IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	:	**No. 08-0367**
	:	
Appellant,	:	Appeal from the Public Utilities Commission of Ohio Case Nos. 03-93-EL-ATA 03-2079-EL-AAM 03-2081-EL-AAM 03-2080-EL-ATA
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify Its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Sub-Sequent to the Market Development Period.	Case No. 03-93-EL-ATA
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Certain Costs Associated with the Midwest Independent Transmission System Operator.	Case No. 03-2079-EL-AAM
In the Matter of the Application of The Cincinnati Gas & Electric Company for Authority to Modify Current Accounting Procedures for Capital Investment in its Electric Transmission and Distribution System And to Establish a Capital Investment Reliability Rider to be Effective after the Market Development Period.	Case No. 03-2081-EL-AAM Case No. 03-2080-EL-ATA
In the Matter of the Commission's Promulgation of Rules for the Conduct of a Competitive Bidding Process for Electric Distribution Utilities Pursuant to Section 4928.14, Revised Code.	Case No. 01-2164-EL-ORD

ENTRY

The Commission finds:

(1) The applicant, The Cincinnati Gas & Electric Company (CG&E), is a public utility as defined in Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) On January 10, 2003, CG&E filed an application (pricing application), in Case No. 03-93-EL-ATA (pricing case), to modify its non-residential generation rates to provide for market-based standard service offer (MBSSO) pricing and to establish an alternative competitive-bid process (CBP) subsequent to the end of the market development period (MDP). Through its pricing application, CG&E intends to offer a retail market-based generation rate to non-residential end-use customers that do not switch to a competitive retail electric service (CRES) provider or the CBP for their generation service. CG&E's proposed CBP will provide non-residential

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end-use customers with another option in addition to the MBSSO through a competitive offering by a CRES provider.

(3) A technical conference was held on February 12, 2003, to allow interested persons the opportunity to better understand CG&E's pricing application. Interested persons and the Commission's staff (staff) also were provided the opportunity to file comments and reply comments and to propose alternative methodologies to CG&E's application.

(4) Motions to intervene in the pricing case were filed by The Kroger Co.; Industrial Energy Users-Ohio (IEU-Ohio); AK Steel Corporation (AK Steel); General Electric Company; Constellation NewEnergy, Inc.; MidAmerican Energy Company; Ohio Consumers' Counsel (OCC); Strategic Energy, LLC; Dominion Retail, Inc.; Energy America, LLC; Duke Realty (Duke); Ohio Partners for Affordable Energy (OPAE); and National Energy Marketers Association (NEMA) (collectively, intervenors). As the Commission finds that CG&E's pricing application may have a direct effect on the MBSSO and CBP for all CG&E customers and that the intervenors have set forth valid reasons for intervention, all of the motions to intervene filed by the intervenors will be granted. Motions for admission *pro hac vice* were filed to admit Craig G. Goodman and David C. Rinebolt to practice before the Commission in the pricing case. These motions will also be granted.

(5) Comments and/or reply comments regarding the pricing application, and/or proposed alternative methodologies, were filed by all of the intervenors other than Duke, as well as by staff, CG&E, The Dayton Power & Light Company, and Eagle Energy, LLC (collectively, commenters).

(6) OCC, IEU-Ohio, AK Steel, and OPAE, have filed motions to dismiss CG&E's pricing application or, alternatively, to set the matter for hearing pursuant to Section 4909.18, Revised Code, or to stay the matter until the Commission completes its rulemaking in In the Matter of the commission's Promulgation of Rules for the conduct of a Competitive Bidding Process for Electric Distribution Utilities Pursuant to Section 4928.14, Revised Code, Case No. 01-2164-EL-ORD (rulemaking proceeding). OCC also requests that the Commission consolidate CG&E's pricing application with the rulemaking proceeding. These parties and several other parties filing comments argue that CG&E's pricing application should be dismissed or stayed until the Commission has considered the comments filed in the rulemaking proceeding and has established proper procedures for the development of MBSSOs and CBPs. They argue that it would be premature to go forward with CG&E's application before rules are approved. In addition, all commenters, including staff, believe that CG&E's pricing application is contrary to electric restructuring public policy objectives set forth in Section

4928.02, Revised Code, and that the pricing application produces results that are unreasonable and unlawful. It is also asserted that certain proposed riders affect customers who would not take service through MBSSO or CBP and, therefore, constitute an increase in rates. Further, certain commenters argue that the application would eliminate the ability of residential customers to be bid as a part of a pool that includes non-residential customers, eliminating the potential for maximum savings under the CBP. The commenters that oppose the pricing application request that the Commission find that the pricing application may be unjust and unreasonable and set the matter for hearing if the Commission does not dismiss the pricing application.

(7) Staff recommends, in its comments, that the Commission hold a hearing on the pricing application inasmuch as it appears to staff that the pricing application appears to be unjust and unreasonable. Staff believes that CG&E's pricing application should not be accepted because its MBSSO is intrinsically anti-competitive. Staff believes that approval of the pricing application would essentially allow CG&E to provide service in the same manner as a CRES provider and that CG&E should not actively compete as a CRES provider within the operational and legal structure of a public utility. Staff also notes that the prerequisite market institutions for the MBSSO are not yet in place. Staff argues that CG&E is seeking approval of a market tracking mechanism which is specific to the wholesale market as it exists today; however, this market is not sufficiently developed to provide confidence in any tracking methodology. Staff also agrees with the various commenters who believe that the pricing application is premature inasmuch as the Commission is still considering MBSSO and CBP rules. Staff also asserts that certain of the costs to be recovered through the proposed tariffs have not been justified.

(8) After considering all the motions and comments filed, the Commission believes that the motions to dismiss CG&E's pricing application should be denied. However, staff and the commenters have raised many issues that merit holding a hearing on CG&E's pricing application. It appears that the pricing application may be unjust and unreasonable and that, pursuant to Section 4909.18, Revised Code, a hearing should be held. The Commission also believes that, in light of the current status of the rulemaking proceeding, it would not be premature and counterproductive to hold a hearing prior to the completion of that proceeding. The Commission further finds that OCC's request to consolidate the pricing case with the rulemaking procedure should also be denied as it would only unnecessarily complicate the rulemaking proceeding.

(9) On October 8, 2003, CG&E filed an application (MISO costs application), in Case No. 03-2079-EL-AAM (MISO costs case), to permit it to defer Schedule 10 Federal Energy Regulatory Commission (FERC) costs and costs assessed by the Midwest Independent System Operator (MISO) pursuant to schedules 16 and 17 of its Open Access Transmission Tariff, also approved by FERC. Through its MISO costs application, CG&E states that it hopes to be able to recover certain costs in order to provide it with the incentive to maintain a sufficient level of capital investment necessary to maintain reliable transmission and distribution.

(10) On October 8, 2003, CG&E also filed an application (capital investment application), in Case No. 03-2081-EL-AAM, to permit it to defer capital investments made during the market development period in its transmission and distribution system and, in Case No. 03-2080-EL-ATA, to establish a rider to recover such capital investments made after the market development period (collectively, capital investment cases). CG&E states that it intends, through the capital investment cases, to facilitate the operation of a reliable transmission and distribution system by removing the disincentives to capital investment which were created by frozen rates.

(11) On October 23, 2003, and November 4, 2003, The Ohio Energy Group (OEG) and OCC, respectively, filed motions to intervene in both the MISO costs case and the capital investment cases. As these cases could have an impact on customers' rates, and OEG and OCC have set forth valid reasons for intervention, these motions will be granted.

(12) OEG and OCC also filed motions to dismiss the MISO costs application and the capital investment application. OCC argues that the Commission has no authority to grant CG&E's requests and that the MISO costs application and the capital investment application are inconsistent with the statewide electric transition framework, with the stipulation CG&E signed to settle its electric transition plan case,[1] and with the distribution and transmission rate cap established for the MDP. Similarly, OEG contends that these applications violate statutory provisions establishing a transmission and distribution rate cap during the MDP, that the applications are attempts to engage in single-issue ratemaking and, with regard to the capital investment application, that the proposed rider is counter to the statutory framework for ratemaking.

(13) The Commission, after due consideration of OEG's and OCC's motions to dismiss the MISO costs application and the capital investment application, finds that the motions should be denied.

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1 *In the Matter of the Application of The Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues*, Case No. 99-1658-EL-ETP (ETP case).

However, as OEG and OCC have raised a number of issues that make it appear that the MISO costs application and the capital costs application may be unjust and unreasonable, a hearing should be held. The Commission further finds that, as there may be issues which overlap among the pricing case, the MISO costs case and the capital investment case, these cases should be consolidated. In addition, the consolidation of these cases will help the Commission consider CG&E's electric operations on a more unified basis.

(14) The Commission is concerned that the competitive retail market for electric generation has not developed as rapidly as was anticipated when it issued its opinion and order the ETP case. We have previously stated that we encourage electric utilities to consider the establishment of plans which will stabilize prices following the termination of their MDPs, and will allow additional time for competitive electric markets to grow.[2] As the competitive retail market for electric generation has not fully developed in the CG&E territory, the Commission finds it advisable that CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.

(15) The Commission will establish the following procedural schedule for these proceedings:

(a) Monday, January 26, 2004 – CG&E is requested to file a proposed rate stabilization plan.

(b) Tuesday, February 24, 2004 – A technical and procedural conference will be held at 10:00 a.m., in hearing room 11-D, at the offices of the Commission.

(c) Tuesday, March 2, 2004 – This is the deadline for filing motions to intervene in these proceedings and for filing objections to CG&E's proposed rate stabilization plan.

(d) Thursday, March 25, 2004 – CG&E's testimony is due.

(e) Thursday, April 1, 2004 – Staff's testimony is due.

(f) Thursday, April 8, 2004 – This is the testimony due date for all other parties wishing to present testimony.

(g) Monday, April 19, 2004 – An evidentiary hearing will be held at 10:00 a.m., in hearing room 11-D, at the offices of the Commission.

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2 *In the matter of the Continuation of the Rate Freeze and extension of the Market Development Period for The Dayton power and Light Company,* Case No. 02-2779-EL-ATA, et al. (Opinion and Order, 9/2/2003, at 29).

(16) A local public hearing will be held at a time and place to be determined by future entry.

It is, therefore,

ORDERED, That motions to intervene and motions for admission *pro hac vice*, as set forth in findings (4) and (11), be granted. It is, further,

ORDERED, That the motions to dismiss CG&E's pricing application and OCC's motion to consolidate the pricing case with Case No. 01-2164-EL-ORD be denied. It is, further,

ORDERED, That OEG's and OCC's motions to dismiss the MISO costs application and the capital costs application be denied. It is, further,

ORDERED, That Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA, and 03-2081-EL-AAM be consolidated. It is, further,

ORDERED, That the procedural schedule set forth in finding (15) be followed. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Judith A. Jones

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Entered in the Journal

DEC 9 2003

Reneé J. Jenkins
Secretary

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CASE DESCRIPTION: CINCINNATI GAS & ELECTRIC
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LEXSEE 2008 OHIO 2230

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No. 2007-0860

SUPREME COURT OF OHIO

2008 Ohio 2230; 2008 Ohio LEXIS 1212

January 22, 2008, Submitted
May 15, 2008, Decided

NOTICE:

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

PRIOR HISTORY: [**1]
APPEAL from Public Utilities Commission of Ohio, No. 05-796-EL-CSS.

DISPOSITION: Order affirmed.

HEADNOTES

Public utilities -- Interruptible electric service -- Fairness of economic interruptions -- Order affirmed.

COUNSEL: Craig Smith, for appellant.

Thomas R. Winters, Acting Attorney General, Duane W. Luckey, Senior Deputy Attorney General, and John H. Jones and William L. Wright, Assistant Attorneys General, for appellees.

Kathy J. Kolich, Senior Counsel, FirstEnergy Service Corporation, for intervening appellee.

JUDGES: CUPP, J. MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and LANZINGER, JJ., concur.

OPINION BY: CUPP

OPINION

CUPP, J.

[*P1] This is an appeal as of right by Elyria Foundry Company ("Elyria") from an order of the Public Utilities Commission of Ohio ("PUCO" or "commission") concerning the interruptible electric service program offered by the Ohio Edison Company. Electric customers that contract for this program agree to have their service subject to interruption in exchange for a discount on the cost of service. In contrast, "firm service" customers are provided a priority service without interruption. Elyria receives a portion of its electric service on an interruptible basis.

[*P2] Elyria takes issue with the method that was used to determine interruptions of its service in 2005. In 2005, Elyria Foundry had a portion of its electric [**2] supply interrupted on 44 days for a total of 645 hours. Previously, Elyria had averaged about four interruptions a year. Elyria contests Ohio Edison's internal policy that resulted in these interruptions, asserting that the program is flawed and not properly filed with the commission as required by the law.

[*P3] Elyria provides no evidence that Ohio Edison's internal policy contradicted the interruptible program outlined in the company tariffs in its appeal of the commission order. Elyria also fails to demonstrate to the court that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. Thus, we affirm the commission's opinion and order.

STATEMENT OF FACTS

[*P4] In Ohio Edison's territory, customers receive interruptible service under one of three tariff provisions. The relevant section in this appeal is Rider 75 Ohio Edison's Tariff PUCO No. 11.

[*P5] Under Rider 75, Ohio Edison may "interrupt service to the customer's interruptible load whenever the incremental revenue to be received from the customer is less than the anticipated incremental expense to supply the interruptible energy for the particular hour(s) of the interruption request."

[*P6] [**3] When an economic interruption is requested by Ohio Edison, the interruptible customer can (1) arrange for service from another supplier; (2) purchase replacement power from Ohio Edison at a prearranged price; (3) ignore the notice and buy replacement power from Ohio Edison at the highest market price; or (4) decrease its usage in accordance with Ohio Edison's firm load responsibilities.

[*P7] Ohio Edison developed a policy of not calling for an economic interruption until all of its interruptible customers are impacted ("2001 policy"). The 2001 policy invokes an interruption when, for at least three consecutive hours, incremental out-of-pocket costs to supply power exceed a "strike price" of $ 85 per (changed to $ 65 in 2003) megawatt hour ("MWh") and the current or expected load obligations exceed available planned resources by 300 megawatts or more. The strike price represents approximately the highest incremental revenue received from any interruptible customer.

[*P8] Ohio Edison's interruptible service is administered by FirstEnergy Solutions Corp. ("FES"), an unregulated electric marketer and wholly-owned subsidiary of FirstEnergy Corp. ("FE"). FES is the owner of virtually all of the generation [**4] assets formerly owned by FE, and it provides all electricity needed by the FE operating companies under a power supply agreement ("PSA") approved by the Federal Energy Regulatory Commission ("FERC").

[*P9] The number of economic interruptions Elyria Foundry experienced each year from 1995. through 2004 varied, but it was never more than 11. Elyria Foundry received a notice from Ohio Edison in 2005 warning that the number of interruptions under Rider 75 might increase. Ohio Edison explained that the previous few years had experienced fairly mild winters and that FERC's changes in the national structure of the electric system, combined with the uncertainty of prices in the power, gas, and coal markets, might trigger interruptions more frequently. Then, the state of Ohio experienced the hottest June and fifth-hottest July in the past 30 years in 2005, and the first 21 days of December 2005 were the coldest ever recorded in Ohio. In addition to the weather conditions, coal-supply issues in the Midwest and oil and natural gas shortages in the aftermath of Hurricane Katrina and other hurricanes in the Gulf region caused price increases.

[*P10] Elyria filed a complaint at the commission concerning the [**5] application of the internal 2001 policy after the frequency of the interruptions increased from an average of four days a year to 44 days in 2005. On January 17, 2007, following a hearing and the submission of briefs, the commission issued its opinion and order in its proceeding ("*Jan. 17th Order*"). The commission found that Elyria did not provide sufficient evidence either that Ohio Edison's charges under Rider 75 had violated any applicable statute, regulation, or guideline or that Ohio Edison had failed to comply with any filing or notice requirement concerning its implementation of Rider 75.

[*P11] On May 10, 2007, Elyria filed a notice of appeal with this court. Ohio Edison intervened as an appellee. The cause is before this court on an appeal as of right.

STANDARD OF REVIEW

[*P12] A PUCO order will 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. *R.C. 4903.13.* See also *Constellation NewEnergy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, P 50.* This "'court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient [**6] 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, 29, quoting AT&T Communications of Ohio, Inc. v. Pub. Util. Comm. (2000), 88 Ohio St. 3d 549, 555, 2000 Ohio 422, 2000 Ohio 423, 728 N.E.2d 371.* 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. Furthermore, the court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order. *Myers v. Pub. Util. Comm. (1992), 64 Ohio St. 3d 299, 302, 1992 Ohio 135, 595 N.E.2d 873.*

[*P13] The court has "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, 1997 Ohio 196, 678 N.E.2d 922.* The court has explained that it may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise [**7] 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.*

ARGUMENT

Proposition of Law No. I

[*P14] Elyria argues that the incremental costs used by Ohio Edison to determine the need for requesting economic interruptions are unlawful. Specifically, Elyria argues that the PSA (power supply agreement) and its formula were not used to determine incremental expenses upon which to request economic interruptions. Elyria asserts instead that "the incremental expenses were based on the total, unallocated, actual purchased power costs of FES." In other words, Elyria claims that Ohio Edison included the electric load in FES's unregulated contracts when deciding whether to issue an economic interruption for Ohio Edison's regulated customers.

[*P15] Elyria asserts that there are up to 3,000 megawatts of competitive market sales by FES that should not have been included in determining the need for interruptions for Ohio Edison's Rider 75 interruptible customers. Consequently, according to Elyria, the commission allowed Ohio Edison to request an excessive number of economic [**8] interruptions during 2005. Elyria also claims that those market customers failed to pay their portion of the increased replacement power rate.

[*P16] Elyria's argument is unavailing. Elyria is an interruptible customer that chose to be a part of the discount system. Rider 75 deals with Ohio Edison's actions once the supply of electricity is in question. Implicit in the interruptible program is the belief that firm customers deserve to receive service before interruptible customers.

[*P17] The commission cites its generic review of interruptible programs in which it developed guidelines to provide a base for utilities to develop these programs. *In the Matter of Interruptible Electric Service Guidelines, Pursuant to the Agreement by Participants in the Commission Roundtable on Competition in the Electric Industry* (Dec. 22, 1998), PUCO No. 95-866-EL-UNC ("*Guideline Order*"). In the *Guideline Order*, the commission recognized that the key to interruptible programs is the distinction between firm and interruptible service. Id. at 8-9. The commission also recognized that" [e]ach utility has an obligation to maintain system integrity and service to firm * * * customers, and it is important to remember that [**9] [interruptible] customers receive substantial-discounts for accepting risk of service interruption.'" *Jan. 17th Order* at 9, quoting *Guideline Order* at 8-9.

[*P18] It is this policy view that interruptible service should not be prioritized over firm service that appropriately leads the commission to find that it is not unreasonable to consider all of the firm obligations of FES, including those outside of the PSA, in determining the costs to Ohio Edison of serving interruptible customers. It was reasonable for the commission to rely on its precedent that helped define the boundaries of the interruptible program. After discussing the *Guideline Order*, the commission determined that it is reasonable to look at all firm-service commitments of the provider to ensure that those customers are served first.

[*P19] Elyria wants the discounted rates and therefore is willing to take the risk of interruption. Once a customer gives up the right to firm service, it falls into the bucket of interruptible customers and is subject to interruptions and inconveniences during the highest peaks on the electric system. The fact that electric suppliers have regulated and unregulated responsibilities does not matter. Elyria [**10] was not required to open itself to the risk of interruptible service. In fact, in its *January 17th Order*, the commission suspended the onerous opt-out provision for interruptible customers to give Elyria and others a one-time opportunity to move back to firm service without penalty. Elyria chose to stay in the program.

[*P20] Ohio Edison's actions comply with the scope of Rider 75 and previous commission decisions on interruptible programs. The commission established the reasonableness of taking FES's entire electric load into account when determining economic interruptions. Elyria failed to provide any evidence that Ohio Edison's actions or that its 2001 policy contradicts Rider 75. Elyria's proposition of law, therefore, must be rejected.

Proposition of Law No. II

[*P21] Elyria argues that Ohio Edison's utilization of its 2001 policy is a rate-setting practice that was not approved under *R.C. 4909.18* and was not published under *R.C. 4905.30*. Elyria argues that during economic interruptions, customers are offered replacement/buy-through power rates that are not approved by the commission.

[*P22] *R.C. 4909.18* requires "a written application to establish any rate * * * or to modify * * * any existing rate [**11] * * * or regulation or practice affecting the same * * *." Elyria incorporates a number of the common definitions of the words in *R.C. 4909.18* to support its position that any effect on rates in any manner is required to be included in a tariff and not in an informal policy.

[*P23] We do not agree with Elyria's argument. Ohio Edison's interruptible program was approved by the commission as set forth in its tariffs under Rider 75. Elyria had the option to purchase firm electric service at the standard price. Instead, Elyria elected to accept some risk and take service under an interruptible tariff. The terms of that interruptible risk/benefit service are defined in Rider 75. The risk of accepting that discount is that at some point, the customer is subject to the highest cost of

electric service if it chooses to run at full power at peak load times. Everything is defined in the commission-approved Rider 75, and therefore no new rate is being established.

[*P24] The 2001 policy is an internal operating procedure, and Elyria's attacks on the 2001 policy are misplaced. Tariff provisions define the programs offered by a regulated utility. However, tariffs are not a standard operating procedure manual [**12] for the utility. Utilities develop internal policies to run their day-to-day business. As detailed in the record, the 2001 policy streamlines the administrative process and enables FES to act timely and efficiently when economic interruption conditions are present. The policy also minimizes the need for contact between the regulated (Ohio Edison) and the unregulated (FES) as required under *R.C. 4928.17* and the commission's code of conduct rules.

[*P25] The 2001 policy enumerates that all contract and tariff restrictions must be followed and that nothing in the policy undermines or diminishes tariff or contractual rates. Thus, nothing in the 2001 policy can contradict the rates and terms in Rider 75. The 2001 policy exists as a checklist, outlining the internal mechanics of Ohio Edison's process to carry out its optional right to interrupt customers' service as outlined in Rider 75. We reject Elyria's second proposition of law.

Proposition of Law No. III

[*P26] Elyria argues that it is disadvantaged by Ohio Edison's policy to interrupt all interruptible customers at the same time, for the same duration, and replace power at the same cost. Elyria argues that the uniform interruptible strike price at [**13] $ 65 MWh discriminates against Elyria as prohibited by *R.C. 4905.35*. *R.C. 4905.35* prohibits any utility from giving any undue or unreasonable preference or advantage to any customer. Elyria states that the use of a single interruptible price resulted in its paying a much higher incremental rate to Ohio Edison for a like and contemporaneous service that was interrupted under the same circumstances and conditions than those customers paying less.

[*P27] The $ 65/MWh strike price represents the highest incremental rate paid by any interruptible customer. The lowest rate paid by an interruptible customer is around $ 30/MWh. Elyria takes issue with the fact that customers paying the lower rate were not interrupted until more than 100 percent of their incremental expense was surpassed. Elyria argues that that policy discriminates against customers like itself who pay $ 51.34/MWh.

[*P28] The commission rejected Elyria's argument, finding no evidence of unlawful or prejudicial treatment under *R.C. 4905.35*. The commission points out that the strike price is not a rate but rather a trigger point used to indicate a need for service interruption. At that point, Elyria can avoid paying the higher electricity [**14] costs by seeking supply elsewhere or shutting down operations. Elyria can also choose to ignore the call for an interruption. If it chooses to ignore or "buys through" the interruption, it must pay the market replacement cost to Ohio Edison. That process was approved by the commission when Rider 75 was filed.

[*P29] Elyria fails to provide any evidence that the 2001 policy contradicts the approved tariff. Elyria also fails to demonstrate that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. Elyria is accepting service under an interruptible program. Elyria has a right to the interruptible rate as long as no interruption is required. Once the interruption is necessary, then Elyria's ability to negotiate or receive differentiated treatment is limited to its options of curtailing use, arranging a third-party provider, or purchasing power from Ohio Edison. Otherwise, under Rider 75, the price to secure electric service for all interruptible customers is left to the market at the time.

[*P30] The 2001 policy does not discriminate against any particular interruptible customer. Ohio Edison developed a neutral policy that would not interrupt [**15] any customers until all customers being served under the plan were subject to an economic interruption. This consistent policy has the benefit of minimizing service interruptions until the problem affects the entire class of customers. The policy also sets a predetermined strike price, ensuring that no customers will be singled out. The single strike price simply recognizes the interruptible customers as a single class of customers facing interruptions under the same terms. Rider 75 is written as a neutral process to give the interruptible customer options to get through the interruption and back to its discounted interruptible rate.

[*P31] We reject Elyria's third proposition of law.

Proposition of Law No. IV

[*P32] In its fourth proposition of law, Elyria argues that the commission violated *R.C. 4903.09*, which requires the commission to set forth the factual basis and reasoning in its decision. Specifically, Elyria argues that the commission did not include adequate record citations when adopting Ohio Edison's position in response to an argument made by Elyria on rehearing.

[*P33] After the March 14th Entry on Rehearing, Elyria filed a second rehearing request arguing that the commission failed to provide [**16] the factual basis and reasoning used for agreeing with Ohio Edison's position dealing with Elyria's mathematical arguments. Elyria

argued that Ohio Edison's calculations of incremental costs were incorrect in that they failed to allocate the cost per MWh based on the percentage of total purchased power consumed by Ohio Edison's customers. Ohio Edison responded that Elyria's mathematical arguments were in error.

