

IN THE SUPREME COURT OF OHIO

On Appeal From The Public Utilities Commission of Ohio

Industrial Energy Users – Ohio, et al.,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

Case No. 2006-1594

Appeal From The Public Utilities
Commission of Ohio

Case No. 05-376-EL-UNC

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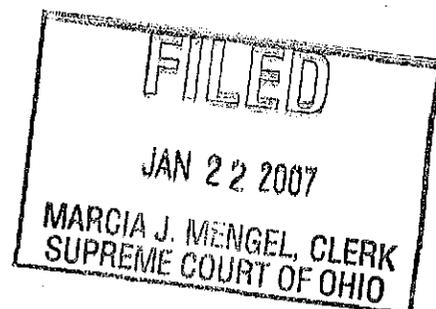
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Appellant, FirstEnergy Solutions Corp. (“FES”) is both a wholesale and retail electric service provider that offers competitive electric services, including firm supplies of electric generation service, to wholesale and retail electric customers in Ohio. FES submits its response to the merit briefs filed by Appellee, the Public Utilities Commission of Ohio (“Commission” or “PUCO”), and Intervening Appellees, Columbus Southern Power Company and Ohio Power Company (collectively, “AEP Utilities.”)

I. Introduction.

As utility appeals go, this one is relatively easy. It involves several statutes that are clear and unambiguous and that resolve the threshold question in such a manner as to render all other issues raised in this appeal moot. The threshold question that must be answered by this Court is simply whether the Commission had the requisite subject matter jurisdiction to entertain an application for recovery, *through regulated rates*, of costs that will be incurred to design, build and operate a generating station in Ohio. The answer can be found in Chapter 4928 of the Ohio Revised Code, which codified Am. Sub. S.B. No. 3, 148 Ohio Laws, Part IV, 7962 (“Senate Bill 3”).

Senate Bill 3 unequivocally declared electric generation service in Ohio to be a competitive retail electric service. R.C. 4928.03. Revised Code Section 4928.05 expressly removed from Commission jurisdiction any authority to regulate competitive retail electric services. Nowhere in Senate Bill 3 did the Ohio General Assembly create an exception to this clear and unequivocal declaration and, therefore, none should be implied.

The critical facts in this appeal are not in dispute. For example, no one is challenging the fact that two utilities owned by American Electric Power Company, Inc. -- Columbus Southern Power Company and Ohio Power Company -- filed an Application to recover in three phases through regulated rates the costs to design, build and operate a generating station.

(Order, p. 3)(FES Appx. A28.) Nor is it disputed that the generation produced from this plant is intended to be sold to retail electric generation customers in Ohio (Order, p. 11)(FES Appx. A36), or that retail electric generation service is a competitive service beyond the jurisdiction of the Commission. (Order, p. 17)(FES Appx. A42.) Yet, the Commission argues that it was necessary for it to entertain the AEP Utilities' Application because "[t]he [generation] facilities needed to maintain an electrically stable distribution system are wearing out and challenged by environmental regulation." (PUCO Br., p. 1.)

Intervening Appellees, the AEP Utilities, support the Commission's actions based on a belief that "[i]t is unrealistic to expect the [AEP Utilities] to invest over \$1 billion on construction for [a generating station] if recovery of costs is subject to uncertainty. If the [AEP Utilities] were required to wait for this facility to be used and useful before seeking cost recovery, the facility would not be built in Ohio." (AEP Br., pp. 10-11.) The AEP Utilities unfairly criticize the Appellants in this proceeding, complaining that "Appellants would leave the need for new generation facilities to whoever might be willing to invest billions of dollars over a multi-year construction period in the hope that, upon completion, the cost of electricity from that facility can compete in the electric generation market." (AEP Br., p. 1.) The AEP Utilities, however, fail to recognize that it is not the Appellants that would have this occur. It was the General Assembly that did so upon enactment of Senate Bill 3 -- legislation that rendered retail electric generation service competitive in Ohio. *Constellation NewEnergy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 539, 2004-Ohio-6767, at ¶ 39. Indeed, a competitive market works exactly how the AEP Utilities describe it. The market is to dictate when electric generating facilities should be built based on market price signals. Therefore, if the AEP Utilities believe that a problem currently exists in Ohio's deregulated electric generation market,

or if the Commission believes that there is a legitimate threat to the overall electric system, it is an issue for the Ohio General Assembly, and not the Commission, to address. It is the role of the legislature to create the laws. It is the role of the Commission to enforce them and, as this Court recently concluded, not “to create remedies outside the perimeters of the law.” *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 109 Ohio St. 3d 328, 2006-Ohio-2110, at ¶ 38.

