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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS AND CASE.....	6
III. ARGUMENT.....	9
PROPOSITION OF LAW NO. 1:.....	9
Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.	9
A. R.C. 4905.31 is plain and unambiguous, and clearly establishes the PUCO’s authority to approve, change, alter, or modify all reasonable arrangements proposed by a utility or a mercantile customer.	10
B. Subsection (E) of R.C. 4905.31 pertains to a reasonable arrangement that may be sought by an applicant. It does not restrict the PUCO’s authority.....	13
PROPOSITION OF LAW 2:.....	18
Chapter 4928 of the Revised Code does not prohibit a mercantile customer from establishing a reasonable arrangement providing for an electric distribution utility to be its exclusive supplier, subject to the Commission’s approval. Nor does Chapter 4928 of the Revised Code prohibit the Commission from approving a reasonable arrangement with such an exclusive supplier provision.	18
A. R.C. 4905.31 clearly permits a mercantile customer to establish a reasonable arrangement with an electric distribution utility, notwithstanding the provisions of R.C. 4928.02 and 4928.06.	19
B. Chapter 4928 of the Revised Code does not prohibit the Public Utilities Commission from approving a reasonable arrangement that encompasses an exclusive supplier provision.	20
PROPOSITION OF LAW 3:.....	22
The Commission’s decision to credit customers for POLR charges paid by Ormet to AEP was reasonable and consistent with the modified electric security plan approved for AEP.	22
A. The PUCO’s decision was reasonable.....	22

TABLE OF CONTENT cont'd.

	<u>Page</u>
B. The PUCO’s decision establishing SSO rates in the ESP proceeding does not conflict with permitting POLR offsets under reasonable arrangements.....	25
C. The Commission’s decision here does not undermine the modified ESP plan approved by the PUCO.	28
PROPOSITION OF LAW 4:.....	30
Where appellants fail to raise specific grounds for rehearing before the Commission, the Court lacks jurisdiction to consider those arguments.	30
PROPOSITION OF LAW 5:.....	34
A finding and order by the commission will not be disturbed unless it appears from the record that the finding and order are manifestly against the weight of the evidence and are so clearly unsupported by record as to show misapprehension or mistake or willful disregard of duty.	34
A. AEP has failed to prove that the Commission’s findings on risk are against the manifest weight of the evidence and show misapprehension, mistake, or willful disregard of duty.	36
IV. CONCLUSION	40
PROOF OF SERVICE.....	43
 APPENDIX	
<u>STATUTES:</u>	
R.C. 4903.09	000001
R.C. 4903.10	000001A
R.C. 4905.22	000002
R.C. 4905.33	000003
R.C. 4905.35	000004

TABLE OF CONTENTS cont'd.

	<u>Page</u>
<u>OHIO ADMINISTRATIVE CODE PROVISIONS:</u>	
Ohio Admin. Code 4901:1-38-01	000005
Ohio Admin. Code 4901:1-38-08	000006
 <u>CONSTITUTIONAL PROVISIONS:</u>	
Section 1, Article II, Ohio Constitution	000007
Section 1, Article IV, Ohio Constitution	000008
 <u>MISCELLANEOUS:</u>	
Am. Sub. S.B. No. 221	000009
 <u>DECISIONS OF THE PUBLIC UTILITIES COMMISSION OF OHIO:</u>	
<i>In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Recover Commission-Authorized Deferrals Through Each Company's Fuel Adjustment Clause,</i> PUCO Case No. 09-1095, Finding and Order (Jan. 7, 2010).....	000069
<i>In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company,</i> PUCO Case No. 09-516-EL-AEC, Entry on Rehearing (Dec. 11, 2009).....	000082
<i>In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc. and In the Matter of the Application for Approval of a Contract for Electric Service between Ohio Power and Globe Metallurgical, Inc.,</i> PUCO Case Nos. 08-883-EL-AEC, 08-884-EL-AEC, Finding and Order (July 31, 2008).	0000087

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>AK Steel Corp. v. Pub. Util. Comm.</i> (2002), 95 Ohio St.3d 81, 765 N.E.2d 863.....	36
<i>Bernardini v. Bd. Of Ed. For the Conneaut Area City School Dist.</i> (1979), 58 Ohio St.2d 1, 12 O.O.3d 1, 387 N.E.2d 1222.....	10
<i>Cincinnati Bell Tel. Co. v. Pub.Util. Comm.</i> (2001), 92 Ohio St.3d 177, 749 N.E.2d 262.....	36.
<i>City of Akron et al. v. Pub. Util. Comm.</i> (1978), 55 Ohio St.2d 155, 9 O. O.3d 122, 378 N.E.2d 480.....	31
<i>City of Cincinnati v. Pub. Util. Comm.</i> (1949), 151 Ohio St. 353, 39 O.O. 188, 86 N.E.2d 10.....	31
<i>Cleveland Electric Illuminating Co. v. Pub. Util. Comm.</i> (1975), 42 Ohio St.2d 403, 71 O.O.2d 393, 330 N.E.2d 1, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302	33
<i>Cleveland Electric Illuminating Co. v. Pub. Util. Comm.</i> (1996), 76 Ohio St.3d 163, 66 N.E.2d 1372.....	36
<i>Conneaut Tel. Co. v. Pub. Util. Comm.</i> (1967), 10 Ohio St.2d 269, 39 O.O.2d 432, 277 N.E.2d 409.....	32
<i>Consumers' Counsel v. Public Util. Comm.</i> (1981), 67 Ohio St.2d 153, 21 O.O.3d 96, 423 N.E.2d 820, appeal dismissed (1982), 455 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455	18
<i>Consumers Counsel v. Pub. Util. Comm.</i> (1994), 70 Ohio St.3d 244, 638 N.E.2d 550.....	31
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269.....	30
<i>Crowl v. DeLuca</i> (1972), 29 Ohio St.2d 53, 58 O.O.2d 107, 278 N.E.2d 352.....	10
<i>Disc. Cellular, Inc. v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957.....	31

TABLE OF AUTHORITIES cont'd.

	<u>Page</u>
<i>Lima v. Pub. Util. Comm.</i> (1922), 106 Ohio St. 379, 1 Ohio Law Abs. 77, 140 N.E. 147	36,37
<i>Marion v. Pub. Util. Comm.</i> (1954), 161 Ohio St. 276, 53 O.O. 148, 119 N.E.2d 67	32
<i>Monongahela Power Co. v. Pub. Util. Comm.</i> , 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921	36
<i>Montgomery County Bd. of Comm. v. Public Util. Comm.</i> (1986), 28 Ohio St.3d 171, 28 OBR 262, 503 N.E.2d 167	18
<i>Ohio Consumers Counsel v. Pub. Util. Comm.</i> , 109 Ohio St.3d 328, 2006-Ohio-2110, 857 N.E.2d 1184, reconsideration denied (2006), 109 Ohio St.3d 1509, 2006-Ohio-2998, 849 N.E.2d 1029	24,27
<i>Ohio Partners for Affordable Energy v. Pub. Util. Comm.</i> , 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764	31
<i>Pike Natural Gas Co. v. Pub. Util. Comm.</i> (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444	18
<i>Proctor, Dir. v. Kardassilaris et al.</i> , 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872	9
<i>Sears v. Weimer</i> (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413	9
<i>Slingluff et al. v. Weaver et al.</i> (1902), 66 Ohio St. 621, 64 N.E. 574	10
<i>State ex rel. White v. Kilbane Koch</i> , 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508	35
<i>State of Ohio v. Kreisler</i> , 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496	9
<i>State of Ohio v. Muncie</i> (2001), 91 Ohio St.3d 440, 746 N.E.2d 1092	9
<i>Symmes Twp. Bd. Of Trustees v. Smyth</i> (2000), 87 Ohio St.3d 549, 721 N.E.2d 1057	9

TABLE OF AUTHORITIES cont'd.

Page

PUCO Cases:

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Recover Commission-Authorized Deferrals Through Each Company's Fuel Adjustment Clause,
PUCO Case No. 09-1095,
Opinion and Order (Jan. 7, 2010).....4

In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company,
PUCO Case No. 09-516-EL-AEC,
Opinion and Order (Oct. 15, 2009)..... 4

In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company,
PUCO Case No. 09-516-EL-AEC,
Entry on Rehearing (Dec. 11, 2009).....4

In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc. and In the Matter of the Application for Approval of a Contract for Electric Service between Ohio Power and Globe Metallurgical, Inc.,
PUCO Case Nos. 08-883-EL-AEC, 08-884-EL-AEC,
Opinion and Order (July 31, 2008)..... 8

STATUTES:

R.C. 4903.0923

R.C. 4903.1030,31,32,35

R.C. 4903.1331,35

R.C. 4905.2223

R.C. 4905.31passim

R.C. 4905.33 15

R.C. 4905.35 15

TABLE OF AUTHORITIES cont'd.

	<u>Page</u>
R.C. 4928.01.....	19,24
R.C. 4928.02.....	passim
R.C. 4928.06.....	18,19,20
R.C. 4928.14.....	2
R.C. 4928.142.....	26
R.C. 4928.143.....	27,28

OHIO ADMINISTRATIVE CODE PROVISIONS:

Ohio Admin. Code 4901:1-38-01	16
Ohio Admin. Code 4901:1-38-03.....	15
Ohio Admin. Code 4901:1-38-04.....	15
Ohio Admin. Code 4901:1-38-05.....	15
Ohio Admin. Code 4901:1-38-08.....	16

CONSTITUTIONAL PROVISIONS:

Section 1, Article II, Ohio Constitution	9
Section 1, Article IV, Ohio Constitution.....	9

MISCELLANEOUS:

Am. Sub. S.B. No. 221	passim
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I. INTRODUCTION

This appeal focuses on Columbus Southern Power Company and Ohio Power Company's ("AEP" or "Companies") dissatisfaction with the solution adopted by the Public Utilities Commission of Ohio ("PUCO" or "Commission") in approving a "reasonable arrangement" between the Companies and one of their large industrial customers. The large industrial customer is Ormet Primary Aluminum Corporation ("Ormet"). The solution adopted by the Commission was intended to enable Ormet to continue to operate, thus retaining approximately 900 high-paying jobs in economically distressed eastern Ohio.