[*P34] The commission agreed with Ohio Edison on this issue and denied the ground for rehearing, citing Ohio Edison's memorandum contra that "if the total cost is to be allocated based on the percentage of consumption to get the unit cost, so too must the volume." Elyria argues that the commission's adoption of Ohio Edison's argument without record support violates *R.C. 4903.09*.

[*P35] We find no merit in Elyria's fourth proposition of law. The commission pointed out the mathematical error made by Elyria. The correction to the mathematical formula showed all that was needed to reject the argument in the rehearing entry. The commission pointed out Elyria's mistake and reaffirmed its order.

[*P36] The commission's order adequately supports its findings and provides the court with an adequate record [**17] to understand the commission's rationale underlying its decision on appeal. The commission's order supports the commission's findings in compliance with *R.C. 4903.09*.

CONCLUSION

[*P37] Elyria paid about $ 450,000 less for electric service in 2005 than if it had accepted electric service as a firm service customer. In spite of these savings, Elyria challenges the basis of the interruptible system and seeks to change how the program is administered. It takes issue with the program despite the record showing the factors necessitating an increase in economic interruptions, such as the extreme weather conditions.

[*P38] The interruptible program is premised on a company's business decision to pay lower rates on a regular basis in exchange for the risk of being interrupted at the highest usage or most expensive times for electric usage during the year. Complaints about how the utility enacts Rider 75 must show that the process contradicts or goes outside of the approved rider. Elyria fails to prove that Rider 75 was violated.

[*P39] We affirm the commission's order.

Order affirmed.

MOYER, C.J., and PFEIFER, LUNDBERG STRATTON, O'CONNOR, O'DONNELL, and LANZINGER, JJ., concur.

LEXSEE 117 OHIO ST. 3D 486

THE INDUSTRIAL ENERGY USERS-OHIO ET AL., APPELLANTS, v. PUBLIC UTILITIES COMMISSION OF OHIO ET AL., APPELLEES.

No. 2006-1594

SUPREME COURT OF OHIO

117 Ohio St. 3d 486; 2008 Ohio 990; 885 N.E.2d 195; 2008 Ohio LEXIS 559

October 9, 2007, Submitted
March 13, 2008, Decided

PRIOR HISTORY:
APPEAL from the Public Utilities Commission of Ohio, No. 05-376-EL-UNC.
Indus. Energy Users-Ohio v. PUC, 112 Ohio St. 3d 1484, 2007 Ohio 755, 862 N.E.2d 112, 2007 Ohio LEXIS 497 (2007)

DISPOSITION: Order affirmed in part and reversed in part, and cause remanded.

HEADNOTES

Public Utilities -- Electric-distribution utility cannot use revenues from its noncompetitive distribution service to subsidize the cost of providing a competitive generation-service component.

COUNSEL: McNees Wallace & Nurick, L.L.C., Samuel C. Randazzo, Lisa G. McAlister, and Daniel J. Neilsen, for appellant Industrial Energy Users of Ohio.

Kathy J. Kolich, for appellant FirstEnergy Solutions Corporation.

Jeffrey L. Small, Kimberly Bojko, and Janine L. Migden-Ostrander, for appellant Office of the Ohio Consumers' Counsel.

Boehm, Kurtz & Lowry, David F. Boehm, Kurt J. Boehm, and Michael L. Kurtz, for appellant Ohio Energy Group.

Marc Dann, Attorney General, and Thomas W. McNamee, Duane L. Luckey, William L. Wright, and John H. Jones, Assistant Attorneys General, for appellee Public Utilities Commission of Ohio.

Marvin I. Resnik and Kevin F. Duffy; and Porter, Wright, Morris & Arthur, L.L.P., and Daniel R. Conway, for intervening appellees Columbus Southern Power Company and Ohio Power Company.

David C. Rineboltand Colleen Mooney, urging reversal for amicus curiae Ohio Partners for Affordable Energy.

Scott W. Schiff & Associates and Scott W. Schiff; and Roetzel & Andress, Thomas L. Rosenberg, and Jessica L. Davis, urging affirmance for amici curiae International Brotherhood of Electrical Workers Local 972, Parkersburg-Marietta Building and Construction Trades Council, AFL-CIO, and Ironworkers Local 787.

Michael B. Gardner, urging affirmance for amicus curiae Murray Energy Corporation.

JUDGES: O'DONNELL, J. MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, LANZINGER, and CUPP, JJ., concur. PFEIFER, J., concurs separately.

OPINION BY: O'DONNELL

OPINION

[*486] [***196] **O'DONNELL, J.**

[**P1] The Industrial Energy Users-Ohio ("IEU"), FirstEnergy Solutions Corporation, the Office of the Ohio Consumers' Counsel ("OCC"), and Ohio Energy Group appeal as of right from orders of the Public Utilities Commission of Ohio [***197] ("commission") approving Columbus Southern Power Company and Ohio Power Company's (collectively, "AEP") application to build an electric-generating facility in Meigs County, Ohio. Specifically, the commission's approval allows AEP to collect approximately $ 24 million for research and development of the generating facility from its customers and further contemplates that AEP will be permitted to recover the construction and maintenance costs of

the facility from its distribution customers upon completion.

[**P2] Appellants contend that because Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962 ("S.B. 3") separated electric generation, which is an unregulated competitive service, from electric distribution, which is a regulated noncompetitive service, the commission's order permitting AEP, an electric-distribution utility, to build a generation plant should be reversed.

[**P3] AEP contends, however, that because *R.C. 4928.14* permits an electric-distribution utility to be involved in building an electric-generating facility to satisfy the utility's provider-of-last-resort ("POLR") and standard-service-offer obligations, it therefore may recover the cost of designing and constructing such a facility from its distribution customers.

[**P4] We agree that provisions of S.B. 3 prevent an electric-distribution utility from using revenues from noncompetitive distribution service to subsidize the cost of providing a competitive generation-service component; however, there may be merit to the commission's regulation of the design, construction, and operation of the proposed generation facility as a distribution-ancillary service related to AEP's POLR obligation, but this record is not fully developed in that [*487] regard. Accordingly, we remand this matter to the commission for further findings. Because the matter is being remanded for further development of the record and because the commission has already issued a conditional refund order that remains in effect, we decline to rule at this time upon IEU's request for a refund of costs already collected from AEP's customers.

HISTORY OF DEREGULATION

[**P5] S.B. 3 restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service. As we have repeatedly recognized, S.B. 3 altered the traditional rate-based regulation of electric utilities by requiring the three components of electric service -- generation, transmission, and distribution -- to be separated. See, e.g., *Migden-Ostrander v. Pub. Util. Comm., 102 Ohio St.3d 451, 2004 Ohio 3924, 812 N.E.2d 955, P 3-4.*

[**P6] Pursuant to *R.C. 4928.03* and *4928.05*, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to *R.C. 4928.15(A)*. *R.C. 4928.02(G)* provides that it is the state's policy to "[e]nsure 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." This provision "prohibits public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice versa." *Elyria Foundry Co. v. Pub. Util. Comm., 114 Ohio St.3d 305, 2007 Ohio 4164, 871 N.E.2d 1176, P 50.* In the context of S.B. 3 electric-utility deregulation, each service component must stand on its own. Id., citing *Migden-Ostrander at P 4.*

[***198] AEP APPLICATION AND PROCEEDINGS

[**P7] On March 18, 2005, AEP filed an application with the commission for approval of a mechanism to recover the expected expenditures for the design, construction, and operation of a 629-megawatt integrated-gasification-combined cycle ("IGCC") generation facility in Meigs County, Ohio.

[**P8] On April 10, 2006, the commission issued its opinion and order approving the application. In its order, the commission determined that it had the authority to regulate the design, construction, and operation of the proposed generation facility because it was a distribution-ancillary service related to AEP's statutory POLR obligation. Accordingly, the commission's order permitted AEP to charge its customers an estimated $ 23.7 million to fund AEP's preliminary research for the proposed construction of the IGCC electric-generation facility. [1] [*488] Additionally, the commission declared that it has the authority to approve a plan that would permit AEP to recover the construction and operation costs of the generating plant from distribution customers. In its application, AEP estimated the cost of the project could reach $ 1.27 billion. However, at oral argument, the parties represented that the overall cost could exceed $ 2 billion.

1 AEP argued that the IGCC process is a favored technology because it burns coal in an environmentally friendly manner. The IGCC process uses gas and steam turbines to generate electricity without releasing contaminants associated with traditional coal burning plants. This process has the environmental benefits of a natural gas-fired plant while using coal, a more readily available fuel source.

[**P9] On June 28, 2006, the commission issued an entry, following a motion for a rehearing, in which it reiterated its authority to establish a charge related to the overall construction and operation of a generating plant as proposed in AEP's application. However, because the commission also determined that elements of the design and engineering might be transferable to other facilities in other states, it ordered AEP to be prepared to refund the charges collected from its customers for all transfer-

able research if AEP has not commenced a continuous course of construction of the proposed IGCC plant by June 28, 2011.

[**P10] FirstEnergy Solutions, IEU, OCC, and the Ohio Energy Group all appealed the commission's order to this court, contending, inter alia, that the order was contrary to law because it improperly regulated competitive electric-generation service in violation of *R.C. Chapter 4928* and it authorized an increase in electric-distribution rates without complying with the provisions of *R.C. Chapter 4909*. Further, Ohio Partners for Affordable Energy filed an amicus brief on behalf of the appellants. AEP intervened as an appellee and the International Brotherhood of Electrical Workers Local 972, Ironworkers Local 787, Parkersburg-Marietta Building and Construction Trades Council, AFL-CIO, and Murray Energy Corporation filed amicus briefs on behalf of appellees.

[**P11] The issues presented to this court are whether the commission properly designated an unregulated competitive generation service as a regulated distribution-ancillary service in order to exercise regulatory jurisdiction, whether the commission properly determined that AEP's POLR obligation justifies a rate-based recovery to build and operate a generation facility, and whether the commission properly denied the requested refund of $ 24 million in generation-plant research-and-development costs that AEP has collected from its [***199] customers pursuant to the commission's order.

STANDARD OF REVIEW

[**P12] "*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, P 50.* [*489] We will not reverse or modify a commission decision as to questions of fact when 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, P 29.* The appellant bears the burden of demonstrating that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. Id. We will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order. *Myers v. Pub. Util. Comm. (1992), 64 Ohio St. 3d 299, 302,1992 Ohio 135, 595 N.E.2d 873.*

[**P13] 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, 1997 Ohio 196, 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.*

DISTRIBUTION-ANCILLARY SERVICE

[**P14] IEU and the other appellants argue that the commission has approved an effort by AEP to ignore the current statutory process and to recover from its distribution customers the costs of planning, building, and maintaining a competitive generation facility. FirstEnergy Solutions points out that the commission acknowledged in its order that retail electric-generation service is competitive under *R.C. 4928.03* and therefore it is not subject to commission regulation.

[**P15] The commission contends that its current order regulates only noncompetitive electric retail "ancillary services."

[**P16] *R.C. 4928.01(A)(1)* defines "ancillary service" as:

[**P17] "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; operation 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."

[*490] [**P18] The commission found that most of the ancillary services enumerated in the statutory definition require a generating plant. Therefore, the commission concluded that S.B. 3 contemplates that an electric distribution utility will provide ancillary service from a generating plant, making the recovery of costs associated [***200] with that generating plant a distribution-ancillary service subject to the commission's regulation.

[**P19] Appellants dispute the commission's analysis, asserting that the construction and maintenance of an electric-generating facility is fundamental to the generation of electric service. The Ohio Energy Group opposes the commission's determination that it is able to

regulate the proposed electric-generating facility by classifying the service as a regulated distribution-ancillary service rather than what it really is -- a competitive electric-generation service. The Ohio Energy Group further contends that the commission is permitting AEP to recover and earn a return on its investment in a power plant, which was previously guaranteed by regulating the electric utility prior to deregulation. It notes that, since the enactment of S.B. 3, utilities no longer have any guarantee that they will either recover costs or earn a return on their power-plant investments through cost-based rates. OCC contends that the commission's findings move the state closer to re-regulation and that, left undisturbed, the commission's exercise of jurisdiction over generation, under the guise of distribution-ancillary services, could circumvent *R.C. Chapter 4928* by permitting the commission to exercise jurisdiction over all generation functions.

[**P20] It is well settled that the generation component of electric service is not subject to commission regulation. In *Constellation NewEnergy, Inc., 104 Ohio St. 3d 530, 2004 Ohio 6767, 820 N.E.2d 885, P 2*, we stated that S.B. 3 "provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service." *R.C. 4928.03* specifies that retail electric-generation service is competitive and therefore not subject to commission regulation, and *R.C. 4928.05* expressly removes competitive retail electric services from commission regulation. Moreover, *R.C. 4928.14(A)* requires an electric-distribution utility to provide a market-based standard service offer of all competitive retail electric services, including electric-generation service.

[**P21] Thus, the issue presented here is whether the commission properly identified the subject matter of AEP's application as a distribution-ancillary service subject to its regulatory jurisdiction.

[**P22] The statutory definition of ancillary service, set forth in *R.C. 4928.01(A)(1)*, contains examples of services that involve the control and regulation of the flow of electricity, not the planning and construction of generation facilities. Because *R.C. 4928.03* explicitly declares electric generation to be a [*491] competitive retail electric service and *R.C. 4928.05* expressly provides that electric generation is no longer subject to the commission's regulation, the classification of AEP's proposed electric-generation facility as a distribution-ancillary service is contrary to law.

[**P23] The commission's holding blurs the legislative distinctions between electric transmission, generation, and distribution. Adoption of its rationale may result in these three functions all being subject to commission regulation, which would negate the legislature's deregulation of the electric-utility industry. While we appreciate the commission's concern with respect to the future reliability of the electric-generation market as Ohio's market-development period comes to an end, a laudable and practical concern for all Ohio utility consumers, we have previously stated that a concern for the future of the competitive market does not empower the commission to create remedies beyond the parameters of the law. *Ohio Consumers'* [***201] *Counsel v. Pub. Util. Comm., 109 Ohio St.3d 328, 2006 Ohio 2110, 847 N.E.2d 1184, P 38*. The existing legislation sufficiently segregates generation of electricity from distribution, and in order to permit the commission to regulate generation services, additional legislative authority is necessary.

[**P24] Accordingly, we reverse the commission's finding, which approved, as a distribution-ancillary service, AEP's application.

POLR -- STANDARD-SERVICE OFFER

[**P25] The commission further found that, as an electric distributor, AEP has a duty under *R.C. 4928.14* to provide retail electric service to consumers as a POLR, and that this duty provides additional justification for rate-based recovery to build and operate a generation facility. [2] AEP contends that our decision in *Constellation NewEnergy, Inc., 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, P 39-40*, supports its position that it is permitted to recover costs associated with fulfilling its POLR responsibility. While the statute imposes a duty on an electric-distribution utility to become a POLR, it fails to specify the manner in which such a distribution utility is to ensure the availability of energy. In this regard, AEP contends that the commission may authorize the recovery of its [*492] costs from its distribution customers in order to fulfill its statutory POLR responsibility.

2 *R.C. 4928.14* speaks of an electric-distribution utility providing competitive retail electric generation service through a "standard service offer." *Ohio Adm.Code 4901:1-35-03*, Appendix A, defines "standard service offer" as "the provision of a market-based variable-rate firm generation service offered by the [electric-distribution utility] as the provider of last resort" and further defines "POLR" as "the statutory responsibility of the [electric-distribution utility] to provide electric supply service to its customers on a comparable and nondiscriminatory basis within its certified territory. This responsibility may be fulfilled by the [electric-distribution utility] providing standard service offer and by providing all other retail electric services necessary to maintain essential electric service to consumers."

[**P26] FirstEnergy Solutions argues that AEP and the commission overextend the electric-distribution utility's POLR obligation and standard service offerings. It acknowledges that *R.C. 4928.14* requires AEP to provide generation service as a POLR, but it contends that there is a distinction between securing electric service from the competitive market and the planning, building, and maintaining of a facility to produce generation service. FirstEnergy Solutions points to the testimony of AEP's own witness, Bruce Braine, to demonstrate that a distribution utility is not required to build the plant that provides the electricity necessary to satisfy its POLR obligation. IEU and OCC argue that in order for the commission to approve AEP's application as a POLR charge, it needs to establish the rates in accordance with its traditional ratemaking authority.

[**P27] *R.C. 4928.14* does require an electric-distribution utility to be prepared to provide retail electric service to consumers through a standard service offer. Regardless of how the service is provided, the electric-distribution utility will incur noncompetitive costs associated with the fulfillment of its POLR obligation. We have previously stressed the importance distinguishing between the regulated and unregulated costs associated with the POLR obligation, stating that "the commission should carefully consider what costs it is attributing as costs incurred as part of an electric-distribution utility's POLR obligations." *Ohio Consumers' Counsel v.* [***202] *Pub. Util. Comm., 114 Ohio St.3d 340, 2007 Ohio 4276, 872 N.E.2d 269, P 26.* Pursuant to *R.C. 4928.15*, all noncompetitive retail electric-distribution service rates and charges shall be established in accordance with the procedures set forth in *R.C. Chapters 4905* and *4909*.

[**P28] *R.C. Chapter 4905* governs the commission's general power to regulate public utilities, while *R.C. Chapter 4909* governs the commission's power to set utility rates and charges.

[**P29] Notably, *R.C. 4909.15* provides that any property sought to be included in the calculation of utility rates must be used and useful in rendering the public-utility service or it must be at least 75 percent complete. We have previously refused to include in a utility rate-base property that was not yet used and useful for service to consumers noting, "Incorporated in this statutory language is the generally accepted principle that a utility is not entitled to include in the valuation of its rate base property not actually used or useful in providing its public service, no matter how useful the property may have been in the past or may yet be in the future." *Ohio Consumers' Counsel v. Pub. Util. Comm. (1979), 58 Ohio St.2d 449, 453, 12 O.O.3d 378, 391 N.E.2d 311* (refusing to permit a nuclear plant that was still in the testing stages to be included in the valuation of [*493] a public utility's ratebase because the plant was not useful or used in supplying service to ratepayers).

[**P30] We also have held that "[i]n order to meet the requirements of *R.C. 4903.09*, * * * the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *MCI Telecommunications Corp. v. Pub. Util. Comm. (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337.* Although strict compliance with the terms of *R.C. 4903.09*, which requires the commission to file a written opinion setting forth its reasons for its decision, is not required, "'[a]legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support.'" *Tongren v. Pub. Util. Comm. (1999), 85 Ohio St. 3d 87, 90, 1999 Ohio 206, 706 N.E.2d 1255,* quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm. (1996), 76 Ohio St. 3d 163, 166, 1996 Ohio 296, 666 N.E.2d 1372.*

[**P31] While the commission may allow recovery of an electric-distribution utility's noncompetitive costs that are associated with its effort to secure competitive retail electric service in furtherance of its statutory POLR obligation, the commission's approval must be given in accordance with *R.C. Chapters 4905* and *4909*.

[**P32] The evidence does not support the order permitting AEP to recover the costs associated with the research and development of the proposed generation facility. To warrant its conclusions regarding AEP's POLR obligation, the commission may supplement the record with evidence to support its order and must verify that AEP has complied with the application requirements under *R.C. 4909.18*. Also, because AEP has not yet begun construction of the generation facility, compliance with the 75 percent used-and-useful standard should also be addressed.

[**P33] Additionally, we note that, while the commission details potential problems with the fleet of existing generation facilities, it fails to make any findings regarding the amount of generation that AEP needs to guarantee its Ohio distribution responsibilities. Nor does the record demonstrate what portion of the facility's costs should be attributed to AEP's POLR obligation versus what costs should be recovered through competitive rates when the facility [***203] begins generating electricity. [3] Accordingly, the record before us is incomplete in these respects and the commission is instructed to make additional findings in support [*494] of its conclusions in this regard. We remand the case to the commission for further proceedings consistent with this opinion.

3 The commission argued in its merit brief that a power plant can fill numerous roles "even after

the *primary function* of those power plants *has been deregulated.*" The commission admits the *primary purpose* of the plant is for the unregulated provision of electric generation. Yet, the record presented to the court places the entire costs for planning, building, and maintaining the plant with the distribution customers as a noncompetitive service.

RESEARCH AND DEVELOPMENT COSTS

[**P34] IEU and OCC seek an order to refund the $ 24 million in IGCC generation plant research and development costs that AEP has already recovered from its customers. IEU acknowledges this court's holding in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co. (1957), 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465, paragraph two of the syllabus*: "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 statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."

[**P35] The commission argues that we should deny the request because IEU had an opportunity to request a stay of the commission order but failed to do so, and it notes that it ordered AEP to refund all charges collected for expenditures that are transferable to other projects if AEP has not commenced a continuous course of construction of the plant within five years of its entry on rehearing.

[**P36] In view of our remand of this matter to the commission, we need not reach the matter of refund. Therefore, we decline to deviate from *Keco* to create an exception based on these facts.

CONCLUSION

[**P37] The provisions of S.B. 3 prevent an electric-distribution utility from using noncompetitive distribution revenues to subsidize the cost of providing competitive generation service components. However, on a properly supported record, the commission may, in accordance with *R.C. Chapters 4905* and *4909*, approve recovery of an electric-distribution utility's noncompetitive costs associated with its effort to secure competitive retail service in furtherance of its POLR obligation. Here, the record does not demonstrate the extent to which recovery should be permitted in this case or whether the appropriate statutory procedures for obtaining such recovery were followed. Accordingly, we remand this case to the commission for further proceedings consistent with this opinion. Because we remand this case to the commission, and because the commission's conditional refund order remains in effect, we need not reach the issue of a refund, and we decline to create an exception to our precedent of denying claims for refund from approved orders of the commission.

Order affirmed in part

and reversed in part,

and cause remanded.

[*495] MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, LANZINGER, and CUPP, JJ., concur.

PFEIFER, J., concurs separately.

CONCUR BY: PFEIFER

CONCUR

PFEIFER, J., concurring.

[**P38] I concur fully in the opinion and the judgment. I write separately solely to state that I would be willing to order a refund without remanding that issue to the commission.

LEXSEE 32 OHIO ST. 3D 306

MCI TELECOMMUNICATIONS CORPORATION, APPELLANT, v. PUBLIC UTILITIES COMMISSION OF OHIO ET AL., APPELLEES

No. 86-861

Supreme Court of Ohio

32 Ohio St. 3d 306; 513 N.E.2d 337; 1987 Ohio LEXIS 387

September 9, 1987, Decided

PRIOR HISTORY: [***1] APPEAL from the Public Utilities Commission of Ohio.

This case is before this court on a direct appeal by appellant, MCI Telecommunications Corporation ("MCI"), from an order issued by the appellee Public Utilities Commission of Ohio ("PUCO"). This case arises from the PUCO's ongoing proceedings to reconfigure the Ohio telecommunications industry following the 1982 court-ordered divestiture of American Telephone & Telegraph Company ("AT & T").

On August 11, 1982, the United States District Court for the District of Columbia ordered the divestiture of the Bell Operating Companies ("local operating companies") from *AT & T. United States v.. American Telephone & Telegraph Co. (D.D.C. 1982), 552 F. Supp. 131*, affirmed *sub. nom. Maryland v.. United States (1983), 460 U.S. 1001.*

The district court's decision ordered the local operating companies to provide nondiscriminatory equal access services (the provision of facilities to originate and terminate long distance interexchange telephone traffic) to all interexchange telephone carriers. The local operating companies were authorized to impose appropriate charges for such access services. Prior to divestiture, [***2] the local operating companies were allocated revenue for long distance interconnection service by an AT & T intra-company toll settlement process.

The district court concluded that the Federal Communications Commission ("FCC") has the responsibility for setting post-divestiture access charges for interstate interexchange service, while the various state regulatory commissions have the responsibility for setting post-divestiture access service charges for intrastate interexchange service.

By orders issued on February 28, 1983 and August 22, 1983, the FCC adopted an interstate access charge plan which included a combination of interexchange carrier and end-user charges. Local exchange companies (the Bell local operating companies and other independent operating companies) were ordered to file interstate access tariffs with the FCC by October 3, 1983, to become effective on January 1, 1984. The FCC urged adoption of a similar access charge plan at the intrastate level.

On April 6, 1983, the PUCO initiated an investigation regarding the establishment of charges for intrastate access by telephone companies engaged in providing local exchange service in Ohio. *In re Commission* [***3] *Investigation Relative to Establishment of Intrastate Access Charges,* PUCO No. 83-464-TP-COI.

On August 24, 1983, the PUCO issued a finding and order in PUCO No. 83-464-TP-COI ("August 24, 1983 order"). The August 24, 1983 order contained an access charge proposal developed by the staff of the PUCO, and scheduled a public hearing to address the merits of the staff's proposal.

On October 19, 1983, the FCC suspended until April 3, 1984, the interstate access charge tariffs which were to have taken effect January 1, 1984, citing the importance of the issues involved and the existence of substantial legal questions.

The PUCO issued an interim opinion and order on December 20, 1983, in PUCO No. 83-464-TP-COI, which approved an interim arrangement to maintain the status quo for local exchange companies providing access services in Ohio until such time as the PUCO established a final access charge methodology. The interim arrangement was to be in effect no longer than April 3, 1984.

