

Janine L. Migden-Ostrander (0002310)
Jeffrey L. Small (0061488)
(COUNSEL OF RECORD)
Kimberly W. Bojko (0069402)
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
Fax No. (614) 466-9475
small@OCC.state.OH.US

COUNSEL FOR APPELLANT
Office of the Ohio Consumers' Counsel

Samuel C. Randazzo (0016386)
(COUNSEL OF RECORD)
Lisa G. McAlister (0075043)
Daniel J. Neilsen (0076377)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215-4228
(614) 469-8000
Fax No. (614) 469-4653
sam@MWNCMH.com

COUNSEL FOR APPELLANT
Industrial Energy Users-Ohio

Kathy J. Kolich (0038855)
(COUNSEL OF RECORD)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
(330) 384-4580
Fax No. (330) 384-3875
kjkolich@firstenergycorp.com

COUNSEL FOR APPELLANT
FirstEnergy Solutions Corp.

David F. Boehm (0021881)
(COUNSEL OF RECORD)
Michael L. Kurtz (0033350)
Kurt J. Boehm (0076047)
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
(513) 421-2255
Fax No. (513) 421-2764
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com

COUNSEL FOR APPELLANT
The Ohio Energy Group

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the construction of merchant plants by companies over which the Public Utilities Commission of Ohio (Commission) has limited authority, if any. Their reading of the law leads to bad public policy and it is wrong.

Appellants' arguments are driven by a short-term focus on avoiding increases in their electric bills. The General Assembly, however, took a longer-term perspective in enacting SB3. It understood the importance of not abandoning customers to market prices that could not be tempered by utility ownership of generating facilities. It also understood that a sufficient supply of electricity is the lifeblood of Ohio's economy. Consequently, SB3 protects all customers by leaving electric distribution utilities (EDU) with the obligation to be the Provider of Last Resort (POLR). There is no single correct strategy for meeting this obligation. Therefore, while POLR service is to be priced at a market-based Standard Service Offer (SSO), nothing precludes the EDU from using its own generating capacity in a manner that tempers the effect on customers of the SSO and contributes to the future supply of electricity needed to support Ohio's economy. In fact, while the Commission's Staff does not advocate a specific technology for meeting the POLR obligation, it does strongly support a diversified energy portfolio that is economically sound on a forward-looking basis. (Supp. p. 42)².

The Commission understands not only what SB3 required, *i.e.*, fulfillment of the POLR obligation, but also understands what SB3 did not preclude, *i.e.*, EDU ownership of electric generating facilities. It understands that a generating facility can be a reasonable and prudent asset used to fulfill a distribution function, *i.e.*, the POLR obligation.

The Commission also understands the importance of developing the next generation of electric generating facilities. To its credit, the Commission has encouraged the construction of

² References in this Brief to "Supp." and "App." refer to the Companies' Second Supplement and Appendix, respectively. References to either the Supplement or Appendix of one of the Appellants is preceded by that Appellant's initials, *e.g.*, IEU App.

an Integrated Gasification Combined Cycle (IGCC) generating facility. The Commission understands that electric generating facilities are long-lived assets and that it is necessary to meet the challenge of balancing our appetite for energy with the growing need to minimize the environmental impacts associated with energy production and consumption.

Contrary to the Appellants' criticisms, the Commission's orders "breathe sense and meaning into [SB3]," *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.* (1st Dist. 1964), 4 Ohio App.2d 4, 6, and honor the presumption that the General Assembly did not intend 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. For its foresight, the Commission should be commended, not vilified. For its proper understanding and application of SB3, its orders which are before the Court should be affirmed.³

II. STATEMENT OF FACTS

"A generator, independent or utility, cannot commit hundreds of millions of dollars on a generation facility using new IGCC technology without a firm purchase obligation to buy the power at a price which supports the project."
(Supp. p. 46)

This single sentence from the testimony of John Baardson, President of intervenor Baard Generation, LLC, presents the compelling logic in support of the Commission's orders which are being challenged by the Appellants. As will be demonstrated in the Argument portion of this brief, SB3 accommodates this logic.

Columbus Southern Power Company and Ohio Power Company (collectively, the Companies) want to build a coal-fired electric generating facility in Meigs County, Ohio. This facility will utilize IGCC technology. IGCC technology is not new or in an experimental stage.

³ The Orders before the Court are the April 10, 2006, Opinion and Order (IEU App. pp. 10-33) and the June 28, 2006 Entry on Rehearing (IEU App. pp. 58-74). The Commission's June 28, 2006 Finding and Order accepting the filing of compliance tariffs (IEU App. pp. 75-77) is not before the Court in any of the appeals in this proceeding.

(Supp. pp. 55, 56). It is a proven technology. (Supp. pp. 19-25, 31). For the electric utility industry, IGCC is the right technology and the case for its deployment in the next generation of electric generating facilities is compelling. An IGCC electric generating facility will be well positioned for carbon capture and sequestration technologies, which could become a critical approach to mitigating greenhouse gas (GHG) emissions. (Supp. pp. 22, 65). Ignoring the potential for GHG environmental restrictions will condemn the electric utility industry and customers to unnecessarily costly future environmental compliance strategies.

Besides these beneficial features supporting IGCC, there are tremendous economic benefits for Ohio, and particularly for the economically depressed region in and around Meigs County. The facility will be designed to burn coal mined in Ohio. (Supp. p. 22). During its approximate four-year construction phase, it will provide a significant number of construction-related jobs in an area of Ohio that's desperately in need of these well-paying positions.⁴ Once the plant is completed, it is expected that its operation will require about 125 permanent well-paid employees. (Supp. p. 7). The facility also is expected to produce about \$10 million per year in tax revenues. (*Id.*). Most of that revenue will be from property tax, with the remainder coming from state income tax. (Supp. pp. 49, 59, 60).

These benefits were not lost on the residents of this area of Ohio, their elected and community representatives, nor, of course on the representatives of the individuals who would build and operate this facility. While the Appellants' briefs pay little, if any attention to the public hearings the Commission convened in Hilliard, Canton and Pomeroy, the participation (or lack thereof) by members of the public is instructive.

⁴ The estimate of peak level of employment ranges from 1900 jobs (Supp. p. 7) to between 1200 and 1900 jobs. (Supp. p. 47). The most recent estimate of employment during construction is a levelized amount of 1200 craft workers. (*Id.*)

In Hilliard, five individuals testified – two supporting the proposal, two opposing it and one who simply offered comments. (IEU App. p. 13). The Canton hearing attracted sworn testimony from three witnesses. Two witnesses opposed the IGCC proposal and one was in favor of the proposal. (IEU App. p. 13).

In contrast, the Pomeroy hearing took place in front of a capacity crowd of over 100 people. Of the 30 people who testified on the record, 26 supported the Companies' proposal. (IEU App. p. 13). Another 41 people placed their names on the record in support of the proposal. (Supp. p. 53). Support came from a variety of elected officials and representatives of the skilled trades and labor unions. (IEU App. p. 14).

The Appellants might dismiss this testimony from Meigs County as self-serving, but it is no more self-serving than the Appellants' assertions that they support construction of an IGCC facility in Meigs County (or do not oppose construction and ownership of generating facilities by utilities) while at the same time challenging the recovery of costs associated with that facility. For instance, OCC "supports locating an IGCC plant in Meigs County because of the economic development benefits it will bring to the region. The OCC does not want to slow down the construction of the plant or prevent an IGCC plant from being built in Meigs County." (Supp. p. 32).⁵

The support in the record for construction of an IGCC facility does not end with this overwhelming public support. The record also reveals the long-term benefits of IGCC. As the Companies' President, Kevin Walker, testified:

"Using coal as the fuel source makes sense given the alternatives. Nuclear fuel has its own set of technical and political/public difficulties. Natural gas is plagued by price volatility and the use of natural gas to fuel base load generating facilities will serve to exacerbate that situation. Other energy

⁵ See also, OEG's Brief at p. 9 and FE's Brief at p.17 where those Appellants state that they do not oppose construction of generating facilities by utilities.

sources, such as wind, solar and other renewables have varying degrees of promise. None of these other sources are ready to step up to fuel the next generation of base load generating plants. In comparison, coal is plentiful and the infrastructure already is in place to mine it and deliver it where needed. Except for its environmental characteristics, coal would be the obvious choice to fuel new generation. That is where IGCC enters the picture.” (Supp. pp. 4, 5).

Testimony co-sponsored by the Companies’ witnesses Mr. Mudd and Mr. Braine reflects that “today’s political and natural environments all indicate the high likelihood of future carbon capture requirements legislated by federal laws or regulations And it is in this area that, absent revolutionary improvements in technology, IGCC leaves the other technologies far behind.” (Supp. p. 26).

Their testimony discussed the adoption of recent environmental restrictions by the United States Environmental Protection Agency.

Under EPA’s recently promulgated Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR), which cover SO₂, NO_x and mercury emissions, most fossil fuel power plants will be subject to a cap on their overall annual emissions of SO₂, NO_x and mercury, with emissions trading permitted. . . . Because the IGCC plant’s SO₂ and mercury emissions are generally lower than the PC [Pulverized Coal] plant’s, its emissions costs are also lower. (Supp. pp. 27, 28).

...

Because an IGCC plant provides AEP with the option to capture and sequester carbon, an IGCC plant has an inherent “option” value compared to PC or [Natural Gas Combined Cycle], where these costs are prohibitive. While an option also exists to potentially capture and sequester carbon from a PC plant, its value is considerably lower in a PC plant, owing to its very high costs within that technological framework. (Supp. p. 29).

In addition to the Companies’ interest in pursuing IGCC technology, the Commission itself expressed its interest in IGCC technology being deployed in fulfillment of the Companies’ POLR obligation. In its order authorizing a Rate Stabilization Plan (RSP) for the Companies, the Commission stated:

“With the recognition that new technologies must be forthcoming to replace the utilities’ aging generation fleet, we urge AEP to move forward with a plan to construct an integrated gasification combined-cycle (IGCC) facility in Ohio. AEP should engage the Ohio Power Siting Board in pursuit of such a plant. We are encouraged by emerging information that suggests that the IGCC technology will be economically attractive. It is worth noting that the Commission is exploring regulatory mechanisms by which utilities, given their POLR responsibilities, might recover the costs of these new facilities.”⁶

Although the Companies (and the Commission) are encouraged by the obvious benefits associated with IGCC technology, they are not unmindful of two important uncertainties. The first is the cost of an IGCC plant and how that cost compares to other options. That comparison, however, is not based just on the up-front construction costs but the costs over the operating lives of these respective technologies. The long-term cost will be heavily influenced by the second uncertainty – the extent and nature of future environmental regulation.

In this regard, the Companies were not alone in their belief that the selection of future generating facility technology must give serious consideration to the ability for carbon capture and sequestration. As Staff witness Lambeck testified: “Electric generating stations are very long lived assets and carbon release limitations are a certainty in my mind over the long life of the next generation of plants. To fail to recognize this certainty when planning new plant installations today would be extremely shortsighted.” (Supp. p. 44). At the hearing, he reinforced the point by stating that “over the lifetime of the plants that we are embarking on and building in the state or the region, these plants need to consider in their planning the ability to sequester carbon.” (Supp. p. 66).

To address the IGCC plant’s cost uncertainties, the Companies proposed a three-phase cost recovery plan. In Phase I, a 12-month bypassable surcharge would be applied to the

⁶ 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. (IEU App. pp. 255, 256).

Companies' SSO rate schedules. The surcharge, which the Commission authorized in its orders now on appeal, is intended to recover the Companies' pre-construction costs; that is, costs incurred prior to the Companies entering into an Engineering, Procurement and Construction (EPC) contract. Those costs are expected to be about \$24 million. (Supp. p. 36). The revenues collected by the Phase I surcharge will be compared to actual pre-construction costs incurred. The net of the under- or over-recovered 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. (Supp. pp. 9, 10).

Phase II of the cost recovery mechanism also provides a bypassable temporary generation rate surcharge. This surcharge would begin once the EPC contract is executed. 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. (Supp. p. 10).