The Commission determined that in order to retain those jobs, it was necessary to grant Ormet a discount on the power bill it would otherwise pay under the Companies' applicable tariffs. Depending on the world-wide price of aluminum and Ormet's other production costs, the maximum discount off of the otherwise applicable industrial tariff rate can balloon up to \$60 million per year for 2010 and 2011. After 2011, the maximum discount is reduced each year. (See AEP Appx. 42-43).

The Ormet discount approved by the Commission is subsidized by all of the remaining customers of the Companies. This direct consumer subsidy ensures that the Companies will receive 100% of the revenues for services they provide to Ormet, just as if Ormet had otherwise paid non-discounted standard tariff rates.

Importantly however, the Commission stopped short of allowing the Companies to retain revenues over and above 100% of the Ormet discount. The PUCO found that "provider of last resort" ("POLR") revenues collected from Ormet would be used to offset customers' subsidy of the Ormet discount. The Companies' POLR charge, approved as a part of the Companies'

standard service offer¹, is a bypassable charge² intended to compensate for the risk that a customer may switch (shop) to a non-AEP provider of generation when the market price of generation is below the tariff rate.³ The Commission found that since Ormet had committed to a ten-year exclusive contract with the Companies, Ormet had given up its right to shop during that term. (AEP Appx. 46). Thus there would be no risk to the Companies that Ormet would shop when the market price of generation drops below the tariff rate. (AEP Appx. 46). Accordingly, the Commission determined that rather than compensate the Companies for a non-existent risk and POLR services they would not need to provide, the Commission would instead require Ormet to pay the POLR charge and credit the other AEP customers for those POLR revenues.⁴ Thus, AEP's remaining customers' subsidy of the Ormet discount is diminished by receiving credits for POLR revenues paid by Ormet. AEP in turn was denied the right to collect windfall revenues for POLR services that they would not need to provide to Ormet. Nonetheless AEP will still receive 100% of the revenues for services they provide to Ormet.

¹ See (AEP Appx. 151-153).

² In the Order issued by the Commission modifying and approving the Companies' electric security plan ("ESP"), the Commission ruled that the POLR rider shall be avoidable for those customers who shop and agree to return at a market price and pay the market price of power incurred by the Companies to serve the returning customers. (AEP Appx. 153). The Company had requested that the rider be non-bypassable.

³ The concept of provider of last resort relates back to provisions implemented in S.B. 3. Specifically, former R.C. 4928.14(C) required the electric distribution utility to serve as a default service provider in its certified territory if a supplier fails to provide service. Revisions made to R.C. 4928.14 by S.B. 221 changed that provision of the code, but kept the provider of last resort obligation intact. See (AEP Appx. 16). See also R.C. 4928.141(A)(AEP Appx. 17).

⁴ The costs of the Ormet discount are to be collected through AEP's economic development rider, which is a non-bypassable rider that applies to all customers, including reasonable arrangement customers.

The Commission's solution recognized that the ability of AEP's customers to fund the Ormet rate discount is not unlimited.⁵ The Commission's ruling limited the subsidy borne by AEP's other customers to 100% of the discounted Ormet rates, holding AEP harmless, but without the ability to pocket additional windfall revenues for POLR services they would not have to provide. Allowing AEP to retain POLR revenues from Ormet, when it does not provide POLR service to Ormet, was an unreasonable result, the Commission concluded. On the other hand, reducing customers' subsidy of the Ormet discount by crediting customers for POLR revenues collected from Ormet was a reasonable result. It was so ordered by the PUCO. (AEP Appx. 47).

The POLR revenues credited to AEP customers to reduce their subsidy of the discount for the Ormet contract are expected to be approximately \$11 million per year. The credit was initially approved for the ten-year contract term. (AEP Appx. 47). In its Entry on Rehearing, the PUCO modified its initial order and ordered that the POLR revenue credit apply only through the end of the Companies' current electric security plan ("ESP"), December 31, 2011. (AEP Appx. 84).

These Ormet discounts, even with the POLR revenue offset, still come at a hefty price to the remaining AEP customers. The discounted electric rates will cost the AEP customers tens of millions of dollars per year. Over ten years, the discounted rate subsidized by AEP customers for

⁵ (AEP Appx. 43).

this one reasonable arrangement⁶ could reach \$381.7 million.⁷ Thus, receiving credits for the POLR charges paid by Ormet could lessen this potential subsidy over the next three years by approximately \$33 million.

However, if AEP prevails in this appeal, AEP will be able to pocket moneys collected from Ormet for a POLR risk that it does not bear and POLR services it does not supply. AEP will recoup from customers 100% of the revenues from the discount, plus more.

AEP's objective is to protect its windfall POLR revenues collected from a customer who cannot shop. Hence, AEP challenges the PUCO's authority, under R.C. 4905.31, to offset the POLR revenues against the reasonable arrangement costs. AEP argues that the POLR revenues equate to "revenue foregone" referenced in R.C. 4905.31(E) under a utility's job retention program. (AEP Brief at 12-13). The PUCO has no authority to deny the Companies "revenue foregone" under a reasonable arrangement, according to AEP. AEP also alleges that the ten-year exclusive contract with Ormet violates the state's policy facilitating competition and encouraging customer choice. (AEP Brief at 19-28). The Companies dispute the Commission's finding that

⁶ At least one other reasonable arrangement, post-S.B.221, has been approved between the Companies and a customer, Eramet Marietta. Under that reasonable arrangement as well AEP customers will be funding discounted electric rates that could equate to approximately \$57 million. See *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC, Opinion and Order at 5 (Oct. 15, 2009) (citing to OCC Witness Ibrahim's testimony). (AEP Appx. 106). The PUCO has granted rehearing on its Opinion and Order, but has not released a substantive Entry on Rehearing. See *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC, Entry on Rehearing (Dec. 11, 2009). (OCC/OEG Appx. 82-86).

⁷For 2010 through 2018, the Commission imposed restrictions on the discount provided to Ormet. For 2010 and 2011, there is a maximum discount of \$60 million per year. In 2012, the maximum discount is \$54 million; for calendar years 2013 through 2018, the maximum discount is reduced by \$10 million per year. All told, with the \$77.7 million requested for 2009, the price tag for AEP customers is staggering.

there is no risk of Ormet shopping, averring that it is against the manifest weight of the evidence.

Finally, the Companies contest the Commission's authority to require them to enter into an "involuntary" contract that "causes harm to AEP's financial interests."⁸ (AEP Brief at 41-48).

The questions presented by this appeal are as follows:

- 1) Under Ohio law a mercantile customer may obtain discounted electric rates in order to retain jobs, by establishing or entering into a reasonable arrangement with a utility. The reasonable arrangement must be filed with and approved by the PUCO. Does the PUCO have authority to determine the amount of the discount that is to be funded by the utility's other customers?
- 2) Under S.B. 221, the General Assembly has established numerous state policies including policies related to electric generation competition, customer choice, and economic development to facilitate the state's effectiveness in the global economy. Does the PUCO run afoul of these policies by approving a customer-proposed ten-year exclusive contract with a utility for the purpose of retaining Ohio jobs?
- 3) The PUCO approved rates for customers under standard service offer tariffs. Under these tariffs, customers are charged for imposing a risk for the utility standing as a default provider if customers shop and return to the utility after receiving generation service from a competitor. Does AEP's default service provider charge (POLR) in its standard service offer tariff necessarily apply to a customer who takes exclusive service from the utility under a reasonable arrangement contract?
- 4) The PUCO has continuing jurisdiction over reasonable arrangements between a utility and a mercantile customer. Any modifications or changes to a reasonable arrangement require notice and an opportunity to be heard. Do such procedures create a risk that a mercantile customer will be permitted to shop during the three-year ESP period?

⁸ OCC/OEG does not address this final claim in their Merit Brief. OCC/OEG choose to focus their brief on the remaining issues. This should not be interpreted as acquiescence to AEP's position on this issue.

II. STATEMENT OF FACTS AND CASE

OCC and OEG⁹ generally agree with the statement of facts as conveyed by the Companies. There are points of clarification needed, however, to accurately convey the chain of events starting with the Companies supporting the ten-year contract and ending with the Companies denouncing the contract as contrary to the policy directives of the state, a mere five months later.¹⁰

AEP suggests that it expressed general support for Ormet's initial proposal for a ten-year contract where it would be the exclusive supplier of Ormet's full energy needs. (AEP Brief at 9). To be precise, AEP stated in its February 23, 2009 motion to intervene as follows: "AEP believes that the proposed contract is lawful and reasonable and based on Ormet's representation should be approved by the Commission." (AEP Appx. 97). AEP mentioned that its support was conditional but only in the sense that the ESP proceeding provides a "satisfactory" outcome. AEP also urged the Commission to approve the power agreement without change. (AEP Appx. 97).