On April 3, 1984, the PUCO issued a second interim opinion and an order in PUCO No. 83-464-TP-COI. Referring to continuing FCC suspensions of interstate access tariffs and other ongoing related FCC [***4] proceedings, the PUCO extended the Ohio interim ar-

rangements until June 13, 1984, and stated that it would continue to monitor the situation.

On May 15, 1984, the FCC issued an order directing that the interstate access service tariffs would become effective on May 25, 1984.

On May 21, 1984, the PUCO issued an opinion and order in PUCO No. 83-464-TP-COI ("May 21, 1984 order") which established the basic mechanism for determining access charges for intrastate interexchange service in Ohio. The essential elements of the PUCO's mechanism were as follows:

1. Ohio intrastate access charges would "mirror" the interstate access charges set by the FCC except for end-user charges. The mirroring would be constant and all rate changes approved by the FCC would be automatically implemented in Ohio, unless the PUCO specifically ordered otherwise.

2. Each local exchange company would be guaranteed access charge revenue equal to the revenue it had received during 1983 under the defunct AT & T toll settlements process. Each month, the total of the company's actual access service revenue plus its intra-company long distance service revenue would be compared to the company's revenue requirement.

[***5] 3. The residual revenue requirement (positive or negative) of each local exchange company would be pooled with the residual revenue requirements of all other local exchange companies. If a local exchange company had a negative residual revenue requirement (*i.e.*, it received surplus revenues during a month), then its surplus revenue would be contributed to the pool. If a local exchange company had a positive residual revenue requirement (*i.e.*, it received insufficient revenues to satisfy its monthly revenue requirement), then it would receive money from the pool to make up its deficiency.

4. If the pool funds were sufficient to satisfy the aggregated residual revenue requirements of all local exchange companies, further funding of the pool would be unnecessary. Any funds remaining in the pool at the end of any quarter would be distributed to local exchange companies and to interexchange carriers, on a pro rata basis. The local exchange companies would receive a proportionate distribution from the surplus based on the ratio calculated by dividing their total quarterly intra-company toll revenues by the total of all access charges for that quarter. The remaining surplus [***6] funds would be distributed to interexchange carriers in proportion to each carrier's total access charge payments during the quarter.

5. If the pool did not have sufficient funds to meet the aggregated residual revenue requirements of all local exchange companies, the deficiency would be recouped by assessing all interexchange carriers a "carrier presence charge" ("CPC").

6. The pool for collection and distribution of residual revenues would be administered by a six-member Ohio Telephone Advisory Board ("OTAB"), comprised of three local operating company representatives and three interexchange carrier representatives. The OTAB was directed to make recommendations to the PUCO as to how best to develop accurate cost data for access services. The May 21, 1984 order stated that adoption of the mirroring mechanism was to be the beginning of the Ohio transition to cost-based pricing for interexchange access service. In addition, however, because the record in the case did not contain properly supported and verifiable cost-based data, the PUCO stated that the interim mechanism was designed to ensure that local exchange companies would be made whole without a need for significant increases [***7] in local exchange rates which could have an adverse effect on the goal of universal telephone service. The interim mechanism was intended to stay in place only until verifiable data became available to the PUCO from which to develop costbased rates. On July 19, 1984, the PUCO issued an entry on rehearing which made some clarifications and modifications of the May 21, 1984 order, but deferred any specific resolution of issues as to disposition of any possible pool surplus. By a second entry issued on July 19, 1984, the PUCO opened a Subfile A docket in PUCO No. 83-464-TP-COI ("Subfile A") to consider proposals and recommendations which might be submitted by OTAB or any other interested party with regard to the administration and operation of the pool. Contrary to the expectations of some parties to PUCO No. 83-464-TP-COI, local exchange companies did not experience significant revenue shortfalls under the interim access charge mechanism. In fact, the pool began to generate a substantial surplus exceeded $ 50 million. On October 15, 1985, the PUCO issued an entry in Subfile A requesting proposals from participants in the access charge pool for a specific plan for distribution of [***8] current and future pool surpluses. The proposals and reply comments submitted in response to that entry evidenced and conflicting opinions as to the source(s) of the surplus funds, and as to the class(es) of parties entitled to repay or reimbursement from the surplus. Some local exchange companies recommended that the surplus funds should be distributed to offset increases in their costs of providing service, while others proposed a proportionate rate reduction. The interexchange carriers claimed the surplus funds since they had obviously paid excessive rates for their access service. On December 18,1984, the PUCO issued an entry establishing a Subfile b docket in PUCO No. 83-464-TP-COI ("Subfile B"), which requested proposals for the development of costbased rates and the systematic transition from the interim pooling arrangement to a new envi-

ronment of company-specific, non-subsidized access service tariffs. Again, the proposals and reply comments submitted in response to that entry evidenced a wide divergence of opinions, positions and recomendations as to the appropriate methodologies which should be adopted. On February 11, 1986, the PUCO issued a supplemental finding and [***9] order ("February 11, 1986 order") which acted upon the pending issues in Subfile A and Subfile B. The February 11, 1986 order adopted fundamental changes in the structure and operation of the interim pooling arrangement, and ordered the distribution of the current pool surplus. The February 11, 1986 order directed that the access charge pool would continue to operate and that mirroring of interstate access charges would continue with the exception of end-user charges. However, the current statewide access pool relative to local exchange companies would be phased out as of January 1, 1987. The PUCO ordered the creation of a new local exchange company reserve fundto offset any revenue shortfalls that might occur during the 1986 pool phase-out. The interexchange carriers' role as guarantors of the pool was eliminated by the abolishment of the potential for imposition of the CPC. With reguard to the distribution of the existing fund surplus, the February 11, 1986 order concluded that local exchange companies and interexchange carriers should share in the pool surplus, since that the surplus was the result of revenue from the access charges paid by interexchange carriers and the revenue [***10] from the local exchange company intra-company long distance services. Thus the PUCO concluded, the surplus should be returned to the local exchange companies and to the interexchange carriers on the basis of their pro-rata contributions to the pool. To the extent local exchange companies received a distribution, the PUCO ordered a reduction of the local exchange companies' message toll service rates proportionate to their share of the surplus dollars. Finally,to oversee the directives of the February 11, 1986 order, the PUCO restructured the OTAB to be comprised of local exchange carriers only. On March 13, 1986, MCI filed an application for reconcideration and an emergency motion to stay the February 11, 1986 order, alleging that the order was unreasonable, unlawful, and discriminatory, and that the PUCO had denied MCI due process by issuing the order without giving prior notice or holding a public hearing before issuing the order. On March 31, 1986, the PUCO issued an entry on rehearing ("March 31,1986 entry") which denied the applications for rehearing filed by MCI and other parties and denied MCI'S motion to stay the implimentation of the February 11, 1986 order. The cause [***11] is now before this court upon an appeal as a matter of right.

DISPOSITION: *Order affirmed.*

HEADNOTES

Public Utilities Commission -- Commission has broad discretion in regulating restructuring of Ohio telecommunications industry -- Order establishing basic mechanism for determining phone access charge for intrastate interexchange service -- Distribution of access charge pool surplus funds -- Notice of intended distribution of surplus funds and hearing prior to issuing order not required when no statutory right to hearing exists -- R.C. 4903.13 -- Commission orders -- Requirements of R.C. 4903.09 satisfied, when -- Order shows the facts in the record upon which it is based and the reasoning followed by the commission in reaching its conclusion.

COUNSEL: *Chester, Hoffman & Willcox, Clifford O. Arnebeck, Jr., Donald C. Brey, Mark J. Palmer* and *Stephanie M. Pestello,* for appellant.

Anthony J. Celebrezze, Jr., attorney general, *Robert S. Tongren, Frank P. Darr* and *Anne E. Henkener,* for appellee.

Donald McG. Rose and *Mark H. Longenecker, Jr.,* for intervening appellee Cincinnati Bell Telephone Co.

Donald W. Morrison and *Charles S. Rowlings,* for intervening [***12] appellee Ohio Bell Telephone Co.

Ellen A. D'Amato for intervening appellee United Telephone Co. of Ohio.

Bruce Kazee, urging affirmance for *amicus curiae,* General Telephone Co. of Ohio.

Schneider, Prohaska & Sams and *J. Raymond Prohaska,* urging affirmance for *amicus curiae,* Ohio Telephone Association.

JUDGES: MOYER, C.J., DOUGLAS, WRIGHT and H. BROWN, JJ., concur. SWEENEY and HOLMES, JJ., dissent. LOCHER, J., dissents with opinion.

OPINION BY: PER CURIAM

OPINION

[*310] [**342] The scope of our review of PUCO orders is set forth in *R.C. 4903.13*, which states in pertinent part:

"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. * * *"

Under the "unlawful or unreasonable" standard specified in *R.C. 4903.13*, 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 PUCO's determination is not against the manifest weight of the evidence and is not so clearly unsupported by the record [***13] as to show misapprehension, mistake or willful disregard of duty. *Dayton Power & Light Co. v.. Pub. Util. Comm. (1983), 4 Ohio St. 3d 91, 4 OBR 241, 447 N.E. 2d 733*; *Columbus v.. Pub. Util. Comm. (1979), 58 Ohio St. 2d 103, 12 O.O. 3d 112, 388 N.E. 2d 1237.* As to questions of law, however, this court has complete, independent power of review. Legal issues are accordingly subjected to more intensive examination than are factual questions. *Consumers' Counsel v.. Pub. Util. Comm. (1979), 58 Ohio St. 2d 108, 12 O.O. 3d 115, 388 N.E. 2d 1370*; *Consumers' Counsel v.. Pub. Util. Comm. (1983), 4 Ohio St. 3d 111, 4 OBR 358, 447 N.E. 2d 749.*

A

MCI first contends that the PUCO's February 11, 1986 order was unreasonable and unlawful because the PUCO failed to give notice of its intended distribution of the surplus funds and failed to conduct a hearing prior to issuing the order, in violation of the due process requirements of the Ohio and United States Constitutions. MCI argues that it was entitled to such prior notice and a hearing because, as a customer purchasing access service from local exchange companies, it had a substantive right in and to the pool [***14] surplus.

We have repeatedly held that a utility ratepayer has no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists. *Armco, Inc. v.. Pub. Util. Comm. (1982), 69 Ohio St. 2d 401, 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, 283, 424 N.E. 2d 561, 566*; *Committee Against MRT v.. Pub. Util. Comm. (1977), 52 Ohio St. 2d 231, 239, 6 O.O. 3d 475, 480, 371 N.E. 2d 547, 552* (P. Brown, J., dissenting). MCI has not cited any statute in support of its contention that it was entitled to a hearing. Accordingly, MCI's first contention is not well-taken. In any event, the record in this case shows that MCI was not prejudiced by the PUCO's failure to hold a hearing. The PUCO indicated its intent to use any pool surplus to reduce local exchange company message toll service rates as early as the May 21, 1984 order. MCI was a party to the original proceedings in PUCO No. 83-464-TP-COI, but it did [*311] not file an application for rehearing of the May 21, 1984 order with regard to the proposed disposition of the pool surplus. MCI had ample opportunities [***15] to advocate its position regarding its entitlement to surplus funds by submitting comments and replies to the submissions of the parties.

[**343] B

MCI's second contention is that the PUCO's order failed to comply with the requirements of *R.C. 4903.09.*

R.C. 4903.09 states that:

"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.*" (Emphasis added.)

MCI argues that the February 11, 1986 order fails to comply with the statute in two regards. First, MCI contends that the PUCO's February 11, 1986 order failed to contain the required findings of fact and reasons prompting the PUCO's decisions. Second, MCI contends that the record in PUCO No. 83-464-TP-COI does not support the PUCO's decision. In effect, MCI argues that the PUCO's decision is against the manifest weight of the evidence and clearly unsupported by the record.

The purpose of [***16] *R.C. 4903.09* (formerly G.C. 614-46a), as stated by this court in *Commercial Motor Freight, Inc. v.. Pub. Util. Comm. (1951), 156 Ohio St. 360, 363-364, 46 O.O. 210, 211-212, 102 N.E. 2d 842, 844-845*, is:

"* * * to enable this court to review the action of the commission without reading the voluminous records in Public Utilities Commission cases. Where the commission states the facts found upon which it bases its decision, this court can usually readily determine, as it is required to do by Section 544, General Code, whether the order of the commission is 'unlawful or unreasonable.' A review of the essential facts so found can also be made with the help of record references supplied by opposing counsel in their briefs. *The General Assembly never intended this court to perform the same functions and duties as the Public Utilities Commission but it did intend that this court should determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission.*" (Emphasis [***17] added.)

Taken literally, *R.C. 4903.09* requires PUCO orders to contain specific findings of fact and conclusions of law. However, the requirements of *R.C. 4903.09* have been satisfied by orders which incorporate or adopt attorney-examiner reports or commission secretary reports which contain such findings or conclusions. *Railway Express Agency, Inc. v.. Pub. Util. Comm. (1962), 173*

Ohio St. 69, 18 O.O. 2d 287, 180 N.E. 2d 10; *New York Central Rd. Co. v.. Pub. Util Comm. (1955), 164 Ohio St. 289, 58 O.O. 68, 130 N.E. 2d 365*; *Buckeye Lake Chamber of Commerce v.. Pub. Util. Comm. (1954), 161 Ohio St. 306, 53 O.O. 180, 119 N.E. 2d 51*. Furthermore, PUCO orders which incorporate testimony from the proceeding or incorporate the entire record from a related investigative PUCO case have been upheld as reasonable and lawful. *County Commissioners' Assn. v.. Public Util. Comm. (1980), 63 Ohio St. 2d 243, 17 O.O. 3d 150, 407 N.E. 2d 534*; *General Motors Corp. v.. Pub. Util. Comm.* [*312] *(1976), 47 Ohio St. 2d 58, 1 O.O. 3d 35, 351 N.E. 2d 183*. In fact, where there was enough evidence and discussion in an order to enable the PUCO's reasoning to be readily [***18] discerned, this court has found substantial compliance with *R.C. 4903.09*, and held that the lack of specific findings may be simply a technical defect which would not result in the invalidation of the order. *Consumers' Counsel v.. Pub. Util. Comm., supra (58 Ohio St. 2d 108)*; *Braddock Motor Freight, Inc. v.. Pub. Util. Comm. (1963), 174 Ohio St. 203, 22 O.O. 2d 173, 188 N.E. 2d 162*.

On the other hand, PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded. *Ideal Transp. Co. v.. Pub. Util. Comm. (1975), 42 Ohio St. 2d 195, 71 O.O. 2d 183, 326 N.E. 2d 861*; *Motor Service Co. v.* [**344] *. Pub. Util. Comm. (1974), 39 Ohio St. 2d 5, 68 O.O. 2d 3, 313 N.E. 2d 803*.

The more recent decisions of this court have analyzed PUCO orders to determine whether findings were made in sufficient detail to enable the court to make its review as to lawfulness and reasonableness. *Cleveland Elec. Illum. Co. v.. Pub. Util. Comm. (1984), 12 Ohio St. 3d 320, 322, 12 OBR 390, 392, 466 N.E. 2d 917, 920*; *Cleveland Elec. Illum. Co. v.. Pub. Util. Comm. (1983), 4 Ohio* [***19] *St. 3d 107, 4 OBR 355, 447 N.E. 2d 746*; *Harold D. Miller, Inc. v.. Pub. Util. Comm. (1982), 1 Ohio St. 3d 162, 1 OBR 194, 438 N.E. 2d 448*.

In order to meet the requirements of *R.C. 4903.09*, therefore, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion.

The PUCO's February 11, 1986 order regarding the distribution of the pool surplus concluded that there was a lack of available information regarding the costs incurred by local exchange companies in providing access services. Faced with this factual deficiency, the PUCO exercised its discretion and selected the fairest alternative by providing for a pro-rata distribution based on the only statistics which were available to document the revenue contribution to the pool -- the levels of revenue contribution to the pool by local exchange companies and by interexchange carriers. The February 11, 1986 order further stated that the PUCO's decision was "tempered by policy considerations, equity, and certain other non-economic factors."

We find that the PUCO's February 11, 1986 order clearly sets forth the PUCO's [***20] reasoning in support of its actions, and that the totality of the record in PUCO No. 83-464-TP-COI contains ample support for that order. The PUCO had before it all the various comments submitted by participating parties, the record from the 1983 hearings and the PUCO's cumulative experience in implementing the deregulation of the telecommunications industry during the past few years. The PUCO's order satisfies the requirements of *R.C. 4903.09* for a reasoned decision based on a factual record. MCI's second argument is rejected.

C

MCI next advances several arguments to the effect that the February 11, 1986 order was unlawful and unreasonable because the PUCO made unreasonable and discriminatory decisions in violation of *R.C. 4905.22*, *4905.33* and *4905.35*. [1]

1 *R.C. 4905.22* provides:

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

R.C. 4905.33 provides:

"No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in *Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923.*, and *4925. of the Revised Code*, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. Mo public utility shall furnish free service or service

for less than the actual cost for the purpose of destroying competition."

R.C. 4905.35 provides:

"No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage."

[***21] [*313] *R.C. 4905.22* essentially requires that utilities provide necessary and adequate service and facilities at just and reasonable rates. *R.C. 4905.33* and *4905.35* are anti-discrimination statutes which prohibit "unreasonable" or "undue" discrimination or preferences in utility service and rates.

MCI argues that the reduction in local exchange company toll rates ordered by [**345] the February 11, 1986 order is unreasonable because the PUCO incorrectly assumed that access revenues and toll charges equally contributed to the pool surplus. In the alternative, MCI argues that if the PUCO's assumption is correct, the PUCO should also have ordered a reduction in interexchange carrier access charges. Finally, MCI argues that the combined impact of the reduction in toll rates and the continuation of the excessive access rates will be unfair subsidization of local exchange company revenues, because interexchange carrier access charges will be required to replace the reduced toll revenues. According to MCI, this unwarranted subsidy of local exchange company toll rates is an unreasonable and undue preference in violation of *R.C. 4905.35* and an unreasonable cross-subsidization [***22] in violation of *R.C. 4905.33* and *4905.22*.

The PUCO and the intervening appellees dispute the factual basis of MCI's arguments, and argue that MCI has failed to properly allege any violations of *R.C. 4905.22*, *4905.33* or *4905.35*.

MCI's allegations regarding the alleged discriminatory actions raise difficult factual issues. MCI's arguments are essentially based on the assumption that interexchange carrier access service charges were the only source of the pool surplus funds. The PUCO, on the other hand, has concluded that local exchange company toll revenues also contributed substantially to the surplus. As discussed above, we do not find that conclusion to be unreasonable or unlawful.

We find that the PUCO's actions in requiring local exchange company rate reductions were not unjust or unreasonable. The PUCO has broad discretion in regulating and supervising the restructuring of the Ohio telecommunications industry. We find that the PUCO's actions in this regard are not against the manifest weight of the [*314] evidence or so clearly unsupported by the record as to constitute mistake, misapprehension or willful disregard of duty.

D

MCI's last argument is that the [***23] PUCO illegally created the OTAB, and has unlawfully delegated to the OTAB responsibilities which the PUCO is statutorily required to perform.

The record in this case demonstrates that the OTAB was created to provide a resource to assist the PUCO in dealing with complex exigencies of the AT & T divestiture and the transition to cost-based access charges. However, the record in this proceeding also indicates that the OTAB has no responsibilities or powers in its own right, and has performed only ministerial acts and data-gathering functions subject to the specific direction and continuing review of the PUCO and its staff. We find the PUCO's creation and use of such an industry advisory board to be both reasonable and appropriate.

It is clear that the PUCO has not exceeded its jurisdiction by the creation of the OTAB. MCI's contention is without merit.

For the reasons stated above, we find that the PUCO's February 11, 1986 order was lawful and reasonable, and it is hereby affirmed.

Order affirmed.

DISSENT BY: LOCHER

DISSENT

LOCHER, J., dissenting.

I am once again compelled to dissent to the cavalier approach taken by this court in affirming an order of the Public Utilities Commission [***24] of Ohio ("PUCO"). The PUCO order of February 11, 1986 is clearly unlawful and unreasonable under *R.C. 4903.13*.

Initially, MCI Telecommunications Corporation ("MCI") was statutorily entitled to notice and a hearing prior to the issuance of the order. The PUCO relies upon *R.C. 4905.26* as authority to set the access rates in the order. With respect to a complaint [**346] concerning the lawfulness or reasonableness of a utility rate, *R.C. 4905.26* provides that when "it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof * * *." Although hearings were held before the PUCO issued its May 21, 1984 order which created the system for determining access charges and the residual revenues pool, the February 11, 1986 order which implements the system provided for in the

May 21, 1984 order is controlled by *R.C. 4905.26* as well.

Therefore, the February 11, 1986 order should have been preceded by a hearing also, rather than the "notice and comment" procedure used by the PUCO. The portion of the statute requiring that there be reasonable grounds for complaint was satisfied, in that [***25] there was great debate among the parties as to how much each had contributed to the residual revenues pool and as to how the pool surplus should be divided. As a result, MCI was denied due process of law when the PUCO issued its February 11, 1986 order without holding a hearing and giving notice to the parties under *R.C. 4905.26.* [2]

2 The majority states that the appellant was not prejudiced by the failure of the PUCO to hold a hearing. I disagree. MCI was prejudiced because the PUCO never gave MCI an opportunity to substantiate its allegations at an evidentiary hearing before it promulgated the order. In this respect, the "notice and comment" procedure was obviously deficient.

[*315] Although I am of the view that the failure of the PUCO to give notice and hold a hearing prior to issuing the order is sufficient to require a reversal of that order, there is an additional reason why the order is unlawful and unreasonable. *R.C. 4903.09* requires that in "all contested cases heard by the public utilities [***26] commission, * * * the commission shall file * * * findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

The majority cites, and then conveniently ignores, cases in which we have held that PUCO orders should be reversed and remanded if they are not based upon the record or any specific finding of fact. See *Ideal Transportation Co. v.. Pub. Util. Comm. (1975), 42 Ohio St. 2d 195, 71 O.O. 2d 183, 326 N.E. 2d 861*; *Motor Service Co. v.. Pub. Util. Comm. (1974), 39 Ohio St. 2d 5, 68 O.O. 2d 3, 313 N.E. 2d 803*. In the case *sub judice*, the PUCO did not base its order on the facts in the record. The PUCO merely concluded that there was a lack of available information on which to base a distribution of the local surplus. Essentially, the PUCO *assumed* that the local and long distance companies contributed equally to the pool, and its order provides that the pool surplus should therefore be distributed pro-rata. Thus, the order is unlawful because it violates *R.C. 4903.09*. A hearing should have been held to resolve the conflicting views of the parties involved in this issue and to enable [***27] the PUCO to gather information on which to base a more equitable distribution of the pool surplus.

Again, I must express my disillusionment with the manner in which the majority reaches its conclusion to affirm the PUCO order. This court is under a statutory duty to determine if a PUCO order is unlawful or unreasonable. Simply deferring to the decisions of the PUCO, in my view, is an evasion of the responsibility placed upon this court pursuant to *R.C. 4903.13*.

Based upon the foregoing, I would reverse and remand this case for further proceedings.

LEXSEE 111 OHIO ST. 3D 300

OHIO CONSUMERS' COUNSEL, APPELLANT, v. PUBLIC UTILITIES COMMISSION OF OHIO ET AL., APPELLEES.

Nos. 2005-0518 and 2005-0946

SUPREME COURT OF OHIO

111 Ohio St. 3d 300; 2006 Ohio 5789; 856 N.E.2d 213; 2006 Ohio LEXIS 3263

April 25, 2006, Submitted
November 22, 2006, Decided

PRIOR HISTORY: APPEAL from the Public Utilities Commission of Ohio, Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, and 03-2080-EL-ATA.
Consumers' Counsel v. PUC, 106 Ohio St. 3d 1529, 2005 Ohio 5146, 835 N.E.2d 379, 2005 Ohio LEXIS 2118 (2005)

DISPOSITION: Orders affirmed in part, and reversed in part, and cause remanded.

HEADNOTES

Electric utilities -- Restructuring -- Retail market competition -- Rate-stabilization plan -- Inclusion of alternative proposal in motion for rehearing did not require separate new rate application -- Commission violated R.C. 4903.09 by approving certain charges on rehearing and modifying its previous order without record support or statement of reasons -- Competitive bidding process in plan satisfies R.C. 4928.14(B) and Ohio Adm.Code 4901:1-35 -- Commission erred in denying discovery of side agreements made by parties to stipulated rate-stabilization plan.

COUNSEL: Janine L. Migden-Ostrander, Ohio Consumers' Counsel, and Jeffrey L. Small and Ann M. Hotz, Assistant Consumers' Counsel, for appellant.

Jim Petro, Attorney General, Duane W. Luckey, Senior Deputy Attorney General, and Thomas W. McNamee and Werner L. Margard III, Assistant Attorneys General, for appellee Public Utilities Commission of Ohio.

Paul A. Colbert, Rocco O. D'Ascenzo, James B. Gainer, and Kate E. Moriarty, for intervening appellee Cincinnati Gas & Electric Company.

McNees Wallace & Nurick L.L.C., Samuel C. Randazzo, Daniel J. Neilsen, and Lisa G. McAlister, for intervening appellee Industrial Energy Users-Ohio.

JUDGES: PFEIFER, J. MOYER, C.J., RESNICK, LUNDBERG STRATTON, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.