As more fully discussed below, the Commission breached the perimeters of the law by entertaining the AEP Utilities’ Application when it clearly lacked the subject matter jurisdiction to do so. Accordingly, FES respectfully asks this Court to reverse in its entirety the Commission’s April 10, 2006 Opinion and Order issued in the case below.

II. Summary of Arguments

It is undisputed that the AEP Utilities’ Application requests recovery, through regulated rates, of the costs to design, build and operate a generating station. Nor does any party challenge the fact that the proposed generating station will generate electricity that is intended to be sold to retail electric customers in the AEP Utilities’ service territories. Moreover, it is clear that Senate Bill 3 expressly rendered “retail electric generation” a “competitive retail electric service” (R.C. 4928.03) and expressly stripped from the Commission any jurisdiction to regulate such services. R.C. 4928.05. Notwithstanding the AEP Utilities’ assertions to the contrary (AEP Br., pp. 14-15), no special Commission expertise is needed to interpret these statutes.¹ They are clear. The Commission has no jurisdiction to regulate retail electric generation service in Ohio.

¹ The AEP Utilities argue that, with regard to “highly specialized issues,” the Court should defer to the Commission’s special expertise in interpreting Senate Bill 3. (AEP Br., p. 15.) As explained *infra*, there is no need to defer to the Commission’s interpretation of Senate Bill 3 because the statutes at issue in this appeal are clear and, therefore, not in need of interpretation. *State v. Kreisler*, 109 Ohio St. 3d 391, 2006-Ohio-2706, at ¶ 12 (“Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General

Neither the Commission nor the AEP Utilities dispute this general proposition. (PUCO Br., p. 11; AEP Br., p. 15.) Rather, they both attempt to read non-existent exceptions into Senate Bill 3, looking for subject matter jurisdiction where none lies. The Commission argues that it has jurisdiction over the Application because the Application deals with “distribution ancillary services.” (PUCO Br., pp. 11-17.) The AEP Utilities take a slightly different approach, arguing that because the generating station’s supply of electric generation is intended to be sold to customers taking retail electric generation from their electric distribution utility instead of an alternative electric generation supplier², the Commission retains jurisdiction over the Application and can authorize regulated recovery of the costs to build and operate the generating facility. The AEP Utilities rely on their reading of *Constellation NewEnergy, supra*, and the recent Cincinnati Gas & Electric case addressed in *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 111 Ohio St. 3d 300, 2006-Ohio-5789 (“CG&E Appeal”).

As will be demonstrated below, both arguments are based on an incorrect interpretation of Senate Bill 3 and, accordingly, Appellant, FES respectfully asks this Court to reverse the Order as being beyond the Commission’s subject matter jurisdiction. Because the Commission lacked the requisite subject matter jurisdiction, all other issues raised in this appeal are moot. However, if the Court should find that the Commission possessed the requisite jurisdiction to

(continued...)

Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.”)

² Customers that either elect to take retail electric generation service from their electric distribution utility, or elect to take service from an alternative electric generation supplier and subsequently return to the electric distribution utility for such service are referred to as Provider of Last Resort (“POLR”) customers. *Constellation NewEnergy, Inc. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 2004-Ohio-6767, at fn. 5.

entertain the Application, FES alternatively asks that the Order be reversed and remanded based on it being unsupported by the evidentiary record in violation of RC. 4903.09.

III. Argument

A. The Fact That Generation Is Necessary To Support Ancillary Services Does Not Confer Upon The Commission Jurisdiction Over An Application Seeking Recovery Of Costs To Build And Operate An Electric Generating Plant.