The proposed power agreement that AEP urged the PUCO to approve, without change, was filed by Ormet with its application. In the power agreement (OCC/OEG Supp.1-28) Article Two unmistakably conveys that AEP and Ormet contemplate an exclusive supplier relationship

⁹ The members of OEG who purchase electric power from the Companies are AK Steel, Aleris, Amsted Rail Co., ArcelorMittal, BP, DuPont, Ford, GE – Aviation, Linde, P&G, PPG, Praxair, Severstal Wheeling, and Worthington Industries.

¹⁰ See AEP Proposition of Law 2 ("The Commission unlawfully adopted a provision within the involuntary contract requiring that AEP's largest customer forego its statutory right to shop for competitive generation service for an entire decade, in violation of the well-established policy of the State of Ohio and the fundamental retail shopping provisions of SB 3 and SB 221.") (AEP Brief at 28-34).

where AEP agrees to provide, and Ormet agrees to take, all power from AEP for the next ten years: “2.01 During the term of this Power Agreement, AEP agrees to furnish to Ormet, and Ormet agrees to take from AEP, all of the electrical energy of the character specified herein, subject to the Terms and conditions of Service, except as otherwise set forth herein***.”

(OCC/OEG Supp. 9-10). Article 2.02 sets the term of the agreement as running from January 1, 2009 through December 21, 2018. (OCC/OEG Supp. 10).

Although this proposed power agreement was subsequently revised, by an amended Ormet application,¹¹ these same exclusive supplier provisions remained intact. AEP filed no response to the Ormet amended application.

Both OCC and OEG (and other intervenors)¹² filed comments on Ormet’s application on April 28 and April 29, 2009. (R. 28, 31). OEG proposed that AEP should not be entitled to provider of last resort risk revenues under the ten-year exclusive Ormet arrangement, as Ormet could not shop for another supplier. Ormet would thus pose no provider of last resort risk upon AEP, OEG reasoned. AEP filed no response to OEG’s comments.

OCC filed testimony of Dr. Ibrahim (R. 24), and subpoenaed two AEP employees, including J. Craig Baker of AEP Service Corporation, to testify at the evidentiary hearing that began April 30, 2009. (R. 21, 22). AEP did not file testimony or call witnesses to testify against the exclusive supplier provision in Ormet’s proposed contract. In fact, Mr. Baker testified at the hearing that AEP supported the Ormet arrangement, conditioned only on the outcome of the electric security plan. (Tr. I at 33-35) (OCC/OEG Supp. 34).

¹¹ On April 10, 2009, Ormet filed an amended application with the PUCO. (R. 15).

¹² The Kroger Company and Industrial Energy Users Ohio intervened in the PUCO proceeding.

While AEP conveys that it “argued against adoption of the exclusive supplier provision, (Article 2.03) as violating the policy of the State of Ohio and the fundamental notion of customer choice embodied in SB 3 and SB 221” (AEP Brief at 9), its arguments came in the eleventh hour. AEP’s protestations began not when the original application was filed, not when the amended application was filed, not when comments were filed, and not when J. Craig Baker was cross-examined. Rather, AEP first objected to the exclusive supplier provision as being anti-competitive in its post-hearing brief filed on July 1, 2009.¹³ This appeared to be in response to anticipating OCC/OEG’s arguments that under the exclusive contract, Ormet could not shop, and AEP should not recoup POLR revenues.

Suddenly, finding itself in jeopardy of not collecting its intended millions of dollars in POLR revenues (for services it would not need to provide), AEP reversed course to become the champion of the competitive marketplace. AEP proceeded to manufacture an argument that any sole source contract with a large customer stifles the development of competition under S.B. 221. AEP’s change of heart appears more related to the convenience instead of earnestness of such arguments.

¹³ Evidently, in September 2008, when AEP sought approval of two ten-year exclusive arrangements with Solsil and Globe Metallurgical, AEP did not deem it to be inconsistent with S.B. 221 to enter into long-term exclusive arrangements. See *In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc.* and *In the Matter of the Application for Approval of a Contract for Electric Service between Ohio Power and Globe Metallurgical, Inc.*, Case Nos. 08-883-EL-AEC, 08-884-EL-AEC (Applications) (July 16, 2008). The PUCO approved those applications by Finding and Order on July 31, 2008. (OCC/OEG Appx. 87).

III. ARGUMENT

PROPOSITION OF LAW NO. 1:

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.¹⁴

When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this Court to apply the rules of statutory interpretation.¹⁵ The Court has adhered to this standard for over one hundred years, as noted by Justice Pfeifer.¹⁶ This standard acknowledges the duty of courts is to expound upon the law, not to create law.

Otherwise the courts encroach upon the power of the General Assembly to enact laws, and thereby threaten the balance of powers created under the Ohio Constitution.¹⁷ Thus, when the Court has been called upon to give effect to an act of the General Assembly, a standard of judicial restraint has developed where the wording of the law is clear and unambiguous.¹⁸ This

¹⁴ *Sears v. Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413, syllabus ¶4. See also *State of Ohio v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus: “Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.”

¹⁵ *State of Ohio v. Muncie* (2001), 91 Ohio St.3d 440, 447, 746 N.E.2d 1092, 1098 (citing *Symmes Twp. Bd. Of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 553, 721 N.E.2d 1057, 1061).

¹⁶ *State of Ohio v. Kreischer*, 109 Ohio St.3d at 395, 848 N.E.2d at ¶14 (citations omitted).

¹⁷ See Section 1, Article II, Ohio Constitution, vesting the legislative power in the Ohio General Assembly, and Section 1, Article IV, Ohio Constitution, vesting the judicial power in the courts. (OCC/OEG Appx. 7,8).

¹⁸ *Proctor, Dir. v. Kardassilaris et al.*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶22.

Court has ruled that a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation.¹⁹ R.C. 4905.31 is such a statute.

A. R.C. 4905.31 is plain and unambiguous, and clearly establishes the PUCO's authority to approve, change, alter, or modify all reasonable arrangements proposed by a utility or a mercantile customer.

R.C. 4905.31²⁰, pre-S.B. 221 and post-S.B. 221, is simple in many respects. It accomplishes three objectives. First, it designates entities and customers who “are not prohibited from” filing for, establishing, or entering into a “reasonable arrangement.” Second, it defines “reasonable arrangements” that are not prohibited from being filed for, established, or entered into. Third, it institutes a process for implementing the arrangements.

The statute, as amended, provides that both public utilities and mercantile customers, or groups of mercantile customers are not prohibited from seeking to establish or enter into a reasonable arrangement. This is conveyed by the following words: “Chapters 4901., 4903., 4905., 4907., 4921., 4923., 4928., and 4929. of the Revised Code do not prohibit *a public utility* from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees***and do not

¹⁹ *Id.*, citing *Bernardini v. Bd. Of Ed. For the Conneaut Area City School Dist.* (1979), 58 Ohio St.2d 1, 6, 12 O.O.3d 1, 387 N.E.2d 1222, 1224. See also *Crowl v. DeLuca* (1972), 29 Ohio St.2d 53, 58-59, 58 O.O.2d 107, 278 N.E.2d 352, 356; *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, syllabus ¶ 2.

²⁰ R.C. 4905.31 (AEP Appx. 4) was enacted in 1953, and underwent its most significant revisions recently under S.B. 221. Notably the revisions did not displace the process for implementing a reasonable arrangement. Nor did S.B. 221 change the PUCO's authority over the reasonable arrangements. Instead the revisions extend the opportunities created for reasonable arrangements to mercantile customers or groups of mercantile customers and expand the categories of reasonable arrangements to include a number of diverse applications including economic development and job retention. See (OCC/OEG Appx. 9-68), S.B. 221, which shows the “redline” version of the amendments to R.C. 4905.31.

prohibit *a mercantile customer* of an electric distribution utility****or group of those customers* from establishing a reasonable arrangement with that utility***.”²¹

After defining this category of applicants, the statute then lists a series of allowable arrangements identified as subsections (A)-(E).²² These are the reasonable arrangements that either the utility or the mercantile customers are not prohibited from seeking.

Next the statute delineates a two step process for implementing the arrangements. The statute identifies the first step as either filing a schedule or establishing or entering into a reasonable arrangement. The words of the statute convey that a utility is not prohibited from “filing a schedule” or “establishing or entering into” a reasonable arrangement. A mercantile customer or a group of mercantile customers are not prohibited from “establishing a reasonable arrangement.”

Once the schedule is filed or the arrangement is established or entered into, the second step must be followed: the schedule or arrangement must be filed with and approved by the commission “pursuant to an application” submitted by the public utility or mercantile customer. The statute provides “[n]o such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of customers***.” The statute directs the public utility to conform its schedule of rates, tolls, and charges, to such arrangements. The statute concludes with a further mandate that “every such schedule or reasonable arrangement shall be under the

²¹ (AEP Appx. 4) (emphasis added).

²² Germane to this appeal is the category “E” which identifies as an allowable arrangement “(E) Any other financial device that may be practicable or advantageous to the parties interested. In case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program***.” (AEP Appx. 4).

supervision and regulation of the commission, and is subject to change, alteration, or modification by the Commission.”

The words of the statute that convey the PUCO’s authority over reasonable arrangements are plain. There is no ambiguity here. The Commission has ultimate authority to approve, regulate, and supervise reasonable arrangements. In the exercise of such authority, the Commission may consider and rule upon whether “costs incurred” in conjunction with any economic development and job retention program, including the “revenues foregone”, should be permitted.

