____ Court Rule: _____
United States Code: Title _____ Section _____ Ohio Admin. Code: O.A.C. _____ - _____ - _____

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

- 1) Scope of PUCO jurisdiction
- 2) Sufficiency of evidence to support the Commission's order
- 3) See attached

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes No

If so, please identify the Case Name: _____
Case No.: _____
Court where Currently Pending: _____
Issue: _____

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Signature of appellant or counsel *per [unclear] authorization*

Counsel for: Appellant, FirstEnergy Solutions Corp.

ATTACHMENT TO CASE INFORMATION STATEMENT

Appendix E, Section II (cont'd.)

Case Names and Citations:

Bernardini v. Bd. of Ed. (1979), 58 Ohio St.2d 1

Monongahela Power Co. v. Pub. Util. Comm., 104 Ohio St.3d 571, 2004-Ohio-6896

Canton Storage & Transfer Co. v. Pub. Util. Comm., 72 Ohio St.3d 1, 1995-Ohio-282

State ex rel Savarese v. Buckeye Local School Dist. Bd. of Ed., 74 Ohio St.3d 543, 1996-Ohio-291

Constellation NewEnergy v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767

Statutes

R.C. 4928.01(A)(1)
R.C. 4928.01(A)(4)
R.C. 4928.01(A)(27)
R.C. 4928.01(B)
R.C. 4928.02
R.C. 4928.03
R.C. 4928.04
R.C. 4928.05
R.C. 4928.14
R.C. 4928.17
R.C. 4928.35
R.C. 4928.40
R.C. 4903.09
R.C. 4909.15
R.C. 4935.04
R.C. 1.49

Section III (cont'd.)

- 3) Statutory interpretation of Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962 (a/k/a Chapter 4928, ORC)

BEFORE

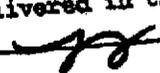
THE PUBLIC UTILITIES COMMISSION OF OHIO

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)
Generation Facility.)

ENTRY ON REHEARING

The Commission finds:

- (1) On March 18, 2005, Columbus Southern Power Company (CSP) and Ohio Power Company (OP or Ohio Power) (jointly AEP-Ohio or Companies) filed an application for authority to recover costs associated with the construction and ultimate operation of an integrated gasification combined cycle (IGCC) electric generating facility to be built in Meigs County.
- (2) On April 10, 2006, the Commission issued an opinion and order (Order) in this case in which it found that it has the authority to establish a mechanism for recovering the costs related to the construction and operation of an IGCC generating plant, where that plant is needed to fulfill AEP-Ohio's provider of last resort (POLR) obligation. That Order further approved the Phase 1 cost recovery mechanism of AEP's application.
- (3) On May 8, 2006, Industrial Energy Users-Ohio (IEU) filed an application for rehearing. On May 10, 2006, applications for rehearing were filed by FirstEnergy Solutions Corp. (Solutions), Direct Energy Services (Direct), The Ohio Energy Group (OEG) and the Ohio Consumers' Counsel (OCC).
- (4) On May 9, 2006, AEP-Ohio filed a motion for an extension of time to file a memorandum contra the applications for rehearing. The purpose of the request, according to AEP-Ohio, was to facilitate the filing of a single response to all the applications for rehearing. AEP-Ohio specifically requested an extension of time of two days that would result in the filing of

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

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

Motion to strike

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

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

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

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

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

Proprietary Information in the Record

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

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

Request for Administrative Notice

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

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

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

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

Due Process

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

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

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

Corporate Separation

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

⁴ Section 4901.16, Revised Code, states:

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

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

Section 4903.09, Revised Code

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

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

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

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

Section 4928.14, Revised Code

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

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

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

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

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

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

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

Ratemaking Statutes

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

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

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

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

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

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

⁷ Order at p. 20.

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

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

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

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

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

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

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

Issues for the next phase of this proceeding

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

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

Request for Clarification

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

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

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

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

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

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

Summary and Conclusions

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

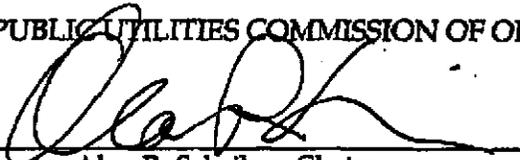
It is, therefore,

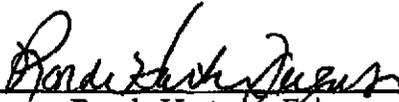
ORDERED, That if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be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

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

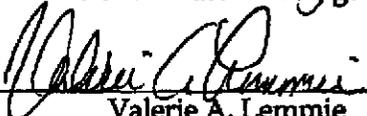
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

Judith A. Jones

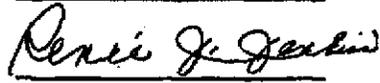

Valerie A. Lemmie

Donald L. Mason

SDL/GNS:ct

Entered in the Journal

JUN 28 2006


Renee J. Jenkins
Secretary

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.