OPINION BY: PFEIFER

OPINION

[*301] [***218] **PFEIFER, J.**

Background

[**P1] This is an appeal as of right by appellant, Ohio Consumers' Counsel ("OCC"), from orders of the Public Utilities Commission of Ohio ("commission" or "PUCO") in case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, and 03-2080-EL-ATA. Cincinnati Gas & Electric Company ("CG & E") was the applicant in all four cases, and OCC and Industrial Energy Users-Ohio ("IEU-O") were intervening parties. CG & E and IEU-O are intervening appellees in this appeal.

[**P2] Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962 ("S.B. 3") restructured Ohio's electric-utility industry to increase retail competition in the generation component of electric service. S.B. 3 required each Ohio electric utility to file a transition plan with the commission that included a [***219] rate-unbundling plan providing for separation of the generation, transmission, and distribution components of electric service. See *R.C. 4928.31*. S.B. 3 provided for a transition period, termed the "market development period," during which an electric utility's rates were subject to regulatory requirements. The maximum transition period permitted by statute was five years, ending December 31, 2005. *R.C. 4928.01(A)(17)* and *(29)* and *4928.40*.

[**P3] On August 31, 2000, the commission approved CG & E's transition plan. *In re Application of Cincinnati Gas & Electric Company for Approval of its Electric Transition Plan, etc., case Nos. 99-1658-EL-ETP et seq., 2000 Ohio PUC LEXIS 814* The order provided for a market development period ending no earlier than December 31, 2005, for residential customers. The market development period for nonresidential customers was to end when 20 percent of the load of each such class switched the purchase of its generation supply, but no later than December 31, 2005, the maximum transition period permitted by statute. See *R.C. 4928.40(B)(2)*.

[*302] [**P4] On January 10, 2003, CG & E filed an application to modify its nonresidential generation rates to provide for market-based-standard-service-offer pricing and to establish an alternative competitive-bid process after its market development period ended. *In re Application of Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing, etc.,* case No. 03-93-EL-ATA. Numerous parties intervened in that case, including OCC and IEU-O. The commission consolidated that case with other related CG & E applications, case Nos. 03-2079-EL-AAM, 03-2081-EL-AAM, and 03-2080-EL-ATA (collectively, the "rate-stabilization-plan cases").

[**P5] On December 9, 2003, the commission advised CG & E to file a "rate stabilization plan" as part of the proceedings because the competitive retail market for electric generation had not fully developed in the CG & E territory. On April 22, 2004, a public hearing was held in Cincinnati. An evidentiary hearing commenced on May 17, 2004, but was adjourned because of ongoing settlement discussions. On May 19, 2004, CG & E presented a stipulation it had reached with several, but not all, of the parties to the proceedings that, if approved, would resolve all of the issues in the rate-stabilization-plan cases. The parties to the stipulation included, among others, CG & E, the commission staff, and IEU-O. OCC opposed the stipulation.

[**P6] On May 20, 2004, hearings resumed. OCC made an oral motion to compel discovery from CG & E relating to alleged side agreements among CG & E and its affiliates with other parties to the stipulation. A PUCO attorney examiner denied OCC's discovery motion.

[**P7] CG & E and others presented testimony in support of the stipulation, and OCC and others presented evidence opposing the stipulation. The hearings concluded on June 1, 2004. Posthearing briefs and letters from consumers were filed.

[**P8] On September 29, 2004, the commission issued its opinion and order approving the stipulation with modifications. The order required, among other things, commission approval for changes in certain cost components, more avoidability of certain charges by shopping customers, and full corporate separation by CG & E if it failed to implement the stipulation as modified. The commission also affirmed the attorney examiner's denial of OCC's discovery motion.

[**P9] [***220] Several parties, including CG & E and OCC, filed applications for rehearing. In its application for rehearing, CG & E accepted some of the commission's modifications and proposed others. The commission, after reviewing CG & E's alternative proposal, found that with certain clarifications and [*303] revisions, CG & E's modifications were meritorious. OCC's application for rehearing was denied.

[**P10] OCC and others filed applications for a second rehearing. The commission denied OCC's second rehearing application on January 19, 2005. The commission issued a third rehearing entry on April 13, 2005. The commission's second and third rehearing entries further refined CG & E's rate-stabilization plan.

[**P11] Following the commission's second rehearing entry, OCC filed its notice of appeal in case No. 2005-0518. Following the commission's third rehearing entry, OCC filed a notice of appeal, case No. 2005-0946. We consolidated these appeals because identical issues are raised in each case.

Standard of Review

[**P12] "*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 P 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 P 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, 1997 Ohio 196, 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.*

Proposition of Law No. 1

Procedural Integrity of Alternative Proposal

[**P13] In proposition of law No. 1, OCC contends that the commission failed to meet certain procedural requirements when it granted, in part, CG & E's first application for rehearing. On September 29, 2004, the commission issued the original order approving, with a number of modifications, the stipulation regarding CG & E's rate-stabilization plan. CG & E filed an application for rehearing [*304] opposing some of the modifications. In its application, CG & E made an "alternative proposal," which OCC refers to as the "new proposal," [1] suggesting additional modifications of the commission's order. The commission found that CG & E's proposed modifications, with certain clarifications and revisions, were meritorious and approved them.

1 We will refer to CG & E's proposed modifications as the "alternative proposal."

[**P14] [***221] OCC maintains that CG & E's first application for rehearing did not set forth specific grounds challenging the reasonableness or lawfulness of the commission's order as *R.C. 4903.10* requires. Rather, OCC claims that CG & E's alternative proposal was an application filled with "new charges, terms, and conditions" and argues that it was improper as a matter of posthearing pleading. OCC contends that the commission was required to adhere to the statutory procedural protections set forth in *R.C. 4928.14(A), 4928.15(A),* [2] *4909.18*, and *4909.19* before it approved CG & E's alternative proposal.

2 *R.C. 4928.15(A)* is not relevant to this matter, as it concerns noncompetitive retail electric distribution service as opposed to competitive retail electric generation service.

[**P15] We conclude that the commission did not fail to adhere to any required procedural protections. The commission treated CG & E's alternative proposal as an assignment of error on rehearing and not as a new or separate proposal. The commission determined that subject to certain clarifications and modifications, CG & E's first assignment of error, i.e., the alternative proposal, should be sustained. The commission merely modified its opinion and order just as it might do based on any other party's arguments on rehearing. Under *R.C. 4903.10(B)*, if the commission determines upon rehearing that its "original order or any part thereof is in any respect unjust or unwarranted, or should be changed," it can abrogate or modify the order. The commission also has discretion under this section to decide whether a subsequent hearing is necessary to take additional evidence.

[**P16] OCC characterizes CG & E's alternative proposal as an application for a rate increase and claims 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*. We conclude, however, that CG & E's alternative proposal was not an application for a rate increase as contemplated by *R.C. 4909.18*. That statute provides:

[**P17] "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, * * * shall file a written application with the public utilities commission."

[*305] [**P18] The commission has discretion under *R.C. 4909.18* in determining whether an application seeks a rate increase. *R.C. 4909.18* applies to increases of an "existing" rate charged by a utility. Here, although the commission's order approved CG & E's rate as a market-based standard service offer, that rate had not yet been implemented because several parties filed timely applications for rehearing. Even if the commission's approval of CG & E's alternative proposal amounted to a rate increase over the market-based standard service offer approved in its original order, it was not an increase of an existing rate. The 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.

[**P19] Moreover, OCC seemingly ignores the fact that the commission provided notice and held extensive hearings in this matter. CG & E initiated this matter under *R.C. 4928.14(A)*, which requires that a market-based standard service offer "shall be filed with the public utilities commission under *section 4909.18 of the Revised Code*." A hearing is required in two instances: (1) when an application for an increase in an existing rate is filed or (2) if [***222] the application is not for an increase in an existing rate, if the proposals in the application appear "unjust or unreasonable." *R.C. 4909.18* and *4909.19*. The commission provided notice and held hearings using the "unjust and unreasonable" standard when it considered CG & E's proposed rate-stabilization-plan stipulation. OCC has not shown that the commission abused its discretion by failing to hold additional hearings on CG & E's alternative proposal.

[**P20] Finally, OCC not only challenges the commission's handling of this matter on statutory procedural grounds, but claims that a lack of notice and hearing constituted violations of due process as well. We

have repeatedly held that there is no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists. See *Consumers' Counsel v. Pub. Util. Comm. (1994), 70 Ohio St.3d 244, 248-249, 1994 Ohio 469, 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.*

[**P21] We conclude that, in relation to CG & E's alternative proposal, the commission did not violate any of the procedural requirements set forth in *R.C. 4928.14(A)*, *4909.18*, or *4909.19*, or any due process guarantees.

Justification for Modifications on Rehearing

[**P22] OCC also contends in proposition of law No. 1 that the commission failed to comply with the requirements of *R.C. 4903.09* because it approved CG & E's alternative proposal without any evidentiary support in the record and without setting forth the reasons supporting that decision. *R.C. 4903.09* provides that [*306] "[i]n all contested cases heard by the public utilities commission * * * the commission shall file * * * findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

[**P23] We have held that "[i]n order to meet the requirements of *R.C. 4903.09*, therefore, the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *MCI Telecommunications Corp. v. Pub. Util. Comm. (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337.* Although strict compliance with the terms of *R.C. 4903.09* is not required, '"[a] legion of cases establish[es] that the commission abuses its discretion if it renders an opinion on an issue without record support.' " *Tongren v. Pub. Util. Comm. (1999), 85 Ohio St.3d 87, 90, 1999 Ohio 206, 706 N.E.2d 1255*, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm. (1996), 76 Ohio St.3d 163, 166, 1996 Ohio 296, 666 N.E.2d 1372.*

[**P24] Under the stipulation approved by the commission's original order, CG & E's market-based standard service offer consisted of two components: the price-to-compare component and the provider-of-last-resort ("POLR") component. The price-to-compare component represents that portion of the market-based standard service offer that consumers switching to a competitive retail electric service provider may avoid paying to CG & E. The POLR component, which the commission refers to as the "unavoidable" or "nonbypassable" component, represents charges incurred by CG & E for risks associated with its statutory obligation under *R.C. 4928.14(C)* as the default provider, or provider of last resort, for customers who opt for another provider who then fails to provide service. See *Constellation New Energy, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 39, fn. 5.*

[**P25] [***223] These components are themselves made up of separate components. The POLR component comprises a rate-stabilization-charge component and an annually [***224] adjusted component. The annually adjusted component was designed to maintain adequate electric capacity reserves in excess of expected demand and to recover costs associated with homeland security, taxes, environmental compliance, and emissions allowances. Neither CG & E nor the commission identified the purpose of the rate-stabilization charge. Nevertheless, the charge is self-defining, and the signatory parties agreed to it.

[**P26] In its first application for rehearing, CG & E proposed modifying the stipulation approved by the commission's order. Under CG & E's proposal, the POLR component would include four components. In addition to the rate-stabilization charge and the annually adjusted component, the POLR component would also include 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 [*307] to serve market-based standard service offer consumers." 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 consumers." CG & E suggested other changes as well, and after reviewing these suggestions, the commission found that with certain clarifications and revisions of its own, CG & E's proposed modifications were meritorious.

[**P27] OCC contends that the commission's modifications to its order were not simple adjustments made upon further consideration on rehearing. OCC claims that the commission violated *R.C. 4903.09* when it approved on rehearing certain charges and made other modifications to its order without record evidence and without setting forth any basis for the decision.

[**P28] We agree. The portion of the commission's first rehearing entry approving CG & E's alternative proposal is devoid of evidentiary support. There are no citations to the record supporting the commission's modifications on rehearing. In addition, the commission did not sufficiently set forth its reasoning for the changes on rehearing. Instead, it merely asserted, without further justification, that the modifications would provide rate

certainty for consumers, ensure financial stability for CG & E, and further encourage the development of competitive markets.

[**P29] CG & E maintains that the evidence presented to the commission in the May hearings supported the commission's modifications on rehearing because CG & E's alternative proposal contained the same components as the litigated stipulation. According to CG & E, the stipulation, as modified by the order, and the alternative proposal, as modified by the commission's first rehearing entry, contained the same price-to-compare and POLR components. CG & E's argument ignores the commission's approval of the infrastructure-maintenance fund as a component of the POLR without reference to record evidence and without explanation. In fact, aside from defining the purpose and amount of recovery allowed to CG & E from the infrastructure-maintenance fund, the commission offered no factual basis or other justification for approving this charge.

[**P30] CG & E claims that the infrastructure-maintenance fund, together with the system reliability tracker, represented the reserve capacity charge previously set forth in the stipulation as part of the annually adjusted component. Although this may be true, we have found nothing in the commission's first rehearing entry to support that assertion. Under the commission's rehearing entry, CG & E's costs for maintaining adequate reserve capacity are now covered by the system-reliability tracker. The commission did not mention the infrastructure-maintenance fund -- which is intended to compensate CG & E for committing its generation capacity to serve consumers who choose the market-based standard [*308] service offer through 2008 -- in the context of maintaining adequate reserve capacity requirements. In that respect, the infrastructure-maintenance fund may be some type of surcharge and not a cost component. Without explanation from the commission, however, we cannot know for certain. In any event, even if we accepted CG & E's claim as true, that would not excuse the commission from its statutory obligation to justify its orders.

[**P31] We are also troubled that the commission's first rehearing entry set the "baseline" for determining certain cost components in the alternative proposal -- the system-reliability tracker, annually adjusted component, and the "fuel and economy purchased power" component -- without any record support and without any explanation. The commission did clarify that it would review the reasonableness of expenditures in these categories by requiring CG & E to establish levels for these cost components for subsequent years. Nevertheless, the commission allowed CG & E to preset the amount of the annually adjusted component for 2005 and 2006 without record evidence or explanation. It is impossible to make any determination about the reasonableness of these components without evidence and explanation from the commission.

[**P32] CG & E also defends the commission's approval of its alternative proposal by asserting that it merely resulted in an increased price to compare -- the price shopping consumers may avoid paying to CG & E -- thereby enhancing the development of the competitive market, and set the various unavoidable POLR charges at much lower levels. The commission did find that the modifications on rehearing would increase the price to compare for all shoppers and would further increase the price to compare by making the annually adjusted component permanently avoidable for an increased percentage of consumers. [3] But the commission did not make any finding on rehearing that the POLR charges were lower.

3 The commission stated that the percentage of consumers who could avoid the annually adjusted component "was increased by the [September 29, 2004] opinion and order from 25 percent to 50 percent." It appears, however, that the commission's order altered only the rate stabilization charge and not the annually adjusted component.

[**P33] We concede that moving the emission allowance from the annually adjusted component to the price-to-compare component, as the commission's first rehearing entry did, would seemingly lower the POLR, because the annually adjusted component is a component of the POLR. In addition, increasing the percentage of consumers who could avoid paying the annually adjusted component would apparently lower the POLR because, under the alternative proposal, the annually adjusted component becomes an avoidable component of the price to compare for that percentage of shoppers who switch to an alternate generation provider. But it is not clear whether other modifications, such as the introduction [*309] of the unavoidable infrastructure-maintenance-fund charge, the system-reliability-tracker charge (which may or may not be avoidable in subsequent [***225] years), and presetting the annually-adjusted-component charge for 2005 and 2006, would increase or decrease the nonbypassable POLR charge.

[**P34] We have held that the commission may modify orders as long as it justifies those changes. *Consumers' Counsel v. Pub. Util. Comm. (1984), 10 Ohio St.3d 49, 50-51, 10 Ohio B. 312, 461 N.E.2d 303.* "On the other hand, PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *MCI Telecommunications, 32 Ohio St.3d at 312, 513 N.E.2d 337.*

[**P35] In this matter, the commission made several modifications on rehearing without any reference to record evidence and without thoroughly explaining its reasons. The commission approved the infrastructure-maintenance-fund charge without evidentiary support or justification. The commission approved other modifications without citing evidence in the record and with very little explanation. The commission cannot justify the modifications made on rehearing merely by stating that those changes benefit consumers and the utility and promote competitive markets. The commission's reasoning and the factual basis supporting the modifications on rehearing must be discernible from its orders.

[**P36] For these reasons, we hold that the commission failed to comply with the requirements of *R.C. 4903.09* when it modified its September 29 order on rehearing. Accordingly, we remand this matter to the commission for further clarification of all modifications made in the first rehearing entry to the order approving the stipulation. On remand, the commission is required to thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings.

Proposition of Law No. 2

[**P37] In proposition of law No. 2, OCC challenges the commission's factual finding that CG & E offered a market-based standard service offer as required by *R.C. 4928.14(A)* and *Ohio Adm.Code 4901:1-35-01*. OCC's argument focuses on the commission's order that approved the stipulation and the modifications to that order in the first rehearing entry.

Order Approving CG & E's Market-Based Standard Service Offer

[**P38] *R.C. 4928.14(A)* provides that "[a]fter its market development period, an electric distribution utility in this state shall provide customers, 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."

[*310] [**P39] *Ohio Adm.Code 4901:1-35-02(C)* provides that an electric distribution utility "may propose a plan for a standard service offer * * * that varies from these rules where there is substantial support from a number of interested stakeholders."

[**P40] CG & E and other parties signed a stipulation that proposed a rate-stabilization plan that would govern CG & E's generation rates following the end of the market development period. CG & E's rate-stabilization plan provided for a market-based standard service offer made up of two components: (1) a price-to-compare component and (2) the POLR component.

[**P41] In making its original determination that CG & E's standard service offer was market based, the commission focused primarily on the price-to-compare component of CG & E's standard service offer. The price-to-compare component [***226] represents that portion of the standard service offer that consumers switching to a competitive retail electric service provider can avoid paying to CG & E. The commission considered testimony comparing the price to compare under the stipulation to three other rates to determine whether the price to compare was consistent with other market prices. CG & E witness Judah L. Rose compared the stipulated price to compare with (1) the rate that CG & E offered with its initial application in this proceeding, along with various adjustments to account for market conditions, (2) generation rates offered by other Ohio electric distribution utilities, and (3) the actual rates at which some competitive retail electric providers have contracted to provide retail service.

[**P42] After considering data and arguments from OCC and others attempting to refute CG & E's evidence, the commission found that CG & E's standard service offer was a market-based rate. The commission stated that (1) *R.C. 4928.14* allowed it flexibility in approving methods for determining market-based rates for standard service offers, (2) the stipulation was negotiated among five suppliers and other organizations representing various categories of consumers, from low-income residential consumers to large industrial users, (3) the stipulation allowed for modifications to reflect changes in certain costs, and (4) revisions to the stipulation would allow the commission to monitor prices and confirm that prices will remain market based over time.

[**P43] The burden is on OCC to show that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the evidence. *AK Steel Corp. v. Pub. Util. Comm. (2002), 95 Ohio St.3d 81, 86, 2002 Ohio 1735, 765 N.E.2d 862*. OCC has failed to show that the commission's finding was unsupported by the evidence so as to be unlawful or unreasonable. See *R.C. 4903.13*.

[**P44] We hold that the commission's finding that CG & E's standard service offer was market based is supported by sufficient probative evidence. As already noted, CG & E's standard service offer was made up of two components: the [*311] price-to-compare and the POLR. The commission analyzed testimony about the price to compare from CG & E witness Rose and considered the objections and evidence in opposition to his testimony. 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 P23.* OCC has offered no evidence or argument to refute the commission's decision that CG & E has provided a "comparable and nondiscriminatory" rate under *R.C. 4928.14(A).*

Modifications on Rehearing to Market-Based Standard Service Offer

[**P45] OCC claims that the commission can no longer rely on the fact that the stipulation was negotiated among several parties to determine that the standard service offer was market based, because the modifications approved on rehearing changed the standard service offer. It is true, as OCC claims, that CG & E's alternative proposal on rehearing was not presented in the form of a stipulated agreement as was CG & E's rate-stabilization plan. We do not consider this fact, standing alone, to be fatal to the commission's finding on rehearing that CG & E's standard service offer remained market based.

[**P46] First, the fact that CG & E's rate-stabilization plan resulted from a stipulation [***227] negotiated among several competitors in retail electric service and various categories of consumers was not the sole criterion relied on by the commission in finding that the standard service offer was market based. Second, the stipulation included a provision that allowed any signatory party to withdraw and void the rate-stabilization plan should the commission reject or modify any part of the stipulation. None of the signatory parties exercised its option to void the agreement despite significant modifications made by the commission to the original stipulation.

[**P47] OCC also claims that the standard service offer under CG & E's alternative proposal is not a market-based rate under *R.C. 4928.14(A)* any more than was the rate approved by the commission under the stipulation. The commission's modifications on rehearing to the price to compare, however, appear to have altered that component in a manner that would promote competition. For example, the commission modified its order to increase the price to compare for all shoppers by moving the cost-of-emissions allowances from the POLR component to the price-to-compare component. It further increased the price to compare by making the annually adjusted component permanently avoidable for a percentage of each class of consumers. The commission found that increasing the price to compare would encourage further development of competitive markets.

[*312] [**P48] We have 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." *Tongren, 85 Ohio St.3d at 92, 706 N.E.2d 1255*; *Myers v. Pub. Util. Comm. (1992), 64 Ohio St.3d 299, 302, 1992 Ohio 135, 595 N.E.2d 873.* OCC has not demonstrated harm or prejudice with respect to the commission's changes on rehearing to the price-to-compare component. Accordingly, we reject OCC's second proposition of law.

Proposition of Law No. 3

[**P49] In proposition of law No. 3, OCC claims that CG & E's rate-stabilization plan does not provide for a competitive bidding process as required by *R.C. 4928.14(B)* and *Ohio Adm.Code 4901:1-35-01.* OCC claims that the law requires CG & E to offer customers the option to purchase power at a competitively bid rate and that CG & E's rate-stabilization plan has provided for a competitive bid only as a "test."

[**P50] *R.C. 4928.14(B)* provides that after the 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." This section also provides that "[t]he 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."

[**P51] OCC concedes that *R.C. 4928.14(B)* allows utilities to avoid providing a competitively bid rate if there are "other means to accomplish generally the same option" but contends that CG & E's rate-stabilization plan does not comply. The commission found, however, that CG & E's plan offers "a reasonable alternative to a more traditional competitive bidding process, provides for a reasonable means of customer participation through the various options that are open to customers under the [plan], and fulfills the statutory requirements for a competitive bidding process."

[**P52] [***228] In lieu of a competitively bid price, CG & E's rate-stabilization plan utilized the price to compare -- the price shopping consumers may avoid paying to CG & E -- to evaluate the market price for CG & E's service area. The plan allows the commission at any time to implement a competitive bidding process to test CG & E's price to compare against the market price. If the price to compare is significantly different from the test bid price, either the commission or CG & E may begin discussions with all parties to continue, amend, or terminate the rate-stabilization plan.

[*313] [**P53] We approved a somewhat similar alternative to the competitive-bid process in *Constella-*

tion, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 44-49. The stipulation in *Constellation* provided for "ongoing Commission review of market-based rates, through a competitive bidding process, if necessary" and provided that "if market-based rates do not reasonably reflect the rates established by the Stipulation, then the Commission may terminate the [rate stabilization plan] and trigger a competitive bidding process * * *." *Id. at P 48.*

[**P54] Like the plan in *Constellation,* CG & E's rate-stabilization plan, as approved by the commission's order and as modified on rehearing, provides customers with a reasonable means of customer participation as *R.C. 4928.14(B)* requires. Various incentives were provided to consumers in the form of shopping credits. [4] Moreover, consumers could bypass certain charges, such as the rate-stabilization charge, the annually adjusted component, and the system-reliability tracker.

4 A "shopping credit" is an incentive to consumers to obtain competitive retail electric generation service from a provider other than an incumbent electric distribution utility. *Constellation New Energy, Inc. v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 30.*

[**P55] OCC also claims that the commission erred in not following its own rules regarding the competitive bidding process. See *Ohio Adm.Code Chapter 4901:1-35-01. Ohio Adm.Code 4901:1-35-02(B)* provides that the commission may waive the requirements of the chapter for good cause shown or upon its own motion. *Ohio Adm.Code 4901:1-35-02(C)* allows electric distribution utilities to propose plans for a "competitive bidding process that varies from these rules where there is substantial support from a number of interested stakeholders."

[**P56] We conclude that the commission's approval of CG & E's alternative to the competitive bidding process was reasonable and lawful. The commission found that CG & E's price to compare, as part of the standard service offer, was market based, and OCC has offered no evidence to contradict that finding. Various customer groups were parties to the stipulation and approved the price to compare and the method by which the price to compare would be tested to ensure that it remains market based. CG & E's rate-stabilization plan provides for a reasonable means of customer participation. Finally, there appears to be significant competition in CG & E's service area through the presence of five competitive electric retail service providers. For these reasons, we reject OCC's third proposition of law.

Proposition of Law No. 4

[**P57] In the fourth proposition of law, OCC contends that the commission's order and first entry on rehearing approving CG & E's rate-stabilization plan permit discriminatory treatment of customers in violation of *R.C. 4905.32 through 4905.35.* [*314] OCC argues that the commission's [***229] decision to allow the first 25 percent of switched residential load customers to avoid paying the rate-stabilization charge of the nonbypassable POLR component is discriminatory because consumers who are not in the first 25 percent cannot avoid the charge. OCC also alleges that the rate-stabilization plan is discriminatory because it allows residential customers who have already switched to a competitor when the plan goes into effect to avoid the rate-stabilization charge automatically.