As explained in FES' initial brief at pages 7-9, the Application is not about distribution ancillary services. It is about recovering the costs to build and operate a generating facility.³ The Commission acknowledges this fact several times in its Order, first noting that the proposed recovery mechanisms included in the Application "are for the stated purpose of *recover[ing] the costs of the [generating station]*" (Order, p. 17)(FES Appx. A42)(emphasis added), and, then, concluding that the Application "lays out a regulatory mechanism by which [the AEP Utilities] might *recover the costs of a coal-fired electric generating facility.*" (Order, p. 19)(Appx. A44) (emphasis added.)⁴ Nowhere do the AEP Utilities justify the Application based on the need to support distribution ancillary services or the need to support their distribution system. Indeed, it is telling that the AEP Utilities' brief does not defend the Order based on the distribution ancillary service argument, other than to attach it to the coat tails of its POLR service argument.

³ As will be discussed *infra* in Section III. C, the Commission's characterization of the Application as being about distribution ancillary services is unsupported by the evidentiary record.

⁴ According to the AEP Utilities, not only did the Commission authorize recovery of Phase I costs, but it also supposedly blessed the Phase II and Phase III recovery mechanisms as being lawful and reasonable. (AEP Br., p.11.) It appears that Appellee and Intervening Appellee are playing a shell game. The AEP Utilities are viewing the Order much more broadly than the Commission, who argues that Appellants' arguments are premature because the Commission only authorized recovery of Phase I cost. (PUCO Br., p. 3.) Regardless of the scope of the Order, the threshold question is whether the Commission had subject matter jurisdiction to entertain the Application. Because it did not, the scope of the Order is irrelevant.

(See e.g., AEP Br., pp. 17, 26, 27.) Perhaps this is because the Commission's argument and interpretation of Senate Bill 3 violates basic rules of statutory interpretation, resulting in an absurd outcome that ignores the traditional separation of the three distinct electric service functions, and renders Senate Bill 3 meaningless.

Rather than attempt to dispute any of the arguments raised in FES' initial brief, the Commission's merit brief simply reiterates, at pages 12-14, its original rationale set forth in the Order. In sum, that rationale is as follows: (i) the Commission has the responsibility to assure reliable distribution service (PUCO Br., p. 12); (ii) the Commission has jurisdiction over non-competitive retail electric services (*id.*); (iii) distribution ancillary services are not listed as competitive retail electric services, therefore, these services must be non-competitive retail electric services subject to Commission regulation (*id.* at 12-13); (iv) distribution ancillary services require a generation source (*id.* at 12-14); and (v) the AEP Utilities' proposed generating station will generate electricity that will support the distribution ancillary services. Therefore, the Commission erroneously concludes, it has jurisdiction to authorize recovery of the costs to design, construct and operate the proposed generating station. (*Id.*)

The Commission's interpretation of Senate Bill 3, in which it finds the requisite subject matter jurisdiction to entertain the Application, is in error. Absent a violation of several basic rules of statutory interpretation, Senate Bill 3 cannot be interpreted as providing an exception that would confer jurisdiction upon the Commission. Thus, the Commission's argument must be rejected.

As FES explained at pages 7-9, of its initial brief, the cornerstone on which the Commission builds its entire justification for jurisdiction is its observation that distribution ancillary service functions require generating plant. (PUCO Br., p. 13.) While perhaps true, it is

irrelevant. Electric service is divided into three distinct functions: generation, transmission and distribution. Pursuant to Senate Bill 3, retail electric generation service is no longer regulated in Ohio. *Constellation New Energy*, 2004-Ohio-6767, at ¶ 2. Transmission service is regulated by the Federal Energy Regulatory Commission, while distribution service remains subject to Commission regulation. Transmission and distribution services are equivalent to the shipping or transportation of other products over a highway. With electricity, the generation produced at the generating station is “shipped” over a network of transmission and distribution wires for delivery to retail customers. Without a generating plant, there would be no need for either transmission or distribution services simply because there would be nothing to “ship.” Therefore, *all* transmission and distribution services, whether ancillary or not, require generating plant.

If the Commission’s rationale were adopted, its jurisdiction would extend not only to the single generating station proposed by the AEP Utilities, but also to *all* generating stations in Ohio, *all* transmission facilities in Ohio and *all* distribution facilities in Ohio -- an outcome that would flip electric utility regulation on its head and render Senate Bill 3 meaningless. In other words, the Commission, through its interpretation of Senate Bill 3, has created an exception that swallows the rule. Clearly an interpretation of Senate Bill 3 that creates such an absurd result cannot be correct. *See State ex rel. Webb v. Bliss*, 99 Ohio St. 3d 166, 2003-Ohio-3049, at ¶ 22 (when interpreting a statute, it should not be presumed that the General Assembly intended to enact a law that produces an unreasonable result.)