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

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

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

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

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

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

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

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

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

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

OPINIONHistory of the Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Proprietary Information in this Proceeding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Companies' Application

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

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

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

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

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

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

Jurisdiction Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Many of the intervenors have argued that Section 4928.14, Revised Code, requires a market-based standard service offer (SSO) in the post MDP, and that precludes the Commission from approving the Companies' application (FirstSolutions Brief at 4-7; see also Calpine's Brief at 4, 5 and note 3; and 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.

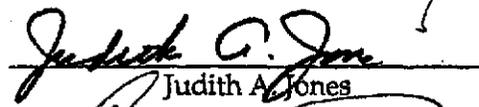
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

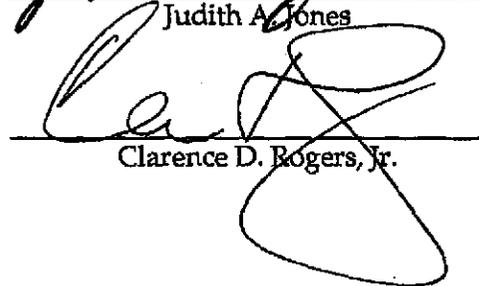


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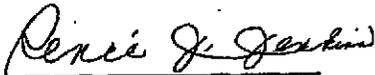


Clarence D. Rogers, Jr.

SDL/GNS:ct

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Renee J. Jenkins
Secretary

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Company and Ohio)
Power Company For Authority to Recover)
Costs Associated With the Construction) Case No. 05-376-EL-UNC
and Ultimate Operation of an Integrated)
Gasification Combined Cycle Electric)
Generating Facility)

APPLICATION FOR REHEARING

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**BEFORE
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and Ultimate Operation of an Integrated)
Gasification Combined Cycle Electric)
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APPLICATION FOR REHEARING

Pursuant to R.C. 4903.10 and Rule 4901-1-35 of the Ohio Administrative Code, Intervenor, FirstEnergy Solutions Corp., files its application for rehearing of the Commission's April 10, 2006 Opinion and Order. ("Order.")

I. INTRODUCTION

On March 18, 2005, Ohio Power Company and Columbus Southern Power Company (together "AEP Companies") filed an Application to recover in three phases the construction and operating costs related to an integrated gasification combined cycle ("IGCC") electric generating station that the AEP Companies intend to build.¹ (Order, p. 11.) According to the AEP Companies, the IGCC generating station will be dedicated to serving the AEP Companies' provider of last resort ("POLR") customers. (Id.) On April 10, 2006, the Commission authorized recovery of the Phase I costs, which are comprised of engineering, scoping study and other pre-construction costs, through a 12-

¹ Construction of the plant has yet to commence.

month bypassable generation surcharge. (Order, pp. 11, 23.) Resolution of issues involving recovery of Phase II and III costs was left for another day.² (Id. at 23.)

Simply put, this case is about recovering costs incurred to construct and operate a generating station. The Order takes a very straightforward issue about generating costs -- which, pursuant to Am. Sub. S.B. No. 3 ("Senate Bill 3"), must be recovered through the competitive generation market -- and unlawfully converts it into one about distribution-related costs that the Order approved for recovery through regulated rates. Not only does such authorization violate Senate Bill 3 and traditional rate making statutes, but it also results in subsidized competition that provides the AEP Companies with significant competitive advantages. Accordingly, Intervenor, FirstEnergy Solutions Corp., respectfully asks the Commission to reconsider its Order and find, as it must, that the Application is unlawful.

II. ARGUMENT

A. The Order Violates Senate Bill 3 and Traditional Ratemaking Statutes.

As the Commission noted, the AEP Companies intend to use "the output from this generating station ... to serve the AEP Companies' POLR customers." (Order, p. 11.) And as the AEP Companies admit, POLR service is nothing more than an obligation of an electric distribution utility ("EDU") "to provide a firm supply of generation service to their customers (a) who have not switched to a Competitive Retail Electric Service ("CRES") provider; (b) who have switched to a CRES provider and then default back to their respective Company's generation service; or (c) who simply choose to return to their respective Company." (AEP App., p. 1, para. 4 (emphasis added.)) Given that

² Although the Order involves only Phase I costs, the arguments set forth herein are equally applicable to Phase II and III costs.

R.C. 4928.14 expressly declares "a firm supply of generation service" to be a competitive retail electric service, and Senate Bill 3 makes no distinction between POLR and non-POLR generation service, the analysis should have ended here and the Application should have been rejected as violating Senate Bill 3.