The statutory process for implementing reasonable arrangements is also quite clear. The utility or mercantile customer files for, enters into, or establishes the arrangement. The arrangement can fall under one of the categories listed as subsection (A) through (E). The utility or mercantile customer files an application seeking approval of the schedule or arrangement at the PUCO. The Commission considers it, and changes, alters, or modifies the arrangement or schedule. The utility adjusts its schedules to reflect whatever the Commission orders.

This was the process followed in the PUCO proceeding below. Ormet sought to establish a reasonable arrangement with AEP. It filed an application with the Commission proposing its reasonable arrangement. The Commission considered the application. The Commission ordered modifications to the proposed reasonable arrangement. One of the modifications was to require AEP to credit customers for POLR revenues paid by Ormet to AEP. This modification reduced the subsidy borne by other AEP customers. AEP was held harmless, and received 100% of the revenues for services provided to Ormet, as if Ormet had been billed under standard service offer schedules. AEP, however, would not receive millions of dollars for a risk not imposed or for services not provided under the reasonable arrangement. Instead the POLR charges would offset

customers' subsidy. Ormet and AEP filed a revised and executed power agreement on September 18, 2009.²³ (R. 59).

B. Subsection (E) of R.C. 4905.31 pertains to a reasonable arrangement that may be sought by an applicant. It does not restrict the PUCO's authority.

The Companies claim that R.C. 4905.31 does not permit the Commission to approve a reasonable arrangement and simultaneously disallow a portion of the costs incurred, including the resulting "revenue forgone." (AEP Brief at 12). The only path to this conclusion is through tortured statutory interpretation. It is this type of forced and subtle construction that this Court has wisely eschewed on numerous occasions.²⁴

The Companies begin their journey by zeroing in on language of subsection (E), oblivious to the other bordering provisions of the statute. The Companies identify the Ormet arrangement as a qualifying financial device that "may" "recover costs incurred in conjunction with any economic development and job retention," including "revenue foregone." The Companies then profess that "may" is intended by the General Assembly to pertain to categories of "financial devices" and not to "costs incurred" including "revenue foregone." (AEP Brief at 13). Rather, AEP posits that the General Assembly provided for permissive reasonable arrangements to include mandatory recovery of "costs incurred," including "revenue foregone." (AEP Brief at 14).

AEP then notes that the General Assembly attached no qualifying or modifying language within subsection (E) and thus, the Commission does not have discretion to deny recovery of revenue foregone. (AEP Brief at 16). In other words, the Commission may allow a financial

²³ The Companies made no other filing to fulfill their requirement under R.C. 4905.31 to "conform its schedule of rates, tolls, and charges to such arrangement***."

²⁴ See *Slingluff et al. v. Weaver et al.*, 66 Ohio St. 627, 64 N.E. 576 (citation omitted).

device to recover costs incurred for economic development or job retention, but may not deny recovery of “costs incurred,” including “revenue foregone” as a result of the program.

The Companies bolster their theory by grasping onto the doctrine of “*expressio unius est exclusio alterius*.” According to the Companies, if the General Assembly wanted to give the Commission “offset” authority – allowing it to reduce the recovery of “revenue foregone” - it would have expressly done so. (AEP Brief at 17). Because the General Assembly did not, the Court should interpret that to mean that the General Assembly intended no offset.

The Companies’ forced interpretation of this specific section of R.C. 4905.31 must fail. The Companies seek to import doubt into the statute as to its meaning and then resort to grammatical arguments related to the placement of the verb “may” to remove the doubt they create. The doubt fashioned by the Companies is based on speculation. This Court has recognized that where the statute is clear and explicit, to import doubt as to its meaning and then attempt to resolve the doubt by supposition based on phraseology or punctuation is improper.²⁵

When the statute is clear and explicit as it is here, the maxim of *expressio unius est exclusio* has no place. This maxim is not a rule of law. It is a rule of construction “used as a tool to cut through ambiguities to lay bare the intendment of a provision.”²⁶ It is only an aid in ascertaining the meaning of law and must yield whenever a contrary intent is apparent.

The section of the statute described by the Companies is clear, and needs no interpretation. R.C. 4905.31 only defines the series of allowable arrangements that the applicants (utility or mercantile customer) are not prohibited from filing, establishing, or entering into. Thus, “may” merely defines the parameters of what the applicants are not prohibited from

²⁵ Id. at 628-629, 64 N.E. 576.

²⁶ *The State ex. rel. Jackman et al. v. Court of Common Pleas of Cuyahoga County et al.* (1967), 9 Ohio St.2d 156, 164, citing *State ex rel. Curtis v. DeCorps, Dir. Of Pub. Serv.* (1938), 134 Ohio St. 295.

seeking. Subsection (E), one of the five categories of reasonable arrangements, presents the applicants with the opportunity to seek a reasonable arrangement for economic development that includes “costs incurred” under the program and “revenue foregone” as a result of such a program. It does not in any way define the Commission’s authority over the arrangements.

Rather the Commission’s authority over the reasonable arrangements is established later on in the statute, where the statute plainly states that the schedule or arrangement must be approved by the Commission: “No such schedule or arrangement is lawful unless it is filed with and approved by the commission, pursuant to an application***.” Lest there be doubt as to the authority of the Commission, all doubt is resolved in the final passage of the statute: “Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.”

The Commission’s general authority over reasonable arrangements is further defined under the Ohio Admin. Code through enabling rules pertaining to the statute. Under those rules when a unique arrangement²⁷ is requested by a mercantile customer, the mercantile customer has the burden of showing the arrangement is “reasonable” and does not violate R.C. 4905.33 (OCC/OEG Appx. 3) and R.C. 4905.35 (OCC/OEG Appx. 4).²⁸ Further, the mercantile customer must show that the arrangement furthers the policy of the State of Ohio embodied in R.C. 4928.02.²⁹ The Commission itself has succinctly described its role in reasonable

²⁷ A “unique arrangement” is a subset of reasonable arrangements under R.C.4905.31 that does not constitute an economic development arrangement (Ohio Adm. Code 4901:1-38-03) or an energy efficiency arrangement (Ohio Admin. Code 4901:1-38-04). (AEP Appx. 30).

²⁸ See Ohio Admin. Code 4901:1-38-05(B)(3). (AEP Appx. 31).

²⁹ Id. See (AEP Appx. 10).

arrangements as one which requires it to determine whether or not the arrangements are in the “public interest.” (AEP Appx. 161).

The words of the statute and the enabling rules convey the PUCO’s authority over reasonable arrangements. They are not ambiguous. R.C. 4905.31 makes it clear that no reasonable arrangement is lawful unless it has been filed with and approved by the Commission. The Commission may change, alter, or modify a reasonable arrangement.

In the exercise of its jurisdiction over reasonable arrangements, it can examine the “costs incurred” and the “revenue foregone” related to an economic development or job retention program. Accordingly, the PUCO can determine whether POLR risk is a “cost incurred” and whether it would amount to “revenue foregone” where the utility is not providing POLR services and is not subject to POLR risk.

The Commission determined that the POLR risk was not a “cost incurred” under the Ormet reasonable arrangement. (AEP Appx. 46-47; 84-85). Since the POLR charge compensates utilities for a risk that a customer will shop and then return, when Ormet gave up its right to shop, it eliminated the POLR risk. Hence, for this reasonable arrangement customer there is no POLR “cost incurred” under R.C. 4905.31(E) which could in turn be recovered as “revenue foregone.” In examining “revenue foregone,” the PUCO rightly considered other factors (e.g., costs that a utility would avoid under the arrangement). Indeed under Ohio Adm. Code 4901:1-38-08(A)(3) (OCC/OEG Appx. 6) cost savings to the electric utility are to be an offset to the recovery of “delta revenues”³⁰ or the “revenue foregone” as the statute refers to such revenues. The avoided POLR expense is essentially a cost savings to the Companies—the

³⁰ “Delta revenues” is a term used solely with respect to reasonable arrangement. It is defined as “the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission.” Ohio Admin. Code 4901:1-38-01(C). (OCC/OEG Appx. 5).

Companies are Ormet's only provider under the ten-year term of the agreement and there would be no "costs incurred" for POLR risk or POLR services for this customer. Thus, there should be no POLR revenues that would be foregone under the agreement; instead the POLR risk and POLR service would be avoided as a result of the agreement. They should be offset against the permissible "revenue foregone" that is collected from CSP customers, as the PUCO correctly determined.

Moreover the Commission has a responsibility to ultimately determine whether the proposed arrangement is reasonable and in the public interest. Part of such a determination focuses on the cost imposed on the utility's customers to subsidize the discounted rates. Whether the discount subsidized by other customers should be offset by POLR revenues is merely one factor the Commission can consider in reviewing a reasonable arrangement.

AEP's interpretation of R.C. 4905.31(E)—that the Commission has no choice but to permit the utility to recover "costs incurred" including "revenues foregone"—supersedes and renders superfluous Commission review of such costs and revenues. The Companies' forced interpretation of R.C. 4905.31 seeks to needlessly restrict the Commission from carrying out its review. It should be rejected. AEP asks this Court to accept its construction of R.C. 4905.31 that limits the authority of the PUCO as established in the statute, inconsistent with its terms, and the terms of the enabling rules. The Court should not accept such arguments.

Otherwise, there would appear to be no reason why the Court could not, as to any legislation, alter it so as to make it conform to the utility's idea as to what the act should have been. Such a ruling would substitute the will and judgment of the General Assembly with the will and judgment of the judiciary who have been selected to merely expound upon the law. The Court has restricted the Commission from legislating and making changes to the statutory

regulatory scheme in the past.³¹ The Court should heed its own advice here where there is no ambiguity in the provisions of R.C. 4905.31. The Appellants' claims of error based on a forced construction of R.C. 4905.31 should be rejected.