The Commission’s reliance on the statutory definition of “ancillary service” is equally misplaced. Revised Code Section 4928.01(A)(1) defines this service as:

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

service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

The Application involves recovery of costs incurred by the AEP Utilities while designing, building and operating a generating station. The definition of “ancillary service” lists numerous examples of the types of services that come within the definition. When interpreting a definitional statute that includes examples of the statute’s meaning, the definition should be interpreted based on the examples expressly listed in the definition. *State v. Hooper* (1979), 57 Ohio St. 2d 87, 89-90. All of the services listed in R.C. 4928.01(A)(1) as examples of ancillary services relate to the *flow* of electricity, not the construction of the generating station that will *produce* the electricity. Therefore, based on the canon of *ejusdem generis*, activities related to the design of a generating station, the construction of a generating station and the operation of a generating station do not come within the definition of “ancillary service” as contemplated by the legislature.⁵

In sum, Senate Bill 3 declared electric generation service to be a competitive retail electric service. R.C. 4928.03. Revised Code Section 4928.05 stripped from the Commission any jurisdiction to regulate competitive retail electric services. As demonstrated above, basic rules of statutory interpretation prevent a reading of Senate Bill 3 that creates an exception which

⁵ This argument is equally valid if it is assumed that the scope of the Order is limited to only Phase I cost recovery, as argued by the Commission. (PUCO Br., p. 4.) The activities giving rise to Phase I costs include, among others, obtaining environmental permits, designing the generating plant, developing project schedules and budgets, and engineering machinery specifications. (AEP Exh. 5, pp. 10-12) (Supp. S29-S31.) Obviously, none of these services is similar to those listed under the statutory definition of “ancillary service.”

confers upon the Commission jurisdiction to regulate the recovery of generation costs simply because the generation giving rise to such costs will support distribution services -- ancillary, or otherwise. Accordingly, the Commission erred when it assumed jurisdiction over the AEP Utilities' Application.

B. The Commission Does Not Retain Jurisdiction Over The Recovery Of Costs To Design, Build And Operate A Generating Station To Be Owned By The AEP Utilities Simply Because The AEP Utilities Have A POLR Obligation.

As the AEP Utilities correctly state, "the General Assembly imposed the Provider of Last Resort (POLR) obligation on electric distribution utilities." (AEP Br., p. 16.) Based on this observation, the AEP Utilities try to somehow create Commission jurisdiction over the recovery of the costs to design, build and operate a generating station. (*Id.*) Such an interpretation of Senate Bill 3 flies in the face of the plain meaning of Senate Bill 3 and requires this Court to insert words into Senate Bill 3 that were not included by the General Assembly. Inasmuch as the AEP Utilities' interpretation of Senate Bill 3 violates basic rules of statutory interpretation, it cannot be correct and must, therefore, be rejected.

As previously explained, R.C. 4928.03 declared retail electric generation to be a competitive retail electric service:

Beginning on the starting date of competitive retail electric service, *retail electric generation*, [and other services] supplied to consumers within the certified territory of an electric utility *are competitive retail electric services*.... [emphasis added.]

The AEP Utilities admit that they intend to sell the output from their proposed generating station to POLR customers within their respective certified territories. (Order, p. 11)(FES Appx. A36.) And, as the Court noted in *Constellation NewEnergy*, 2004-Ohio-6767 at fn. 5, POLR customers are simply retail customers that purchase their retail electric generation from their electric distribution utility rather than from an alternative supplier. Moreover, nowhere in R.C. 4928.03

did the General Assembly exclude from the term “competitive retail electric service” retail electric generation sold to POLR customers. Clearly, if the General Assembly had intended such an exception, it certainly would have said so. Indeed, even R.C. 4928.14, the statute on which the AEP Utilities rely to support their position, cannot be interpreted to create such an exception. This statute requires electric distribution utilities such as the AEP Utilities to “provide consumers ... within [their] certified territor[ies], a market-based standard service offer of *all competitive retail electric services ... including a firm supply of electric generation service.*” R.C. 4928.14 (emphasis added.) Again, the General Assembly had the opportunity in R.C. 4928.14 to exclude from the term “competitive retail electric service” electric generation sold to POLR customers and, again, the General Assembly chose not to do so. Indeed, rather than excluding this generation from competitive services, the General Assembly highlighted the fact that a firm supply of electric generation offered to POLR customers *is* a competitive retail electric service.