Notwithstanding this straightforward approach to addressing the issues raised in this proceeding, the Commission, incorrectly and without evidentiary support, contorts the matter by converting the Application for recovery of generation-related costs into an Application about "providing distribution ancillary services ... [which are] necessary to support the distribution function." (Id. at 17.) As is discussed below, the IGCC generating station will produce electricity, just like any other generating plant. It will provide electricity to serve all classes of customers, not just POLR customers. And the output from this plant will provide a competitive retail electric service that is beyond the jurisdiction of this Commission. Moreover, there is no evidence to support the Commission's characterization of the Application as being about distribution-related services, and even if there were, the Commission's analysis and ultimate conclusions are wrong as a matter of law.

1. **The Phase I costs pertain to a competitive retail service and, therefore, the recovery of such costs is beyond the jurisdiction of the Commission to authorize.**

The Phase I costs are comprised of engineering, scoping study and other pre-construction costs incurred by the AEP Companies while preparing to construct a generating station. The AEP Companies admit that the generating station will provide a firm supply of electric generation service to retail customers. (AEP App., p. 1, para. 4.)

And R.C. 4928.14(A) expressly states that a firm supply of electric generation service is a competitive retail electric service:

After the market development period, an electric distribution utility in this state shall provide consumers ... within its certified territory, a market-based standard service offer of all **competitive retail electric services ... including a firm supply of electric generation service.** [Emphasis added.]

In light of the foregoing, the Phase I costs incurred as a prelude to the construction and operation of the IGCC generating station are clearly related to a competitive retail electric service.

Revised Code Section 4928.05 stripped the Commission of its jurisdiction to regulate the costs associated with competitive retail electric services, providing in pertinent part:

On and after the starting date of competitive retail electric service, a **competitive retail electric service** supplied by an electric utility or electric service company shall not be subject to supervision and regulation ... by the public utilities commission under Chapters 4901. to 4909., ... 4935 ... of the Revised Code.... [Emphasis added.]

Therefore, the Commission, when it approved the recovery of Phase I costs, exceeded its statutory authority.

Further, the Commission concludes that “[t]he AEP application lays out a regulatory mechanism by which it might recover the costs of a coal-fired generating facility to address the long-term reliability and security of the energy supply for POLR service.” (Order, p. 19.) Like generation cost recovery, generation resource planning is also beyond the Commission’s jurisdiction. This is apparent based on a comparison of R.C. 4935.04 before and after the enactment of Senate Bill 3. Prior to the passage of Senate Bill 3, R.C. 4935.04 provided:

(C) Each person owning or operating a major utility facility within this state ... shall annually furnish a report to the commission for its review. The report shall be termed the long term forecast report and shall contain:

(1) a year-by-year, ten year forecast of annual energy demand, peak load, reserves, and a general description of the resource plan to meet demand;

(3) A description of major utility facilities planned to be added or taken out of service in the next ten years, including prospective sites for generating plants....

The pre-Senate Bill 3 version of R.C. 4935.04 included within the definition of "major utility facility" an "electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty megawatts or more." (R.C. 4935.04(A)(1)(a), 146 v H476 (eff. 9-17-96).)³ After the enactment of Senate Bill 3, however, the definition of "major utility facility" excluded any reference to electric generating plants (R.C. 4935.04(A)(1)(a)) and, in fact, also expressly excludes electric distribution lines. (R.C. 4935.04(A)(1)(b).)

In light of the foregoing, upon enactment of R.C. 4928.05, the Commission no longer had the requisite statutory authority to authorize recovery of the Phase I costs through regulated rates, and upon amendment of R.C. 4935.04, it no longer had oversight of generation resource planning. Therefore, the Commission has no jurisdiction to address the Application, especially under the guise of ensuring "the long-term reliability and security of the energy supply for POLR service."

While this should be dispositive of the matter, even if the Commission retains jurisdiction over the Application, it must find that the Application violates other aspects of Ohio law.

³ This version of R.C. 4935.04 was in effect until January 1, 2001.

2. The Order violates R.C. 4928.17.

There is no question that the output from the IGCC generating station will serve retail electric service customers. The Commission acknowledges this in the Order (Order, p. 11), as do the AEP Companies in their Application. (AEP App., p.1, para. 4.) Since all retail electric generation service is a competitive service in the State of Ohio, the AEP Companies must provide such service through an affiliate that is either corporately or functionally separated from the AEP Companies' regulated businesses.

Revised Code Section 4928.17 requires any utility that intends to provide both competitive and non-competitive services to submit a corporate separation plan. This plan, at a minimum, must provide that competitive services, including retail electric generation service, will be offered through "a fully separated affiliate," with separate accounting. The AEP Companies, each an electric utility, will jointly own the IGCC facility. These companies provide non-competitive regulated distribution services to all of their customers, as well as a firm supply of retail electric generation service to their POLR customers. Thus, the AEP Companies' Application proposed to provide both competitive and non-competitive retail electric services through their respective regulated businesses -- a practice expressly prohibited by law.