PROPOSITION OF LAW 2:

Chapter 4928 of the Revised Code does not prohibit a mercantile customer from establishing a reasonable arrangement providing for an electric distribution utility to be its exclusive supplier, subject to the Commission's approval. Nor does Chapter 4928 of the Revised Code prohibit the Commission from approving a reasonable arrangement with such an exclusive supplier provision.

In its merit brief, AEP argues that the PUCO's adoption of an "involuntary" contract between it and Ornet is unlawful because it violates well-established policy of the state and the retail shopping provisions of S.B.3 and S.B. 221. (AEP Brief at 28-34). According to AEP, approval of the exclusive supplier provision is contrary to the most basic and central premise of S.B.3 and S.B. 221: the development of competitive electric generation markets for retail customers. (AEP Brief at 28). AEP directs the Court to the codified policies contained in R.C. 4928.02 (C), (G), and (H) (AEP Appx. 10) as evidence of the policy. (AEP Brief at 29). AEP also makes reference to R.C. 4928.06 (AEP Appx. 14), claiming that the exclusive supplier provision could not survive scrutiny under the factors the Commission looks to when determining whether there is effective competition or reasonable alternatives for that service. (AEP Brief at 30).

³¹ See e.g. *Consumers' Counsel v. Public Util. Comm.* (1981), 67 Ohio St.2d 153, 164, 21 O.O.3d 96, 423 N.E.2d 820, appeal dismissed (1982), 455 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444 (no authority for the PUCO to enact an excise tax adjustment clause); *Montgomery County Bd. of Comm. v. Public Util. Comm.* (1986), 28 Ohio St.3d 171, 28 OBR 262, 503 N.E.2d 167 (no authority for the PUCO to authorize PIPP plan arrearages to be collected through the EFC rate).

Additionally, AEP complains that the PUCO ruling is unreasonable because it unduly restricts retail competition and locks Ormet's load out of the competitive market. (AEP Brief at 30). AEP alleges that "prohibiting shopping for such an enormous electric load is unquestionably a major constraint on the competitive generation market in Ohio." (AEP Brief at 31). No expert testimony is needed to enforce the clear policy of the General Assembly, as articulated in Chapter 4928, AEP claims after, coincidentally, sponsoring no testimony. (AEP Brief at 32). AEP alleges as well that enforcing an exclusive supplier provision contradicts the public interest and should be declared unconscionable and unenforceable. (AEP Brief at 32).

A. R.C. 4905.31 clearly permits a mercantile customer to establish a reasonable arrangement with an electric distribution utility, notwithstanding the provisions of R.C. 4928.02 and 4928.06.

Ormet applied to establish a reasonable arrangement with AEP. (AEP Supp. 33). Ormet chose to give up the right to shop for generation service in exchange for a long-term exclusive supplier agreement with AEP. Under the long-term contract with AEP, Ormet is provided with rates that are discounted from the otherwise applicable tariffs it would pay. Customers of AEP were ordered to fund the entire discount granted Ormet, primarily in order to retain Ohio jobs. (AEP Appx. 44).

Ormet's application to establish a reasonable arrangement with AEP was specifically permitted under the revisions to R.C. 4905.31 that came with S.B. 221. S.B. 221 (OCC/OEG Appx. 9-68) expanded the scope of reasonable arrangements under R.C. 4905.31 to allow "mercantile customers" such as Ormet to unilaterally establish a reasonable arrangement, subject to the PUCO's approval. The General Assembly in R.C. 4928.01(A)(19) defined a mercantile customer as meeting a minimum consumption -- more than 700,000 Kwh per year. (AEP Appx. 5). No maximum consumption was set to limit larger mercantile customers from establishing or

entering into reasonable arrangements. Nor did the General Assembly put restrictions on the length of reasonable arrangements when revisions to Chapter 4928 and R.C. 4905.31 were made through S.B. 221.

The General Assembly not only expanded reasonable arrangements under S.B. 221, but also revised the introductory language of the statute. Specifically, the preamble to R.C. 4905.31 expands upon the chapters of the Revised Code that do not prohibit reasonable arrangements. Among the chapters listed as not prohibiting reasonable arrangements is Chapter 4928. This Chapter was specifically added when S.B. 221 was enacted. (OCC/OEG Appx. 11).

Thus, notwithstanding AEP's arguments to the contrary, R.C. 4928.02 and 4928.06 do not prohibit mercantile customers from establishing reasonable arrangements under R.C. 4905.31. The specific revised language of R.C. 4905.31 makes this abundantly clear.³² AEP's arguments that the Commission violated Chapter 4928 of the Revised Code must fail as the plain language of the statute states that nothing in Chapter 4928 precludes reasonable arrangements, including those containing exclusive supplier provisions.³³

B. Chapter 4928 of the Revised Code does not prohibit the Public Utilities Commission from approving a reasonable arrangement that encompasses an exclusive supplier provision.

Contrary to AEP's assertions otherwise, the Commission's approval of the Ormet reasonable arrangement is consistent with a number of the policies underlying S.B. 221. Although one of the objectives of S.B. 221 is to foster competition, AEP ignores the myriad of

³² See (AEP Appx. 89), where the PUCO acknowledged that, given the revised statutory language, it could not find as a matter of law, that the proposed unique arrangement, which includes an exclusive supplier provision, violates R.C. 4928.02.

³³ See (AEP Appx. 89).

other policies underlying S.B. 221—policies that are effectuated by the PUCO approving the modified reasonable arrangement with Ormet.

Under R.C. 4928.02, the policies of the state include: (A) ensuring the availability of “reasonably priced retail electric service;”(B) providing customers with “the supplier, price, terms, conditions, and quality options that they elect to meet their respective needs;” (E) “effective customer choice of retail electric service;”(G) developing and implementing flexible regulatory treatment; and (N) facilitating the state’s effectiveness in the global economy. (AEP Appx. 10).

By approving the modified Ormet reasonable arrangement with the POLR offset, the Commission can, consistent with R.C. 4928.02(A), attempt to ensure that reasonably priced electric retail rates are available for both Ormet and the other customers of AEP who subsidize the discount. Under the reasonable arrangement the Commission has permitted Ormet to choose its supplier and the conditions of service that meet its needs, consistent with the policy directive of R.C. 4928.02 (B) and (E). The Ormet reasonable arrangement is premised upon the concept of permitting flexible regulatory treatment—rates that vary from tariff, and are tied to the world-wide price of aluminum and to employee levels. This is the type of flexible regulatory treatment referred to under R.C. 4928.02(G). Finally, Ormet has maintained that without the reasonable arrangement it would not be able to remain competitive, given the fact that electricity constitutes 30 to 35% of its cost of producing aluminum. (AEP Supp. 38-39). Ormet maintained that it could not stay in business in Ohio if it did not receive some sort of discounted pricing under a reasonable arrangement.³⁴ Thus approving the reasonable arrangement between Ormet and AEP,

³⁴ See Ormet Application at 7 (AEP Supp.33).

in the PUCO's view, facilitated the state's effectiveness in the global economy, consistent with R.C. 4928.02 (N).

Thus, even if one were to accept AEP's unsubstantiated contention that the competitive market is theoretically injured by the Ormet contract, the Court should conclude that there are countervailing and competing policies within Chapter 4928 that are fulfilled by upholding the PUCO's decision regarding the contract. At the very least the Court should be aware that had this reasonable arrangement not been approved, and discounted electric rates not been given to Ormet, Ormet alleged that it would have been difficult if not impossible for it to sustain its operations in Ohio.³⁵ Ormet might have shut down. The closing of its doors would have been detrimental to the Ohio economy, the PUCO concluded, as evidenced by the significant economic benefits the Commission found attributable to Ormet.³⁶ AEP's arguments should be rejected.

PROPOSITION OF LAW 3:

The Commission's decision to credit customers for POLR charges paid by Ormet to AEP was reasonable and consistent with the modified electric security plan approved for AEP.

A. The PUCO's decision was reasonable.

The Ormet arrangement was submitted to the PUCO for approval. Under R.C. 4905.31, the PUCO may approve, change, alter, or modify such reasonable arrangements. The PUCO's decision in this respect is no different than any other decision of the PUCO. The decision must

³⁵ See Testimony of Ormet Witness Tanchuk at 8 (testifying that Ormet's economic survival would be threatened if the unique arrangement was not approved). (OCC/OEG Supp at 71).

³⁶ See (AEP Appx. 36), where the PUCO found considerable benefits to the Ohio economy from Ormet's continued operation. These included \$195 million in employee compensation and benefits to the regional economy; creation of an additional 2,400 jobs in the region, and \$6.7 million in tax revenue generated yearly. See also (OCC/OEG Supp at 38-67), Testimony of Ormet Witness Coombs.

be lawful and reasonable, and result in charges for service that are just and reasonable.³⁷ It must be conveyed by findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based on the findings of fact.³⁸ That is precisely what happened here.

The PUCO approved a modified reasonable arrangement between Ormet and AEP, which requires AEP to credit its customers for provider of last resort revenues from Ormet. This credit helps defray the cost of the discounted rates that AEP customers were ordered to subsidize. Otherwise AEP would be assured of windfall revenues for POLR services that are not being provided to Ormet. For 2009, the POLR offset will diminish the Ormet discount subsidized by AEP customers by approximately \$11 million. (AEP Brief at 3). Each year thereafter, at least through 2011, the POLR offset should be comparable assuming Ormet's operations remain consistent with its 2009 experience.