[**P58] OCC relies on *R.C. 4905.32, 4905.33, 4905.34* and *4905.35. R.C. 4928.05(A)(1)* provides that "[o]n and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility * * * shall not be subject to supervision and regulation * * * by the public utilities commission under [R.C.] Chapters 4901. to 4909. * * *, except * * * division (B) of 4905.33, and [R.C.] 4905.35." *R.C. 4905.33(B)* is inapplicable because OCC makes no claim under that provision that CG & E is furnishing "free service or service for less than actual cost for the purpose of destroying competition." *R.C. 4905.35(A)* provides that "[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage."

[**P59] In *AK Steel Corp., 95 Ohio St.3d 81, 2002 Ohio 1735, 765 N.E.2d 862,* we rejected arguments similar to those made by OCC here. In that case, AK Steel argued that shopping incentives in the form of shopping credits were discriminatory under *R.C. 4905.35(A)* because the credit was higher for the first 20 percent of those in each class who switch to an electric marketer. We held that "although customers who take the early initiative to shop for an alternate supplier of generation will benefit from their actions, the benefit does not amount to undue preference or discrimination, because all customers will have an equal opportunity to take advantage of the shopping incentives." *Id. at 87, 765 N.E.2d 862.*

[**P60] In this matter, OCC has offered no argument or evidence to contradict the commission's conclusion that all residential consumers will have an equal opportunity to avoid the rate-stabilization charge. Thus, based on our decision in *AK Steel,* we reject OCC's argument.

[**P61] Moreover, OCC is not asking us to eliminate this particular shopping incentive but, rather, to require the commission to allow all shoppers to avoid the rate-stabilization charge. Decisions on the level of shopping incentives, however, are within the discretion of the commission. See *Constellation, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 34.* OCC's argument in this regard is speculative; there is no way to prove that limiting the percentage of residential customers who may avoid the rate-stabilization charge to 25 percent will cut off [*315] later shopping. According to the commission, the percentage of residential consumers who are shopping has never approached the 25 percent level.

[**P62] OCC has not met its burden of showing that the provision allowing a certain percentage of residential customers who shop to avoid the rate-stabilization charge is discriminatory. Therefore, we overrule proposition of law No. 4.

Proposition of Law No. 5

[**P63] OCC maintains that the commission violated *R.C. 4909.18*, *4928.15*, and *4928.38* by approving nonbypassable charges for those customers switching to competitive retail electric service providers without requiring a rate case and without statutory authorization. OCC complains [***230] that the infrastructure-maintenance fund, system-reliability tracker, rate-stabilization charge, and annually adjusted component are anticompetitive charges and that the commission lacked statutory authorization to approve them. OCC essentially claims that these charges should be avoidable by shopping customers.

[**P64] *R.C. 4928.14(A)* requires an electric distribution utility, after its market development period, to provide consumers 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."

[**P65] *R.C. 4928.14(C)* provides that "[a]fter 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."

[**P66] Under the stipulation providing for the rate-stabilization plan, the signatory parties agreed upon an unavoidable POLR charge to compensate CG & E for its statutory obligation to provide last-resort services to consumers in its area. The POLR charge comprised two components: the rate-stabilization charge and the annually adjusted component. Under CG & E's alternative proposal, the POLR charge was modified to include two additional components: an infrastructure-maintenance fund and the system-reliability tracker.

[**P67] In its order, the commission held that the annually adjusted component did not create a subsidy by shopping customers for standard-service-offer customers because CG & E has expenses related to its statutory obligation to provide POLR service, which the annually adjusted component was intended to offset. Similarly, the commission noted on rehearing that the system-reliability tracker was designed to allow CG & E to recover expenses related to its POLR obligation. The commission never specifically addressed the rate-stabilization [*316] charge or the infrastructure-maintenance fund, but the same reasoning would apply because these are also components of the POLR charge.

[**P68] We conclude that the commission's decision in this regard was not unlawful. Under *R.C. 4928.14(A)* and *(C)*, an electric distribution utility, such as CG & E, 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. The standard service offer would apply to customers who choose not to shop for an alternative supplier and to those who shop and return to CG & E for electric generation services. We have traditionally deferred to the judgment of the commission in situations involving the commission's special expertise. See *AT & T Communications of Ohio, Inc. v. Pub. Util. Comm. (1990), 51 Ohio St.3d 150, 154, 555 N.E.2d 288.* Indeed, we recently agreed with the commission's determination that similar charges were legally sustainable and could reasonably be applied to all customers. See *Constellation, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 36-40.*

[**P69] OCC also claims that nothing in the record justifies the level of the nonbypassable charges and that the commission failed to comply with procedural protections in *R.C. 4909.18* and *4928.15* for reviewing noncompetitive services. [***231] We addressed these arguments in our discussion of the first proposition of law. Moreover, the commission rejected OCC's argument that the annually adjusted component, the infrastructure-maintenance fund, and the system-reliability tracker were noncompetitive services. Instead, the commission found that these components were part of CG & E's competitive electric generation charges and were not charges on distribution or transmission services under *R.C. 4928.15.* "Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility. " *Weiss v. Pub. Util. Comm.*

(2000), 90 Ohio St.3d 15, 17-18, 2000 Ohio 5, 734 N.E.2d 775, citing *Collinsworth v. W. Elec. Co. (1992), 63 Ohio St.3d 268, 272, 586 N.E.2d 1071*. For these reasons, we overrule proposition of law No. 5.

Proposition of Law No. 6

[**P70] OCC contends that the commission approved provisions of the rate-stabilization plan and alternative proposal that allow CG & E to improperly avoid its corporate separation obligations in violation of *R.C. 4928.17*.

[**P71] Under its 2000 electric-transition-plan opinion, the commission approved CG & E's modified corporate separation plan, which provided for the transfer of its generating assets to an exempt wholesale generator no later than December 31, 2004. See *In re Application of CG & E for Approval of Its Electric Transition Plan, case No. 99-1658-EL-ETP, 2000 Ohio PUC LEXIS 814, *102-111 (Aug. 31, 2000)*. CG & E's [*317] rate-stabilization plan included a provision that CG & E would not be required to transfer generating assets to an electric wholesale generator by the end of 2004. The commission approved this provision, finding that it was reasonable for CG & E to retain its generating assets during the period it is committed to provide stabilized rates. According to the commission, it would be inappropriate to ask CG & E to stabilize its rates and then deny it the ability to do so. The commission, therefore, amended CG & E's corporate separation plan to allow it to retain its generating assets through 2008. Thus, the commission's approval of this provision amended CG & E's corporate separation plan as approved by the 2000 electric-transition-plan opinion.

[**P72] OCC is apparently arguing that the commission violated *R.C. 4928.17(A)* by not requiring CG & E to transfer its generating assets by December 31, 2004, as CG & E's corporate separation plan provided. The commission has discretion to approve an alternative functional corporate separation plan for an interim period upon a determination of "good cause." See *R.C. 4928.17(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*").

[**P73] OCC acknowledges the commission's authority under *R.C. 4928.17(C)* to approve a modified corporate separation [***232] plan. OCC, nevertheless, contends that the commission's discretion to approve a modified separation plan "to apply for an interim period" is not unlimited as to time. OCC complains that CG & E has already operated under a "functional separation plan" for five years under the 2000 electric-transition-plan opinion. Now CG & E has proposed to extend that plan for an additional three years under the rate-stabilization plan. According to OCC, this results in an unfair competitive advantage and illegal preference to CG & E.

[**P74] OCC has failed to offer any legal authority or evidentiary proof to support its claims. Under *R.C. 4928.17(C)*, the commission's discretion is limited only by the "good cause" standard and the requirement that the commission find that "such alternative plan will provide for ongoing compliance with the policy [*318] specified in" *R.C. 4928.02*. OCC has not supported its claims of competitive disadvantage and undue preference with any testimony or other evidence in the record. The commission's "good cause" determination under *R.C. 4928.17(C)* was a factual determination, and OCC has offered no evidence to show that the commission's finding is against the manifest weight of the evidence or is clearly unsupported by the record. See *AK Steel, 95 Ohio St.3d at 85-86, 765 N.E.2d 862*.

[**P75] OCC claims that the doctrine of collateral estoppel bars relitigation of CG & E's electric-transition-plan case from 2000. According to OCC, the provision requiring CG & E to divest its generating assets by December 31, 2004, cannot be modified because the issue of corporate separation was already determined in the earlier case. OCC waived this issue by not setting forth this specific ground in its first application for rehearing. See *R.C. 4903.10*; *Consumers' Counsel v. Pub. Util. Comm., 70 Ohio St.3d at 247, 638 N.E.2d 550*. Even if it had preserved this issue, OCC's collateral-estoppel claim is without merit. Collateral estoppel precludes the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. See *Consumers' Counsel v. Pub. Util. Comm. (1985), 16 Ohio St.3d 9, 10, 16 Ohio B. 361, 475 N.E.2d 782*. The doctrine is inapplicable here because there was no relitigation in this matter of a point of law or fact that was passed upon by the commission in the 2000 electric-transition-plan case. The corporate separation issue addressed in that case was whether CG & E could delay transferring its generating assets from December 31, 2000, to the end of 2004. The issue in this matter -- whether CG & E should be allowed

to amend its corporate separation plan to allow it to retain generating assets through 2008 -- was not decided in the electric-transition-plan case. These cases involved different pricing plans, different time periods, i.e., the market development period and the succeeding period, and different reasons for approving a modified corporate separation plan.

[**P76] OCC has not met its burden of showing that the commission's order in this instance was unlawful or unreasonable. *R.C. 4928.17(C)* expressly grants the commission discretion to approve alternative corporate separation plans. We overrule OCC's sixth proposition of law.

Proposition of Law No. 7

[**P77] OCC claims that the commission erred when it did not permit the discovery of undisclosed agreements between CG & E and the signatory parties that were not made part of the stipulation. OCC contends that the commission violated *R.C. 4903.082* and *Ohio Adm.Code 4901-1-16* when it denied its discovery request.

[*319] [**P78] [***233] In May 2004, OCC requested production of documents from CG & E for all agreements entered into on or after January 26, 2004, between CG & E and the parties to the matters before the commission. At a hearing, after it became clear that CG & E would not comply with the request for documents, OCC orally moved for an order to compel. The examiner denied OCC's motion to compel, citing commission precedent that the existence of side agreements was not relevant to the commission's determination as to the reasonableness of the proposed stipulation and because, to the extent that side agreements involved settlement discussions, they were privileged. The commission upheld the examiner's ruling on the same basis.

[**P79] OCC argues that the commission cannot make a reasonableness determination regarding the stipulation without knowing whether side agreements existed among the stipulating parties and the terms of those agreements. The reasonableness test considers whether the settlement was a product of serious bargaining among capable, knowledgeable parties, whether the settlement benefits ratepayers and the public interest, and whether the settlement package violates any important regulatory principle or practice. *Constellation, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 8.*

[**P80] In *Constellation,* we rejected exactly this argument as applied to the second and third prongs of the reasonableness test. *Id. at P 10-15.* In that case, we upheld the commission's decision that alleged side agreements were not discoverable because the information sought by discovery -- information related to the negotiation of the proposed stipulation -- was privileged. We further agreed with the commission that the information sought was not relevant to whether the stipulation satisfied the second and third criteria for testing reasonableness. *Id. at P 14-15.* Based on this reasoning, we uphold the commission's denial of OCC's discovery request to the extent that the relevance of the information sought was based on the second and third prongs of the reasonableness test. As the commission noted in *Constellation,* "no agreement among the signatory parties to the stipulation can change the terms of the stipulation. Either the terms of the stipulation are, on their face, beneficial to the ratepayers and the public or they are not. Even if there were side agreements among the signatory parties, those agreements would not change the public benefit or detriment of the stipulation." *Id. at P 14.*

[**P81] The remaining issue, which was not raised in *Constellation,* is whether the commission erred in denying discovery of side agreements requested by OCC as relevant to the first test of reasonableness: whether the settlement is a product of serious bargaining among capable, knowledgeable parties. We hold that the commission erred in this regard.

[*320] [**P82] We have "complete and independent power of review as to all questions of law" in appeals from the commission. See *Luntz Corp. v. Pub. Util. Comm. (1997), 79 Ohio St.3d 509, 512, 1997 Ohio 342, 684 N.E.2d 43. Ohio Adm.Code 4901-1-16(B)* provides that "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *R.C. 4903.082* provides that "[a]ll parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities [***234] commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable." See, also, *R.C. 4903.22.*

[**P83] The text of *Ohio Adm.Code 4901-1-16(B),* the commission's discovery rule, is similar to *Civ.R. 26(B)(1),* which governs the scope of discovery in civil cases. *Civ.R. 26(B)* has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638, 661, 1994 Ohio 324, 635 N.E.2d 331* ("The purpose of *Civ.R. 26* is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding"). See *Disciplinary Counsel v. O'Neill (1996), 75 Ohio St.3d 1479, 664*

N.E.2d 532 ("Pursuant to *Civ.R. 26(B)(1)*, a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter").

Relevancy to "Serious Bargaining" Criterion

[**P84] OCC argues that the existence of side agreements could be relevant to a determination that the stipulation was not the product of serious bargaining. OCC suggests that if CG & E and one or more of the signatory parties agreed to a side financial arrangement or some other consideration to sign the stipulation, that information would be relevant to the commission's determination of whether all parties engaged in "serious bargaining." We agree.

[**P85] The commission found that "serious bargaining did occur, among capable, knowledgeable parties" and that "[m]ultiple bargaining sessions, open to all parties, took place before the commencement of the hearings." The commission noted that testimony at the hearing indicated that all parties participated in negotiating sessions, although not all parties signed the stipulation. The existence of side agreements between CG & E and the signatory parties entered into around the time of the stipulation could be relevant to ensuring the integrity and openness of the negotiation process. Although the commission's most recent [*321] decisions have denied discovery of side agreements, in the past, the commission has allowed their disclosure based on this same reasoning. See *In re Joint Application of SBC Communications, Inc. et al. for Consent and Approval of a Change of Control,* case No. 98-1082-TP-AMT (Apr. 9, 1999) 7.

[**P86] Both the commission and intervenor IEU-O contend that the possible existence of separate, undisclosed agreements among some of the parties is irrelevant to the commission's evaluation of the reasonableness of the stipulation. They urge this court to conclude that the commission's reasonableness review is limited to the written stipulation, just, according to them, as we did in *Constellation.* Whether the stipulation was the product of serious bargaining, however, was not addressed in *Constellation* and cannot be resolved solely by reviewing the proposed stipulation. The commission cannot rely merely on the terms of the stipulation but, rather, must determine whether there exists sufficient evidence that the stipulation was the product of serious bargaining. Any such concessions or inducements apart from the terms agreed to in the stipulation might be relevant to deciding whether negotiations were fairly conducted. The existence of concessions or inducements would seem particularly relevant in the context of open settlement discussions involving multiple [***235] parties, such as those that purportedly occurred here. If there were special considerations, in the form of side agreements among the signatory parties, one or more parties may have gained an unfair advantage in the bargaining process. Therefore, we hold that the commission erred in denying discovery of this information based on lack of relevancy.

Privilege

[**P87] The commission and the intervenors also argue that recent commission precedent and this court's decision in *Constellation* support their position that side agreements are not discoverable because they are privileged. In *Constellation,* we upheld the commission's practice of denying discovery of side agreements on the commission's belief that these agreements are privileged. *Constellation, 104 Ohio St.3d 530, 2004 Ohio 6767, 820 N.E.2d 885, at P 14-15.* For the following reasons, we modify that ruling.

[**P88] *Constellation* was this court's review of a case involving an application by the Dayton Power & Light Company for an extension of its market development period. See *In re Continuation of Rate Freeze & Extension of Market Dev. Period for Dayton Power & Light Co., case No. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 (Sept. 2, 2003).* In that case, the commission cited *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc. (C.A.6, 2003), 332 F.3d 976,* as persuasive authority and held that side agreements, "being information related to the negotiation of the proposed stipulation," are privileged. In *Goodyear,* the Sixth Circuit recognized a "settlement privilege" under federal law that protects statements made in furtherance of settlement from third-party discovery. *Id. at 980-982.*

[*322] [**P89] Although federal case law such as *Goodyear* is not binding on this court with regard to interpreting the Civil Rules, it can be instructive where, as here, Ohio's rule is similar to the federal rule. See *First Bank of Marietta v. Mascrete, Inc. (1997), 79 Ohio St.3d 503, 508, 1997 Ohio 158, 684 N.E.2d 38. Fed.R.Civ.P. 26(b)(1)* and *Ohio Civ.R. 26(B)(1)* are substantially similar. We do not find *Goodyear* persuasive, however, and decline to recognize a settlement privilege applicable to Ohio discovery practice.

[**P90] The court in *Goodyear* crafted a new settlement privilege under *Fed.R.Evid. 501* that protects settlement communications from third-party discovery. *Goodyear, 332 F.3d at 980-982.* There is no broad consensus of support, in federal courts or in other states, for such a privilege. See *In re Subpoena Issued to Commodity Futures Trading Comm. (D.D.C. 2005), 370 F.Supp.2d 201, 207-210.* The Sixth Circuit appears to be the only circuit court of appeals to recognize such a

privilege. See *In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm. (C.A.D.C. 2006), 370 U.S. App. D.C. 113, 439 F.3d 740, 754* (declining to assess the merits of a privilege claim novel "in this circuit and in all but one other circuit court of appeals").

[**P91] Moreover, the settlement privilege in *Goodyear* is grounded solely in federal law. *Goodyear, 332 F.3d at 979-980. Goodyear* was a diversity case, however, and should have been governed by the controlling state privilege law. Under *Fed.R.Evid. 501*, in cases where state law supplies the rule of the decision, such as a diversity-jurisdiction matter, "the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." See *Samuelson v. Susen (C.A.3, 1978), 576 F.2d 546, 549-551*; *Home Indemn. Co. v. Lane Powell Moss & Miller (C.A.9, 1995), 43 F.3d 1322, 1328.* See, also, *Grupo Condumex, S.A. de C.V. v. SPX Corp. (N.D.Ohio 2004), 331 F.Supp.2d 623, 629, fn. 3* (stating that *Goodyear,* as a diversity [***236] case, should have applied the state law of privilege).

[**P92] Privilege under Ohio law is governed by statute or "by principles of common law as interpreted by the courts of this state in the light of reason and experience." *Evid.R. 501.* Yet the commission and intervenors have cited no Ohio statute or case law that expressly creates a "settlement privilege" pertaining to information sought at the discovery stage. Indeed, *Evid.R. 408* provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements is not always impermissible.

[**P93] Even if we were to conclude that *Goodyear* was persuasive authority, the commission misapplied its holding in this matter. The absolute privilege recognized in *Goodyear* protects against the disclosure of settlement communications, that is, statements "made during settlement talks." *Goodyear, 332 F.3d at 979.* Here, OCC is not seeking to discover the communications made during [*323] settlement negotiations but, rather, the terms of the side agreements and the agreements themselves. The Sixth Circuit stated that the settlement privilege is absolute but extends only to the underlying discussions made during settlement negotiations and not to the occurrence of settlement talks, the terms of any settlement, or the settlement agreement itself. *Id. at 981-982.* If there were side agreements, such as contracts negotiated between CG & E and the signatory parties to prevent or conclude further litigation that were not made part of the stipulation, *Goodyear* would not preclude discovery of such information.

[**P94] Accordingly, we hold that the commission abused its discretion in barring discovery of side agreements in this matter based on a federal settlement privilege. We remand this matter to the commission and order that it compel disclosure of the requested information. Upon disclosure, the commission may, if necessary, decide any issues pertaining to admissibility of that information.

Conclusion

[**P95] For the reasons explained above, we hold that the commission failed to comply with *R.C. 4903.09* by not providing record evidence and sufficient reasoning when it modified its order on rehearing and that the commission abused its discretion when it denied discovery regarding alleged side agreements. Accordingly, the commission's orders are affirmed in part and reversed in part, and this matter is remanded for further consideration consistent with this opinion.

Orders affirmed in part, and reversed in part, and cause remanded.

MOYER, C.J., RESNICK, LUNDBERG STRATTON, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JUNE 11, 2008 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 12, 2008 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE

Go to the Ohio Code Archive Directory

ORC Ann. 4928.08 (2008)

§ 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 non-competitive 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.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Aggregation of percentage of income customers for purpose of auction, RC § 4928.54.

Billing and collection agent defined, RC § 4928.01.

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

Energy emergency rules; governor may declare emergency, RC § 4935.03.

Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures, RC § 4928.16.

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

Minimum service requirements; consumer protection rules, RC § 4928.10.

Separate pricing of services; itemization on bill; repackaging and offering on bundled basis, RC § 4928.07.

OH Administrative Code

Certification of CRES providers. OAC ch. 4901:1-24.

Case Notes & OAGs

RECOVERY OF COSTS.

Commission's order allowing the utility to recoup its increased billing costs resulting from deregulation from all its customers was reasonable and lawful. Commission's order allowing the utility to recover from its customers any out-of-pocket costs resulting from a default by a CRES provider was reasonable and lawful: Ohio Consumers' Counsel v. PUC, 110 Ohio St. 3d 394, 853 N.E.2d 1153, 2006 Ohio LEXIS 2900, 2006 Ohio 4706, (2006).

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4901:1 Utilities
Chapter 4901:1-24 Certification of CRES Providers

OAC Ann. 4901:1-24-04 (2008)

4901:1-24-04. Application process.

(A) An application for certification shall be made on forms supplied by the commission. The application forms shall provide for sufficient information to enable the commission to assess an applicant's managerial, financial, and technical capability to provide the service it intends to offer and its ability to comply with commission rules or orders adopted pursuant to Chapter 4928. of the Revised Code.

(B) The applicant shall complete the appropriate application form (e.g., retail electric generation provider, aggregator/power broker, or governmental aggregator) in its entirety and supply all required attachments, affidavits, and evidence of capability specified by the form at the time an application is filed.

(1) Retail electric generation providers, power marketers shall file general, technical, managerial, and financial information as set forth in the application. This information includes but is not limited to:

(a) Ownership and organizational descriptions.

(b) Managerial experience and capabilities and prior regulatory or judicial actions.

(c) Financial capability as depicted on publicly available information, balance sheets, and credit ratings.

(d) Technical ability and experience in scheduling and providing power under contract agreements.

(2) Aggregators/power brokers shall file general, managerial, and financial information as set forth in the application. This information includes but is not limited to:

(a) Ownership and organizational descriptions.

(b) Managerial experience in providing aggregation services, financial capability as depicted on publicly available information, and applicable credit ratings.

(3) Governmental aggregators shall file general information as set forth in the application. This information includes but is not limited to:

(a) Copies of its operational plans.

(b) Descriptions of experience.

(C) An applicant for certification or certification renewal shall file a completed and notarized original application signed by a principal officer of the applicant and ten conformed copies, including all supporting attachments and affidavits, with the commission's docketing division.

(1) The date that the commission's docketing division stamps an application received shall serve as the official filing date with the commission.

(2) In accordance with rule 4901:1-24-06 of this chapter, the commission may deny without prejudice any application that is not complete or does not include the attachments, documentation, and affidavits required by the application form.

(3) In accordance with this chapter, in instances where information and/or documentation required by these rules is not available at the time of filing an application, an applicant may substitute a notarized affidavit by an officer of the

applicant stating that the applicant will file such information and/or documentation with the commission at least ten business days prior to offering or providing CRES to a customer in this state. The affidavit shall be accompanied by an explanation as to why such information is not available for inclusion with the application.

History: Eff 9-18-00; 3-1-03.

Rule promulgated under: RC 111.15.

Rule authorized by: RC 4928.06.

Rule amplifies: RC 4928.16 R.C. 119.032 review dates: 10/08/2002 and 09/30/2007.

RULES OF PRACTICE OF THE SUPREME COURT OF OHIO

(Including amendments effective January 1, 2008)

The following Rules of Practice of the Supreme Court of Ohio include all amendments adopted and effective through January 1, 2008, and apply to practice and procedure in cases before the Supreme Court of Ohio.

Most of the rules are followed by Staff Commentary. Although the Supreme Court used the Staff Commentary in its deliberations on rule amendments, the Staff Commentary has not been adopted by the Supreme Court as part of the amendments.

Appendices following the rules include prescribed forms and samples of the types of documents most commonly filed in the Supreme Court. The samples are included to illustrate to attorneys and litigants the proper form to be used for documents filed in the Supreme Court. To ensure compliance with the rules, the complete text of the relevant rules should also be reviewed before documents are submitted for filing.

Filings may be made by delivering the documents in person or by mail addressed to the Clerk at the following address:

Clerk
Supreme Court of Ohio
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431

Certain documents may be filed by facsimile transmission to the Clerk at the following number: **(614) 387-9539.** Before a document is sent by facsimile transmission, Sec. 1(B) of S.Ct.Prac.R. XIV should be consulted to determine whether it is the type of document that may be filed in that manner.

All filings must be made during the regular business hours of the Clerk's Office, which are 8:00 a.m. to 5:00 p.m. Monday through Friday, excluding holidays. The Supreme Court has adopted security procedures that apply to all visitors and persons with business before the Court. These include check-in with the State Highway Patrol, including the presentation of photo identification, and scanning of all materials brought into the Court. Persons hand delivering documents to the Clerk's Office should build in extra time for these security procedures, which must be followed before gaining access to the Clerk's Office. Documents received **in the Clerk's Office** after 5:00 p.m. will not be filed until the next business day.