The fact that the AEP Companies claim that they will dedicate the electricity produced by this plant to the service of POLR customers is irrelevant. Senate Bill 3 does not determine whether a service is competitive based on customer classifications. The question is not whether the generation will be used to serve POLR or non-POLR customers. Rather, the question is whether Senate Bill 3 deemed the service competitive.

(R.C. 4928.14(B).) In the case of retail electric generation service, it most certainly did.

(R.C. 4928.14(A).)

3. **The Order violates R.C. 4928.14**

Revised Code Section 4928.14 addresses POLR service and requires all EDUs, including the AEP Companies, to serve those customers who choose not to shop in the competitive generation market, as well as those customers within the EDUs' respective certified territories that have selected a CRES provider who subsequently fails to perform. Throughout R.C. 4928.14, the General Assembly indicates its intention that POLR service be based on market prices. The Order does not provide for this. Rather, with regard to Phase I costs, the Order authorizes recovery of the actual cost incurred, plus carrying charges, through a 12-month bypassable generation surcharge, regardless of whether the market would otherwise bear these costs. Nothing about this approach to cost recovery is market based.

4. **The Order violates R.C. 4909.15.**

In addition to violating Senate Bill 3, the Order also violates traditional ratemaking statutes set forth elsewhere in Title 49. The Commission characterizes the Application as one "about providing the distribution ancillary services ... [which are] necessary to support the distribution function." *Id.* at 17.) If, assuming for the sake of argument, that these costs are distribution-related costs, then the Phase I costs are subject to ratemaking statutes and principles currently set forth in Chapter 4909. The Order authorizes recovery of Phase I costs even though the project to which these costs are attributed has yet to be started. Revised Code Section 4909.15(A)(1) permits the

Commission to include a reasonable allowance for construction work in progress, provided that "the particular construction project is at least seventy-five per cent complete." [Emphasis added.] Inasmuch as not one shovel of dirt has been turned in this project, the Order's authorization of immediate cost recovery of Phase I costs violates R.C. 4909.15.⁴

The Commission attempts to justify the Phase I surcharge as "a mechanism that assures recovery of costs that the EDU incurs in its position as the [provider of last resort]." Relying on the case, *Constellation NewEnergy v. Pub. Util. Comm.*, 104 Ohio State 3d, 530 (2004), the Commission concludes that the surcharge to recover pre-construction costs incurred to build and operate a generating facility are "comparable to the Rate Stabilization Surcharge that the Ohio Supreme Court confirmed when it affirmed the Commission decision in *Constellation NewEnergy, supra*." (Order at 18.) The costs at issue in this case, however, are pre-construction costs related to the construction and operation of a generating station. Clearly, these costs were not the costs contemplated in *Constellation NewEnergy*. Moreover, there is no basis in law, fact or physics that can substantiate the claim that the electricity generated from the IGCC facility will serve POLR customers. This plant has no greater chance of producing the electricity that will serve POLR customers than any other generating station. Given this, if the Commission's rationale is carried to its logical conclusion, any costs associated with the construction and operation of any generating station could be recovered through

⁴ Perhaps the biggest irony of all is that the recovery of Phase I costs would never have been permitted at this stage of the project had Senate Bill 3 never been enacted. Under pre-Senate Bill 3 ratemaking, the preconstruction costs of a generation project would have been capitalized and included in base rates as part of an overall rate case. The former version of R.C. 4909.15 would have prohibited, as it does today, the recovery of the Phase I costs until the IGCC project was at least 75% complete. (R.C. 4909.15 (144 v S143 (eff. 7-10-91)), which was in effect until January 1, 2001.) Therefore, not only is the recovery of Phase I costs unlawful under the law in existence today, but it would also have been unlawful under the laws of yesterday.

POLR surcharges that are regulated by the Commission. Such a result would flip Senate Bill 3 on its head and render it meaningless. Clearly, the Ohio Supreme Court made no such finding in the *Constellation New Energy* case.

5. **The Order violates R.C. 4909.03.**

The Order not only ignores the nature of the Phase I costs as generation-related costs, it also ignores the nature of the Application, which even the AEP Companies characterize as one seeking "an approved mechanism by which costs associated with **constructing and operating [the IGCC generating station]** throughout the life of the facility can be recovered in rates authorized by the Commission (AEP App., p. 5, para. 7) (emphasis added.) Rather than accept the characterization of the Application as stated by the AEP Companies, the Order characterizes it as one "about providing the distribution ancillary services ... [which are] necessary to support the distribution function." (Id. at 17.) This finding is unsupported by the record in violation of R.C. 4903.09 which provides:

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

The Application is devoid of any mention of the IGCC generating station being built to support the reliability of the AEP Companies' distribution system, as is the evidentiary record. *Nowhere do the AEP Companies present any testimony or other evidence addressing their distribution system or the reliability thereof.* No load flow studies were presented to demonstrate which circuits would allegedly be supported by the

IGCC generating station, nor were any four-year growth studies presented during the hearing that would indicate how such growth would affect the distribution system prior to the IGCC plant coming on line. In fact, the Order fails to make even one cite to the evidentiary record in support of the Commission's findings. Nor does it include within its "Findings of Fact and Conclusions of Law" any findings or conclusions that deal with the generating station being used to support distribution reliability. Perhaps this was because the AEP Companies presented no evidence on this or numerous other issues raised by the filing of the Application. The Commission noted this lack of evidence when it requested that the AEP Companies submit additional information in the next phase of this proceeding. And several of the AEP Companies' witnesses demonstrated that such evidence could not be presented during the hearing.