The Commission's Order was reasonable in this regard because it recognized that AEP will be the exclusive supplier to Ormet (AEP Appx. 46) and thus, there is no risk that Ormet will shop for generation and then return to AEP. The Commission correctly concluded that if AEP were to retain POLR revenues from Ormet, it would be compensated for a service it would not be providing. (AEP Appx. 46). The Commission declined to require customers to fund an additional subsidy to AEP for POLR. AEP instead was held harmless—it was permitted to recoup 100% of the revenues for services it provided to Ormet, as if Ormet had been billed for such services under standard tariff rates. The Commission properly exercised its authority to modify the reasonable arrangement proposed by Ormet to make the arrangement reasonable from

³⁷ See R.C. 4905.22, requiring charges for electric services rendered to be just and reasonable. (OCC/OEG Appx. 2).

³⁸ See R.C. 4903.09. (OCC/OEG Appx. 1).

the perspective of all involved, including the customers of AEP who pay increased rates to subsidize the Ormet discount.

In the Commission's evaluation of the POLR risks associated with Ormet, the Commission recognized the significance of the Ormet agreement. That agreement, proposed by Ormet, establishes AEP as the exclusive supplier to Ormet over the next ten years. Ormet's agreement to stay with AEP directly affects the POLR risks AEP will bear related to supplying it. The PUCO found there was no POLR risk posed by Ormet under the long-term agreement. Thus, with no POLR risk being imposed on AEP, credits were ordered for the POLR revenues collected from Ormet. These credits are used to lessen customers' subsidy of the Ormet discount.

The Commission's decision here is analogous to the treatment of shopping credits the Court affirmed in *Ohio Consumers' Counsel v. Pub. Util. Comm.*³⁹ In that appeal, the Commission had approved a proposal that aggregation customers⁴⁰ be able to avoid a portion of the rate stabilization charge if they committed to obtaining electric generation from another supplier. The rate stabilization charge was the means, under S.B.3, for the utility to be compensated for its provider of last resort risk.⁴¹ Although OCC and others challenged the credits as discriminatory, this Court affirmed the PUCO. This Court found that providing credits or offsets to the rate stabilization charge was reasonable, as provider of last resort risks are

³⁹ *Ohio Consumers Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 857 N.E.2d 1184, ¶21-27, reconsideration denied (2006), 109 Ohio St.3d 1509, 2006-Ohio-2998, 849 N.E.2d 1029.

⁴⁰ "Aggregation customers" refers to customers taking service under a qualifying aggregation program. See R.C. 4928.01(A)(13). (AEP Appx. 5).

⁴¹ *Ohio Consumers Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d at 335, 857 N.E.2d at 1192.

different for different customer groups.⁴² The Court recognized that since the aggregation customers agreed to stay with the competitive provider and not return to the utility, the utility's POLR risks were greatly reduced.⁴³

Here, the Commission has made the determination that the POLR risk related to one customer, Ormet, is not like the POLR risks that other customers may impose on AEP. This is because Ormet, similar to the aggregation customers in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, chose to pursue an arrangement where there is no risk created that it will impose POLR costs on the utility. That option was a reasonable arrangement under which AEP will be the exclusive supplier of Ormet for the next ten years. The Commission then ordered credits to the economic development rider the other customers pay to subsidize the discounted Ormet rates. These credits are similar in concept to the credits permitted in *Ohio Consumers' Counsel v. Pub. Util. Comm.* The Commission's finding here is entirely consistent with the principles of *Ohio Consumers' Counsel v. Pub. Util. Comm.* and acknowledges that POLR risks of a utility vary greatly depending upon the unique circumstances of the customer and the nature of the service provided. The Commission's decision is reasonable and should be affirmed.

B. The PUCO's decision establishing SSO rates in the ESP proceeding does not conflict with permitting POLR offsets under reasonable arrangements.

The Companies argue that the PUCO's decision to allow Ormet to "effectively bypass" AEP's "non-bypassable"⁴⁴ POLR charge conflicts with the PUCO's decision in the ESP cases.

⁴² *Id.* at 337, 857 N.E.2d at 1193.

⁴³ *Id.*

⁴⁴ The Companies mischaracterize the POLR charge as "non-bypassable." The Commission specifically determined that the POLR charge was bypassable by customers who shop and agree to return at market price. See (AEP Appx. 153). Its ruling applied to standard service offer customers as well as customers in governmental aggregation programs. See (AEP Appx. 218).

(AEP Brief at 22). The Companies explain that the PUCO on rehearing rejected an OEG proposal that would have allowed *standard service offer* customers to avoid a POLR charge if they agreed not to shop during the ESP period. (AEP Brief at 23). The PUCO's Entry on Rehearing there upheld the "shopping rule" that customers would be required to pay a POLR charge *during the time they are served under SSO rates* even if they agreed not to shop during the ESP period. (AEP Brief at 22-24). The "exclusive supplier" provision of the Ormet reasonable arrangement is no different than the OEG proposal rejected by the Commission in the ESP Entry on Rehearing, claim the Companies. Thus, the Companies argue that to allow Ormet to "effectively bypass" the POLR charge is inconsistent with the Commission's ESP ruling.

The Companies' arguments miss the mark because they fail to recognize that the Commission's ESP shopping rule pertains to a specific set of customers --SSO customers -- who are different in many respects from reasonable arrangement customers. SSO customers are subject to rates set through standard service offerings approved by the PUCO in ESP proceedings, governed by R.C. 4928.142. (AEP Appx. 18). Standard service offerings essentially represent a cookie cutter approach to reasonable generation rates.⁴⁵

In contrast, mercantile customers such as Ormet, who enter into or establish reasonable arrangements, are subject to rates set through an entirely different process—a process which recognizes the unique nature of each customer, or group of customers. Under R.C. 4905.31,

⁴⁵ Yet even within its standard service offer, the Commission recognized that there are varying degrees of POLR risks imposed by standard service customers. Indeed the PUCO found that if standard service offer customers made specific commitments to mitigate POLR risks imposed on the Companies, they could avoid POLR charges. For instance if customers agreed to pay market rates if they shopped and sought to return, then the PUCO found the POLR charges to such customers could be avoided. The Commission's Order here is consistent, not inconsistent with the ESP Order. Like the ESP order which recognized that customer commitments can reduce or eliminate the Companies' POLR risk, the Commission here recognizes a reasonable arrangement customer's commitment not to shop over the term of a contract eliminates the POLR risk to the Companies.

service under a reasonable arrangement allows for unique prices, terms, and conditions as denoted by the flexible provisions of the statute permitting variable rates based on a number of scenarios. Indeed as aptly noted by the PUCO, AEP itself enumerated factors that it believes distinguish Ormet from standard service customers. (AEP Appx. 87).

R.C. 4905.31 also establishes a discrete application process to be followed to obtain approval of reasonable arrangements. R.C. 4905.31 delineates a separate PUCO approval process for a proposed reasonable arrangement along with a discrete filing of the schedule of rates conforming to the approved reasonable arrangement. Not only are reasonable arrangements controlled by their own statute, but they are judged by a separate set of standards that have been specifically developed and codified in the Ohio Administrative Code⁴⁶ as the enabling rules of R.C. 4905.31. Those standards are not the same standards that apply to SSO rates established in the Companies' ESP, pursuant to provisions of R.C. 4928.143.

The Commission was correct in determining that the POLR ESP ruling that was related to SSO customers was inapplicable to reasonable arrangement customers. The Court should affirm this decision. The Commission's ruling was a sound ruling, and acknowledged the statutory distinction between standard service offer customers and reasonable arrangement customers.⁴⁷ Moreover, the Commission's ruling implicitly recognizes that any POLR risk that would come from reasonable arrangement customers migrating—purchasing their generation from a

⁴⁶ See Ohio Admin. Code 4901:1-38 et seq. (OCC/OEG Appx. 5-6); (AEP Appx. 28-32).

⁴⁷ As the Ohio Supreme Court has noted, a utility's provider of last resort risks are different for different customer groups. *OCC v. Pub. Util. Comm.*, 109 Ohio St.3d at 328, 337-338 (upholding additional shopping credits against the POLR charge--collected via a rate stabilization charge--for residential aggregation groups and commercial and industrial customers who agree not to return to the utility's generation service during the rate plan and agree to pay market price if they return).

competitive supplier when the price is lower than the reasonable arrangement price—is quite different from migration risks associated with SSO customers.

C. The Commission’s decision here does not undermine the modified ESP plan approved by the PUCO.

The Companies argue that the Commission’s ruling undermines the modified ESP plan it approved. (AEP Brief at 24-27). The Companies allege that the POLR charge approved in the ESP proceeding was based on approving a specific revenue requirement for POLR, and interfering with the revenue stream (by reducing the POLR revenues collected by the Companies) is unreasonable and unlawful. (AEP Brief at 24-25). Additionally, the Companies argue that the PUCO’s order modifies the total ESP package that the PUCO held to be more favorable in the aggregate than the expected results of the MRO. Modifying the package violates the controlling statutory standard (R.C. 4928.143(c)(1)) (AEP Appx. 21) and process establishing an ESP, especially where the PUCO precludes full recovery of ESP rates, the Companies argue. (AEP Brief at 25).