The Phase II surcharges will collect an annually levelized carrying charge on the cumulative construction costs. As with the Phase I surcharges, the Phase II generation rate surcharges will be added to the Commission-approved SSO rate schedules. And, again, the revenues collected by the Phase II surcharge will be compared to the actual carrying costs, and the net under- or over-recovered revenues will be added to or subtracted from the CWIP accounts for the IGCC facility which will be used in determining the IGCC Recovery Factor during Phase III. (Supp. pp. 11-13).

Phase III covers the operating life of the IGCC facility. Prior to the commencement of Phase III, the Companies will file with the Commission an IGCC Recovery Factor. This 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, i.e., products that are needed as part of the

fuel consumption process. The Commission will 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. (Supp. pp. 14, 15).

Once an IGCC Recovery Factor is determined, it will be compared to the then-current Commission-approved SSO for the Companies. Based on that comparison, an IGCC Adjustment Factor will be calculated to reflect the revenue difference between the Recovery Factor and the then-current SSO. (Supp. pp. 14, 15).

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.⁷ The IGCC Adjustment Factor will be revised throughout Phase III as the Commission approves changes in the Companies' SSO and in the IGCC Recovery Factor. (Supp. pp. 16, 17).

In summary, the three-phase cost recovery proposal is structured in a manner which accommodates a phased approach to constructing the IGCC facility. During Phase I, the Companies will collect part of the total cost of construction. These pre-construction costs are legitimate and warranted expenses incurred by the Companies in furtherance of their POLR obligation. The costs stem from the necessary preliminary activities that will bring the Companies to the point at which a final cost of construction will be known. As such, the costs are properly recoverable by the Companies as electric distribution utilities.

⁷ OCC's assertion that "nothing in the Application or the PUCO's procedures hinted that distribution rates were at issue" (OCC Br. p. 21) defies the record. See page 11 of the Companies' Application. (App. p. 11).

The Companies will know the final cost of construction prior to commencement of the Phase II surcharge. Once that information is known, the Companies will be able to make a final determination that the cost of the proposed facility still supports going forward with construction. In addition, at that time the Companies can advise the Commission of the most current cost information and the Commission will have the ability to review the plan for consistency with the Companies' Application.

Those who characterize the Companies' proposal as asking the Commission to sign over a blank check, the amount of which will be filled in by the Companies at a later date, are ignoring the testimony of Mr. Baker, Senior Vice President – Regulatory Services, American Electric Power Service Corporation. He testified that Phase III cost recovery will begin “after a hearing and the Companies' showing that [the IGCC Recovery Factor] is reasonable.” (Supp. p. 14). Mr. Walker's testimony was in accord with Mr. Baker's testimony. He stated that: “The proposal has a reasonability test for costs that will have to be approved by the Commission, so that's the fail safe.” (Supp. pp. 57, 58).

Therefore, approval of the Companies' proposal would conclusively resolve the question of whether it was appropriate to construct an IGCC facility. It would not mean, however, that the Commission would be unable to review whether the Companies' construction of the IGCC facility was performed in a manner which resulted in costs being unreasonably incurred.

There is another key aspect of the Companies' cost recovery proposal. As Mr. Walker testified:

The Companies will not be able to go forward with construction of an IGCC plant in Ohio unless this plan, or some comparable plan, is approved by the Commission. It is unrealistic to expect the Companies to invest over \$1 billion on construction for an IGCC facility if recovery of costs is subject to uncertainty. If the Companies were required to wait for this facility to be

used and useful before seeking cost recovery, the facility would not be built in Ohio. (Supp. p. 6).

Therefore, while the Commission's orders on review before the Court only serve to implement Phase I of that proposal, those orders appropriately have indicated that the basic structure of Phases II and III are reasonable and lawful.

Given the uncertainties discussed above, the Appellants argue against incurring the costs of going forward with the Companies' IGCC proposal. The Companies, and more importantly the Commission, take the view that despite the uncertainties, the Companies, their customers and Ohio's economy cannot afford to live in a status quo world. Therefore, based on the evidence and the applicable law, the Commission concluded that it "has the authority to approve a mechanism that grants recovery of the costs of the IGCC plant" and that recovery of IGCC-related POLR costs "can be assured through the recovery mechanism that the IGCC Cost Recovery and Adjustment Factors provide." (IEU App. p. 27).

However, while the Commission authorized the Companies to begin IGCC Phase I cost recovery, it did not sign over a blank check to the Companies. The Commission directed the Companies to return to the Commission with answers to a variety questions. (IEU App. pp. 29, 30). At that point the Commission will render a final judgment concerning the reasonableness of proceeding with construction of the proposed IGCC facility. By taking this measured approach, the Commission kept open the IGCC option as a means by which the Companies can meet their POLR obligations.

Contrary to the Appellants' assertions, the proposal does not harm the development of a competitive electric market for generation service. In fact, the Companies' proposal will promote the development of such a market. This will result from the bypassable SSO surcharges during Phases I and II of the cost recovery proposal. The bypassable nature of the surcharges

will encourage customers to arrange for generation service in the near term of market development from someone other than the Companies because such customers will avoid paying the SSO and the surcharges. This position is supported by the testimony of one of the intervenors opposing the Companies' proposal. Mr. Baardson, appearing on behalf of Beard Generation, LLC, testified that during Phases I and II Competitive Retail Electric Service (CRES) providers would have the advantage of their customers not paying the surcharges that customers who continue to rely on the Companies as the POLR would have to pay. (Supp. pp. 63, 64).

Further, despite the Appellants' arguments to the contrary, the Commission's exercise of rate authority regarding the IGCC proposal does not give the Companies' IGCC facility a competitive advantage over non-regulated parties that might be interested in building an IGCC facility as a merchant facility.

A non-regulated, *i.e.*, merchant facility has greater upside potential as market prices rise over time. In contrast, however, under the Companies' proposal, as the market-based SSO increases and exceeds the IGCC Recovery Factor, the IGCC Adjustment Factor will result in a credit to customers' distribution rates. In other words, customers will be shielded from increasing market prices.⁸

Regarding the Companies' POLR obligations, IEU contends "that neither AEP nor any other party presented any evidence on the amount of generating capacity that might be required by CSP and OPCo to supply their SSO requirements." (IEU Br. p. 10, fn. 24). IEU's assertion is based on the testimony of one of the Companies' witnesses who could not say *exactly* what their POLR load would be in 2010.

⁸ To the extent market prices are expected to be below the IGCC Recovery Rate, it is unlikely that a merchant IGCC facility would be built. This is because the developer would not anticipate being able to recover its costs in market-based transactions.

Despite that witness's inability to be precise, the record contradicts IEU's assertion.

DMR Exhibit 1 to Companies' Ex. 7 reflects a peak demand growing from roughly 9,000 MW in 2006 to nearly 12,000 MW by 2024. (Supp. p. 38). Even using the low end of that range, a 600 MW IGCC plant represents about 7% of that peak load. Therefore, since it is not realistic to expect that more than 93% of the Companies' load will switch to CRES providers, it is very likely that at least 600 MW of generating capacity will be required by the Companies to meet their POLR load, or what IEU refers to as the SSO requirements. Based on this data it is not surprising that Mr. Baker testified that "our POLR obligation would be higher than 600 [MW]. . . ." (Supp. p. 61).⁹

Based on all these considerations, the Companies responded to the AEP RSP Order's request that they propose a cost-recovery mechanism that would support their ability to construct and operate an IGCC facility in support of their POLR obligation. The Application proposes a cost-recovery mechanism for an IGCC plant that they will dedicate to meeting their POLR obligations over the long-term. After providing notice of and holding local public hearings and an evidentiary hearing, the Commission issued its Opinion and Order approving the Application

⁹ IEU's criticism that there is insufficient evidence in the record to support the Companies' need for generation capacity to serve their POLR requirements in amounts equal to or more than what the IGCC plant will provide, besides being incorrect, is ironic in light of IEU's tendency to improperly rely upon extra-record information in its Brief. For example, the rate of return figures that IEU offers at page 21 of its Brief to support its Proposition of Law No. 2 are not based on evidence in the record of this proceeding. Instead, they reiterate an argument that IEU made in a post-hearing brief that it submitted in a different proceeding. The Commission did not accept those rate of return arguments, or the information on which the arguments were based (which the Companies believe are inaccurate) in the proceeding where they were presented, let alone in this proceeding.

As another example, IEU cites to a myriad of extra-record information in footnote 73, at pages 29-30, of its Brief. Neither the Reliability Assurance Agreement, the Settlement Agreements, the Appalachian Power Company Application, nor the Investor & Banking Meeting documents to which IEU refers in its footnote 73 are in the record of this proceeding.

In appeals of commission orders, R.C. 4903.13 does not permit appellants to rely upon factual information from outside of the record. In addition, IEU cannot inject these documents and the factual information included or referenced in them into this proceeding by the expedient of including them in its Appendix because they are not proper items for an Appendix either. See O.S.Ct. Rule VI, Section 2(B)(5).

in large part. It approved a Phase I POLR charge component for each Company that would recover its share of pre-construction costs for the IGCC plant. It found that the Companies' long-term cost-recovery mechanism would provide the cost-recovery assurance needed by the Companies to proceed with constructing and operating an IGCC facility. While the Commission deferred judgment on implementation of the Phase II and Phase III POLR cost-recovery components pending the submission of additional information by the Companies regarding several issues, it concluded that the Companies should be permitted to recover the reasonable costs of further developing and detailing their proposal.

The facts of this record support the Commission's decision and, as will be discussed in the Argument portion of the Brief, the applicable law contemplates and permits the Commission's decision.

III. ARGUMENT

Proposition of Law No. 1:

An Order Of The Public Utilities Commission Of Ohio Will Not Be Reversed On Appeal As To Questions Of Fact Where The Record Contains Sufficient Probative Evidence To Show That The Order Was Not Manifestly Against The Weight Of The Evidence And Was Not So Clearly Unsupported By The Record As To Show Misapprehension, Mistake, Or Willful Disregard Of Duty. As To Questions Of Law, The Court May Rely On The Expertise Of A State Agency In Interpreting A Law Where Highly Specialized Issues Are Involved And Where Agency Expertise Would, Therefore, Be Of Assistance In Discerning The Presumed Intent Of Our General Assembly.

The Court recently explained its standard of review of the Commission's orders in *Ohio Consumers' Counsel v Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (the *CG&E RSP Appeal*), at ¶12:

"R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶50. We will not reverse or

modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* Although we have "complete and independent power of review as to all questions of law" in appeals from the commission, *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 678 N.E.2d 922, we may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

The Court confirmed in the *CG&E RSP Appeal* that SB3 does involve "highly specialized issues" and, accordingly, it will give substantial deference to the Commission's interpretations of, and its expertise in establishing rates pursuant to, SB3's provisions:

"We have recognized the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3, and we have accorded due deference in this regard to the commission's statutory interpretations and expertise in establishing and modifying rates. *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, at ¶23."

CG&E RSP Appeal, supra, at ¶44.

Based on the facts already discussed and the remaining Propositions of Law, the Commission's orders on appeal should be affirmed under this applicable standard of review.

Proposition of Law No. 2:

An Electric Distribution Utility May Procure Power From Generating Plant That It Constructs And Owns In Order To Meet Its Obligations As The Provider Of Last Resort Under R.C. 4928.14.

As part of SB3, the General Assembly declared, in R.C. 4928.02(A), that it is the policy of this state to “[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.” Paramount among the myriad duties that SB3 assigns to the Commission is the responsibility to “ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.” R.C. 4928.06(A).

When enacting SB3, 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. Not wanting to leave those customers out in the cold, either figuratively or literally, the General Assembly imposed the Provider of Last Resort (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. (R.C. 4928.14(A), emphasis added).

The General Assembly also provided 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 EDU for the provision 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. (R.C. 4928.14(C)).