As the Order notes, "the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options." (Order, p. 19.) And in the Order, the Commission specifically orders the AEP Companies to "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," specifically including within these matters "[t]he 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." (Id. at 21 (emphasis added.)) Clearly if no load flow study has been presented and no details as to how the pooling and interconnection agreements will be dealt with, it is impossible to conclude that the generation from the IGCC generating station will support distribution reliability on any portion of the AEP

Companies' distribution system, especially when such support is not scheduled to occur for another four years.

Moreover, the record clearly indicates that the AEP Companies could not present evidence of this nature during the hearing. Several of the AEP Companies' witnesses admitted that neither the PJM transmission network studies nor the final plant design had been completed. So again, if the transmission configuration and plant design had not, as of the date of the hearing, been completed, how could there be any valid data in the record to support how (or *if*) the distribution system will be impacted by this generating station? In fact, there was none.

But what is most telling is the testimony of the AEP Companies' Witness Baker who indicated that the IGCC generating station will not be built without pre-approval from this Commission for the recovery of all reasonable costs incurred for the construction and operation of the IGCC generating station. (Tr. I; p. 253.) Therefore, contrary to the Commission's conclusion, the construction of the generating plant in Ohio has nothing to do with distribution reliability and everything to do with cost recovery.

B. The Commission's Analysis is Flawed, Thus Dooming its Findings to the Same Fate.

Rather than cite to any factual evidence to support its conclusion, the Commission relies on the definition of "ancillary service" found in R.C. 4928.01(A)(1). After reviewing this statutory definition, the Commission concludes that:

most of these ancillary services require generating plant. Thus, we find that [Senate Bill 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. [citations omitted.] 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 [Senate Bill 3] does contemplate that the EDU would provide services from generating plant to provide "ancillary service" as it relates to POLR service." [Id. at 18. (emphasis added.)]

Once the Commission concludes that the ancillary services supposedly supporting distribution reliability require generation support, the Commission finds that because POLR service is a distribution function, the IGCC generating station will provide the distribution-related ancillary services necessary to support such POLR service:

Distribution reliability is a core concern of the Commission and the [electric distribution utility's] POLR function is a distribution-related service. ... 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. [Id.]

The foregoing analysis and ultimate conclusion creates a non-existent link between distribution reliability and POLR service. Moreover, as discussed below, the initial premise in the Order -- that the ancillary services requiring generation support are distribution-related ancillary services -- is incorrect. Therefore, the conclusions drawn from this invalid premise are also in error.

1. **The analysis fails to recognize the distinction between distribution and transmission ancillary services.**

Revised Code Section 4928.01(A)(1) defines "ancillary service" as:

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; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

While the above definition makes a passing reference to both transmission and distribution services, the Commission only has the statutory authority to regulate non-competitive *retail*, distribution-related ancillary services. Non-competitive wholesale, transmission-related ancillary services are within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). This jurisdictional delineation is demonstrated in R.C. 4928.04:

- (A) The public utilities commission by order may declare that **retail ancillary, metering, or billing and collection service** supplied to consumers within the certified territory of an electric utility on or after the starting date of competitive retail electric service is a competitive retail electric service [Emphasis added.]

Although the Commission mentions the "retail" limitation to its authority in the Order, it ignores the retail-wholesale/distribution-transmission distinction when making its findings. The Commission observes that "most of these ancillary services [listed in R.C. 4928.01(A)(1)] require generating plant." (Id. at 18.) Yet, the Commission neither cites to any evidence of record that discusses this fact, nor identifies to which of the services listed in R.C. 4928.01(A)(1) it is referring. Moreover, there is nothing in this or other recent Commission proceedings that would support the finding that any of the ancillary services listed in R.C. 4928.01(A)(1) are within the jurisdiction of this Commission. In fact, the current structure of Ohio's electric industry, as well as recent Commission rulings related to such structure, would support the exact opposite conclusion.