The Companies appear to misapprehend the interplay between the reasonable arrangements and the Companies’ ESP. In the ESP, the Companies proposed an economic development cost recovery rider to collect costs, incentives, and foregone revenues associated with new or expanding special arrangements for economic development and job retention.⁴⁸ This is the very rider that will apply to the Ormet reasonable arrangement and will permit the Companies to fund the costs, incentives, and foregone revenues associated with the approved Ormet agreement. The Companies proposed in the ESP that the rider be set at zero, based upon

⁴⁸ See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO et al., Testimony of Dave Rausch at 12, Company Ex. 1; see (AEP Appx. 160-161).

the fact that reasonable arrangements, as contemplated by R.C. 4905.31, had not been filed with and approved by the PUCO at the time that the ESP plan was filed.

OCC advocated at that time for a PUCO ruling that reasonable arrangement costs be shared 50/50 between customers and the utility, based on past PUCO precedent.⁴⁹ The Companies on the other hand urged the PUCO to reject OCC's recommendation, arguing that economic development and full recovery of foregone revenue is consistent with S.B. 221 and a significant feature of its ESP plan. The Commission, however, did not reject OCC's recommendation but concluded that OCC's concerns were "unfounded and unnecessary at this stage." Rather, the Commission concluded that it is "vested with the authority to review and determine whether or not economic development arrangements are in the public interest."⁵⁰

This ESP ruling reinforced the case by case approach to economic development arrangements, which is consistent with prior Commission practice and the PUCO's enabling rules of R.C. 4905.31.⁵¹ The PUCO also conveyed its intent to deal with OCC's concerns when approval of the economic development arrangements is being sought. Thus, the PUCO left open the door to arguments such as OCC's that there should be some sharing of the economic development costs.

Hence, "modifications" to the ESP, by virtue of economic development cases, were anticipated and entirely consistent with the Commission's ESP Order. AEP should not be heard to complain now that such modifications are not permitted. AEP would have the PUCO shift the balance of the ESP even further in favor of investors and against customers who are paying AEP

⁴⁹ See (AEP Appx. 160-161).

⁵⁰ Id.

⁵¹ See Ohio Admin. Code 4901:1-38 et seq.

tens of millions of dollars in subsidies even with the current crediting of POLR revenues. This is neither reasonable nor lawful. AEP's arguments should be rejected.

Moreover, although AEP seeks to emphasize that the Commission characterized the POLR revenue as a "revenue requirement," the Court should not be misled to assume there is precision in setting POLR that is normally found in establishing revenue requirements. There is not. The POLR "revenue requirement" determined by the PUCO is simply a measure of the risk that AEP bears that its customers will migrate or leave the standard service offer. It was derived from a futures pricing model that assumed that the POLR costs equate to a series of options to buy power and assumed no reasonable arrangements under R.C. 4905.31.⁵² The POLR charge approved in the ESP is nothing but an output of the model, affected by a series of inputs that estimate risk. The output of the model which assumed no reasonable arrangements is unrelated to the actual costs of migration and switching. Hence, relying on a "revenue requirement" that is not cost based, and arguing that it equates to a guarantee of specific revenues is inconsistent with how the POLR "cost" was derived. The Companies' arguments should fail here.

PROPOSITION OF LAW 4:

Where appellants fail to raise specific grounds for rehearing before the Commission, the Court lacks jurisdiction to consider those arguments.⁵³

In AEP's Proposition of Law III, AEP argues that the Commission's conclusion that there is no risk of Ormet shopping conflicts with controlling statutes and is otherwise against the manifest weight of the record. (AEP Brief at 34-41). Within this proposition of law AEP argues that numerous contract provisions (2.03, 3.01, 3.02, and 8.01) allow for early termination by

⁵² OCC and others have appealed this portion of the approved ESP in S.Ct. Case No. 09-2022.

⁵³ See R.C. 4903.10 (OCC/OEG Appx. 1A); *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 349, 2007-Ohio-4276, 872 N.E.2d 269, 278.

the PUCO, AEP, and/or Ormet. (AEP Brief at 36). AEP avers that these contract provisions allowing early termination of the contract create the risk that Ormet will be able to shop.

Under R.C. 4903.10(B) “[n]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application [for rehearing].” This Court has consistently upheld the requirements of R.C. 4903.10 (and 4903.13), and has construed them as mandatory, jurisdictional requirements.⁵⁴ Most recently in *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*,⁵⁵ this Court reiterated that setting forth specific grounds on rehearing and identifying errors in a notice of appeal is a jurisdictional pre-requisite for its review. The Court there precluded the appellant from raising issues it did not apply for rehearing on.⁵⁶

Moreover, the Court has strictly construed the specificity requirements of R.C. 4903.10.⁵⁷ In *City of Cincinnati v. Pub. Util. Comm. et al.*⁵⁸, the Court concluded that the General Assembly intended to deny an appellant the right to raise a question on appeal where the appellant used a shotgun instead of a rifle to hit the question. This specificity standard –shotgun or rifle- has been referred to as the “strict specificity test” of R.C. 4903.10.⁵⁹ This Court has found that where an

⁵⁴ *Consumers Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247, 638 N.E.2d 550.

⁵⁵ *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 211, 2007-Ohio-4790, ¶ 14-16, 874 N.E. 2d 764.

⁵⁶ See also *City of Akron et al. v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, 161-162, 9 O.O. 3d 122, 378 N.E.2d 480, 484-485 (proposition of law not asserted in application for rehearing and not found in their notice of appeal may not be considered on appeal).

⁵⁷ *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 374-375, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59 (finding that appellants grounds for rehearing allege nothing more than broad, general claims and thus appellants failed to preserve issues for appeal).

⁵⁸ *City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 378, 39 O.O. 188, 86 N.E.2d 10, 40.

⁵⁹ See for example, *Office of Consumers’ Counsel v. Pub. Util. Comm. of Ohio et al.* (1994), 70 Ohio St.3d 244, 248, 638 N.E.2d 550, 553.

application for rehearing does not state specifically the ground on which the applicant considers the PUCO's order to be unreasonable and unlawful, it does not comply with R.C. 4903.10.⁶⁰

Applying this standard to AEP's application for rehearing (AEP Appx. 51-74) reveals that AEP used a shotgun approach in its rehearing and completely missed its target. It did not raise the specific contract arguments that it is now presenting for the first time on brief and hence, did not comply with R.C. 4903.10.

In its Application for Rehearing (AEP Appx. 51-74), Allegation of Error No. 1 is the only assignment of error devoted to seeking a rehearing on the PUCO's conclusion that Ormet presents no risk of shopping. Error No. 1 reads as follows: "The Commission's conclusion that during the ten-year term of this unique arrangement there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP is unreasonable and conflicts with the Commission's orders in AEP's ESP Cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO ("ESP cases")." (AEP Appx. 52). In the accompanying memorandum in support AEP presents numerous arguments disputing the Commission's no-risk finding. AEP specifically claims that the PUCO's authority to change, alter, or modify the reasonable arrangement under R.C. 4905.31 equates to a risk that the contract will be terminated and Ormet will be permitted to shop. (AEP Appx. 54). Additionally AEP argues that the specific modifications the PUCO made requiring employee levels and reductions in deferrals by April 2012 reflect a termination risk. (AEP Appx. 54-55). AEP also argues that its past experience with Ormet is another ground for the

⁶⁰ See *Marion v. Pub. Util. Comm.* (1954), 161 Ohio St. 276, 278-279, 53 O.O. 148, 119 N.E.2d 67; *Conneaut Tel. Co. v. Pub. Util. Comm.* (1967), 10 Ohio St.2d 269, 270, 39 O.O.2d 432, 277 N.E.2d 409.

Court to reverse the PUCO's conclusion that there is no risk of Ormet shopping. (AEP Brief at 36-37).⁶¹

There is no argument, however, found in AEP's Application for Rehearing Error No. 1 or the memorandum in support, that even hints of its merit brief arguments that provisions in the Ormet contract create a risk of early termination. And yet, AEP presents these arguments in its merit brief. (AEP Brief at 36). Those portions of its brief that pertain to such arguments are improper and should be struck under Ohio law.

Even if AEP's arguments are considered on the merits, they fail. Should Ormet cancel the contract early in order to shop, Ormet would nonetheless have to obtain distribution services from AEP. Those distribution services would be subject to a POLR charge that is bypassable only under certain conditions.⁶² Under those circumstances, the reasonable arrangement would have terminated and along with it the customers' subsidy of the discounted rates under the Ormet reasonable arrangement. In turn, any POLR revenues paid by Ormet, as a distribution only customer, would no longer be credited to AEP customers. AEP would actually be subject to POLR risk for Ormet, and thus would be providing POLR service to Ormet, justifying retention of POLR revenues collected from Ormet.

In contrast, under the current reasonable arrangement, AEP is not providing POLR services, nor is it incurring POLR risk. Through a direct customer subsidy of the Ormet discount the Companies receive 100% of the revenues for services they provide to Ormet, just as if Ormet had otherwise paid non-discounted standard tariff rates. The Commission however, deemed it

⁶¹ AEP also argues about the PUCO's revised approach on rehearing of examining only the first three years of the contract. This portion of the brief (along with others) was the subject of OCC/OEG's motion to dismiss, filed with this Court on February 5, 2010. There has been no ruling, to date, on this motion.

⁶² See footnote 2.

inappropriate for AEP to retain revenues over and above 100% of the discount for Ormet discount. It denied AEP the right to collect windfall revenues for POLR services not provided and POLR risk not incurred. The PUCO was correct in its ruling. The Court should affirm.