The Court has stated on numerous occasions that statutes should be interpreted based on their plain meaning. *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St. 3d 70, 2005-Ohio-3807, at ¶ 38. In this instance, the General Assembly could not have been clearer. Based on both R.C. 4928.03 and R.C. 4928.14, *all* retail electric generation, whether sold to POLR or non-POLR customers, is a competitive retail electric service. There is nothing to interpret. *Kreischer, supra*. Therefore, in order for this Court to interpret Senate Bill 3 as the AEP Utilities would have it do, this Court would have to read words into Senate Bill 3 that simply are not there, thus violating a basic canon of statutory interpretation. *State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Educ.* (1994), 69 Ohio St. 3d 217, 220. Accordingly, the AEP Utilities interpretation of Senate Bill 3 is wrong and should be rejected.

While the foregoing should be dispositive of the AEP Utilities' position, the AEP Utilities also argue that the Commission Order was correct because (i) Senate Bill 3 does not prevent utilities from procuring their POLR generation supplies from generating assets owned by the utilities (AEP Br., p. 16); and (ii) the Court upheld in prior instances the Commission's approval to recover POLR related costs through a POLR surcharge. (AEP Br., pp. 19-22.) Neither of these arguments are persuasive. First, the AEP Utilities miss the point. The issue before this Court is not the lawfulness of the source from which electric distribution utilities procure the generation used to meet their POLR obligations. Rather, the issue before this Court is whether the Commission had the requisite subject matter jurisdiction to entertain an application seeking regulated cost recovery for costs incurred to design, build and operate a generating station; a generating station whose output is intended to be sold to retail electric generation customers within Ohio. As has been demonstrated above, based on the overall "competition-encouraging statutory scheme" of Senate Bill 3, *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St. 3d 451, 2004-Ohio-3924, at ¶ 35, as well as the plain meaning of R.C. 4928.03, R.C. 4928.14, and R.C. 4928.05, the Commission clearly does not.

The AEP Utilities reliance on *Constellation NewEnergy, supra*, and the CG&E Appeal is equally misplaced. (AEP BR., pp. 19-22.)⁶ As a preliminary matter, given that the Commission did not have the jurisdiction to entertain the Application, its order is unlawful and must be reversed in its entirety. Therefore, the Commission's findings with regard to the recovery of Phase I costs through a POLR surcharge (as well as any other rulings that the Commission or the AEP Utilities believe the Commission might have made in its Order with regard to recovery of

⁶ The Commission makes a similar argument in its brief. (*See e.g.*, PUCO Br., pp. 19-20.)

Phase II and III costs) must also be reversed. Moreover, neither the CG&E Appeal nor the *Constellation NewEnergy* case are controlling in this matter because neither of these cases involved an application to recover the costs to construct and operate a generating station over the life of the plant. Both cases had their genesis in rate stabilization plans with finite time periods and, at least with regard to the *Constellation* case, the Commission never found the costs at issue to be POLR costs. *Constellation NewEnergy*, 2004-Ohio-6767, at ¶ 39.

In sum, none of the AEP Utilities' arguments support a finding that the Commission had the jurisdiction needed to entertain their application. Senate Bill 3 did not exclude from the scope of competitive retail electric services retail electric generation sold to POLR customers. The source from which electric distribution utilities procure the generation needed to meet their POLR obligations is irrelevant for purposes of resolving the issues before this Court. And the cases relied upon by the AEP Utilities are distinguishable from the facts presented in this appeal and, therefore, are not controlling. Based on the foregoing, the AEP Utilities' arguments are without merit and should be rejected.

C. If This Court Determines That The Commission Had The Necessary Jurisdiction To Entertain The Application, The Order Must Still Be Reversed As Being Unsupported By The Evidentiary Record In Violation Of R.C. 4903.09.