Under the current industry structure, there are three distinct functions: (i) generation, which, pursuant to Senate Bill 3 is no longer regulated; (ii) transmission, which is regulated by FERC; and (iii) distribution, which is regulated by the Commission. In Ohio, the transmission function is now controlled by the Midwest Independent

Transmission System Operator, Inc. ("MISO") or PJM Interconnection, LLC ("PJM"). Services such as those listed in the statutory definition of "Ancillary Service" are provided and invoiced by either MISO or PJM through their respective FERC approved tariffs.⁵ Clearly, if these costs have been approved by FERC and these costs relate to ancillary services, such services are within the jurisdiction of the FERC and not the Commission.

As further evidence that the IGCC generating station will not support distribution ancillary services, one need only look at the IGCC generating station itself. This generating facility will produce more than 600 megawatts of electricity. The output from this plant will interconnect with high voltage transmission lines, with no direct connection to distribution voltage or the distribution system. Therefore, *if* the IGCC generating station will support any ancillary services, they will be *transmission-related* ancillary services.

In light of the foregoing, there is no nexus between the ancillary services that require IGCC generation support and distribution-related ancillary services that come under the jurisdiction of the Commission. Accordingly, the basic premise on which the Commission's entire analysis is based is flawed.⁶

⁵ The Commission recently recognized FERC's jurisdiction over these types of costs in the case of *In re Ohio Edison et al*, Case No. 04-1931-EL-ATA (hereinafter, "FirstEnergy Deferral Case") and its companion case, *In re Ohio Edison et al*, Case No. 04-1932-EL-ATA. See Exhibit B-4 filed in the FirstEnergy Deferral Case for a list of costs found by the Commission to be within the jurisdiction of FERC. This list is virtually identical to the list of ancillary services listed in R.C. 4928.01(A)(1).

⁶ Even if we assume for the sake of argument that there is a nexus between the IGCC facility and the distribution function, the Commission's analysis is incorrect. Not federal law, not state law, nor even the AEP Companies can dictate the flow of electricity from this plant. The laws of physics do. Therefore, any number of generating stations could be providing the ancillary service support that the Commission believes will exist through the IGCC generating station. So, again, under the Commission's analysis virtually any generating facility at any given time could be subject to the Commission's regulation – a result that is in total conflict with the underlying purpose of Senate Bill 3.

2. **The Commission's analysis fails to recognize the distinction between providing POLR service and producing the electricity that will be provided as POLR service.**

Throughout these proceedings, the line between providing a firm supply of generation service to POLR customers and the actual production of such generation has been unnecessarily blurred. Generating stations, whether they are IGCC or more traditional technology, produce electricity. Generating stations have no POLR obligation. The EDU's have this obligation. And this obligation is simply to obtain generation service, regardless of source, consistent with R.C. 4928.14. Nowhere in R.C. 4928.14 or elsewhere in Senate Bill 3 has the burden been placed on the EDU to construct and operate the generating stations that produce the electricity that could supply POLR customers. Indeed, these were exactly the types of activities that Senate Bill 3 rendered competitive.

C. **The Order Provides the AEP Companies With a Competitive Advantage.**

Because the costs incurred in the pre-construction phase of the IGCC generating station project are generation-related costs, they must, pursuant to Senate Bill 3, be recovered through the market and not through regulated rates. If the Order is permitted to stand, it will result in subsidized competition, thus giving the AEP Companies a significant competitive advantage in the marketplace.

1. **There is no functional difference between a merchant plant and the IGCC generating station.**

There is no functional difference between a merchant generating plant and the IGCC generating station. They both produce electricity. In fact, in order to construct a merchant plant, the owner must incur engineering, scoping study and other pre-construction costs just as the AEP Companies have done with regard to the IGCC plant.

If the Order stands, the owner of the merchant plant would be at the mercy of the market to recover its pre-construction costs, while the AEP Companies would be guaranteed recovery of their costs, regardless of market conditions. It is this distinction that provides the AEP Companies with a competitive advantage. As the AEP Companies' Witness Walker explained, "If the IGCC facility is placed in a separate entity, there is no apparent way that cost recovery can be assured." (AEP Br., p. 23.)

Staff Witness Wissman also noted the competitive advantages surrounding the Application, noting that the Application provides advantages to the AEP Companies that do not exist for independent power producers ("IPPs"). (Tr. V, pp. 161-165.) For example, Ms. Wissman noted that a request for cost recovery assurance prior to the plant being built is "something that *would be very attractive for any investor,*" as would an opportunity to recover a regulated return on the investment. (Id. at 163.) (emphasis added.) Given that the Commission has no jurisdiction over an IPP's cost recovery, a merchant plant has no choice but to rely solely on the open market for its return on and return of its investment. If the Order stands, the AEP Companies would obtain these advantages discussed by Ms. Wissman, simply because they chose to obtain them, rather than take their chances in the open market. It is the fact that AEP would have the choice to avoid market price risk that creates the advantage over other providers who would not have similar options.