The Commission has recognized that divisions (A) and (C) of R.C. 4928.14 require the Companies to fulfill POLR responsibilities after the MDP. (AEP RSP Order, IEU App. p. 245). The Commission specifically noted in the AEP RSP Order that the Companies will be held forth as the POLR to consumers who either fail to choose an alternative supplier or who return to them after taking service from another generation supplier. (IEU App. p. 255). Consistent with that obligation to serve, the Companies' responsibility extends beyond ensuring that they have the capacity to serve non-switching or returning customers whose requirements may be readily predicted. They must also have sufficient capacity to meet unanticipated demand.

The Commission further recognized that the EDU's POLR obligations also include the responsibility to maintain access to the generation resources necessary to support the reliable operation of the EDU's distribution system. The Opinion and Order noted that such generating capacity, because it supports the reliable operation of the EDU's distribution system, is ancillary to the provision of distribution services. (IEU App. pp. 26, 27). Thus, because the POLR function is necessary to the provision of distribution service, it falls squarely within R.C. 4928.01(A)(1)'s definition of "ancillary service."¹⁰

This Court has confirmed both the EDU's POLR obligations and the lawfulness of establishing charges for recovering the costs of fulfilling those obligations. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St. 3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶¶39-40. Most recently, the Court described the POLR obligation as follows:

Under R.C. 4928.14(A) and (C), an electric distribution utility . . . has an obligation to ensure generation supply for customers not being served by a competitive retail electric service provider by offering a market-based standard service offer that establishes prices for that supply.

CG&E RSP Appeal at ¶68 (emphasis added).

¹⁰ R.C. 4928.01(A)(1) provides, in pertinent part, that "[a]ncillary service" means any function necessary to the provision of electric . . . distribution service to a retail customer. . . ."

As the Commission concluded in the proceeding below, its jurisdiction over the provision of non-competitive retail electric services pursuant to R.C. 4928.05(A) provides it with authority to assure the recovery of costs that the EDU incurs to meet its POLR obligation. This obligation includes the commitment to stand ready to provide standard service offers to all of its customers that do not switch or who return to the EDU for generation service, and also to provide ancillary services, as defined in R.C. 4928.01(A)(1), that ensure the reliable operation of the distribution network. Opinion and Order (IEU App. pp. 26, 27); and Entry on Rehearing, at Findings 21, 24, and 27. (IEU App. pp. 63-66).

SB3 requires EDUs to have sufficient capacity to meet their POLR obligations. What they must accomplish – satisfying all requirements for generation service by customers who either shop and then return or who don't shop at all, and ensuring the reliable operation of the distribution system that delivers generation services to all customers– is clear. How they may go about the tasks and what an appropriate strategy for meeting those obligations might be are not specified. The lack of specificity is not a flaw in SB3. Rather, it is a strength of the electric restructuring law that allows EDUs flexibility in how they meet their POLR obligations.

The proposition that the EDU's capacity resources that are necessary to fulfill its POLR obligations may include generation assets that the EDU owns or controls finds substantial support in R.C. 4928.17(E). That provision generally allows the EDU to divest its generation assets without the requirement of Commission approval pursuant to the provisions of R.C. Title 49 that might have applied prior to SB3's enactment, such as R.C. 4905.20 and 21. However, R.C. 4928.17(E) specifically notes that the right to divest generating assets is subject to those provisions of R.C. Title 49 "relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset." (Emphasis added). R.C. 4928.17(E) confirms that

there is no blanket restriction in SB3 regarding ownership of generation assets by EDUs. Indeed, R.C. 4928.17(E) confirms that there are circumstances in which ownership and control of generation assets could be appropriate to support the EDU's distribution function.

The Commission relied upon SB3's flexibility when it encouraged the Companies to move forward with plans for the construction of an IGCC facility in Ohio. (IEU App. pp. 255, 256). In doing so, the Commission recognized that it is appropriate for an EDU to have access to a portfolio of capacity and energy options in order to meet its post-MDP POLR obligations.

Access to owned generation that is dedicated to the POLR tasks during periods subsequent to the RSP is a legal and appropriate component of a portfolio of capacity and energy options that the EDU uses to satisfy its POLR obligations. Because it will be owned by the Companies, the commitment of the IGCC plant's output to meet their POLR obligations is highly reliable. It also provides a long-term hedge against the volatility in both the availability and pricing of wholesale capacity and energy supplies.

Given this applicable law, the Commission correctly determined that SB3 does not prohibit an EDU from procuring power from a generating plant that it constructs and owns in order to meet its obligations as the provider of last resort.

Proposition of Law No. 3:

In Order To Enable An Electric Distribution Utility To Procure Power Supplies To Meet Its Provider Of Last Resort Obligations, The Public Utilities Commission Of Ohio May Authorize The EDU To Establish POLR Charges That Assure Recovery Of The EDU's Costs Incurred To Meet Its Obligations.

After concluding that it is appropriate for the Companies to take steps to guarantee that they will have access to generation in the long run that will be dedicated to meeting their POLR responsibilities, including ancillary services to support the reliable operation of their distribution networks, the Commission explained its authority to establish a cost recovery mechanism:

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. (IEU App. p. 27).

This Court has most recently confirmed the Commission's authority to establish POLR charges that recover expenses related to the EDU's POLR obligations in the *CG&E RSP Appeal, supra*, 111 Ohio St.3d 300, 2006-Ohio-5789. In that appeal the Court considered numerous criticisms of the Commission's decisions approving a rate stabilization plan for CG&E, including a POLR component of CG&E's standard service offer, which would take effect after the end of that EDU's market development period.

The POLR component that the Commission approved in its Opinion and Order which led to the *CG&E RSP Appeal* contained a "rate stabilization" component and an "annually adjusted" component. The annually adjusted component was designed to recover a variety of costs, including costs CG&E incurred to maintain adequate electric capacity reserves in excess of expected demand. On rehearing the Commission modified the POLR component by adding an "infrastructure maintenance fund" component and a "system reliability tracker" component. The infrastructure maintenance fund charge was intended "to compensate CG&E for committing its

generation assets to serve market-based standard service offer customers.” The system reliability tracker was intended to permit CG&E “to recover its annually committed capacity, purchased power, reserve capacity, and other market costs necessary to serve market-based standard service offer customers.” On rehearing the Commission found the additional POLR components to have merit and approved them. *CG&E RSP Appeal, supra*, at ¶¶24-36.

Despite OCC’s objections, the Court notably did not find fault with the purposes that the various components of the POLR charge were designed to serve.¹¹ Instead, the Court observed that the Commission had approved the various components of CG&E’s POLR cost recovery mechanism in order to enable CG&E to recover various types of expenses related to its POLR obligations. The Court held that the Commission’s decision was not unlawful, observing that “[w]e have traditionally deferred to the judgment of the commission in situations involving the commission’s special expertise.” *CG&E RSP Appeal, supra*, at ¶68, citing *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (1990), 51 Ohio St.3d 150, 154, 555 N.E.2d 288; and *Constellation NewEnergy, supra*, at ¶¶36-40.

The expenditures in connection with the IGCC plant for which the Companies sought assurances of recovery in their Application in the proceeding below, as was the case with the elements of the POLR component that the Court reviewed in the *CG&E RSP Appeal*, relate to their POLR obligations. Their purposes are to assure that over the long term the Companies will have available to them the generation resources necessary to meet their POLR obligations, including the reliable operation of their distribution networks. There are distinguishing aspects of the Companies’ cost recovery proposal, compared to the POLR components under consideration

¹¹ The Court agreed with OCC’s argument that the Commission did not provide an adequate explanation of the evidentiary basis for the changes it made in its rehearing order to the POLR components. Consequently, the Court remanded the matter to the Commission for further clarification of those rehearing modifications. *CG&E RSP Appeal, supra*, at ¶¶27-36.

in the *CG&E RSP Appeal*, which make the Companies' arguments for affirmance on appeal even more compelling. First, the Commission more thoroughly reviewed and explained in its orders in the proceeding below the relationship of the expenditures by the Companies on the IGCC plant to their POLR obligations. Second, the Commission had a well-developed record of how the cost recovery mechanism that the Companies had proposed would recover their expenditures on the IGCC plant. Finally, there was a definitive explanation in the record of the types of costs to be recovered during all phases of the cost recovery proposal.

The Commission's orders in this case are consistent with its authority under SB3 to establish POLR charges that assure an EDU it may recover the costs of meeting its POLR obligations. *Constellation, supra; CG&E RSP Appeal, supra.*

Proposition of Law No. 4:

The Public Utilities Commission Of Ohio's Decisions Are Supported By The Evidence Of Record And Its Order Sets Forth The Reasons Prompting Its Decisions In Accordance With The Requirements Of R.C. 4903.09.

The Court has held that "where enough evidence and discussion are found 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.* (1988), 38 Ohio St.3d 266, 270, 527 N.E.2d 777. The Court also has explained that the purpose of R.C. 4903.09 is to provide it with sufficient details to enable it to determine, upon appeal, how the Commission reached its decision. *Migden-Ostrander v. Pub. Util. Comm.* (2004), 102 Ohio St.3d 451, 455, 812 N.E.2d 955; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 107, 110, 447 N.E.2d 746.

The Commission provided the reasoning supporting its jurisdiction to approve a cost recovery mechanism for the IGCC plant and, in particular, the charges for recovery of Phase I

costs in the April 10, 2006 Opinion and Order at pages 12-18 (Opinion), 19-21 (Conclusion), and 22-23 (Findings of Fact and Conclusions of Law).

In particular, the Commission's Opinion and Order states:

To provide a safety net for those customers, [not served by a CRES provider] the General Assembly imposed the POLR generation service obligation on electric distribution utilities: [reciting portion of R.C. 4928.14 (A)] (IEU App. p. 21).

...

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: [reciting a portion of R.C. 4928.14 (C)]. (IEU App. p. 22).

...

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.*).

...

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 proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. (IEU App. p. 26).

...

[T]his 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. . . 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. (*Id.* emphasis added).

...

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. . . . 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. (IEU App. p. 27, emphasis added).

...

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. . . . [T]he 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. (IEU App. p. 27, emphasis added).

...

[T]he 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. . . . We find that this Commission has the authority to approve a mechanism that grants recovery of the costs of the IGCC plant. (*Id.* emphasis added).

• • •

The Commission agrees that such economic benefits and technological advances [related to the IGCC] 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. (IEU App. p. 29, emphasis added).

• • •

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. (IEU App. p. 30, emphasis added).

The Commission's reasoning is readily discernable, and the orders provide sufficient details to enable the Court to determine, upon appeal, how the Commission reached its decision. Despite the Commission's full discussion of its reasoning, several Appellants contend that the Commission's orders nonetheless violate R.C. 4903.09. However, the Appellants' objections are to the Commission's decision itself and how the Commission arrived at that decision, not that the Court is unable to discern how the Commission reached its decision. Their arguments that the Order violates R.C. 4903.09 are not persuasive.

Proposition of Law No. 5:

By Assuring Recovery Of Costs Incurred To Procure Generation Resources Through Which EDUs Will Meet Their POLR Obligations, Including The Provision Of Ancillary Services That Support The Reliable Operation Of The EDUs' Distribution Networks, The Public Utilities Commission Of Ohio Does Not Regulate Competitive Retail Electric Generation Service In Violation Of SB3.

Several Appellants argue that the Commission's orders amount to the regulation of retail electric generation service in violation of R.C. 4928.03, which declares retail generation service to be a competitive service, and R.C. 4928.05(A)(1), which removes it from supervision and regulation by the Commission. (FE Prop. of Law No. 1, Brief at pp. 6-13; OCC Prop. of Law No. 1.A., Brief at pp. 10-15; and OEG Prop. of Law No. 1, Brief at pp. 6-9).

The common flaw in these arguments is that they mischaracterize the Companies' Application and the Commission's orders. The Companies' proposal for recovering the costs of the IGCC plant and the Commission's orders authorizing cost recovery do not involve the regulation of competitive retail electric service. They involve the regulation of the Companies' distribution-based POLR responsibilities, including the provision of ancillary services. The orders do not affect the price or terms and conditions of competitive generation services.