In cases such as the case below, the Commission is required, pursuant to R.C. 4903.09 to "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." The court has held that there is substantial compliance with R.C. 4903.09 "where enough evidence and discussion are found in an order to enable the PUCO's reasoning to be readily discerned. . . ." *MCI Telecommunications Corp. v. Pub. Util. Comm'n* (1988), 38 Ohio St. 3d 266, 270. The Court has also explained that the purpose of R.C. 4903.09 is to provide the Court with sufficient details

so as to enable it to determine, upon appeal, how the Commission reached its decision.

Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n (1983), 4 Ohio St. 3d 107, 110.

Both the Commission and the AEP Utilities attempt to demonstrate the Order's compliance with R.C. 4903.09 by simply reiterating the Commission's rationale as set forth in its Order. (PUCO Br., pp. 21-24; AEP Br., pp. 22-25.) Neither the Commission's nor the AEP Utilities' argument is persuasive because neither explains how the Commission concluded that the AEP Utilities' Application is about "distribution ancillary services." As explained *infra* at page 6-7, this finding by the Commission is the cornerstone upon which the Commission builds its entire analysis. As more fully explained in FES' initial brief at pages 15-17, it is this finding by the Commission that is unsupported in the evidentiary record with no explanation as to how it was derived. Nowhere in the Order does the Commission point to a single passage in the AEP Utilities' Application to support its conclusion, nor does it cite to an exhibit or single statement in the AEP Utilities' witnesses' testimony that would do the same. In fact, the Commission never once mentions "distribution ancillary services" in its findings of fact or conclusions of law. And in at least two instances in the Order, the Commission contradicts itself, first by finding that the proposed recovery mechanisms included in the Application "are for the stated purpose of *recover[ing] the costs of the [generating station]*" (Order, p. 17)(FES Appx. A42)(emphasis added), and then concluding that the Application "lays out a regulatory mechanism by which [the AEP Utilities] might *recover the costs of a coal-fired electric generating facility.*" (Order, p. 19)(Appx. A44) (emphasis added.)⁷ Therefore, in light of the foregoing, the Commission's

⁷ Notwithstanding the Commission's assertions in its brief to the contrary (PUCO Br., pp. 16-17), the Commission is not free to *sua sponte* convert an application based on one theory of the case into another after the evidentiary record has been closed. If permitted to do so, the nature of evidence to be presented by parties would never be certain, thus preventing, as

Order must be reversed as being unsupported by the evidentiary record, in violation of R.C. 4903.09.

IV. Conclusion

In sum, the AEP Utilities propose to build a generating station in Ohio and intend to sell the electric generation from this plant to retail electric generation customers (albeit POLR customers) located in their respective certified service territories. The AEP Utilities filed an application with the Commission to recover through regulated rates the costs to design, build and operate the plant. Senate Bill 3 was enacted to create a competitive retail electric generation market in Ohio. Indeed, R.C. 4928.03 clearly and unequivocally declares *all* retail electric generation to be a competitive retail electric service. Equally clear is R.C. 4928.05 that stripped from the Commission any jurisdiction to regulate competitive retail electric services. Therefore, the Commission lacked the requisite jurisdiction to entertain the Application submitted by the AEP Utilities. Accordingly, the Commission's Order is unlawful and must be reversed.

While both the Commission and the AEP Utilities attempt to read an exception into Senate Bill 3 that would confer upon the Commission the jurisdiction necessary to entertain the Application, their respective interpretations of Senate Bill 3 violate basic rules of statutory interpretation and, therefore, are in error and must be rejected. Moreover, because the Commission cannot overcome the threshold issue of jurisdiction, all other matters addressed in the Order and issues raised in this appeal are now moot. The Order is unlawful in its entirety and must be reversed.

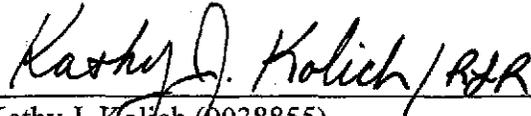
(continued...)

happened in the case below, the parties from presenting evidence to refute the newly created scope of the case.

If, however, the Commission should find that the Commission had the requisite authority to entertain the Application, the Order must, at a minimum, be reversed and remanded as being unsupported by the evidentiary record in violation of R.C. 4903.09.

Dated: January 22, 2007

Respectfully submitted,

Handwritten signature of Kathy J. Kolich in black ink, written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant FirstEnergy Solutions Corp. was served by regular U.S. mail, with a courtesy copy by e-mail, to the following this 22nd day of January, 2007:

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