The Supreme Court's Web site may be accessed to review frequently asked questions and answers about filing: www.supremecourtofohio.gov. Questions regarding the Rules of Practice or the status of cases pending before the Supreme Court may be directed to the Clerk's Office at the following phone numbers: **(614) 387-9530 or (614) 387-9531.**

Staff Commentary to Rule II
(2008 Amendments)

Section 2(A)(2)(c)

This amendment makes the title of the referenced document consistent with S.Ct.Prac.R. III, Section 4.

Sections 2(A)(4)(b) and (c)

For clarity, these amendments simply reverse the position of the two paragraphs.

Section 2(B)(2)

This amendment clarifies the types of appeals about which the section refers.

Section 2(D)(2)

This amendment clarifies the Supreme Court's practice when appellate counsel is to be appointed by a court of appeals. The appeal is not remanded; rather, the court of appeals is ordered to make the appointment.

Section 3(A)(1)

The amendment in this section emphasizes that a notice of appeal from a decision of the Board of Tax Appeals must comply with special service requirements under Rule XIV, Section 2(B)(2).

Section 6

This section has been eliminated. The section required the filing of a case information statement form at the time an appeal was perfected. While the case information statement was originally adopted to assist the Court with issues tracking, the Court found it to have limited usefulness.

RULE III. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS

Section 1. Memorandum in Support of Jurisdiction.

(A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. [See Appendix B following these rules for a sample memorandum.]

(B) A memorandum in support of jurisdiction shall contain all of the following:

(1) A table of contents, which shall include the proposition(s) of law stated in syllabus form as set forth in *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39, 213 N.E.2d 182, 184;

(2) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted;

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Peerless Network of Ohio, LLC for a Certificate of Public Convenience and Necessity to Provide Local Exchange Service and Interexchange Telecommunications Services within the State of Ohio.	)	Case No. 08-611-TP-ACE

ENTRY

The attorney examiner finds:

(1) On May 22, 2008, the applicant, Peerless Network of Ohio, LLC (Peerless) filed an application in this case seeking a certificate of public convenience and necessity to provide local exchange service in telephone exchanges identified in the application and interexchange services throughout the state of Ohio.

(2) On May 22, 2008, counsel for the applicant filed a motion for protective order by which the applicant seeks to protect the confidentiality of the financial information set forth in Exhibit D to its certification application, which has been marked confidential and filed under seal. The information for which protective treatment is sought consists of: (a) Exhibit D-1 to the application, an executive summary describing the applicant's current financial condition, liquidity, and capital resources; (b) Exhibit D-2 to the application, the applicant's current actual and pro forma income statement and balance sheet; and (c) Exhibit D-3 to the application, documentation regarding the applicant's current cash and funding sources.

(3) Peerless is privately held, rather than a publicly traded company. In its motion for a protective order, the applicant indicates that the involved financial information is not otherwise available to the applicant's competitors. Further, the applicant submits that disclosure of this information could be competitively damaging to the applicant.

(4) Under certain limited circumstances, the Commission has been willing to grant motions of telephone companies who seek to protect the confidentiality of the financial information they are

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required to submit as part of their certification applications. To date, such protection has been granted for periods of up to 18 months, where the company seeking the protective order can show that:

(a) It is privately held, or is a company that as a wholly owned subsidiary of a public traded company, does not routinely publicly report its financial status.

(b) The information for which protective status is sought represents recent historical, contemporaneous, or projected details about the operations and/or finances of the company seeking the protective order that are competitively sensitive and have never previously been made available to the general public or filed with any other public agency.

Each of the above criteria has been met in this case with respect to Exhibit D of the certification application filed by Peerless in this case. Accordingly, the motion for protective order filed by Peerless in this docket should be granted, such that, unless and until specifically ordered otherwise, public disclosure of Exhibit D to the certification application, filed under seal, shall occur for the first time on December 15, 2009, i.e., the date 18 months from the date of the issuance of this protective order. In the event that Peerless should desire to seek continued protective treatment for this information beyond this 18-month period, it must make application for such continued protection in compliance with Rule 4901-1-24(F), Ohio Administrative Code (O.A.C.).

It is, therefore,

ORDERED, That the motion for protective order filed by Peerless in this case is granted. Accordingly, unless and until specifically ordered otherwise, public disclosure of the Exhibit D the certification application filed under seal in this case shall occur for the first time on December 15, 2009, i.e., the date 18 months from the date of the issuance of this protective order. In the event that Peerless should desire to seek continued protective treatment for this information beyond this 18-month period, it must make application for such continued protection in compliance with Rule 4901-1-24(F), O.A.C. It is, further,

ORDERED, That this entry shall not be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this entry be served upon Peerless, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Daniel E. Fullin
Attorney Examiner

JRJ
;geb

Entered in the Journal
JUN 13 2008

Reneé J. Jenkins
Secretary

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Onvoy, Inc. d/b/a Onvoy Voice Services for a Certificate of Public Convenience and Necessity to Provide Local Exchange Service and Interexchange Telecommunications Services Within the State of Ohio.	)	Case No. 08-624-TP-ACE

ENTRY

The attorney examiner finds:

(1) On May 23, 2008, the applicant, Onvoy, Inc. d/b/a Onvoy Voice services (Onvoy) filed an application in this case seeking a certificate of public convenience and necessity to provide local exchange service in telephone exchanges identified in the application and interexchange services throughout the state of Ohio.

(2) On May 23, 2008, counsel for the applicant filed a motion for protective order by which the applicant seeks to protect the confidentiality of the financial information set forth in Exhibits D-2 and D-3 to its certification application, which have been marked confidential and filed under seal. The information for which protective treatment is sought consists of: (a) Exhibit D-2 to the application setting forth the applicant's most recent audited financial statements, namely its consolidated balance sheets, consolidated statements of operation, and consolidated statements of cash flow; and (b) Exhibit D-3 to the application, setting forth documentation regarding the applicant's current cash and funding sources.

(3) Onvoy is privately held, rather than a publicly traded company. In its motion for a protective order, the applicant indicates that the involved financial information is not otherwise available to the applicant's competitors. Further, the applicant submits that disclosure of this information could be competitively damaging to the applicant.

(4) Under certain limited circumstances, the Commission has been willing to grant motions of telephone companies who seek to

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protect the confidentiality of the financial information they are required to submit as part of their certification applications. To date, such protection has been granted for periods of up to 18 months, where the company seeking the protective order can show that:

(a) It is privately held, or is a company that as a wholly owned subsidiary of a public traded company, does not routinely publicly report its financial status.

(b) The information for which protective status is sought represents recent historical, contemporaneous, or projected details about the operations and/or finances of the company seeking the protective order that are competitively sensitive and have never previously been made available to the general public or filed with any other public agency.

Each of the above criteria has been met in this case with respect to Exhibits D-2 and D-3 of Onvoy's certification application in this case. Accordingly, Onvoy's motion for protective order should be granted, such that, unless and until specifically ordered otherwise, public disclosure of Exhibits D-2 and D-3 to Onvoy's certification application shall occur for the first time on December 15, 2009, i.e., the date 18 months from the date of the issuance of this protective order. In the event that Onvoy should desire to seek continued protective treatment for this information beyond this 18-month period, it must make application for such continued protection in compliance with Rule 4901-1-24(F), Ohio Administrative Code (O.A.C.).

It is, therefore,

ORDERED, That Onvoy's motion for protective order filed by Onvoy in this case is granted. Accordingly, unless and until specifically ordered otherwise, public disclosure of the Exhibits D-2 and D-3 to Onvoy's certification application shall occur for the first time on December 15, 2009, i.e., the date 18 months from the date of the issuance of this protective order. In the event that Onvoy should desire to seek continued protective treatment for this information beyond this 18-month period, it must make application for such continued protection in compliance with Rule 4901-1-24(F), O.A.C. It is, further,

ORDERED, That this entry shall not be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this entry be served upon Onvoy, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Daniel E. Fullin
Attorney Examiner

JRJ
;geb

Entered in the Journal
JUN 13 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates.	))	Case No. 07-589-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 07-590-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)))	Case No. 07-591-GA-AAM

OPINION AND ORDER

The Commission, considering the applications, testimony, the applicable law, proposed Stipulation, and other evidence of record, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

John J. Finnigan, Jr., Paul A. Colbert, and Elizabeth Watts, 139 East Fourth Street, Room 25, AT II, Cincinnati, Ohio 45201-0960, on behalf of Duke Energy Ohio, Inc.

Janine Migden-Ostrander, The Office of Ohio Consumers' Counsel, by Larry Sauer, Joseph Serio, and Michael Idzkowski, Assistant Consumers' Counsel, 10 West Broad Street, 18th Floor, Columbus, Ohio 43215-3485, on behalf of the residential consumers of Duke Energy Ohio, Inc.

David C. Rinebolt and Colleen Mooney, 231 West Lima Street, Findlay, Ohio 45840-3033, on behalf of Ohio Partners for Affordable Energy.

Bricker & Eckler LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215-4236, on behalf of the city of Cincinnati.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group and The Kroger Company.

Chester, Wilcox & Saxbe, LLP, by John W. Bentine, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of Interstate Gas Supply, Inc.

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Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 Gay State Street, P.O. Box 1008, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC and Integrys Energy Services, Inc.

Christensen, Christensen, Donchatz, Kettlewell & Owens, LLC, by Mary W. Christensen and Jason Wells, 100 East Campus View Blvd., Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

John M. Dosker, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202-1629, on behalf of Stand Energy Corporation.

Thomas R. Winters, First Assistant Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright and Thomas Lindgren, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

OPINION:

I. PROCEDURAL BACKGROUND

Duke Energy Ohio, Inc. (Duke, company) is a public utility, engaged in the distribution and sale of natural gas to approximately 424,000 customers in Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Montgomery, and Warren counties, Ohio. As a public utility and a natural gas company within the definition of Sections 4905.02 and 4905.03(A)(6), Revised Code, Duke is subject to the jurisdiction of this Commission in accordance with Sections 4905.04, 4905.05 and 4905.06, Revised Code.

On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. The Commission issued an entry on July 11, 2007, establishing a test period of January 1, 2007 through December 31, 2007 for the proposed rate increase and a date certain of March 31, 2007, as well as granting certain waivers requested by Duke.

Duke filed the application in Case No. 07-589-GA-AIR, seeking to increase its gas rates on July 18, 2007. Duke also filed separate applications for approval of an alternative rate plan (Case No. 07-590-GA-ALT) and for approval to change accounting methods (Case No. 07-591-GA-AAM). As originally filed, Duke's rate increase application sought approval for a 5.71 percent annual rate increase, an additional $34 million, over current total adjusted operating revenues. As part of the alternative rate plan application, Duke proposes to: (a) extend the term of the Accelerated Main Replacement Program (AMRP) and the associated rider (Rider AMRP) through the year 2019, (b) establish a process to recover its future investment in Duke's Utility of the Future initiative through a new rider

(Rider AU), and (c) create a new sales decoupling rider (Rider SD) to remove any disincentive for energy conservation initiatives. In the accounting application, Duke seeks approval to defer certain costs to be recovered later as a part of the AMRP expenditures and to capitalize the cost incurred for certain property relocations and replacements.

By entry issued September 5, 2007, the Commission found that Duke's application in Case No. 07-589-GA-AIR complied with the requirements of Section 4909.18, Revised Code, and Rule 4901:1-19-05, Ohio Administrative Code (O.A.C.) and accepted the application for filing as of July 18, 2007. The entry also granted Duke's waiver requests as to certain standard filing requirements and directed Duke to publish notice of the application in newspapers of general circulation in the company's service territory. Duke filed proof of such publication on February 25, 2007. To provide interested parties with an opportunity to make inquiries about the Duke applications, a technical conference was hosted by the Commission's staff on August 20, 2007.

Motions to intervene in these cases were granted to the Ohio Energy Group (OEG), the Kroger Company (Kroger), Interstate Gas Supply, Inc. (Interstate), the city of Cincinnati, the office of the Ohio Consumers' Counsel (OCC), People Working Cooperatively, Inc. (PWC), Integrys Energy Services, Inc. (Integrys), Direct Energy Services, LLC (Direct), Stand Energy Corporation (Stand), and the Ohio Partners for Affordable Energy (OPAE).

Investigations of Duke's applications were conducted and reports filed by the Commission staff and Blue Ridge Consulting Services, Inc. (Blue Ridge), an independent auditing firm. Both the report filed by staff (Staff Report, Staff Ex. 1) and financial audit report filed by Blue Ridge (financial audit report, Staff Ex. 4) were filed on December 20, 2007. Objections to the Staff Report and/or financial audit report were filed by PWC, OEG, Duke, OPAE, OCC, and, jointly, by Integrys and Direct. Motions to strike certain objections were filed by Duke and OCC. Memoranda contra the motions to strike objections were filed by Duke, Interstate, OPAE, and, jointly, by Integrys and Direct.

On January 25, 2008, a prehearing conference was held, as required by Section 4909.19, Revised Code. In accordance with Section 4903.083, Revised Code, local public hearings were held on February 25, 2008, in Cincinnati, Ohio, and on March 11, 2008, in Mason, Ohio.

A total of 27 witnesses testified at the two local hearings in Cincinnati, while four people took the stand at the Mason hearing. Two witnesses testified in favor of the rate increase, particularly as to the accelerated main replacement (AMRP) and riser replacement programs. Another witness testified that, although he was not opposed to the rate increase if Duke required additional money to maintain the gas lines, he was opposed to the extent that the increase is incorporated into the monthly customer charge as

opposed to the volumetric charge. The witness claimed that applying the increase in such a manner discourages energy efficiency and adversely affects residential customers with small homes (Cincinnati Public Hearing I, p. 20-21). The remaining witnesses at the local public hearings were opposed to the increase, asserting that their utility bills are already expensive, particularly for individuals on fixed incomes and for low income individuals and families; while others argued that increasing the customer charge, as proposed, would discourage conservation.

The evidentiary hearing was called on February 26, 2008, and continued, to allow the parties additional time to negotiate a settlement of the issues in these proceedings. On February 28, 2008, the parties filed a Joint Stipulation and Recommendation (Stipulation, Joint Ex. 1) resolving all the issues except the adoption of a new residential rate design. The evidentiary hearing was reconvened on March 5 and March 6, 2008. Duke and staff filed the testimony of Paul G. Smith (Duke Ex. 29) and of J. Edward Hess (Staff Ex. 2), in support of the Stipulation. With respect to the unresolved issue of residential rate design, Duke presented witnesses James A. Riddle (Duke Exs. 10 and 25), Paul G. Smith (Duke Exs. 11 and 19), Donald L. Stork (Duke Exs. 13, 20, and 22), and James E. Ziokowski (Duke Ex. 16); OCC called Wilson Gonzalez (OCC Exs. 5 and 18) and Anthony J. Yankel (OCC Ex. 6 and 17); and Staff presented the testimony of Stephen E. Puican (Staff Ex. 3).

Initial briefs, in support of their respective positions, were filed by Duke, OPAE, OCC, and staff on March 17, 2008. Reply briefs were filed on March 24, 2008.

A. Duke's Motion for Protective Order

On February 21, 2008, Duke filed a motion for protective order for information attached to the direct testimony of Matthew G. Smith (Duke Ex. 27) and marked as Attachment MGS-1. Duke contends that Attachment MGS-1 contains proprietary pricing information from vendors for equipment necessary for Duke's Utility of the Future program. The company states that the information for which Duke seeks confidential treatment is not known outside of Duke and its vendors. Furthermore, Duke states that, within the company, such information is only disseminated to employees who have a legitimate business need to know and act upon such information. Accordingly, Duke considers the information to be proprietary, confidential, and trade secret, as defined in Section 1333.61, Revised Code, and requests that the information be treated as confidential in accordance with the provisions of Sections 1333.61 and 4901.16, Revised Code. No party opposed Duke's request for protective treatment of Attachment MGS-1.

The Commission recognizes that Ohio's public records law is intended to be liberally construed to ensure that governmental records are open and made available to the public, subject to only a few very limited and narrow exceptions. *State ex rel. Williams*

v. Cleveland (1992), 64 Ohio St.3d 544, 549. However, one of the exceptions is for trade secrets. Section 1333.61(D), Revised Code, defines trade secret as:

> [I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Commission finds that Attachment MGS-1 is financial information that derives independent economic value from not being generally known to or readily ascertainable by proper means by others who can obtain economic value from its use and that it is subject to reasonable efforts to maintain its secrecy. Therefore, we find that it contains trade secret information, as defined under Section 1333.61(D), Revised Code, and, therefore, that it should be granted protective treatment. In accordance with Rule 4901-1-24, O.A.C., Duke's request for a protective order is granted and the information filed under seal, as Attachment MGS-1, shall be afforded protective treatment for 18 months from the date this order is issued. Any request to extend protective treatment shall be made in accordance with Rule 4901-1-24(F), O.A.C.

B. Duke's Motion for Waiver and Leave to File Depositions

On February 25, 2008, Duke filed a motion for waiver of a Commission filing requirement and leave to file depositions *instanter*. Duke states that depositions were conducted on February 21, 2008. On Friday, February 22, 2008, Duke filed notice that it would be filing the deposition transcripts of five witnesses and commenced electronic transmission of the depositions. However, Duke states that it subsequently learned that only one of the five depositions was received by the Commission's Docketing Division before the end of the business day on February 22, 2008. Accordingly, the remaining four depositions were electronically transmitted on Monday, February 25, 2008. Duke requests that the Commission waive the requirement of Rule 4901-1-21(N), O.A.C., that depositions be filed with the Commission at least three days prior to the commencement of the

hearing. In this instance, the Commission finds Duke's request to waive the requirement that deposition transcripts be filed at least three days prior to the commencement of the hearing to be reasonable. Accordingly, the request for waiver should be granted.

II. SUMMARY OF THE EVIDENCE

A. Summary of the Proposed Stipulation

The only issue not resolved by the Stipulation is the proposed residential rate design which was litigated and is expressly reserved for our determination. A new design is recommended by the Commission's staff and Duke, but opposed by OCC and OPAE. The city of Cincinnati, PWC, and the commercial and industrial intervenors take no position with respect to this issue (Jt. Ex. 1 at 5). Pursuant to the Stipulation, the parties agree, among other things, that:

(1) Duke will receive a revenue increase of $18,217,566, which represents a percentage increase of 3.05 percent and is based on a 8.15 percent rate of return. Duke will not be required to file the 60-day update filing of actual financial data for the test year (Jt. Ex. 1, at 5 and Stipulation Ex. 1).

(2) Duke's revenue distribution, billing determinants, and rates to be adopted are shown on Exhibit 2 of the Stipulation, and assume the adoption of the new residential rate design. The rates also reflect the shift of $6,000,000 to the residential class, phased-in over two years, based upon the agreed revenue requirement and Duke's updated cost of service study (*Id.* at 5; Stipulation Ex. 2).[1]

(3) Duke will amortize deferred rate case expenses requested for recovery in its filing in these cases as recommended in the Staff Report (*Id.* at 6).

(4) Duke will implement new depreciation rates that reflect the mid-point between Duke's proposed depreciation rates and the rates proposed in the Staff Report, as shown on Stipulation Exhibit 5 (*Id.*).

(5) The allocation of common plant related to the provision of gas distribution service will be based on an updated allocation

[1] OCC and OPAE object to the characterization of this cost reallocation as a "subsidy/excess" used in the Stipulation (*Id.* at 5, footnote 6).

factor of 18.29 percent that excludes the generation plant assets contributed to Duke by Duke Energy North America, LLC (*Id.*).

(6) Duke will file actual data to support a Rider AMRP adjustment for the last nine months of 2007. The Rider AMRP revenue requirement will be modified to include deferred curb-to-meter expense and riser expense, net of maintenance savings, for calendar year 2007. Such net deferred expense shall be capitalized with carrying charges at an annual rate of 5.87 percent, representing the company's long-term debt rate, and recovered through Rider AMRP, beginning in this filing. Duke may elect to recover this expense in any annual Rider AMRP filings, provided that the recovery does not exceed the Rider AMRP cumulative residential rate caps. If this deferred expense causes Duke to exceed the Rider AMRP cumulative rate cap in any year, Duke may recover that portion of the deferred expense that exceeds the rate cap in a subsequent year as long as the recovery does not exceed the cumulative rate cap. The new Rider AMRP residential rates are limited on a cumulative basis as shown on Stipulation Exhibit 4, at 3, and recoverable pursuant to the Rider AMRP revenue allocation described in paragraph 9 of the Stipulation. Duke may implement these rates, effective with the beginning of the first billing cycle following issuance of the Commission's order, adjusted as necessary to permit the company full recovery of the revenue increase through May 1, 2009, subject to refund, upon Commission approval (*Id.* at 6-7).

(7) Following the implementation of new Rider AMRP rates, Duke will file a pre-filing notice and application annually to implement subsequent adjustments to Rider AMRP, beginning in November 2008.[2] The annual filing will support the adjustment to Duke's revenue requirement for any increase to Rider AMRP. Duke shall continue to make its Rider AMRP annual filing until the effective date of the Commission's order in Duke's next base rate case (*Id.* at 8-9).

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[2] Although the Stipulation directs Duke to make its annual filings in Case No. 07-589-GA-AIR, each annual review should be filed in a new case to accommodate the operational efficiencies of the Commission's Docketing Information System. These annual review cases will be linked to the instant proceedings, and Duke should serve all parties to these proceedings with each prefiling notice and annual AMRP application.

(8) Duke's revenue requirement calculation and Rider AMRP application filed with the Commission shall include the post-March 31, 2007 (date certain) original cost and accumulated reserve for depreciation of property associated with the AMRP program that is used and useful on December 31 of the prior year in the rendition of service as such property is associated with the AMRP and riser replacement programs, including capital expenditures for new plant (including but not limited to new mains, services and risers), adjustments for the retirement of existing assets, calculated Post-In-Service Carrying Charges ("PISCC") on net plant additions and related deferred taxes until included in rates for collection in Rider AMRP, a proper annual depreciation expense, and any sums of money or property that Duke may receive to defray the cost of property associated with the AMRP capital expenditures. The return assigned to the recovery of all such net capital expenditures shall be at a pre-tax weighted average cost of capital of 11.7 percent (*Id.* at 9-11).[3]

(9) Duke will substantially complete the AMRP by the end of 2019 and will complete the riser replacement program by the end of 2012. Duke will file an application with the Commission for approval to extend the AMRP program if not substantially completed by the end of 2019 (*Id.* at 12).

(10) Duke shall maintain its alternative regulation commitments until the effective date of the Commission's order in the company's next base rate case, except that the incremental $1,000,000 in funding for weatherization shall be funded through base rates.[4] If, for any reason, Duke does not expend the $3,000,000 gas weatherization funding amount in any year, the amount not expended will be carried over to the following year and added to the annual $3,000,000 funding to be available for distribution to weatherization projects during that year. If a weatherization service provider does not meet its contract requirements, including its failure to meet deadlines, following consultation with the Duke Energy Community Partnership (Collaborative), Duke will reprogram the remaining funding to

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3 This rate of return is based on a 10.4 percent return on equity.

4 OCC agrees with Duke's incremental $1 million weatherization funding; however, OCC does not agree that this out-of-test period expenditure should be collected through base rates, and asserts that this amount should instead be collected through a rider.

a different project and/or assign it to another weatherization service provider so that the funding dollars can be spent expeditiously and productively (*Id.* at 12-14). [5]

(11) The residential rate caps on Stipulation Exhibit 4 apply to Rider AMRP. Duke may establish deferrals for the expenses of the riser replacement program if these expenses cause Duke to exceed the cumulative rate cap, including a carrying cost of 5.87 percent. The rate caps shall be cumulative rather than annual caps such that if the rate increase is below the annual cap in a given year, the unused portion of the cap may be carried forward to future years but can never exceed the cumulative cap. If the deferred curb-to-meter expense or the deferred riser replacement program expense causes Duke to exceed the cumulative rate cap in any year, then Duke may recover that portion of the deferred expense that exceeds the cumulative rate cap in a subsequent year as long as the recovery does not exceed the cumulative rate cap (*Id.* at 17).

(12) The parties agree that Duke shall take over ownership of the curb-to-meter service, including the riser, whenever a new service line or riser is installed or whenever an existing curb-to-meter service or riser is replaced. Duke shall file its tariffs in these cases such that Duke will be responsible for the cost of initial installation, repair, replacement and maintenance of all curb-to-meter services, including risers, except that consumers shall pay the initial installation costs related to the portion of service lines in excess of 250 feet. In 2008, Duke will begin capitalizing rather than expensing the costs currently described as "Customer Owned Service Line Expense." For this purpose, Duke will submit proposed tariff changes to Staff for review and approval, with a copy to parties, prior to filing the revised sheets with the Commission. Such capitalized costs shall be recoverable through Rider AMRP (*Id.* at 12-14).[6]

(13) Duke will file, within 60 days of the Commission's final order in this proceeding, a deployment plan for the company's Utility of the Future Program for 2008-2009 (*Id.* at 15-16).

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5 The members of the Collaborative include Duke personnel and representatives of the OCC, Staff, the Hamilton County Cincinnati Community Action Agency, City of Cincinnati, and PWC.