Not only will the IGCC generating station be similar in function to merchant plants, but it will also be similar in function to the remainder of the AEP generation fleet. As the Order currently stands, the high costs of building the IGCC generating station will be placed on the backs of the AEP Companies' Ohio POLR customers, while the less

costly generation from AEP's existing generation fleet will be redirected to the competitive market. (AEP Br., pp. 22-23; Co. Exh. 1, p. 4.) Having the luxury of this choice allows the AEP Companies to maximize the return on all of their generation assets, thus providing them a significant advantage over others in the market who must rely solely on market forces for both their return on and return of their investment.

2. The approval of the Application allows AEP to bid more low-cost generation in the wholesale market.

The Order states that the bypassability of the Phase I surcharge will have no negative impacts in the competitive market. Not only is this conclusion in error, as demonstrated above, but this conclusion ignores the fact that there is competition in wholesale markets as well.

The AEP Companies intend to dedicate all of their low-cost generation to the market, while relying on regulated cost recovery for the more expensive IGCC facility. (AEP Br., pp. 22-23.) Witnesses for the AEP Companies admit that AEP has no current plans to retire any of its existing generation at any time in at least the next ten years. (Tr. I, p. 249.) Therefore, if the 600 megawatt IGCC generating station is built, AEP has an additional 600 megawatts of existing generation, admitted by the AEP Companies to be relatively low-cost, that can be bid into the market. Because of the low-cost of this generation, AEP's existing generation is virtually guaranteed to be dispatched in the PJM footprint. Including this additional 600 megawatts of low-cost generation in the PJM pool, while obtaining regulated cost recovery for the more costly above-market IGCC facility, creates a huge competitive advantage for the AEP Companies, if for no other reason than it allows the low-cost generation to displace another potential supplier on the

margin. The result -- both the over- and under-market AEP generation earns a return, while the margin plant sits idle.

The AEP Companies will not build the IGCC facility unless they receive assurances that all reasonably incurred construction and operating costs will be recovered. (Co. Exh. 1, p. 7.) They have readily admitted that the initial costs of the IGCC facility will be greater than other generating stations currently in the market. Therefore, the additional 600 megawatts of generation can only displace the margin plant if the Order stands. The fact that the AEP Companies can pick and choose which of their plants will be dedicated to the market, and which of their plants will receive regulated cost recovery, is most certainly a competitive advantage over any generation supplier that must rely solely on the market place to stay in business. Senate Bill 3 precludes the creation of such a competitive advantage. R.C. 4928.02(G).

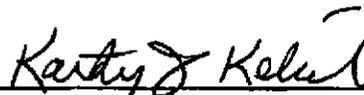
III. SUMMARY

In sum, the Commission lacks the jurisdiction necessary to address the Application. The Application deals with the recovery of costs incurred to build and operate a generating station that will provide a firm supply of generation service to retail customers. Because this service is by definition a competitive retail electric service, the Commission no longer has jurisdiction to regulate cost recovery, pursuant to R.C. 4928.05, nor the planning and siting of generating stations, pursuant to R.C. 4935.04. Notwithstanding, if the Commission retains jurisdiction, the Application must be rejected as violating both Senate Bill 3 and traditional rate making statutes found elsewhere in Title 49. Moreover, the Order's contorted logic, in an attempt to rationalize the Commission's jurisdiction and authority to approve recovery of Phase I costs, is

unsupported by the record and, therefore, in violation of R.C. 4909.03. And finally, the reliance on the definition of "ancillary service" set forth in R.C. 4928.01(A) is misplaced, given that the listed ancillary services are transmission related and, again, beyond the jurisdiction of the Commission to regulate.

If the separation of powers is to have any meaning in this State, the Commission must defer to the policy decisions made by the General Assembly when it rendered *all* firm supplies of retail electric service -- both POLR and non-POLR -- competitive. If, in fact, the societal goals discussed on pages 19 and 20 of the Order are to be achieved, it is for the General Assembly, and not this Commission, to amend the law. It is the role of the Commission to follow the law and to ensure that any Application before it does the same. Clearly, for all of the reasons set forth above, the Application fails miserably and must, therefore, be rejected upon reconsideration. Anything less renders Senate Bill 3 meaningless and provides the AEP Companies with significant competitive advantages in both the retail and wholesale generation markets. Accordingly, Intervenor, FirstEnergy Solutions Corp., respectfully asks this Commission to find upon reconsideration that the Application is unlawful.

Respectfully submitted,

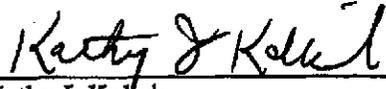


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CERTIFICATE OF SERVICE

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§ 4903.09. Written opinions filed by commission in all contested cases.

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

HISTORY: GC § 614-46a; 110 v 451; Bureau of Code Revision, 10-1-53; 125 v 613. Eff 10-26-53.

§ 4909.01. Definitions.