FE argues that SB3 provides no connection between generating plant and ancillary services, as defined in R.C. 4928.01(A)(1). The words of that section plainly say otherwise. Ultimately, even FE concedes the point when it admits that the Commission's observation that most of these ancillary services listed in R.C. 4928.01(A)(1) require generating plant "is obviously true." (FE Brief, at p. 9).

FE also contends that the EDU's POLR obligation under R.C. 4928.14, which requires it to provide default service to non-switching and returning customers, does not require them to build and own generating plants for that purpose. (FE Brief, at pp. 10-11). Neither the

Companies nor the Commission have taken the position that the Companies are required to build and own generating plants. The Commission has concluded that the Companies may build and own a generating plant, and cost-recovery assurance is appropriate, when the plant will be used to meet their POLR responsibilities, including providing default generation service and ancillary services that support the reliable operation of their distribution networks.

FE also claims that the Commission is mistaken in its belief that it has a responsibility under SB3 to ensure that EDUs have adequate capacity to meet their POLR obligations. According to FE, the exclusion of competitive generation service and generation plant from the long-term forecast reporting process of R.C. 4935.04 confirms that the Commission has no such responsibility. (FE Brief at pp. 11-12). Under R.C. 4928.14, however, the Commission does have a regulatory role with regard to EDUs' provision of POLR services, and it also is required to regulate ancillary services. The changes in the Commission's long-term forecast report duties under R.C. 4935.04 do not affect its responsibilities regarding the EDUs' POLR and ancillary services.

FE also asserts that providing cost-recovery assurance to the Companies for the IGCC plant will be anti-competitive because it will disadvantage merchant plant developers who face market risks without assurances of cost recovery. First, unlike the Companies, merchant plant developers do not have POLR responsibilities. They can choose whether and to whom they will sell their power and at what price they will sell. Second, the Companies will recover the costs of their IGCC plant and no more. Merchant plant developers may charge whatever the market will bear. Third, absent up-front assurance of cost recovery, the IGCC plant will not be built by the Companies or by a merchant plant developer.¹²

¹² See the quoted testimony at the outset of this Brief's Statement of Facts.

OEG contends that the Commission's orders violate R.C. 4928.05 by requiring the Companies' customers to pay cost-based rates for generation service provided by the IGCC plant. As a result, OEG argues, the orders breach SB3's covenant with consumers and utilities "that all electric generation service, whether it is produced by an inexpensive or expensive generating unit is subject to market pricing." (OEG Brief, at p. 9). Similarly, OCC claims that the Commission "approves charges for a generation function," and that violates R.C. 4928.05(A)(1) which removes competitive retail electric services, including generation service, from the Commission's oversight. (OCC's Brief, at pp. 10-11, emphasis in original).

These criticisms are not valid. The generation service that the IGCC plant will provide to help meet the Companies' distribution-related POLR obligations to provide default generation service to non-switching and returning customers will be priced at the same market-based standard service offer rates that the Commission will establish for all such default service, however it is sourced. In particular, during the 2006-2008 period covered by the AEP RSP Order, the rates that non-switching and returning customers ("default" service customers) will pay for default generation service are, and will be, the market-based standard service offer rates established pursuant to R.C. 4928.14 in that case. After the end of the RSP, during 2009 and beyond, rates for the Companies' standard service offers will continue to be established by the Commission in accordance with the market-based standard of R.C. 4928.14.

The POLR charge that the Commission approved in the proceeding below is based on the costs that the Companies will incur during Phase I of the IGCC plant's construction process. Neither the Phase I charge that the Commission has approved, nor the Phase II or Phase III charges (or credits) that the Commission has not yet approved, are charges that customers pay as part of the price for default generation service. Rather, they are POLR charges (or credits) that

provide assurance that the Companies will recover the costs (and no more) of procuring a generation resource that will, in turn, enable them to meet their POLR responsibilities in the future, including the provision of ancillary services that support the reliable operation of their distribution networks.

OCC contends, nevertheless, that the Commission's Order contains statements that are inconsistent with characterizing the Phase I surcharge as distribution-related. For example, OCC notes that the Phase I charge is bypassable, which OCC claims indicates that it is generation-related because, it says, rates for distribution-related services are non-bypassable. (OCC's Brief, at p. 12). This elevates form over substance. The Companies proposed to make the Phase I surcharge bypassable in order to encourage customers to switch. (Supp. p. 9). All Phase I costs will be recovered, either through the Phase I charge or by adding any collection shortfall at the end of Phase I to the Companies' construction work in process accounts. If the bypassable nature of the charge during Phase I created a legitimate issue regarding the POLR character of the costs that it is designed to recover, which it does not, the cure would be to make it non-bypassable.

OCC also notes that the Commission in its orders directed the Companies in the next phase of the proceeding below to report on their consideration and evaluation of investors in the proposed IGCC facility. OCC surmises that this directive makes no sense if the purpose of the IGCC plant is "to provide adequate distribution service that only the Companies can legally provide within their service territories." (OCC Brief, at p. 13, emphasis in original). If there is an absence of logic, it is in OCC's criticism. The directive that the Companies report on whether it makes sense to share the burden of financing the IGCC plant with third parties has no connection to the function that the plant will serve for the Companies. Regardless of how it is

financed, or whether it is co-owned with others, the plant's purpose for the Companies will be to meet their POLR responsibilities, which are related to their distribution function.

OCC also is skeptical of the orders' findings that distribution reliability is a core concern of the Commission and that the IGCC plant will support distribution reliability. OCC states that the seriousness of the Commission's concern is belied by the fact that this is the first proceeding in which the Commission has articulated such a view. (OCC Brief, at pp. 13-15). The legitimacy of the Commission's concern is not measured by when or how it first is articulated or the type of case in which it is articulated. In any event, this is the first case since enactment of SB3 in which the issue of constructing a new generation facility to meet the POLR obligation has been presented to the Commission. Therefore, it is not surprising that this is the first time the Commission has articulated its views on this issue.

The Commission's orders do not regulate competitive retail electric generation service in violation of SB3 and the Appellants' arguments to the contrary should be rejected.

Proposition of Law No. 6:

Construction And Ownership Of A Generating Plant And The Use Of Such A Plant By An Electric Distribution Utility To Meet POLR Obligations Do Not Conflict With The Corporate Separation Requirements of R.C. 4928.17.

OCC claims in its Proposition of Law No. 1.B., Brief at pp. 15-17, that the Companies' proposal to build and own the IGCC plant and dedicate the facility to their POLR obligations violates the corporate separation requirements of R.C. 4928.17. OCC contends that Ohio law prohibits the ownership of generating assets by an EDU and requires the provision of generation services through a separate affiliate. (OCC Brief, pp. 15-16). The Commission rejected OCC's criticism, finding that the primary purpose of the IGCC plant is to provide distribution ancillary services and to meet the Companies' POLR obligations. (Entry on Rehearing, IEU App. p. 63).

The Commission decided this issue correctly. The corporate separation requirements of R.C. 4928.17 do not preclude the Companies from owning the IGCC plant or providing the generation or ancillary services that they must as the providers of last resort. First, R.C. 4928.17(A) provides, in part, that “no electric utility shall engage in [Ohio], either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service [i.e., distribution service] and supplying a competitive retail electric service [i.e., retail generation service] . . .” (emphasis added) unless the utility implements and operates under a corporate separation plan that, among other things, requires that the competitive service be provided through a fully separated affiliate.

The Companies, although each is an “electric utility” as that term is defined in R.C. 4928.01(A)(11), are not “engaged in the business” of supplying competitive retail electric services. Instead, as part of their responsibilities of supplying a non-competitive retail electric service (i.e., distribution service) they bear the EDU’s POLR obligation to stand ready to provide all consumers within their certified territories with a standard service offer of all competitive retail electric services necessary to maintain essential electric service to those consumers “including a firm supply of electric generation service.” They have no choice in the matter.

As EDUs, the Companies are not permitted to compete against CRES providers certified pursuant to R.C. 4928.08(B). Pursuant to R.C. 4928.14, the rate that they may charge for default generation service, although market-based, is set by the Commission. In addition, they are obliged by R.C. 4928.14 to provide default generation service to all consumers in their certified territories, including those who return after their generation service arrangements with CRES

providers end. CRES providers have no such default obligation and can set the prices for their retail generation services at whatever levels they choose.¹³

Other provisions of R.C. Chapter 4928 support the conclusion that the Companies are not “engaged in the business” of supplying competitive retail electric service simply by providing default generation service. For example, R.C. 4928.08(B) prohibits the provision of competitive retail electric services to consumers in Ohio without first being certified by the Commission. The Commission has never required EDUs to obtain CRES certification pursuant to R.C. 4928.08(B) or its rules that implement that statutory provision in order to provide default generation service. As another example, R.C. 4928.17(E) provides that an electric utility “may” divest itself of generating assets at any time without the Commission’s approval. If full corporate separation were required of an electric utility simply because it fulfilled its POLR obligation, divestiture would not be discretionary. OCC’s contention that the Companies are no longer allowed to own generation assets flies in the face of the discretion to divest such assets which is apparent in R.C. 4928.17(E).

The proposition that R.C. 4928.17 requires the Companies to provide default generation service to their distribution service customers by a separate affiliate would put that statute in considerable conflict both with R.C. 4928.14 and the laws of nature. R.C. 4928.14 explicitly requires the EDU to provide default generation service to any and all consumers within its certified territory that do not have an alternative supplier. Even if the statute did not specifically

¹³ At page 17 of its Brief, OCC claims that assuring cost recovery for the IGCC plant “is the antithesis of corporate separation” because it subsidizes the Companies’ research costs and, thus, provides an advantage to them that merchant plant builders do not have. There are two flaws in OCC’s criticism. First, the Companies will not recover “research” costs. They will recover the costs of designing and building a specific IGCC plant. Second, the Companies do not have the upside potential that merchant plant owners have. The Companies’ recovery will be limited to their actual costs by the cost recovery mechanism that they have proposed. Merchant plant owners may recover whatever the market will bear.

require it, the EDU, as a result of its position as the distribution network operator, will always be the provider of last resort.

By fulfilling their statutorily imposed obligation to sell default generation service as part of the distribution function the Companies can hardly be considered, for the purpose of R.C. 4928.17, to be “engaged in the business” of supplying a competitive retail generation service. And, when they provide ancillary services, which are specifically defined to be non-competitive services, that support the reliable function of their distribution systems, they certainly are not engaged in the business of providing competitive retail electric services. OCC’s argument that the Companies may not own the IGCC plant and use the plant’s output to meet their POLR obligations because it would violate the corporate separation requirements of R.C. 4928.17 is not persuasive.

Proposition of Law No. 7:

When The Public Utilities Commission Of Ohio Provides Notice Of And A Hearing On An Electric Distribution Utility’s Application To Establish A Cost Recovery Mechanism For Its POLR Costs That Are In Accordance With the Requirements Of R.C. 4928.14, It Satisfies The Requirements Of R.C. Title 49.

Several Appellants contend that the Order is unlawful because it establishes charges to recover the pre-construction Phase I costs of the IGCC plant without conducting a full-blown rate case in accordance with the rate base, rate-of-return and procedural requirements of R.C. 4909.18, 4909.19, and 4909.15 that apply to traditional rate increase cases. They believe that the orders conflict with the “used and useful” requirement of R.C. 4909.15(A)(1), including the 75-percent-complete criterion for including construction work in process (CWIP) in rate base. OCC and OEG also assert that the Commission’s orders violated R.C. 4928.15(A)’s requirement that rate schedules for distribution services and R.C. 4928.15(B)’s requirement that rate schedules for ancillary services must be filed in accordance with the requirements of R.C. Chapter 4909. OEG

also asserts that the Commission permits each Company to charge a price for its market-based standard service offers that is equal to the sum of the market-based rate (established in the AEP RSP Order) plus a surcharge for the IGCC Phase I costs (established in the proceeding below). OEG claims that this violates R.C. 4928.14's requirement that the EDU must charge a market-based rate for its SSO. (IEU Prop. of Law Nos. 1 and 4, Brief, pp. 15-20; OCC Prop. of Law No. 2.A, 2.B, 2.C, and 2.E., Brief, pp. 19-25, 28-30; FE Prop. of Law No. 2, Brief, pp. 13-14; and OEG Prop. of Law Nos. 3 and 4, pp. 14-17). These criticisms are without merit.