6 Neither Direct, Interstate, nor Integrys endorse this provision of the stipulation.

(14) Duke's base rates do not include any amount for gas storage carrying costs. On a going forward basis, Duke will recover its actual gas storage carrying costs through its gas cost recovery rider (Rider GCR), without reduction to rate base, as shown on Stipulation Exhibit 1. Carrying charges associated with the actual monthly balances of Current Gas in Storage shall be accrued at a 10 percent annual rate as shown on Stipulation Exhibit 3. Further, the parties agree that the Commission should: (a) approve the methodology for the calculation of the storage carrying costs for inclusion in the GCR rate, as demonstrated in Stipulation Exhibit 3; (b) find that such an adjustment to Duke's rates is not an increase in base rates; and (c) approve recovery of such costs in Duke's next GCR filing following the Commission's order in this proceeding (*Id.* at 16-17).

(15) Duke shall conduct an internal audit of its method and process for allocating service company charges to Duke by no later than 2009, and shall provide the audit report to Staff and the OCC (*Id.* at 18).

(16) Duke shall continue to use the "Participants Test" as one of the methods for evaluating its Demand Side Management/Energy Efficiency programs as appropriate; however, Duke shall continue to use other cost/benefit tests as the Collaborative deems appropriate (*Id.* at 19).

(17) Duke will implement a pilot program available to the first 5,000 eligible customers. The intent of the pilot program will be to provide incentives for low-income customers to conserve and to avoid penalizing low-income customers who wish to stay off of programs such as the Percentage of Income Payment Plan (PIPP). Eligible customers shall be non-PIPP low usage customers verified at or below 175 percent of the poverty level. Duke will design a tariff that adjusts the fixed monthly charge for eligible customers as shown on Stipulation Exhibit 2. These rates may be adjusted if the Commission does not approve the fixed customer charge as shown in Stipulation Exhibit 2. Duke will develop the details for this program in consultation with Staff and the parties. Duke shall evaluate the program after the first winter heating season to determine, following consultation with staff and the parties, whether the program should be

continued to all eligible low-income customers, including considerations of program demand and cost (*Id.* at 20).

(18) Duke will convene a working group or collaborative process, open to interested stakeholders, within 60 days after approval of the Stipulation, to explore implementing an auction to supply the standard service offer. Duke will report to the Commission within one year after approval of this Stipulation, the findings of the working group or collaborative including the facts and arguments which support and or oppose implementation of an auction process. The working group or collaborative process shall also review whether the present allocation of 80 percent of the net revenues from Duke's asset management agreement should continue to flow to GCR customers only, or should be changed to flow to GCR customers and choice customers (*Id.* at 21-22).

(19) Duke shall revise its GCR tariff to implement a sharing mechanism for sharing of net revenues from off-system transactions.[7] Such sharing mechanism shall be effective if Duke does not have an asset management agreement transferring management responsibility for its gas commodity, storage and transportation contracts to a third party, and shall provide for sharing of the net revenues from off-system transactions to be allocated 80 percent to GCR and choice customers and 20 percent to Duke shareholders. The revenue sharing percentage proposed by implementation of the sharing mechanism in this Stipulation is expressly limited to gas-related sales transactions, and shall not have precedential value in establishing the sharing percentages for similar electric sales transactions by Duke. This sharing mechanism, but not the 80 percent/20 percent revenue allocation, shall be subject to review in future GCR cases (*Id.* at 21-22).[8]

(20) Duke shall meet with Staff and other interested parties to discuss eliminating customer deposits for PIPP customers and shall eliminate such deposits if Staff agrees (*Id.* at 18).

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7 Off-system transactions are defined to include but are not limited to Off-System Sales Transactions, Capacity Release Transactions, Park Transactions, Loan Transactions, Exchange Transactions, and any other similar, but yet unnamed transactions.

8 This paragraph does not change the allocation contained in the current sharing mechanism for revenues received under Duke's asset management agreement.

(21) Duke shall review and fully consider the merits of adopting any new payment plans submitted by any party and, if Duke elects not to implement such new payment plan, Duke shall respond to the stakeholder in writing to state the reason for its decision (*Id.* at 18).

(22) Duke shall review its use of payday lenders as authorized payment stations and will use its best efforts to eliminate the use of payday lenders as authorized payment stations if other suitable locations for the payment stations are available in the same geographic area. Duke shall provide a list of all payday lenders utilized as authorized payment stations to Staff and other interested parties annually. The annual payday lenders list is to be provided initially on May 1, 2008, and on May 1, each year thereafter (*Id.* at 18-19).

(23) Duke shall communicate with its customers to educate them about the difference between authorized and non-authorized payment stations. Duke shall work with members of the Collaborative to develop the educational materials and communication strategy (*Id.* at 19).

B. Summary of the Residential Rate Design Issue

This case marks a sea change in the recommendation of the Commission's Staff with respect to the method of determining a gas utility's residential distribution rate design. Traditionally, natural gas distribution rates in Ohio have been set by allocating a relatively small proportion of the fixed costs to the "customer" charge, with the remaining fixed costs recovered through a volumetric component. However, volatile and sustained increases in the price of natural gas, along with heightened interest in energy conservation, have called into question long-held ratemaking practices for gas companies. In this proceeding, Staff and Duke advocate the adoption of a modified Straight Fixed Variable (SFV) residential rate design that allocates most fixed costs of delivering gas to a monthly flat fee with the remaining fixed costs recovered through a variable or volumetric component. Under this proposed new "levelized" rate design, Duke's current $6.00 residential customer charge would be eliminated. Instead, residential customers would pay a flat monthly fee of around $20 to $25, but with a corresponding lower usage component to recover the remaining fixed distribution costs (Staff Ex. 1, at 30-33, 46-48; Stipulation Ex. 2; Duke Ex. 29 at 6; Tr. I at 87-88, 147-148, 159).

In its initial filings, Duke's proposed residential rate design included a $15.00 customer charge with a sales decoupling rider to address an alleged revenue erosion problem caused by declining average use per customer. The Staff Report noted this

historical trend, but rejected a sales decoupling rider mechanism in favor of a phased-in SFV rate design. Staff's position was subsequently joined by Duke and the new design was used for calculations in the Stipulation exhibits, but adoption of the proposed rate design was expressly reserved for consideration by the Commission (Staff Ex. 1, at 30-33, 46-49; Jt. Ex. 1, at 1, 5, 19-20).

The levelized rate design is opposed by OCC and OPAE, both of whom advocate keeping the current low residential customer charge and high volumetric rates. In the alternative, they argue that, if a decoupling mechanism is to be adopted, the appropriate design is a decoupling rider rather than the flat rates recommended by Duke and Staff. The other parties to these proceedings either have no interest in residential rate design or chose not to take a position on this issue.

OCC and OPAE first cite the projected overall growth in Duke's residential gas revenues for 2008-2012 in contending that Duke has no revenue erosion problem because any revenue loss from declining sales on a per-customer basis will be more than offset by future increases in Duke's residential customer base (OCC Br. at 53; OCC Ex. 6, at 5-6; OCC Ex. 12). OCC and OPAE then argue that, in the event the Commission determines there is a revenue erosion problem, the Commission should adopt a sales decoupling rider to unlink revenue recovery from sales, similar to that stipulated to by Vectren Energy Delivery of Ohio ("Vectren"). *See, In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, Pursuant to Section 4929.11, Revised Code, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May be Required to Defer Such Expenses and Revenues for Future Recovery through Such Adjustment Mechanisms,* Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 27, 2007).

Staff maintains that the evidence of record clearly indicates that Duke's revenue erosion problem is real and that the levelized rate design is the better way to balance the utility's desire for recovery of its authorized return with promotion of energy efficiency as a customer and societal benefit through control of energy bills. Staff notes that nearly six million dollars of the total $34.1 million revenue deficiency identified by Duke in this case is attributable to declining customer usage and cites the decline in per-customer, residential natural gas consumption, which has been accelerating since the marked price increases in the winter of 2000/2001. Staff asserts that, as long as the bulk of a utility's distribution costs are recovered through the volumetric component of base rates, this decline in per-customer usage threatens the utility's recovery of its fixed costs of providing service. Staff contends that the levelized rate design best addresses this issue while simultaneously removing the disincentives to utility-sponsored energy efficiency programs that exist with the traditional rate design (Duke Ex. 11, at 3-6, 11; Staff Ex. 3, at 3-5; Tr. I at 214-216; Staff Br. at 6-7).

Staff points out that the proposed new levelized rate design is a form of decoupling that breaks strict linkage between utility earnings and customer consumption by recognizing that virtually all the costs of gas distribution service are fixed, and the cost to serve a residential customer is largely the same, regardless of the specific customer's usage. Duke and Staff contend that it is neither fair nor accurate to characterize this fixed component as a customer charge because, under Duke's current rate design, the customer charge is set at an artificially low level that only minimally compensates the company for its fixed costs of providing gas service (Duke Ex. 29, at 6; Tr. I at 159; Staff Br. at 6-8;).

Staff and Duke argue that, since the costs of providing gas distribution service are almost exclusively fixed, the proposed rate design will more closely match costs and revenues, thereby giving customers more accurate and timely pricing signals. They also contend that spreading the recovery of fixed costs more evenly over the entire year will help to reduce winter heating bills. Staff and Duke allege that customer incentives to conserve energy will remain strong because 75 to 80 percent of each customer's total bill is the cost of the gas itself (Staff Ex. 3, at 3-5; Tr. I at 159, 214-216; Tr. II at 91-93).

Finally, Staff and Duke suggest that a strict matching of fixed rates with fixed costs would result in a $30.00 fixed residential distribution charge. However, because the proposed rate design is a significant departure from current rates, the Stipulation proposes to phase-in the new design over two years, using a lower fixed charge of $20.25 in year one, and $25.33 in year two. In addition, the remaining variable base rate component contains two usage tiers in an effort to minimize impacts on low-use residential customers, since average and larger usage residential customers will either benefit or be unaffected by the levelized rate design proposal (Jt. Ex. 1, at Ex. 2; Tr. I at 55, 87-88, 147-148).

OCC and OPAE counter that the stipulated rate design proposal amounts to a huge jump in the fixed monthly customer charge and violates a 30-year rate-making principle of gradualism. Moreover, they allege, it would violate the state policy to promote energy efficiency under Section 4929.02, Revised Code, because the proposed rate design sends an anti-conservation price signal to consumers, penalizes customers who have invested in energy efficiency by extending the payback period, and takes away the consumers' ability to control their energy bills. In addition, they assert that the levelized rate design is regressive towards low-use customers, and transfers wealth from low-income customers to high-use customers who are predominantly high-income customers (OCC Br. at 17-35, 46-55, 75-76).

Staff and Duke contend that under the proposed new rate design, high-use customers will benefit relative to low-use customers, and cite an analysis of PIPP customers to support the proposition that most low-income customers will actually benefit from this change. According to Duke witness Paul G. Smith, the PIPP customer data indicated that the average PIPP customer consumes approximately 1,000 ccf per year, or

approximately 25 percent more than the average non-PIPP customer and, therefore, levelized rates will actually reduce the annual cost for the average PIPP customer, and the cost of the PIPP program (Duke Ex. 29, at 11-12). Duke and Staff argue that if PIPP customer usage is representative of all of Duke's low-income customers, then most of Duke's low-income ratepayers will actually benefit from this policy change. In addition, they note any adverse impact of the levelized rate design will be mitigated by the new low-income/low-use pilot program included in the Stipulation. This program provides a credit to offset the higher fixed monthly charge for the first 5,000 non-PIPP, low-use customers verified at or below 175 percent of the federal poverty level. (Duke Br. at 17-35, 46-55, 75-76).

OCC and OPAE insist that the levelized rates will harm low-income customers and that the PIPP customer data is not indicative of other Duke low-income customers, but offered no data to support this contention (OCC Br. at 46-53; OPAE Br. at 4, 8).

III. DISCUSSION AND CONCLUSION

A. Consideration of the Stipulation

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all or most of the issues presented in the proceeding in which it is offered.

In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(b) Does the settlement, as a package, benefit ratepayers and the public interest?

(c) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994) (*citing Consumers' Counsel, supra*, at 126). The court stated in that case that the Commission may

place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

The Commission finds that the Stipulation filed in these cases appears to be the product of serious bargaining among capable, knowledgeable parties. The signatory parties represent a wide diversity of interests including the utility, residential consumers, low-income residential consumers, commercial and industrial consumers, and Staff. Further, we note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters.

The Stipulation also meets the second criterion. As a package, the Stipulation advances the public interest by resolving all issues raised, except as to residential revenue design, thereby avoiding extensive litigation. While the Stipulation includes a general rate increase of approximately three percent across all customer classes, that increase will allow the company an opportunity to recover its expenses. As for the new AMRP, which now includes riser replacement and company ownership of certain customer service lines, the Stipulation continues the mechanism established for the parties and the Commission to evaluate the reasonableness of the expenses incurred on a consistent, regular basis during the program until another base rate application is filed by Duke. We conclude that the continuance of the main replacement program, the initiation of the riser replacement program and Duke's ownership of customer service lines advances the public interest and safety. As with the previous program, the new AMRP and riser replacement program does not sanction cost recovery of any or all yet-to-be-incurred costs and does institute caps on future recovery. The Stipulation also continues the process under which each year's AMRP and riser replacement expenses can be evaluated for the next AMRP rider, while also addressing questions related to over-recovery and treatment of cost savings. We note that the accounting provisions adopted to facilitate the new AMRP program and the riser replacement program cease at the completion of each program. The Commission further notes that the Stipulation provides for the continuation of the weatherization program and a pilot program for low income customers.

Regarding company ownership of certain customer service lines, Duke should, upon the request of the customer, work with the customer as to location, relocation, and, manner of installation of the service line, to the extent feasible under the gas pipeline safety regulations, Duke's tariff, and Duke's procedures.

Finally, the Stipulation meets the third criterion because it does not violate any important regulatory principle or practice. Indeed, the Stipulation provides a resolution for Duke to economically continue the AMRP and to initiate the riser replacement program facilitating gas system safety and reliability improvements.

On March 14, 2008, Duke moved for waiver of the requirement to file an update of the partially forecasted income statement and any variances for the test year, pursuant to Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C. Duke notes that, as part of the Stipulation, the parties negotiated a revenue increase and further agreed to recommend that Duke be allowed to forgo the requirement of filing actual financial data for the test year (Jt. Ex. 1, at 5, footnote 5).

The Commission finds that the Stipulation filed in these matters is in the public interest and represents a reasonable disposition of all but one of the issues raised in these proceedings. We will, therefore, adopt the Stipulation in its entirety and grant Duke's motion for a waiver of the requirement to file an updated income statement in accordance with Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C.

B. Consideration of the Residential Rate Design

The Commission first notes that there is no disagreement in this case that Duke's residential rates need to go up in order to cover Duke's prudently incurred costs to provide service. There is also no dispute in this case as to the amount of the increase in revenues needed to allow Duke to earn a fair rate of return on its investment. In addition to an overall increase in revenue of 3.1 percent, the settlement before us provides for the assignation of $6 million in costs from commercial and industrial customers to the residential class. This reallocation reduces a pre-existing subsidy of residential customers by commercial and industrial customers. Thus, the parties have already agreed that residential customers, as a class, will pay an increase of 11.9 percent during the first year and 14.1 percent in the second year for the distribution portion of each residential customer's bill.

The only issue left to the Commission is the design of the rates Duke should bill residential customers to collect the revenues agreed to in the settlement. We agree with Staff that the time has come to re-think traditional natural gas rate design. Conditions in the natural gas industry have changed markedly in the past several years. The natural gas market is now characterized by volatile and sustained price increases, causing customers to increase their efforts to conserve gas. The evidence of record clearly documents the declining sales-per-customer trend over the decades. In fact, more than 15 percent of Duke's revenue deficiency in this rate case is attributable to declining customer usage, a trend which is not just continuing, but is also accelerating (Duke Ex. 11, at 3-6, 11; Staff Ex. 3, at 3-5; Tr. I at 214-216; Staff Br. at 7). Under traditional rate design, the ability of a company to recover its fixed costs of providing service hinges in large part on its actual sales, even though the company's costs remain fairly constant regardless of how much gas is sold. Thus, a negative trend in sales has a corresponding negative effect on the utility's ongoing financial stability, its ability to attract new capital to invest in its network, and its incentive to encourage energy efficiency and conservation.

The Commission, therefore, concludes that a rate design which separates or "decouples" a gas company's recovery of its cost of delivering the gas from the amount of gas customers actually consume is necessary to align the new market realities with important regulatory objectives. We believe it is in the interest of all customers that Duke has adequate and stable revenues to pay for the costs of its operations and capital and to ensure the continued provision of safe and reliable service. We further believe that there is a societal benefit to removing from rate design the current built-in incentive to increase gas sales. A rate design that prevents a company from embracing energy conservation efforts is not in the public interest. Duke's commitment to provide $3 million for weatherization projects under the Stipulation is critical to our decision in this case (Jt. Ex. 1, at 12-14). Indeed, the Commission notes that a commitment to conservation initiatives will be an important factor in any future decision to adopt a decoupling mechanism. The Commission encourages Duke to review and further enhance its weatherization and conservation program offerings. As one part of this review, Duke should adopt the objective to make cost-effective weatherization and conservation programs available to all low-income consumers and to ramp up such programs as rapidly as reasonably practicable.

Having determined that a new decoupling rate design is appropriate, we must decide the better choice of two methods: a levelized rate design, which recovers most fixed costs up front in a flat monthly fee, or a decoupling rider, which maintains a lower customer charge and allows the company to offset lower sales through an adjustable rider.

On balance, the Commission finds the levelized rate design advocated by Duke and Staff to be preferable to a decoupling rider. Both methods would address revenue and earnings stability issues in that the fixed costs of delivering gas to the home will be recovered regardless of consumption. Each would also remove any disincentive by the company to promote conservation and energy efficiency. The levelized rate design, however, has the added benefit of producing more stable customer bills throughout all seasons because fixed costs will be recovered evenly throughout the year. In contrast, with a decoupling rider, as favored by OCC, customers would still pay a higher portion of their fixed costs during the heating season when their bills are already the highest, and the rates would be less predictable since they could be adjusted each year to make up for lower-than-expected sales.

A levelized rate design also has the advantage of being easier for customers to understand. Customers will transparently see most of the costs that do not vary with usage recovered through a flat monthly fee. Customers are accustomed to fixed monthly bills for numerous other services, such as telephone, water, trash, internet, and cable services. A decoupling rider, on the other hand, is much more complicated and harder to explain to customers. It is difficult for customers to understand why they have to pay

more through a decoupling rider if they worked hard to reduce their usage; the appearance is that the company is penalizing them for their conservation efforts.

The Commission also believes that a levelized rate design sends better price signals to consumers. The rate for delivering the gas to the home is only about 20 to 25 percent of the total bill. The largest portion of the bill, the other 75 to 80 percent, is for the gas that the customer uses. This commodity portion, the cost of the actual gas used, is the biggest driver of the amount of a customer's bill. Therefore, gas usage will still have the biggest influence on the price signals received by the customer when making gas consumption decisions, and customers will still receive the benefits of any conservation efforts in which they engage. While we acknowledge that there will be a modest increase in the payback period for customer-initiated energy conservation measures with a levelized rate design, this result is counterbalanced by the fact that the difference in the payback period is a direct result of inequities within the existing rate design that cause higher use customers to pay more of their fair share of the fixed costs than low-use customers.

The levelized rate design also promotes the regulatory objective of providing a more equitable cost allocation among customers regardless of usage. It fairly apportions the fixed costs of service, which do not change with usage, among all customers, so that everyone pays his or her fair share. Customers who use more energy for reasons beyond their control, such as abnormal weather, large number of persons sharing a household, or older housing stock, will no longer have to pay their own fair share plus someone else's fair share of the costs.

We recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. The levelized rate design will impact low usage customers more, since they have not been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction. Average users will see only the impact of the increase agreed to by the parties; they will see no additional impact as a result of the Commission choosing the levelized rate design.

The Commission is sensitive to the impact of any rate increase on customers, especially during these tough economic times. We believe that the new levelized rate design best corrects the traditional design inequities while mitigating the impact of the new rates on residential customers by maintaining a volumetric component to the rates, by phasing in the increase over a two-year period, and by not reflecting the full extent of Duke's fixed costs in the proposed fixed charge. Still, we are concerned with the impact on low-income, low-use customers. Thus, crucial to our decision to adopt Duke and Staff's proposed rate design is the Pilot Low Income Program aimed at helping low-income, low-use customers pay their bills. This new program will provide a four-dollar, monthly

discount to cushion much of the impact on qualifying customers. To ensure that this discount is available to as many customers as possible, we direct that Duke expand this pilot program to include up to 10,000 customers, instead of the 5,000 customers specified in the Stipulation. Pursuant to the terms of the stipulation, Duke, in consultation with staff and the parties, shall establish eligibility qualifications for this program by first determining and setting the maximum low usage volume projected to result in the inclusion of 10,000 low-income customers who have previously been defined by the stipulation to be those at or below 175 percent of the poverty level. The Commission expects that Duke will promote this program such that to the fullest extent practicable the program is fully enrolled with 10,000 customers. Following the end of the pilot program, the Commission will evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-use, low-income customers.

We are also concerned about the immediate impact of implementing the levelized rate design during the summer months when overall consumption is lowest. For the average customer, the new rate design will result in lower bills in the winter, but higher bills in the summer. Our concern is that the fixed charge increase may not be anticipated by customers who have budgeted for the traditional lower fixed charge during the low usage summer months. To mitigate this impact, we are directing that, from the initial bills resulting from this order through bills covering the period ending September 30, 2008, the fixed charge be set at $15.00, consistent with Duke's original proposal. The corresponding volumetric rate for those months should also be adjusted to compensate for any revenue shortfall that this adjustment in the fixed charge will cause. Thereafter, rates will be as proposed in the Stipulation. We believe this additional phase-in of the new residential rate structure will give customers a further opportunity to adapt to this change, including the benefits of the budget billing option.

C. Rate Determinants:

1. Rate Base

The value of Duke's property used and useful in the rendition of natural gas services as of the December 31, 2007, is not less than $649,964,874, as stipulated by the parties (Jt. Ex. 1, at Schedule A-1).

The Commission finds the rate base of $649,964,874, as provided in the Stipulation, to be reasonable and proper based on the evidence presented in these matters. Accordingly, the Commission adopts the valuation of $649,964,874 as the rate base for purposes of this proceeding.

2. Operating Income:

In accordance with the proposed Stipulation, the parties agree that Duke's operating revenue is $597,573,805 and that the net operating income is $43,274,872 for the 12 months ended December 31, 2007 (Jt. Ex. 1, at Schedule A-1). The Commission finds the operating revenue and net operating income, as provided in the Stipulation, to be reasonable and proper based on the evidence presented in these matters. The Commission will, therefore, adopt these figures for purposes of these proceedings.

3. Rate of Return and Authorized Increase:

As stipulated by the signatory parties, under its present rates, Duke's net operating income is $43,274,872. Applying this amount to the rate base of $649,964,874 results in a rate of return of 6.66 percent. Such a rate of return is insufficient to provide Duke with reasonable compensation for the gas service it renders to customers. Accordingly, the signatory parties have agreed that Duke should be authorized to increase its revenues by $18,217,566, an increase of approximately 3.05 percent above current annual revenues. This would result in an overall rate of return of 8.45 percent, which the Commission finds to be reasonable.

4. Rates and Tariffs:

Duke is directed to file a proposed customer notice. Duke is further authorized to cancel and withdraw its present tariffs governing service to customers affected by these applications and to file tariffs consistent in all respects with the discussion and findings set forth herein for the Commission's consideration. The approved tariffs will be effective for all services rendered after the effective date of the tariffs.

FINDINGS OF FACT:

(1) On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. In that notice, the company also requested a test year beginning January 1, 2007, and ending December 31, 2007, with a date certain of March 31, 2007.

(2) By entry issued July 11, 2007, the Commission approved Duke's request to establish the test period of January 1, 2007, through December 31, 2007, for the rate increase proposal and a date certain of March 31, 2007.

(3) Duke filed its rate increase application on July 18, 2007. On July 18, 2007, Duke also separately filed requests for approval

of an alternative rate plan, docketed at Case No. 07-590-GA-ALT, and for approval of changes in accounting methods, docketed at Case No. 07-591-GA-AAM.

(4) By entry dated September 5, 2007, the Commission found that Duke's rate increase and alternative rate plan applications complied with the requirements of Section 4909.18, Revised Code, and Rule 4901:1-19-05, O.A.C.

(5) The Commission accepted Duke's rate increase application for filing as of July 18, 2007.

(6) OEG, Kroger, Interstate, the city of Cincinnati, OCC, PWC, Integrys, Direct, Stand and OPAE each requested, and was granted, intervention in these proceedings.

(7) Objections to the staff report were filed by Duke, PWC, OEG, OPAE, OCC, and, jointly, by Integrys and Direct.

(8) Duke published notice of its applications and the hearings and filed the required proofs of publication on February 11, February 25, and March 12, 2008.

(9) The staff of the Commission and the financial auditor filed their respective reports of investigation on December 20, 2007.

(10) On January 25, 2008 a prehearing conference was held, as required by Section 4909.19, Revised Code.

(11) Two local public hearings were held in Cincinnati, Ohio, on February 25, 2008, and another local public hearing was held in Mason, Ohio, on March 11, 2008, in accordance with Section 4903.083, Revised Code. At the Cincinnati hearings a total of 27 witnesses gave testimony and four witnesses gave testimony at the Mason hearing.

(12) On February 28, 2008, a Stipulation was filed by all the parties to this proceeding resolving all the issues presented in these matters, except rate design.