As used in this chapter:

(A) "Public utility" has the meaning set forth in section 4905.02 of the Revised Code.

(B) "Telegraph company," "telephone company," "electric light company," "gas company," "natural gas company," "pipeline company," "water-works company," "sewage disposal system company," "heating or cooling company," "messenger company," "street railway company," "suburban railroad company," "interurban railroad company," and "motor-propelled vehicle" have the meanings set forth in section 4905.03 of the Revised Code.

(C) "Railroad" has the meaning set forth in section 4907.02 of the Revised Code.

(D) "Motor transportation company" has the meaning set forth in sections 4905.03 and 4921.02 of the Revised Code.

(E) "Trailers," "public highway," "fixed termini," "regular route," and "irregular route" have the meanings set forth in section 4921.02 of the Revised Code.

(F) "Private motor carrier," "contract carrier by motor vehicle," "motor vehicle," and "charter party trip" have the meanings set forth in section 4923.02 of the Revised Code.

HISTORY: Bureau of Code Revision, 10-1-53; 129 v 501 (Eff 9-19-61); 136 v H 579 (Eff 12-21-75); 138 v H 21 (Eff 7-2-80); 144 v S 143 (Eff 7-10-91); 148 v S 3. Eff 1-1-2001.

The effective date is set by section 5 of SB 3.

§ 4909.15. Fixation of reasonable rate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period

beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 4928.01. Definitions.

(A) As used in this chapter:

- (1) "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.
- (2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.
- (3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code as amended by Sub. S.B. No. 3 of the 123rd general assembly.
- (4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.
- (5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.
- (6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.
- (7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent it consumes electricity it so produces or to the extent it sells for resale electricity it so produces.
- (8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.
- (9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.
- (10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.
- (11) "Electric utility" means an electric light company that is engaged on a for-profit basis in the business of supplying a noncompetitive retail electric service in this state or in the businesses of

supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on the effective date of this section pursuant to an order of the public utilities commission issued under Chapter 4905, or 4909, of the Revised Code and in effect on the day before the effective date of this section, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program as prescribed in rules 4901:1-18-02(B) to (G) and 4901:1-18-04(B) of the Ohio Administrative Code in effect on the effective date of this section or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; the home energy assistance program as prescribed in section 5117.21 of the Revised Code and in executive order 97-1023-V or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; the home weatherization assistance program as prescribed in division (A)(6) of section 122.011 |122.01.1| and in section 122.02 of the Revised Code or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; the Ohio energy credit program as prescribed in sections 5117.01 to 5117.05, 5117.07 to 5117.12, and 5117.99 of the Revised Code or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; and the targeted energy efficiency and weatherization program established under section 4928.55 of the Revised Code.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile commercial customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is

noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Project" means any real or personal property connected with all or part of an industrial, distribution, commercial, or research facility, not-for-profit facility, or residence that is to be acquired, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination of those activities, with aid furnished pursuant to sections 4928.61 to 4928.63 of the Revised Code for the purposes of not-for-profit, industrial, commercial, distribution, residential, and research development in this state. "Project" includes, but is not limited to, any small-scale renewables project.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the underpreciated A costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Small electric generation facility" means an electric generation plant and associated facilities designed for, or capable of, operation at a capacity of less than two megawatts.

(29) "Starting date of competitive retail electric service" means January 1, 2001, except as provided in division (C) of this section.

(30) "Customer-generator" means a user of a net metering system.

(31) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator which is fed back to the electric service provider.

(32) "Net metering system" means a facility for the production of electrical energy that does all of the following:

- (a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;
- (b) Is located on a customer-generator's premises;
- (c) Operates in parallel with the electric utility's transmission and distribution facilities;
- (d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(33) "Self-generator" means an entity in this state that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

(C) Prior to January 1, 2001, and after application by an electric utility, notice, and an opportunity to be heard, the public utilities commission may issue an order delaying the January 1, 2001, starting date of competitive retail electric service for the electric utility for a specified number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2001.

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

A So in enrolled bill, division (A)(26).

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

The provisions of § 9 of SB 3 (148 v -) read as follows:

SECTION 9. Sections 4905.301, 4905.66, 4905.67, 4905.68, 4905.69, 4909.157, 4909.158, 4909.159, 4909.191, 4909.192, 4909.193, 4913.01, 4913.02, 4913.03, 4913.04, 4913.05, 4913.06, 4913.07, 4933.27, and 4933.34 of the Revised Code, as repealed by this act, shall take effect on January 1, 2001, but if the Public Utilities Commission issues an order under division (C) of section 4928.01 of the Revised Code, as enacted by this act, the repeal of such sections shall be applied accordingly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.
- (2) The supplier is no longer capable of providing the service.
- (3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.
- (4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

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

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

§ 4928.17. Corporate separation plan.

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

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

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

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

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

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing

compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

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

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

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

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