The POLR function created by SB3 is a new distribution service component, separate and apart from the traditional notion of distribution service. The IGCC plant and its output will enable the Companies to meet their POLR obligations in the future. The plant will be available to provide capacity in an ancillary fashion to support the reliable operation of the Companies' distribution systems. The plant also will be dedicated to providing capacity and energy both to non-switching customers and customers who switch to a CRES provider and later return to the Companies' SSOs. Both the distribution reliability support and the optionality (for customers to switch or not to switch) that the Companies must provide in order to fulfill their POLR obligations are related to the Companies' distribution functions, but the Companies will use generation plant to provide these benefits. This POLR service is not a competitive retail electric generation service. Therefore, the costs of providing POLR service, which in this case will include the costs of the IGCC plant, are properly recovered through separate POLR charges. Thus, the IGCC cost-recovery mechanism for which the Companies requested approval recovers "expenses related to [their] statutory obligation[s] to provide POLR service. . . ." *CG&E RSP Appeal, supra*, ¶167.

In addition, this Court has confirmed that the Commission has the authority to establish POLR charges through proceedings conducted pursuant to R.C. 4928.14. *CG&E RSP Appeal*, ¶¶63-68; *Constellation NewEnergy, supra*, ¶¶39-40. The fact that the Companies did not seek to establish market-based SSOs along with their proposed POLR cost recovery mechanism for the IGCC plant did not prevent the Commission from proceeding to address their proposal under R.C. 4928.14. Neither R.C. 4928.14 nor the Court's decision in *Constellation NewEnergy* indicate that the Commission may only establish a POLR cost recovery mechanisms for an EDU at the same time and in the same proceeding that establishes a market-based SSO for the EDU. R.C. 4909.18 and 4909.19

The Commission's review and approval of POLR charge components is not subject to the provisions of R.C. 4909.18 and 4909.19 that govern rate increases for traditional non-competitive distribution services. This is so because the establishment of a POLR charge, such as the one for which the Companies obtained Commission approval, does not involve an increase to an existing rate.

The Court most recently confirmed this point in the *CG&E RSP Appeal*, ¶¶16-19. It addressed and rejected the argument, which the Appellants have advanced again in this appeal, that the establishment of POLR charges is subject to the provisions of R.C. Chapter 4909 that govern rate increase cases. See also *Constellation NewEnergy, supra*, ¶¶36-40.

In the *CG&E RSP Appeal*, OCC had characterized CG&E's proposal for a POLR charge comprised of several components as an application for a rate increase, just as Appellants have characterized the Companies' proposal in this case. OCC claimed that the Commission was required to comply with the procedures – public notice, a staff investigation, and a hearing – set forth in R.C. 4909.18 and 4909.19. (*Id.*, at ¶16). In rejecting that argument the Court first held

that the Commission has discretion under R.C. 4909.18 in determining whether an application seeks to increase an “existing” rate. (*Id.*, at ¶18). The Court concluded that “[t]he notice, investigation, and hearing requirements of R.C. 4909.19 are not triggered because they apply only upon application for a rate increase pursuant to R.C. 4909.18, which we have determined did not occur.” *Id.*, ¶18; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1969), 17 Ohio St.2d 45, 46 Ohio Ops.2d 264, 245 N.E.2d 351.

The Companies’ Application seeks to establish a rate that will allow them to recover new costs of meeting their POLR obligations. It does not seek to increase an existing rate. Accordingly, Appellants’ arguments that the provisions of R.C. Chapter 4909 that govern rate increase cases are applicable to the Companies’ proposal are incorrect.

In any event, the procedure by which the Commission reviewed the Companies’ Application satisfied R.C. 4909.18. Under R.C. 4909.18, if the EDU’s application is not for an increase in an existing rate, as is the case with the Companies’ Application, a hearing is only required if it appears to the Commission that the proposals in the application are unjust and unreasonable. Not surprisingly, in the instant case the Commission did not determine that the Company’s proposals appeared unjust and unreasonable. Indeed, the Companies’ Application was in response to the Commission’s request in its Opinion and Order approving their rate stabilization plan. Nevertheless, the Commission provided notice of and held extensive hearings on the Companies’ Application. The Companies filed proof of their publication of the notice that the Commission required. (Supp. pp. 39, 40). The Commission conducted local public hearings in Hilliard, Canton, and Pomeroy, Ohio, and an evidentiary hearing that commenced on August 8, 2005, and continued each business day thereafter through August 16, 2005. The Commission held the same type of hearing on the Companies’ Application that it provided in the proceeding

that led to the *CG&E RSP Appeal*. Accordingly, the notice and hearing that the Commission provided satisfied the requirements of R.C. 4909.18, to the extent that provision is applicable.¹⁴

The Appellants' criticisms of the notice and hearing process that the Commission used to review the Application are without basis. The Commission's orders did not violate R.C. 4909.18 or 4909.19.

R.C. 4909.15(A)(1)

The revenue requirements formula of R.C. 4909.15 is not applicable to requests to establish a rate that does not involve an increase in an existing rate. See *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1969), *supra*. Consequently, the "used and useful" criterion of R.C. 4909.15(A)(1), including its 75-percent-complete standard for including CWIP in rate base is not applicable to the Companies' Application. The Appellants' criticisms that the Commission's orders violated those provisions of R.C. 4909.15(A)(1) have no basis.

R.C. 4928.15

OCC's argument that the Commission's orders violated R.C. 4928.15(A), which requires electric utilities to file distribution service schedules under R.C. 4909.18, and OEG's argument that the orders violate R.C. 4928.15(B), which similarly requires them to file ancillary service schedules, are also unpersuasive. The Companies' made their proposal for a cost-recovery mechanism for the IGCC plant pursuant to the Commission's authority to assure EDUs' recovery of their POLR costs under R.C. 4928.14. See *CG&E RSP Appeal, supra*, ¶¶63-68; and *Constellation NewEnergy, supra*, ¶¶37-40. In addition, even if R.C. 4928.15(A) or (B) were

¹⁴ And, because the process that the Commission provided satisfied the requirements of R.C. 4909.18, even if there had been a technical non-compliance with the requirements of that statute, the Commission's orders had no prejudicial effect on Appellants. In that event, the Court would not reverse the Commission. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶22 ("This court has explained in past cases that we 'will not reverse an order of the Public Utilities Commission unless the party seeking reversal demonstrates the prejudicial effect of the order,'" citing *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 92, 706 N.E.2d 1255).

applicable and the proposal is subject to the procedural requirements of R.C. 4909.18, the notice and hearing that the Commission provided satisfied the requirements of that section for the reasons explained above.

R.C. 4928.14

OEG's argument, that by adding the IGCC Phase I surcharge to the Companies' SSOs the Commission's orders violate R.C. 4928.14's requirement that SSOs must be market-based, is flawed because the Phase I surcharge is not part of the price of the Companies' SSOs. It is not an adder to the SSO price. It is a separate POLR charge. OEG's confusion on this point appears to result from the fact that the Phase I charge is bypassable. The fact that it is bypassable does not convert the Phase I charge into a part of the SSO price that customers pay. It does not compensate the Companies for default generation service that non-switching customers are currently purchasing and consuming during Phase I. It is designed to recover costs that the Companies are incurring currently to develop a resource that will be dedicated to meeting their POLR service obligations over the long term. It does not violate the market-based standard of R.C. 4928.14. Rather, such POLR charges are the natural consequence of the EDU bearing POLR obligations. *Constellation New Energy, supra*, ¶¶39-40; *CG&E RSP Appeal*, ¶¶64-68.

Proposition of Law No. 8:

The Public Utilities Commission Of Ohio's Order Pays Due Respect To Its Prior Decisions, Including Its Order Approving The Companies' Rate Stabilization Plan.

OCC contends that the POLR charge components which the Commission established amount to generation service rate increases "outside of the framework" of the Companies' rate stabilization plan that the Commission approved in the AEP RSP Order (or, as OCC refers to it, the "Post-MDP" case). OCC alternately argues that those POLR charge components amount to distribution service rate increases that contravene the freeze, through the end of 2008, on

distribution service rates that the Commission established in the Companies' 2000 transition plan cases (for Columbus Southern Power Company) and the AEP RSP Order (for Ohio Power Company). OCC claims that the Commission did not justify these changes to its prior orders as required by *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706. (OCC's Prop. of Law No. 2.D, Brief at pp. 25-28).

IEU also argues that the Commission's orders conflict with the Companies' distribution rate freezes. (IEU Prop. of Law No. 2, Brief at pp. 20-23.) In addition, IEU claims that the Commission inconsistently used a cost-based approach to establish components of POLR charges for the Companies in this case, on the one hand, while resorting to a market-based method for setting SSOs for them in the AEP RSP Order, on the other hand. IEU contends that this is arbitrary and capricious. (IEU Prop. of Law No. 4, Brief at pp. 25-31).

OCC's and IEU's criticisms are unfounded. First, the POLR charge components that the orders established are not "outside of the framework" of the Companies' rate stabilization plan. The AEP RSP Order itself encouraged the Companies to make their application and propose a cost-recovery mechanism for the POLR costs of constructing and operating the IGCC plant. (IEU App. p. 255). Thus, that order specifically left open for consideration in a subsequent proceeding the POLR charges established in the instant proceeding. Since the Order did not modify the AEP RSP Order, the Commission did not fail to respect that prior order.

In any event, the Commission is not prohibited from modifying prior orders in the face of new circumstances. Instead, as this Court has held, the question is whether the Commission has an adequate reason for doing so. *Office of Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 ("When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such orders may be

changed or modified.”) See *Ohio Domestic Violence Network v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 311, 324, 638 N.E.2d 1012. In this case, circumstances definitely have changed. The Companies have proposed to build an IGCC plant in Ohio and dedicate it to supporting their POLR obligations. The Companies’ proposal and the new POLR costs they will incur to implement it constitute new circumstances that warrant recognition by the Commission even if that means changing or modifying the AEP RSP Order.

Second, the orders do not contravene the Companies’ distribution rate freezes. The POLR charge components that the Commission approved are not increases of any rates, let alone increases of the rates for distribution services unbundled in the Companies’ 2000 transition plan cases that are subject to the freeze.¹⁵ Rather, the Commission simply established POLR charge components that enable the Company to recover POLR costs that they are incurring to develop the IGCC plant.

Third, there is no inconsistency in the methods that the Commission used to establish the Companies’ market-based SSOs in the AEP RSP Order and POLR charge components in the proceeding below. The methods are different because the law requires it. The price of the SSO is determined on a market basis because that is the standard that R.C. 4928.14(A) established for it. Because it is necessary to assure the Companies that they will recover their actual POLR costs, *Constellation, supra*, a cost basis is the appropriate method for determining POLR charges.

¹⁵ OCC’s claim that the POLR charge components that the Commission established in the proceeding below amount to increases in the Rate Stabilization Surcharge (RSS) that the Commission approved in the Companies’ RSP Case (OCC’s Brief, at p. 26, note 13) is also incorrect. The purpose of, and the costs recovered by, the Companies’ RSS POLR components are different from those of the components that the Commission’s Order established to assure them of recovery of their IGCC plant costs. See *CG&E RSP Appeal, supra*, at ¶66, in which the Court noted that CG&E’s POLR charge has several components, each of which serves a separate purpose and recovers different types of POLR costs.

Proposition of Law No. 9:

No Requirements Of Due Process Preclude the Public Utilities Commission of Ohio From Considering And Relying Upon Arguments Presented By Its Staff In Post-Hearing Briefs.

IEU contends that the proposition that generation plant is necessary to provide ancillary services which support the reliable operation of the Companies' distribution network, and that the IGCC plant can provide such services, was first advanced in the Staff's reply brief in the proceeding below. IEU asserts that R.C. 4901.16 required the Staff to present its position earlier in the proceeding, either through a report to the Commission or in testimony at the hearing. IEU also argues that it was so fundamentally unfair for the Commission to rely upon the Staff's brief that the Commission violated IEU's constitutional due process rights. (IEU Prop. of Law No. 5, Brief, at pp. 32-35).