(13) The evidentiary hearing commenced as scheduled on February 26, 2008, was continued until February 28, 2008, and reconvened on March 5, 2008. At the evidentiary hearing, Duke and staff each presented one witness in support of the

Stipulation. In regard to the one litigated issue, rate design, Duke presented four witnesses, OCC presented two witnesses and staff presented one witness.

(14) The Stipulation is the product of serious bargaining between knowledgeable parties, benefits ratepayers, advances the public interest, and does not violate any important regulatory principles or practices.

(15) The value of all of the company's jurisdictional property used and useful for the rendition of natural gas service to customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than $649,964,874.

(16) Under its existing rates, Duke's net operating revenue is $43,274,872, under its existing rates. This net annual revenue of $43,274,872, when applied to a rate base of $649,964,874, results in a rate of return of 6.66 percent.

(17) A rate of return of 6.66 percent is insufficient to provide Duke reasonable compensation for the service it provides.

(18) A rate of return of 8.45 percent is fair and reasonable, under the circumstances presented in these cases, and is sufficient to provide the company just compensation and return on the value of its property used and useful in furnishing natural gas service to its customers.

(19) A rate of return of 8.45 percent applied to the rate base of $649,964,874 will result in allowable net operating income of $54,922,032.

(20) The allowable gross annual revenue to which the company is entitled for purposes of this proceeding is $615,791,371.

CONCLUSIONS OF LAW:

(1) Duke's application for a rate increase was filed pursuant to, and this Commission has jurisdiction of the application pursuant to, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code. The application complies with the requirements of these statutes.

(2) Staff and Blue Ridge conducted investigations of the application, filed their respective reports, and served copies of the Staff Report on interested persons in accordance with the requirements of Section 4909.19, Revised Code.

(3) The hearings, and notice thereof, complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.

(4) The Stipulation is the product of serious bargaining between knowledgeable parties, benefits ratepayers, advances the public interest, and does not violate any important regulatory principles or practices. The Stipulation submitted by the parties is reasonable and shall be adopted in its entirety.

(5) Duke's existing rates and charges for gas service are insufficient to provide Duke with adequate net annual compensation and return on its property used and useful in the provision of natural gas service.

(6) A rate of return of 8.45 percent is fair and reasonable under the circumstances of this case and is sufficient to provide Duke just compensation and return on its property used and useful in the provision of gas service to its customers.

(7) Duke should be authorized to cancel and withdraw its present tariffs governing service to customers affected by these applications and to file tariffs consistent in all respects with the discussion and findings set forth herein.

(8) The levelized rate design, as modified herein, is a reasonable resolution to address Duke's declining sales volumes per customer, allow Duke the opportunity to collect the revenue requirement established in this rate case proceeding and encourage Duke's participation in customer energy conservation programs.

ORDER:

It is, therefore,

ORDERED, That Duke's request for a protective order in regards to Attachment MGS-1 is granted for 18 months from the date this order is issued. It is, further,

ORDERED, That Duke's request for leave to file depositions less than three days prior to the commencement of the evidentiary hearing is granted. It is, further,

ORDERED, That the Stipulation filed on February 28, 2008 is approved in its entirety. It is, further,

ORDERED, That Duke's request for a waiver of the requirement to file an updated income statement, pursuant to Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C., is granted. It is, further,

ORDERED, That Duke implement the levelized rate design for its residential customers as discussed in this order. It is, further,

ORDERED, That Duke's applications to increase its rates and charges for gas service, to implement an alternative rate plan and to modify accounting methods are granted to the extent provided in this opinion and order. It is, further,

ORDERED, That Duke is authorized to cancel and withdraw its present tariffs governing gas service to customers affected by these applications and to file new tariffs consistent with the discussion and findings as set forth in this order. Upon receipt of four complete copies of tariffs conforming to this opinion and order, the Commission will review and consider approval of the proposed tariffs by entry. It is, further,

ORDERED, That a copy of this order be served upon all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman - concurring opinion

Paul A. Centolella - Concur in part and dissent in part.

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

RMB/GNS/vrm

Entered in the Journal
MAY 28 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates.	))	Case No. 07-589-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 07-590-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)))	Case No. 07-591-GA-AAM

CONCURRING OPINION OF
CHAIRMAN ALAN R. SCHRIBER

The straight fixed variable (SFV) option proposed by the PUCO Staff and adopted here today appropriately speaks to two significant issues. One is the potential impact on low income customers and the other is the desired effect that the Order shall have upon conservation.

The latter consideration is paramount. As we acknowledge that there are serious energy issues, we strive to promote and adopt advanced and renewable energy sources. While these are necessary and important pursuits, I believe that conservation is the most important measure of all. Nothing is less costly or more effective than simply reducing consumption. As time goes by, I trust that we will expend many resources adopting conservation measures on "both sides of the meter".

What we are attempting to do today is to provide appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. By "rational", I mean a balanced approach that penalizes neither those whom have already squeezed the last cubic foot of natural gas from their budget, nor those whom might be inclined to "over-conserve".

The proposed SFV option achieves the optimum balance because it segregates fixed costs from those costs that are within the control of the consumer. In contrast, the current pricing scheme assigns all costs- fixed and variable – to the level of usage. The inherent danger with the current system is that consumers might be led to believe that the more they cut back, the more they save. This is true to a point. The point happens to be that of diminishing returns; over conservation takes place when the fixed costs of providing the

service are no longer covered with revenue. This inevitably leads to a rate case and higher rates. In other words, if usage-sensitive rates are assigned to fixed costs, and if usage falls below a certain point, then fixed costs do not get covered. It is then time for a rate case: what has the consumer saved?

If the solution is appropriate price signals, then prices must be associated with the volume of gas alone. In contrast, under the current pricing scheme, the gas company has no incentive to encourage conservation because those same usage sensitive rates might flow through to fixed costs as consumption grows, much to the utility's advantage. Under the SFV, the fixed costs are covered and the company makes no money on the gas commodity. Therefore, the company might actually promote conservation more aggressively.

One alternative to the old conventional method is a decoupling rider mechanism. In this case, Homeowner A who has already squeezed the last cubic foot of un-needed gas from his home via conservation oriented expenditures is discriminated against. This results from the make-whole provision that accrues to the utility when Homeowner B begins to pare down consumption. In other words, as B's meter begins to spin slower, so too do the company's revenues. Homeowner A will be compelled to make up some share of the shortfall, notwithstanding the fact that Homeowner A can cut back consumption no further.

Finally, those who argue that inadequate price signals are the biggest issue need only look at the impact of budget billing. What signal is being sent when the bill each month is the same regardless of consumption? Yet, is anyone recommending the elimination of budget billing?

The other issue in play is that of the income effect of the SFV methodology. One can conclude that consumers of greater amounts of gas will see their bills fall while those at the low end will see theirs rise. This does not mean that the burden will fall disproportionately on low-income consumers. There is record testimony that suggests that low-income consumers, i.e., PIPP customers consume more on average per year than others. Clearly, PIPP customers are protected. Furthermore, while one can play freely with percentages, the nominal dollar increases due to the rate restructuring is quite small. As a precaution, however, the Commission is modifying the stipulation to provide a four dollar credit to ten thousand non-PIPP customers as opposed to five thousand provided for in the stipulation.

All told, it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with one hundred percent certainty all of the facts and all of the possible outcomes. This is precisely why the law has provided this Commission with the ability to react to adverse outcomes should they arise. This is the ultimate consumer protection.

Alan R. Schriber, Chairman

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates.	))	Case No. 07-589-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 07-590-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)))	Case No. 07-591-GA-AAM

OPINION OF COMMISSIONER PAUL A. CENTOLELLA
CONCURRING IN PART AND DISSENTING IN PART

The majority concludes that the current residential rate design has a negative impact on the ability of Duke Energy Ohio (hereafter "Duke", "the Company", or "the utility") to maintain financial stability, attract new capital, and on its incentive to encourage energy efficiency and conservation. And, the majority determines that it is necessary to decouple the utility's recovery of fixed costs from its volumetric sales. I concur with the majority in these conclusions and on issues other than residential rate design. I dissent from the majority regarding how to transition toward a residential rate design which decouples the recovery of fixed costs from volumetric rates.

Having determined that a new decoupling rate design is appropriate, the Commission must decide two questions. First, we must decide the better choice between two decoupling methods: a straight fixed variable (SFV) rate design, which recovers fixed costs in a flat monthly customer charge, or a decoupling adjustment, which allows the company to recover the same fixed cost revenue requirement with a lower customer charge by adjusting subsequent year rates to true up revenues received from volumetric charges. Second, in the event the Commission finds the SFV rate design preferable, the Commission should consider how to transition to a rate design which is significantly different from the rate structures that have formed the basis of consumer expectations.

Over the long-term, moving in the direction of a SFV rate design is preferable to keeping a modest customer charge and relying entirely on a decoupling adjustment. Both methods will address revenue and earnings stability issues in that the fixed costs of delivering gas to the home will be recovered irrespective of consumption. When fully implemented, each will remove any disincentive by the Company to promote conservation

and energy efficiency. And, both methods can be implemented in a straight forward manner and, if appropriately designed, easily explained to consumers as a deliberate or more gradual transition toward recovering fixed costs through a customer charge. However, as the ultimate objective, significant movement toward a fixed variable rate design is consistent with developing a more efficient rate structure. Efficient rate design seeks to align price elastic rate elements more closely to marginal costs, while recovering a larger portion of any residual revenue requirements through comparatively price inelastic charges. Experience shows that there is a significant price response to increases in volumetric charges, as evidenced by the recent steep reductions in average per customer consumption as gas costs increased. Given that customer charges are paid to provide access to gas service, it is reasonable to expect comparatively less price response with respect to increases in the customer charge. Over the long-term, this supports significant movement toward a SFV rate design in which a larger portion of the company's fixed cost revenue requirements is recovered through the customer charge.

Additionally, the SFV rate design will reduce the month-to-month variation in customer bills as fixed costs will be recovered evenly throughout the year, making it easier for customers to deal with high winter heating bills. While decoupling adjustments are not difficult to implement, a SFV rate design, when fully implemented, will remove the need for any additional administrative proceedings to review decoupling adjustments.

Consumers have made investment decisions based on expectations regarding natural gas pricing and fairness compels us to move at a measured pace when making fundamental changes in rate design. For this reason, the Commission should carefully consider the appropriate transition path.

On the question of how to transition to a fixed charge rate design, Duke and the Staff have proposed a modified SFV rate design in which the customer charge would be set at $20.25 per bill in year one and $25.33 per bill in year two. Fully implementing a SFV rate design would require a customer charge in excess of $30 per residential consumer bill. Duke and the Staff also proposed and the Commission has expanded a "Pilot Low Income Program" that would provide some low income consumers a discount to cushion the impact of the change in rate design.

In my view, the pace of the transition in this case is more rapid than should be selected given the consumer expectations created by long-standing rate design practices and the recovery of fixed costs should be fully decoupled from sales volumes during the transition.

The pace of the transition proposed in the stipulation could send the wrong message to consumers with respect to energy conservation. Consumers who have made efficiency investments and reduced their consumption could see a significant increase in

the regulated portion of their bills, while their neighbors who have implemented no energy efficiency measures and are high use customers will see the regulated portion of their gas bills decline by similar amounts. Given rising gas commodity costs, increasing dependence on foreign sources of gas supply, and the likely adoption of limits on greenhouse gas emissions from the burning of fossil fuels, encouraging the adoption of cost effective energy efficiency measures should be among our highest priorities. A more gradual transition to a SFV rate design would minimize near term bill increases for low use consumers recognizing the investments that many of these consumers have made to reduce their gas usage, allow consumers to capture a greater portion of the expected benefits of such investments, and avoid the appearance that the Commission is rewarding high use by lowering the gas bills of high use customers.

Second, during the period covered by this Order, the modified SFV approach will not fully decouple recovery of the Company's fixed costs from sales volumes. A modest three percent reduction in sales during the first year would represent a loss to Duke of the opportunity to recover more than a million dollars of its fixed costs.

To address these concerns, I would reach the following result.

First, the recommendation of the Staff and Company should be modified to reduce the year one customer charge for all residential consumers to $16.25 per residential bill and establish the base level of the year two customer charge for all residential consumers at $21.33.

Second, consistent with the majority opinion, the Company should review and further enhance its weatherization and conservation program offerings. As one part of this review, Duke should adopt the objective of making cost-effective weatherization and conservation programs available to all low income consumers and to ramp up programs to facilitate implementation of all such measures as rapidly as reasonably practicable. Low income consumers often face difficult choices between paying their energy bills and meeting other essential needs, yet may be among the last to be able to take advantage of cost-effective energy efficiency investments. Consumers who struggle to make ends meet often find it difficult to pay for the initial cost of efficiency measures. And, many low income consumers live in rental housing with landlords who have little incentive to install efficiency measures that would reduce their tenants' utility bills.

Third, in conjunction with filing a proposal for approval of significantly expanded energy efficiency programs and recovery of the costs of such programs, I would invite the Company to propose an interim decoupling adjustment. This adjustment should be structured to adjust the second and subsequent year base customer charge of $21.33 for the difference, on a per customer bill basis, between the portion of the Company's fixed cost

residential revenue requirement that is allocated to volumetric rates and the revenues recovered for such fixed costs through volumetric rates at weather normalized sales levels.

To meet the energy challenges of the 21st Century, Ohio will need to greatly improve the efficiency with which we use all forms of energy including natural gas. Efficient price signals will be an important, but not sufficient, element in this transformation. Our increasing knowledge of behavioral economics and experience with utility energy efficiency programs has shown that utility efficiency programs can produce significant net economic benefits. The Commission needs to encourage the cost-effective expansion of such programs. And, we should not wait through the completion of a multi-year transition to a SFV rate design before doing so in full measure.

Paul A. Centolella, Commissioner

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JUNE 11, 2008 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 12, 2008 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

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ORC Ann. 4905.18 (2008)

§ 4905.18. Depreciation account

Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the public utilities commission, after investigation, determines that a depreciation account can be reasonably required. The commission shall ascertain, determine, and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The public utility commission shall require every telephone company to carry a proper and adequate depreciation or deferred maintenance account and shall ascertain, determine, and prescribe what are proper and adequate charges in each exchange area of such company. The charge for depreciation shall be such as will provide the amount required over the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation as it finds necessary.

HISTORY:

GC § 614-49; 102 v 549(563), § 51; Bureau of Code Revision, 10-1-53; 125 v 613. Eff 10-26-53.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Depreciation fund, RC § 4905.19.

Violation, RC § 4905.56.

OH Administrative Code

Prescription of depreciation charges by telephone companies. OAC 4901:1-3-04.

Law Reviews & Journals

Public utility legislation. William H. Schneider. 14 Ohio St. L.J. 377 (1953).

Case Notes & OAGs
ANALYSIS Depreciation reserve Amortization Derivative action --Recovery Error

"DEPRECIATION RESERVE".

A "depreciation reserve" is an accounting technique whereby a fund is built up from annual contributions, as an item of expense of operation, over a period of time representing the service life of a public utility plant to offset and to equal in value the ultimate total loss through use of the utility property so that at the end of such service life the depreciation reserve fund will replace the property so worn out by the various factors of depreciation: Columbus v. Public Util. Comm., 154 Ohio St. 107, 93 N.E.2d 693 (1950).

AMORTIZATION.

Amortization of a depreciation reserve deficiency is a permissible adjustment to test year expenses: Consumers' Counsel v. P.U.C., 6 Ohio St. 3d 405, 453 N.E.2d 584 (1983) Consumers' Counsel v. P.U.C., 6 Ohio St. 3d 412, 453 N.E.2d 590 (1983).

DERIVATIVE ACTION.

--RECOVERY.

In a derivative action against the directors of a public utility for accounting and for the recovery by the corporation of alleged unauthorized dividends bottomed upon the provisions of GC §§ 614-49 and 614-50 (RC §§ 4905.18 and 4905.19), it is necessary, as a condition precedent to recovery, to state and prove that the public utilities commission investigated the utility and determined that a depreciation account could be reasonably required, and after such action had ascertained, determined and prescribed "what are proper and adequate charges for depreciation of the several classes of property" owned by the utility: Henry v. Wellington Tel. Co., 76 Ohio App. 77, 63 N.E.2d 233 (1945).

ERROR.

Utilities commission did not err by excluding from the rate base the unamortized balance of the pre-1971 investment tax credit since the utility presented no evidence that these tax benefits were flowed through to customers: Ohio Bell Tel. Co. v. P.U.C., 68 Ohio St. 2d 193, 429 N.E.2d 1068 (1981).

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JUNE 11, 2008 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 12, 2008 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE

Go to the Ohio Code Archive Directory

ORC Ann. 4928.05 (2008)

§ 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 sections 4905.10 and 4905.31, division (B) of section 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. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

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. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

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; 152 v S 221, § 1, eff. 7-31-08.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

152 v S 221, effective July 31, 2008, in (A)(1), inserted "and 4905.31" and made related changes, and added the last sentence; and added the last sentence to (A)(2).

Case Notes & OAGs

GENERALLY.

Commission's finding that the utilities' standard service offer was market based was supported by sufficient probative evidence. Commission's approval of the utility's alternative to the competitive bidding process was reasonable and lawful. The utility's rate-stabilization plan was not discriminatory. RC § 4928.17 authorizes the commission to approve a modified corporate separation plan: Ohio Consumers' Counsel v. PUC, 111 Ohio St. 3d 300, 856 N.E.2d 213, 2006 Ohio LEXIS 3263, 2006 Ohio 5789, (2006).

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TITLE 49. PUBLIC UTILITIES
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ORC Ann. 4928.14 (2008)

§ 4928.14. Default service where supplier fails to provide service to customers

The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141 [4928.14.1], 4928.142 [4928.14.2], and 4928.143 [4928.14.3] of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this section 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:

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

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

(C) 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.

(D) 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; 152 v S 221, § 1, eff. 7-31-08.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

152 v S 221, effective July 31, 2008, deleted former (A) and (B), pertaining to market based standard service offers and competitive bidding process; and, in the present introductory paragraph (formerly (C)), deleted "After the market development period" from the beginning, substituted "under sections 4928.141, 4928.142, and 4928.143 of the Revised Code" for "filed under division (A) of this section", and redesignated the remaining subdivisions accordingly and made related changes.

Related Statutes & Rules

Cross-References to Related Statutes

Municipal, township or county aggregation of retail electric loads, RC § 4928.20.

Utility to file schedules containing unbundled rate components; equitable reduction to reflect utility's receipt of refund; standard service offer during market development period; amendment of separation plan; plan for independent operation of transmission facilities, RC § 4928.35.

Case Notes & OAGs
ANALYSIS Generally Anticompetitive subsidies

GENERALLY.

Cornerstone of SB 3 was the requirement that electric utilities unbundle the three major components of electric service-generation, distribution, and transmission. Commission's decision regarding the voluntary enrollment procedure was not unlawful, unreasonable, or against the manifest weight of the evidence: Ohio Consumers' Counsel v. PUC, 114 Ohio St. 3d 340, 872 N.E.2d 269, 2007 Ohio LEXIS 2166, 2007 Ohio 4276, (2007).

Commission's approval of the utility's alternative to the competitive bidding process was reasonable and lawful. The utility's rate-stabilization plan was not discriminatory. RC § 4928.17 authorizes the commission to approve a modified corporate separation plan: Ohio Consumers' Counsel v. PUC, 111 Ohio St. 3d 300, 856 N.E.2d 213, 2006 Ohio LEXIS 3263, 2006 Ohio 5789, (2006).

Commission acted without authority when it approved a rate-stabilization plan that did not require that the electric company also offer customers electric service at a rate determined by competitive bid. RC §§ 4905.31, 4905.33, and 4905.35 do not require uniformity in utility prices and rates. A reasonable differential or inequality of rates may occur where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer. The commission lawfully found that the utility had established good cause to allow approval of an alternative functional-separation plan pursuant to RC § 4928.17(C): Ohio Consumers' Counsel v. PUC, 109 Ohio St. 3d 328, 847 N.E.2d 1184, 2006 Ohio LEXIS 1164, 2006 Ohio 2110, (2006).

ANTICOMPETITIVE SUBSIDIES.

Commission violated RC § 4928.02(G), concerning anticompetitive subsidies, when it gave the utility authority to collect deferred increased fuel costs through future distribution rate cases, or to alternatively use excess fuel-cost recovery to reduce deferred distribution-related expenses: Elyria Foundry Co. v. PUC, 114 Ohio St. 3d 305, 871 N.E.2d 1176, 2007 Ohio LEXIS 1950, 2007 Ohio 4164, (2007).

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE
STANDARD SERVICE OFFER

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ORC Ann. 4928.16 (2008)

§ 4928.16. Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures

(A) (1) The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, regarding the provision by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code of any service for which it is subject to certification.

(2) The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections; or whether an electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply with any provision of sections 4928.01 to 4928.10 of the Revised Code regarding a competitive retail electric service for which it is subject to certification or any rule or order adopted or issued under those sections.

(3) If a contract between a mercantile commercial customer and an electric services company states that the forum for a commercial dispute involving that company is through a certified commercial arbitration process, that process set forth in the contract and agreed to by the signatories shall be the exclusive forum unless all parties to the contract agree in writing to an amended process. The company shall notify the commission for informational purposes of all matters for which a contract remedy is invoked to resolve a dispute.

(4) The commission, by rule adopted pursuant to division (A) of section 4928.06 of the Revised Code, shall adopt alternative dispute resolution procedures for complaints by nonmercantile, nonresidential customers, including arbitration through a certified commercial arbitration process and at the commission. The commission also by such rule may adopt alternative dispute resolution procedures for complaints by residential customers.

(B) In addition to its authority under division (C) of section 4928.08 of the Revised Code and to any other remedies provided by law, the commission, after reasonable notice and opportunity for hearing in accordance with section 4905.26 of the Revised Code, may do any of the following:

(1) Order rescission of a contract, or restitution to customers including damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of this section;

(2) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections. In addition, the commission may order any remedy provided under section 4905.22, 4905.37, or 4905.38 of the Revised Code if the violation or failure to comply by an electric utility related to the provision of a noncompetitive retail electric service.

(3) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code has violated or failed to comply, regarding a competitive retail electric service for which it is subject to certification, with any provision of sections 4928.01 to 4928.10 of the Revised Code or any rule or order adopted or issued under those sections.

(C) (1) In addition to the authority conferred under section 4911.15 of the Revised Code, the consumers' counsel may file a complaint under division (A)(1) or (2) of this section on behalf of residential consumers in this state or appear before the commission as a representative of those consumers pursuant to any complaint filed under division (A)(1) or (2) of this section.

(2) In addition to the authority conferred under section 4911.19 of the Revised Code, the consumers' counsel, upon reasonable grounds on and after the starting date of competitive retail electric service, may file with the commission under section 4905.26 of the Revised Code a complaint for discovery if the recipient of an inquiry under section 4911.19 of the Revised Code fails to provide a response within the time specified in that section.

(D) Section 4905.61 of the Revised Code applies to a violation by an electric utility of, or to a failure of an electric utility to comply with, any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections.

HISTORY:

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

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

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

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

OH Administrative Code

Dispute resolution. OAC ch. 4901:1-26.

Enforcement of electric customer service and safety provisions. OAC ch. 4901:1-23.

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CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE
STANDARD SERVICE OFFER

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ORC Ann. 4928.18 (2008)

§ 4928.18. Additional jurisdiction and powers of commission concerning utility or affiliate

(A) Notwithstanding division (D)(2)(a) of section 4909.15 of the Revised Code, nothing in this chapter prevents the public utilities commission from exercising its authority under Title XLIX [49] of the Revised Code to protect customers of retail electric service supplied by an electric utility from any adverse effect of the utility's provision of a product or service other than retail electric service.

(B) The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations. Any such examination or investigation by the commission shall be governed by Chapter 4903. of the Revised Code.

(C) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section, may do any of the following:

(1) Issue an order directing the utility or affiliate to comply;

(2) Modify an order as the commission finds reasonable and appropriate and order the utility or affiliate to comply with the modified order;

(3) Suspend or abrogate an order, in whole or in part;

(4) Issue an order that the utility or affiliate pay restitution to any person injured by the violation or failure to comply;

(D) In addition to any remedies otherwise provided by law, the commission, regarding a determination of a violation pursuant to division (B) of this section and commensurate with the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation, may do either of the following:

(1) Impose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation. The recovery and deposit of any such forfeiture shall be subject to sections 4905.57 and 4905.59 of the Revised Code.

(2) Regarding a violation by an electric utility relating to a corporate separation plan involving competitive retail electric service, suspend or abrogate all or part of an order, to the extent it is in effect, authorizing an opportunity for the utility to receive transition revenues under a transition plan approved by the commission under section 4928.33 of the Revised Code.

Corporate separation under this section does not prohibit the common use of employee benefit plans, facilities, equipment, or employees, subject to proper accounting and the code of conduct ordered by the commission as provided in division (A)(1) of this section.

(E) Section 4905.61 of the Revised Code applies in the case of any violation of section 4928.17 of the Revised Code or of any rule adopted or order issued under that section.

HISTORY:

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

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Complaint or commission initiative concerning transition plan, RC § 4928.36.

OH Administrative Code

Corporate separation. OAC 4901:1-20-16.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on the following either electronically or by first class U.S. mail, postage prepaid, upon the following, this 8th day of July, 2008.

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