IEU's criticisms are baseless. First, the proposition that generating plant must be used to provide many ancillary services is not subject to evidentiary debate. It is codified in R.C. 4928.01(A)(1)'s definition of "ancillary service."

"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. (emphasis added).

As the Commission noted in its Opinion and Order, at page 18: "[i]t is clear to this Commission that most of these ancillary services require generating plant." (IEU App. p. 27).

Second, R.C. 4901.16 does not dictate whether, let alone when, the Staff must issue a report to the Commission or present testimony in a proceeding. Rather, it addresses when members of the Staff may divulge information regarding a public utility obtained in their roles as

Staff members. It disqualifies any Staff member who violates that statutory provision from working for the Commission. No member of the Staff violated R.C. 4901.16. Nor did the Commission's orders.

Third, there is no statute or rule that requires the Staff to present its final position in a proceeding at the outset. Nor does any statute or rule restrict the Staff from modifying its position during the course of a proceeding, including during the briefing stage. As the Commission's investigative arm, the Staff not only is permitted to consider all evidence introduced at the hearing before taking its final position, it should be encouraged to do so. IEU's argument that the Staff has fewer rights than intervenors do must be rejected.¹⁶

Finally, Ohio law does not support IEU's due process argument. This case is about establishing a rate mechanism that will assure the recovery of costs incurred to provide POLR services. The Court has repeatedly held that "there is no constitutional right to notice and a hearing in rate-related matters if no statutory right to a hearing exists." *CG&E RSP Appeal, supra*, ¶20; *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 248-249, 638 N.E.2d 550; *Armco, Inc. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 401, 409, 23 O.O.3d 361, 433 N.E.2d 923; *Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453, 21 O.O.3d 279, 424 N.E.2d 561. As discussed in Proposition of Law No. 6 in this Brief, there was no statutory right to a hearing regarding the Companies' proposal. Therefore, due process rights could not have been violated and IEU's arguments in this regard should be rejected.

¹⁶ FE never submitted any testimony and not only formalized its position at the briefing stage of this case, but has taken an appeal to pursue that position.

Proposition of Law No. 10:

In The Event Of A Reversal Of The Public Utilities Commission Of Ohio's Orders, There Is No Basis For Requiring A Refund Of Phase I Charges Collected In Compliance With Those Orders.

IEU contends that if the Court reverses the Commission's orders in this appeal it should direct the Commission to order the Companies to refund the Phase I revenues collected during the pendency of this appeal. (IEU Br. pp. 35-38). Because IEU did not raise this issue on rehearing, R.C. 4903.10 precludes consideration of that issue on appeal.¹⁷ (See IEU App. pp. 38, 39). The statute states, in part:

No party shall in any court urge or rely on any grounds for reversal, vacation or modification not so set forth in [the rehearing application].

Interestingly enough, the notion of refunds had been raised by IEU in its objections to the Companies' tariff filing that was made to implement the Commission's Opinion and Order. (IEU's Supp. p. 72). Those objections were filed on April 21, 2006, more than two weeks prior to IEU's May 8, 2006 rehearing application. Further, IEU did not seek rehearing of the Commission's June 28, 2006 Finding and Order accepting the tariff filing. Since the issue of refunds is not properly raised on appeal, the Court should not modify the Commission's orders as sought by IEU.

Even if the Court were to reverse the Commission's orders on appeal and were inclined to consider the refund issue, it should reject IEU's arguments. IEU recognizes the applicability of this Court's decision in *Keco Industries v. The Cincinnati & Suburban Bell Telephone Co.*, (1957) 166 Ohio St. 254. IEU contends that the Court in *Keco* "focused on the applicability of the common law's treatment of unjust enrichment" (IEU Br. p. 36). In reality, the Court focused on whether the remedy of restitution "has been abrogated either directly or indirectly by

¹⁷ OCC's brief, while not presenting any supporting argument, also asks the Court to order such a refund. (OCC Br. p. 35). As with IEU, OCC did not raise the issue on rehearing. (See OCC App. pp. 51-53).

statute.” (*Keco*, p. 256). Having analyzed the statutes, which still are applicable today, the Court held that:

Any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common law remedy of restitution in such cases. (*Id.* at 259).

This ruling, of course, is well understood by IEU. Prior to this appeal having been brought by IEU, it filed a Complaint for Writ of Prohibition with this Court attempting to preclude the Companies from collecting the Commission-approved Phase I surcharge.¹⁸ In that proceeding IEU, in reliance on *Keco*, argued that “a successful appeal cannot cure the injury suffered by electric utility customers as a result of payment of unlawful rates. This Court has already decided that such unlawful collections are not refundable as a matter of law [citing *Keco*].” (App. p. 16). In responding to motions to dismiss its complaint, IEU once again relied on *Keco* when it argued that “[c]ustomers are not permitted to obtain refunds where the PUCO has illegally increased rates.” (App. p. 18).

Even if the Court were to reverse the Commission in this appeal, adhering to *Keco* would not produce an unjust or unreasonable result. The point IEU misses is that Phase I recovery is not dependent on the eventual construction and operation of the Companies’ proposed IGCC facility. Instead, as the Commission correctly noted, Phase I cost recovery is linked to the investigation, analysis, evaluation and development of a realistic plan to address the Companies’ POLR obligation in a manner which considers concerns raised in this case by IEU and other parties. (IEU App. p. 29). Therefore, reversal of the Commission would not change the fact that

¹⁸ *State ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm.* Case No. 06-1257, dismissed October 4, 2006.

the Phase I surcharges were related to the Companies' legitimate business activities related to their POLR obligation.

Further, IEU did not avail itself of the remedy provided by R.C. 4903.16. That statute provides for issuance of a stay of the Commission's order. IEU's argument to subvert *Keco* to remedy its own decision to not pursue a stay must be rejected.

IEU's argument that *Keco* should be ignored when the Commission's error is "so far out of bounds" (IEU. Br. p. 36) must be rejected as well. The *Keco* decision has stood the test of time for nearly 50 years. Creating exceptions, such as IEU proposes, will inject uncertainty throughout the appellate process. Further, IEU's argument asks the Court to modify the statutes on which *Keco* is based to allow refunds in some circumstances. This request for judicial legislation should be rejected, particularly given the statutory availability for a stay of the Commission's orders.

Finally, IEU argues that the Commission itself made a portion of the Phase I surcharge recoveries refundable and, therefore, the Court can order a total refund. First, the rate authorization was, in part, conditional. If the condition is triggered, the "refund" would be made in concert with the extent of the original Phase I surcharge authorization. That is different than the Commission revisiting an earlier decision and ordering a refund because it did not like the ultimate outcome of its prior order. Therefore, the Commission's conditional Phase I authorization does not open the door to imposing refunds that run contrary to Ohio law, and IEU has not provided any authority to suggest otherwise.

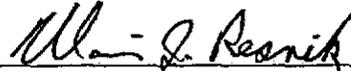
IEU's request for refunds in the event the Court reverses the Commission's orders on appeal is not properly before the Court. Even if that request were properly before the Court, it should be rejected as contrary to statute and long-standing precedent from this Court.

IV. CONCLUSION

American Electric Power Company, Inc. has just celebrated its 100 year anniversary. Throughout this long history it has adhered to the credo of "inventing the future" through technological development and leadership. (Supp. p. 3). Today, the public interest compels the construction of new electric generating capacity as well as the protection of our environment. IGCC and SB3 permit these two public interest considerations to move forward in a compatible manner.

The Companies want to continue their legacy of technological development and leadership by constructing an IGCC facility in Ohio and for Ohio. The Appellants argue against this proposal and in favor of their position which will wrap Ohio's future electric generating capacity needs in a massive question mark. The Commission correctly has found that the evidence supports the Companies' proposal and the law permits it. Therefore, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

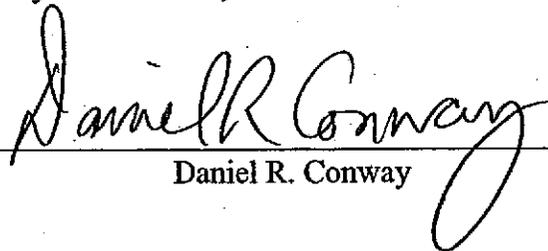


Marvin I. Resnik (0005695)
Kevin F. Duffy (0005867)
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1606
Fax: (614) 716-2950
Email: miresnik@aep.com
Email: kfduffy@AEP.com

Daniel R. Conway (0023058)
Porter, Wright, Morris & Arthur LLP
41 S. High Street
Columbus, Ohio 43215
Telephone: (614) 227-2270
Fax: (614) 227-2100
Email: dconway@porterwright.com

PROOF OF SERVICE

Intervening Appellees Columbus Southern Power Company's and Ohio Power Company's Merit Brief was served by first class U. S. mail, postage prepaid, upon counsel identified below for all parties of record this 22nd day of December, 2006.


Daniel R. Conway

Service List

Jim Petro
Duane W. Luckey
Chief, Public Utilities Section
Thomas W. McNamee
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Samuel C. Randazzo
Lisa G. McAlister
Daniel J. Neilsen
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215-4228

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

Kathy J. Kolich
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308

David F. Boehm
Michael L. Kurtz
Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

Case No. 05- 376 -EL-UNC

APPLICATION

INTRODUCTION

1. Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, the Companies) are public utilities and electric light companies as those terms are defined in §§ 4905.02 and 4905.03(A)(4), Ohio Rev. Code, respectively.
2. The Companies also are electric distribution utilities (EDU) as that term is defined in § 4928.01(A)(6), Ohio Rev. Code.
3. The Companies are electric utility operating company subsidiaries of American Electric Power Company, Inc. (AEP).
4. Pursuant to §§ 4928.35(D) and 4928.14, Ohio Rev. Code, the Companies (as EDUs) are required 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 because the CRES provider has failed to deliver generation service; or c) who simply choose to return to their respective Company.

This statutory requirement recently has been characterized by the Commission as a

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Provider of Last Resort (POLR) obligation (In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan), Case No. 04-169-EL-UNC (the RSP case) January 26, 2005 Opinion and Order, pp. 27, 29, 37, 38).

5. In its RSP Opinion and Order the Commission authorized the establishment of a POLR charge. (p. 27). Elsewhere in its Opinion and Order the Commission stated that the Companies "will be held forth as the POLR to consumers.... Consistent with Ohio law, the POLR designation places expectations upon EDUs; the companies must have sufficient capacity to meet unanticipated demand." (p. 37). The Commission urged the Companies "to move forward with a plan to construct an integrated gasification combined-cycle (IGCC) facility in Ohio." (*Id.*). In that connection, the Commission stated that it "is exploring regulatory mechanisms by which utilities, given their POLR responsibilities, might recover the costs of these new facilities." (p. 38).

6. As part of their fulfillment of their ongoing POLR responsibility, the Companies are prepared to embark on the path toward construction of a 600 MW IGCC facility at a site in Ohio. On a preliminary basis the Companies have asked the PJM RTO to analyze the impacts of locating a 600 MW facility in Meigs County, Ohio in the Great Bend area. The Companies will share in the costs of the IGCC facility based upon the retail loads of each Company during the expected operating life of the facility.

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

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

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

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

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

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

Technology	PC Subcritical	PC Supercritical	IGCC (E-Gas) W/ Spare	IGCC (E-Gas) No Spare	NGCC High CF	NGCC Low CF
Total Plant Cost, \$/kW	1,230	1,290	1,350	1,250	440	440
Total Capital Requirement, \$/kW	1,430	1,490	1,610	1,490	475	475
Fixed O&M, \$/kW-yr	40.5	41.1	56.1	52.0	5.1	5.1
Variable O&M, \$/MWh	1.7	1.6	0.9	0.9	2.1	2.1
Avg. Heat Rate, Btu/kWh (HHV)	9,310	8,690	8,630	8,630	7,200	7,200
Capacity Factor, %	80	80	80	80	80	40
Levelized Fuel Cost, \$/Mbtu (2003\$)	1.50	1.50	1.50	1.50	5.00	5.00
Capital, \$/MWh (Levelized)	25.0	26.1	28.1	26.0	8.4	16.9
O&M, \$/MWh (Levelized)	7.5	7.5	8.9	8.3	2.9	3.6
Fuel, \$/MWh (Levelized)	14.0	13.0	12.9	12.9	36.0	36.0
Levelized Total (LCOE) \$/MWh	36.5	36.6	39.9	37.2	47.3	56.5

Source: Electric Power Research Institute

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

7. In order to proceed, however, the Companies must have an approved mechanism by which costs associated with constructing and operating such a project throughout the life of the facility can be recovered in rates authorized by the Commission.

Therefore, consistent with the Commission statements noted above, the Companies submit this application in which they propose a three-phase regulatory mechanism for recovering their costs, including carrying costs, associated with meeting their POLR responsibilities. As described in greater detail below:

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

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

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

PHASE I RECOVERY

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

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

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

Dollars are in \$000s

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

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

Dollars are in \$000s

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

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

Columbus Southern Power Company

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

Ohio Power Company

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

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

PHASE II RECOVERY

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

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

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

Ohio Power Company

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

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

PHASE III RECOVERY

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

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

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

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

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

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

OTHER RSP IMPACTS

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

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

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

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

CONCLUSION

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

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

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

Respectfully submitted,



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

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

Counsel for Columbus Southern Power Company and Ohio Power Company

IN THE SUPREME COURT OF OHIO

State of Ohio, ex. Rel. Industrial Energy Users-Ohio :
Relators, : Complaint for Writ of Prohibition
v. : to Prevent the Public Utilities
The Public Utilities Commission of Ohio : Commission of Ohio from Enabling
Alan R. Schriber, Chairman : Electric Rate Increases Pursuant to
Ronda Hartman Fergus, Commissioner, : its Order dated April 10, 2006, its
Judith A. Jones, Commissioner, : Finding and Order dated June 28, 2006
Donald L. Mason, Commissioner, and : and its Entry on Rehearing dated
Valerie A. Lemmie, Commissioner, : June 28, 2006 in PUCO Case No.
Respondents. : 05-376-EL-UNC Without Meeting
: Applicable Procedural and Substantive
: Requirements of Ohio Law
: Case No. 06-1257

COMPLAINT FOR WRIT OF PROHIBITION

Jim Petro
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

Duane W. Luckey
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
(614) 466-4397

ATTORNEYS FOR RESPONDENTS

Alan R. Schriber, Chairman
Ronda Hartman Fergus, Commissioner
Judith A. Jones, Commissioner
Donald L. Mason, Commissioner
Valerie A. Lemmie, Commissioner
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

RESPONDENTS

Samuel C. Randazzo, Esq. (0016386)
(COUNSEL OF RECORD)
Lisa G. McAlister, Esq. (0069402)
Daniel J. Neilsen, Esq. (0076377)
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215-4228
(614) 469-8000
Fax No. (614) 469-4653

On Behalf of Industrial Energy Users-Ohio

ATTORNEYS FOR RELATOR

the cost recovery of the IGCC facility is unlawful, there is no opportunity for the affected customers to be made whole.

- B. Second, a successful appeal cannot cure the injury suffered by electric utility customers as a result of payment of unlawful rates. This Court has already decided that such unlawful collections are not refundable as a matter of law.⁵⁴ Consequently, rates paid by CSP's and OPCo's Ohio customers during the course of an appeal will never be refunded, even if the appeal is ultimately successful.
- C. On the other hand, no one is harmed by the relief requested herein. The rates to be collected through the tariffs at issue in this proceeding are intended to collect for the preconstruction costs of an electric generating facility that has not been constructed, has not been reviewed or approved by the OPSB,⁵⁵ and in any event is not intended to begin construction until January 2007. Therefore, while granting the requested writ harms no one, the refusal of the writ requested herein leaves only the statutory remedy of appeal, which is clearly inadequate as it can neither prevent nor cure the irreparable injury which will be suffered by CSP's and OPCo's Ohio customers if forced to pay unlawful rate increases.

⁵⁴ *Keco Indus., Inc. v. The Cincinnati & Suburban Bell Tel. Co.* 166 Ohio St. 254, syll. para. 2 (1957).

⁵⁵ CSP and OPCo recently asked the OPSB to delay the proceeding because they need additional time to examine "cultural resources" located at the potential site of the hypothetical IGCC plant. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for a Certificate of Environmental Compatibility and Public Need for the Great Bend IGCC Project in Meigs County, Ohio*, Ohio Power Siting Board Case No. 06-30-EL-BGN, Letter to Ohio Power Siting Board at 1-2 (May 22, 2006).

IN THE SUPREME COURT OF OHIO

State of Ohio, ex. Rel. Industrial Energy Users-Ohio	:	Complaint for Writ of Prohibition
Relators,	:	to Prevent the Public Utilities
	:	Commission of Ohio from Enabling
v.	:	Electric Rate Increases Pursuant to
	:	its Order dated April 10, 2006, its
The Public Utilities Commission of Ohio	:	Finding and Order dated June 28, 2006
Alan R. Schriber, Chairman	:	and its Entry on Rehearing dated
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Judith A. Jones, Commissioner,	:	05-376-EL-UNC Without Meeting
Donald L. Mason, Commissioner, and	:	Applicable Procedural and Substantive
Valerie A. Lemmie, Commissioner,	:	Requirements of Ohio Law.
	:	
Respondents.	:	Case No. 06-1257

MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS BY THE PUBLIC UTILITIES COMMISSION OF OHIO AND COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

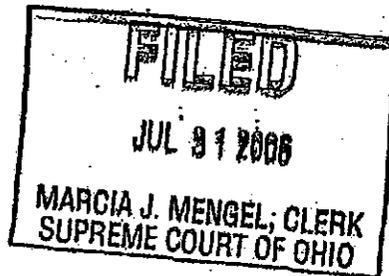
Jim Petro (0022096)
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

Duane W. Luckey (0023557)
Chief, Public Utilities Section
Steven T. Nourse (0046705)
(COUNSEL OF RECORD)
Thomas W. McNamee (0017352)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215
(614) 466-4397
Duane.luckey@puc.state.oh.us
Steven.nourse@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us

ATTORNEYS FOR RESPONDENTS,
Public Utilities Commission of Ohio

Alan R. Schriber, Chairman
Ronda Hartman Fergus, Commissioner
Judith A. Jones, Commissioner
Donald L. Mason, Commissioner
Valerie A. Lemmie, Commissioner
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, OH 43215

RESPONDENTS



setting prices for a competitive service under Section 4928.14, Revised Code, and were thus not subject to the requirements of a Chapter 4909 rate increase application.³⁰ Thus, whatever support the Companies or the PUCO seek to extract from the Court's prior rulings regarding the PUCO's RSP decisions and the Court's affirmation of such decisions, there is nothing the Court has done to even suggest that the PUCO has the authority to increase rates for non-competitive services without following the mandatory statutory process that applies to non-competitive services.

C. There is No Other Adequate Remedy at Law for IEU-Ohio to Pursue Other Than the Complaint for Writ of Prohibition

The Companies and the PUCO also each argue that IEU-Ohio's Complaint should be dismissed because there is an adequate remedy otherwise available to IEU-Ohio. Again, the argument by both parties misinterprets IEU-Ohio's Complaint, ignores the scope of the relief requested and misapplies the applicable law. As IEU-Ohio indicated in its Complaint at pages 26-28, IEU-Ohio could not have filed a Notice of Appeal and have been made whole as a result of a successful appeal. Customers are not permitted to obtain refunds where the PUCO has illegally increased rates. As the Court stated in *Keco Indus. Inc. v. The Cincinnati & Suburban Bell Tel. Com.*:

Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a

Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period, PUCO Case No. 03-2144-EL-ATA, Opinion and Order at 22-24 and 46 (June 9, 2004) (hereinafter "FirstEnergy RSP Order") (Appendix at 38-40 and 62).

³⁰ FirstEnergy RSP Order at 46. (Appendix at 62).

§ 4901.16. Penalty for divulging information.

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.

HISTORY: GC § 614-11; 102 v 549, § 13; Bureau of Code Revision. Eff 10-1-53.

§ 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.

§ 4903.10. Rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional

evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

HISTORY: 125 v 274 (Eff 10-2-53); 129 v 1610 (Eff 10-18-61); 147 v H 215. Eff 9-29-97.

§ 4903.13. Reversal of final order; notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

HISTORY: GC §§ 544, 545; 103 v 804(815), §§ 33, 34; 116 v 104 (120), § 2; Bureau of Code Revision. Eff 10-1-53.

§ 4903.16. Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

HISTORY: GC § 548; 103 v 804(815), § 37; 116 v 104(121), § 2; Bureau of Code Revision. Eff 10-1-53.

§ 4905.20. Abandonment of facilities.

No railroad as defined in section 4907.02 of the Revised Code, operating any railroad in this state, and no public utility as defined in section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, sewer line, steam pipe line, or any portion thereof, pumping station, generating plant, power station, sewage treatment plant, or service station of a public utility, or the service rendered thereby, which has once been laid, constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in section 4905.21 of the Revised Code. Any railroad or public utility violating this section shall forfeit and pay into the state treasury not less than one hundred dollars, nor more than one thousand dollars, and shall be subject to all other legal and equitable remedies for the enforcement of this section and section 4905.21 of the Revised Code.

HISTORY: GC § 504-2; 107 v 525; 108 v Ptl, 372; Bureau of Code Revision, 10-1-53; 129 v 501. Eff 9-19-61.

§ 4905.21. Application to abandon, withdraw or close.

Any railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn, or closed for traffic or service all or any part of a main track or depot, and any public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for traffic or service all or any part of any line, pumping station, generating plant, power station, sewage treatment plant, or service station, referred to in section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing. The commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the commission for the hearing of the application.

Upon the hearing of the application, the commission shall ascertain the facts and make its findings thereon, and if such facts satisfy the commission that the proposed abandonment, withdrawal, or closing for traffic or service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, it may allow such abandonment, withdrawal, or closing; otherwise it shall be denied, or if the facts warrant, the application may be granted in a modified form. If the application asks for the abandonment or withdrawal of any main track, main pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, sewer line, steam pipe line, pumping station, generating plant, power station, sewage treatment plant, service station, or the service rendered thereby, in such manner as can result in the permanent abandonment of service between any two points on such railroad, or of service and facilities of any such public utility, no application shall be granted unless the railroad or public utility has operated the track, pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, sewer line, steam pipe line, pumping station, generating plant, power station, sewage treatment plant, or service station for at least five years. Such notice shall be given by publication in a newspaper of general circulation throughout any county or municipal corporation which has granted a franchise to the railroad or public utility, under which the track, pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, sewer line, steam pipe line, pumping station, generating plant, power station, sewage treatment plant, or service station is operated or in which the same is located, once a week for two consecutive weeks before the hearing of the application. Notice of the hearing shall be given such county, municipal corporation, or public utility in the manner provided for the service of orders of the commission in section 4903.15 of the Revised Code. This section and section 4905.20 of the Revised Code do not apply to a gas company when it is removing or exchanging abandoned field lines.

This section applies to all service now rendered and facilities furnished or hereafter built and operated, and an order of the commission authorizing the abandonment or withdrawal of any such service or facility shall not affect rights and obligations of a railroad or public utility beyond the scope of the order, anything in its franchise to the contrary notwithstanding.

HISTORY: GC § 504-3; 107 v 525, § 2; 108 v Ptl, 372; Bureau of Code Revision, 10-1-53; 125 v 903(1029) (Eff 10-1-53); 129 v 501 (Eff 9-19-61); 129 v 1601 (Eff 10-25-61); 130 v Ptl, 237 (Eff 12-16-64); 147 v H 215. Eff 9-29-97.

§ 4909.15. Fixation of reasonable rate.

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

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

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

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

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

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

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

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule,

standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

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

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

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

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

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

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

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

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

(b) The amount of any tax credits granted to an electric light company under section 5727.391 [5727.39.1] of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition,

construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 [5727.39.1] of the Revised Code.

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

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

§ 4909.18. Application for establishment or change in rate.

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

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

- (A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;
- (B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

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

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

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

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

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

§ 4909.19. Publication; investigation.

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

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

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

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

prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

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

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

§ 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 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. Eff 10-5-99.

§ 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 10-5-99.

§ 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 10-5-99.

§ 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 10-5-99.

§ 4928.06. Commission to ensure effectuation of state policy; rules; abuses of market power.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903, of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations for legislation to the standing committees of both houses of the general assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the commission and the consumer's counsel also shall provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive retail electric services in this state. In addition, until the end of all market development periods as determined by the commission under section 4928.40 of the Revised Code, those standing committees shall meet at least biennially to consider the effect on this state of electric service restructuring and to receive reports from the commission, consumers' counsel, and director of development.

(D) In determining, for purposes of division (B) or (C) of this section, whether there is effective competition in the provision of a retail electric service or reasonably available alternatives for that service, the commission shall consider factors including, but not limited to, all of the following:

- (1) The number and size of alternative providers of that service;
- (2) The extent to which the service is available from alternative suppliers in the relevant market;
- (3) The ability of alternative suppliers to make functionally equivalent or substitute services

readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services.

The burden of proof shall be on any entity requesting, under division (B) or (C) of this section, a determination by the commission of the existence of or a lack of effective competition or reasonably available alternatives.

(E) (1) Beginning on the starting date of competitive retail electric service, the commission has authority under Chapters 4901. to 4909. of the Revised Code, and shall exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service.

(2) In addition to the commission's authority under division (E)(1) of this section, the commission, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The commission may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure shall be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the commission's authority is not preempted by federal law. The measure shall remain in effect until the commission, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated.

(F) An electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code shall provide the commission with such information, regarding a competitive retail electric service for which it is subject to certification, as the commission considers necessary to carry out this chapter. An electric utility shall provide the commission with such information as the commission considers necessary to carry out divisions (B) to (E) of this section. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information.

The commission shall require each electric utility to file with the commission on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt hours of electricity, and shall require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of the retail customer.

HISTORY: 148 v S 3. Eff 10-5-99.

§ 4928.08. Certification to provide competitive service; capability standards.

(A) This section applies to an electric cooperative, or to a governmental aggregator that is a municipal electric utility, only to the extent of a competitive retail electric service it provides to a customer to whom it does not provide a noncompetitive retail electric service through transmission or distribution facilities it singly or jointly owns or operates.

(B) No electric utility, electric services company, electric cooperative, or governmental aggregator shall provide a competitive retail electric service to a consumer in this state on and after the starting date of competitive retail electric service without first being certified by the public utilities commission regarding its managerial, technical, and financial capability to provide that service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from default. Certification shall be granted pursuant to procedures and standards the commission shall prescribe in accordance with division (C) of this section, except that certification or certification renewal shall be deemed approved thirty days after the filing of an application with the commission unless the commission suspends that approval for good cause shown. In the case of such a suspension, the commission shall act to approve or deny certification or certification renewal to the applicant not later than ninety days after the date of the suspension.

(C) Capability standards adopted in rules under division (B) of this section shall be sufficient to ensure compliance with the minimum service requirements established under section 4928.10 of the Revised Code and with section 4928.09 of the Revised Code. The standards shall allow flexibility for voluntary aggregation, to encourage market creativity in responding to consumer needs and demands, and shall allow flexibility for electric services companies that exclusively provide installation of small electric generation facilities, to provide ease of market access. The rules shall include procedures for biennially renewing certification.

(D) The commission may suspend, rescind, or conditionally rescind the certification of any electric utility, electric services company, electric cooperative, or governmental aggregator issued under this section if the commission determines, after reasonable notice and opportunity for hearing, that the utility, company, cooperative, or aggregator has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.

(E) No electric distribution utility on and after the starting date of competitive retail electric service shall knowingly distribute electricity, to a retail consumer in this state, for any supplier of electricity that has not been certified by the commission pursuant to this section.

HISTORY: 148 v S 3. Eff 10-5-99.

§ 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 10-5-99.

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

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

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

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

HISTORY: 148 v S 3. Eff 10-5-99.

§ 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 10-5-99.

§ 4935.04. Long-term forecast report by major utility facility owner or operator; review, comment, hearings.

(A) As used in this chapter:

(1) "Major utility facility" means:

(a) An electric transmission line and associated facilities of a design capacity of one hundred twenty-five kilovolts or more;

(b) A gas or natural gas transmission line and associated facilities designed for, or capable of, transporting gas or natural gas at pressures in excess of one hundred twenty-five pounds per square inch.

"Major utility facility" does not include electric, gas, or natural gas distributing lines and gas or natural gas gathering lines and associated facilities as defined by the public utilities commission; facilities owned or operated by industrial firms, persons, or institutions that produce or transmit gas or natural gas, or electricity primarily for their own use or as a byproduct of their operations; gas or natural gas transmission lines and associated facilities over which an agency of the United States has certificate jurisdiction; facilities owned or operated by a person furnishing gas or natural gas directly to fifteen thousand or fewer customers within this state.

(2) "Person" has the meaning set forth in section 4906.01 of the Revised Code.

(B) Each person owning or operating a gas or natural gas transmission line and associated facilities within this state over which an agency of the United States has certificate jurisdiction shall furnish to the commission a copy of the energy information filed by the person with that agency of the United States.

(C) Each person owning or operating a major utility facility within this state, or furnishing gas, natural gas, or electricity directly to more than fifteen thousand customers within this state annually shall 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;

(2) A range of projected loads during the period;

(3) A description of major utility facilities planned to be added or taken out of service in the next ten years, including, to the extent the information is available, prospective sites for transmission line locations;

(4) For gas and natural gas, a projection of anticipated supply, supply prices, and sources of supply over the forecast period;

(5) A description of proposed changes in the transmission system planned for the next five years;

(6) A month-by-month forecast of both energy demand and peak load for electric utilities, and gas sendout for gas and natural gas utilities, for the next two years. The report shall describe the major utility facilities that, in the judgment of such person, will be required to supply system demands during the forecast period. The report from a gas or natural gas utility shall cover the ten- and five-year periods next succeeding the date of the report, and the report from an electric utility shall cover the twenty-, ten-, and five-year periods next succeeding the date of the report. Each report shall be made available to the public and furnished upon request to municipal corporations and governmental agencies charged with the duty of protecting the environment or of planning land use. The report shall be in such form and shall contain such information as may be prescribed by the commission.

Each person not owning or operating a major utility facility within this state and serving fifteen thousand or fewer gas or natural gas, or electric customers within this state shall furnish such information as the commission requires.

(D) The commission shall:

(1) Review and comment on the reports filed under division (C) of this section, and make the information contained in the reports readily available to the public and other interested government agencies;

(2) Compile and publish each year the general locations of proposed and existing transmission line routes within its jurisdiction as identified in the reports filed under division (C) of this section, identifying the general location of such sites and routes and the approximate year when construction is expected to commence, and to make such information readily available to the public, to each newspaper of daily or weekly circulation within the area affected by the proposed site and route, and to interested federal, state, and local agencies;

(3) Hold a public hearing:

(a) On the first long-term forecast report filed after January 11, 1983;

(b) At least once in every five years, on the latest report furnished by any person subject to this section;

(c) On the latest report furnished by any person subject to this section if the report contains a substantial change from the preceding report furnished by that person. "Substantial change" includes, but is not limited to:

(i) A change in forecasted peak loads or energy consumption over the forecast period of greater than an average of one-half of one per cent per year;

(ii) Demonstration of good cause to the commission by an interested party.

The commission shall fix a time for the hearing, which shall be not later than ninety days after the report is filed, and publish notice of the date, time of day, and location of the hearing in a newspaper of general circulation in each county in which the person furnishing the report has or

intends to locate a major utility facility and will provide service during the period covered by the report. The notice shall be published not less than fifteen nor more than thirty days before the hearing and shall state the matters to be considered.

Absent a showing of good cause, the commission shall not hold hearings under division (D)(3) of this section with respect to persons who, as the primary purpose of their business, furnish gas or natural gas, or electricity directly to fifteen thousand or fewer customers within this state solely for direct consumption by those customers.

(4) Require such information from persons subject to its jurisdiction as necessary to assist in the conduct of hearings and any investigation or studies it may undertake;

(5) Conduct any studies or investigations that are necessary or appropriate to carry out its responsibilities under this section.

(E) (1) The scope of the hearing held under division (D)(3) of this section shall be limited to issues relating to forecasting. The power siting board, the office of consumers' counsel, and all other persons having an interest in the proceedings shall be afforded the opportunity to be heard and to be represented by counsel. The commission may adjourn the hearing from time to time.

(2) The hearing shall include, but not be limited to, a review of:

(a) The projected loads and energy requirements for each year of the period;

(b) The estimated installed capacity and supplies to meet the projected load requirements.

(F) Based upon the report furnished pursuant to division (C) of this section and the hearing record, the commission, within ninety days from the close of the record in the hearing, shall determine if:

(1) All information relating to current activities, facilities agreements, and published energy policies of the state has been completely and accurately represented;

(2) The load requirements are based on substantially accurate historical information and adequate methodology;

(3) The forecasting methods consider the relationships between price and energy consumption;

(4) The report identifies and projects reductions in energy demands due to energy conservation measures in the industrial, commercial, residential, transportation, and energy production sectors in the service area;

(5) Utility company forecasts of loads and resources are reasonable in relation to population growth estimates made by state and federal agencies, transportation, and economic development plans and forecasts, and make recommendations where possible for necessary and reasonable alternatives to meet forecasted electric power demand;

(6) The report considers plans for expansion of the regional power grid and the planned facilities of other utilities in the state;

(7) All assumptions made in the forecast are reasonable and adequately documented.

(G) The commission shall adopt rules under section 111.15 of the Revised Code to establish criteria for evaluating the long-term forecasts of needs for gas and electric transmission service, to conduct hearings held under this section, to establish reasonable fees to defray the direct cost of the hearings and the review process, and such other rules as are necessary and convenient to implement this section.

(H) The hearing record produced under this section and the determinations of the commission shall be introduced into evidence and shall be considered in determining the basis of need for power siting board deliberations under division (A)(1) of section 4906.10 of the Revised Code. The hearing record produced under this section shall be introduced into evidence and shall be considered by the public utilities commission in its initiation of programs, examinations, and findings under section 4905.70 of the Revised Code, and shall be considered in the commission's determinations with respect to the establishment of just and reasonable rates under section 4909.15 of the Revised Code and financing utility facilities and authorizing issuance of all securities under sections 4905.40, 4905.401 [4905.40.1], 4905.41, and 4905.42 of the Revised Code. The forecast findings also shall serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.

(I) (1) No court other than the supreme court shall have power to review, suspend, or delay any determination made by the commission under this section, or enjoin, restrain, or interfere with the commission in the performance of official duties. A writ of mandamus shall not be issued against the commission by any court other than the supreme court.

(2) A final determination made by the commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such determination was unreasonable or unlawful.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the commission by any party to the proceeding before it, against the commission, setting forth the determination appealed from and errors complained of. The notice of appeal shall be served, unless waived, upon the commission by leaving a copy at the office of the chairperson of the commission at Columbus. The court may permit an interested party to intervene by cross-appeal.

(3) No proceeding to reverse, vacate, or modify a determination of the commission is commenced unless the notice of appeal is filed within sixty days after the date of the determination.

HISTORY: RC § 1551.17, 137 v H 415 (Eff 12-14-77); 139 v H 694 (Eff 11-15-81); 139 v S 378 (Eff 1-11-83); 140 v H 100 (Eff 2-24-83); 140 v H 150 (Eff 8-26-83); RC § 4935.04, 141 v H 381 (Eff 10-17-85); 141 v H 356 (Eff 6-26-86); 146 v H 476 (Eff 9-17-96); 148 v S 3. Eff 1-1-2001.

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