PROPOSITION OF LAW 5:

A finding and order by the commission will not be disturbed unless it appears from the record that the finding and order are manifestly against the weight of the evidence and are so clearly unsupported by record as to show misapprehension or mistake or willful disregard of duty.⁶³

In its Proposition of Law III, AEP alleges that the PUCO's conclusion that there is no risk of Ormet shopping during the term of the contract and returning to SSO service is against the manifest weight of the evidence. (AEP Brief at 34-41). AEP alleges that the PUCO's authority to change, alter, or modify the reasonable arrangement under R.C. 4905.31 equates to a risk that the contract will be terminated and Ormet will be permitted to shop. (AEP Brief at 35). Within this proposition of law AEP argues as well that numerous contract provisions (2.03, 3.01, 3.02, and 8.01) allow for early termination by the PUCO, AEP, and/or Ormet. (AEP Brief at 36). AEP avers that these contract provisions allowing early termination of the contract create the risk that Ormet will be able to shop. Additionally AEP argues that the specific modifications the PUCO made requiring employee levels and reductions in deferrals by April 2012 reflect a termination risk. (AEP Brief at 36). AEP also argues that "unforeseen developments" with Ormet "could well cause a modification or termination of the contract." (AEP Brief at 35). AEP regales the court with its factual history with Ormet which it believes is another ground for the

⁶³*Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 71 O.O.2d 393, 330 N.E.2d 1, syllabus ¶8, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302.

Court to reverse the PUCO's conclusion that there is no risk of Ormet shopping. (AEP Brief at 36-37).⁶⁴

At the outset there is a fundamental flaw in the Companies' arguments. The Companies appear to argue that the Court should reverse the Commission's finding in the *initial Opinion and Order* that there is no risk that Ormet will shop during the 10-year duration of the contract. (AEP Brief at 34). This approach fails to recognize that the initial Opinion and Order was revised on rehearing in response to the Companies' application for rehearing. In the Entry on Rehearing the PUCO clarified that its ruling was limited in scope to the duration of the Companies' electric security plan. "It is not necessary to reach the question of whether Ormet can shop beyond the duration of the current ESP" opined the PUCO. (AEP Appx. 84). Accordingly, the PUCO approved POLR credits for the three-year period, and not the ten-year period originally proposed in its initial Opinion and Order. Thus, this Court need not reach the issue of whether the PUCO erred in its initial finding of no risk during the ten-year contract. Any opinion expressed on this issue would be merely advisory and not in accord with the long standing practice of courts to decline to render advisory opinions.⁶⁵

The factual issue, as the PUCO has redefined it through its "revised approach on rehearing," is whether, during the three year period from 2009 through 2011, there is a risk that Ormet will shop and impose POLR obligations upon AEP. Yet, this was an issue that the Companies chose not to apply for rehearing on, but appears in prominent fashion in the Companies' brief. The Companies argue it as "as a related matter." (AEP Brief at 34). As OCC

⁶⁴ AEP also argues about the PUCO's revised approach on rehearing of examining only the first three years of the contract. This portion of the brief (along with others) was the subject of OCC/OEG's Motion to Dismiss.

⁶⁵ *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶18 (citations omitted).

and OEG argued in their joint motion to dismiss, because the Companies failed to comply with R.C. 4903.10 and 4903.13, the Court has no jurisdiction to hear the Companies' arguments.⁶⁶ The Court, thus, cannot entertain the Companies' arguments against the revised approach on rehearing.

This inevitably leads to the conclusion that the Companies have no grounds to argue against the PUCO's findings on the risk of shopping imposed by Ormet under the contract. The Companies Proposition of Law III is left without legs to stand on. Nonetheless, with no ruling on the OEG/OCC Joint Motion at this time, OCC and OEG respond to the Companies' arguments on the PUCO's revised approach on rehearing. In this regard, OCC and OEG request that if the Court subsequently grants OCC/OEG's Motion to Dismiss on this issue, that arguments contained in this Appellee Brief be stricken. This would facilitate judicial efficiency and avoid creating an opportunity for the Companies to reintroduce their arguments in the form of a reply to Appellees' brief.

A. AEP has failed to prove that the Commission's findings on risk are against the manifest weight of the evidence and show misapprehension, mistake, or willful disregard of duty.

This Court has consistently held that as to findings of fact, the Commission's Order will not be disturbed unless it appears that the Order is against the manifest weight of the evidence *and* shows misapprehension, mistake, or willful disregard of duty.⁶⁷ The standard of review has been interpreted to mean that the Court will not substitute its judgment for that of the

⁶⁶ See Joint Motion to dismiss, filed February 5, 2010. The Court has not yet ruled on this motion.

⁶⁷ *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1, syllabus ¶8.

Commission.⁶⁸ Additionally, the Court has opined that in its review it will not reweigh evidence on factual questions when there is sufficient probative *evidence in the record* to enable it to conclude that the PUCO's opinion is not manifestly against the weight of the evidence.⁶⁹ Indeed this Court has opined that it will not reverse the PUCO based on conjecture.⁷⁰

The burden of proof in this regard rests solely on the Appellant.⁷¹ This Court has recognized that this burden is difficult to sustain because it has consistently found it proper to defer to the PUCO in matters that require the PUCO's expertise and discretion.⁷²

In the proceeding below AEP presented no witnesses to testify that the Ormet ten-year contract presented the POLR risks it now complains of. Nor did any party to the proceeding. In fact, AEP presented no testimony at all. Neither did AEP (or any other party) conduct any cross-examination of the other OCC, Staff, or Ormet witnesses on this issue. Hence, there is no evidence in the record to support AEP's assertion that Ormet could shop during the three-year term, or that it would shop.

Indeed AEP's arguments were presented in AEP's post hearing brief and are based in part upon conjecture or speculation about what may occur in the future with respect to Ormet's operations, based on past events. For instance, AEP clings to the recent extra-record information that the "future operations of Ormet has been cast in uncertainty," claiming that "some other

⁶⁸ *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578, 2004-Ohio-6896, 820 N.E.2d 921, ¶29, (citation omitted).

⁶⁹ *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*(1996), 76 Ohio St.3d 163,165, 666 N.E.2d 1372, 1375 (citation omitted).

⁷⁰ *Lima v. Pub. Util. Comm.* (1922), 106 Ohio St. 379, 1 Ohio Law Abs. 77, 140 N.E. 147.

⁷¹ See for example, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 86, 765 N.E.2d 862, 867.

⁷² See *Cincinnati Bell Tel. Co. v. Pub.Util. Comm.* (2001), 92 Ohio St.3d 177, 179-180, 749 N.E.2d 262.

unforeseen future development” could occur to cause the termination of the contract. (AEP Brief at 35). Additionally, the Companies lament their past experience with Ormet,⁷³ which they believe shows that a risk exists over the next two years that Ormet will shop. (AEP Brief at 36-37). These grounds are not only conjecture, but they reflect information hastily pulled together and plopped in front of the PUCO for the first time in AEP’s application for rehearing. It is not information found in the record; nor did the Companies seek to introduce the information through appropriate channels such as administrative notice. Thus, the Companies seek to reverse the PUCO based in part on extra-record information that is no more than conjecture. The Court should reject this approach as prohibited under its well-established precedent that rejects conjecture as a basis to reverse the PUCO on questions of fact.⁷⁴

Similarly, the Commission should also reject the Companies’ arguments that the PUCO’s authority to modify or terminate the contract under R.C. 4905.31(E) (AEP Brief at 35) equate to a risk that Ormet will be able to shop. As the Commission noted in its Entry on Rehearing any modification or termination of the contract would take place only after notice and opportunity for a hearing. (AEP Appx. 84). Thus, AEP would, as an affected party, have the opportunity to be heard on the modifications, and could object to such modification or termination. The Commission would be held to the standards prescribed in the statute, as well as the enabling rules, and general rules with respect to PUCO orders—standards which are not lightly met and do not permit arbitrary termination or modification of a reasonable arrangement.

⁷³ The Companies refer to outside-the-record information related to the transfer of Ormet outside the Companies’ service territory, and its return, with AEP’s consent. AEP believes this information is relevant to shopping risk during 2009-2011. (AEP Brief at 36-37, footnotes 16, 17). The PUCO correctly ruled that such information “has no bearing on the risk of Ormet shopping for a competitive retail electric provider.” (AEP Appx. 85).

⁷⁴ See *Lima v. Pub. Util. Comm.*, 106 Ohio St. 379, 140 N.E. 147.

In stark contrast to the outside the record conjecture posed by AEP in its brief, is the record evidence in the proceeding that establishes no evidence of POLR risk for Ormet during the three-year ESP period. What the record did establish is that Ormet has made a decision not to shop. It was Ormet that proposed to commit for ten years to obtain all of its electric requirements exclusively from AEP. Ormet's decision was declared in its Application, and its witnesses supported its commitment.⁷⁵ The Commission's Order simply ratified Ormet's decision to make AEP its exclusive supplier for the next ten years.

Moreover, what is conspicuously absent from the record, is any attempt by AEP to protect itself from the risk of Ormet shopping. If AEP believed that the contract presented a significant risk of shopping, why didn't AEP propose that the Commission modify the terms of the contract to provide it protection? For instance, AEP could have proposed a liquated damages clause be inserted to protect itself in the event that Ormet broke the agreement to shop. But AEP did not.

AEP has thus failed to sustain the heavy burden of an appellant challenging a fact finding of the PUCO on appeal. AEP did not provide any affirmative record evidence to show that the PUCO's finding was against the manifest weight of the evidence. In fact, the record evidence supports the opposite conclusion—that there is no risk of Ormet shopping during the first three years of the contract. Additionally, AEP has not shown how the PUCO's finding shows misapprehension, mistake, or willful misapprehension of duty. Accordingly, the Court should affirm the PUCO's order in this respect.

⁷⁵ See Direct Testimony of Ormet Witness Henry W. Fayne at 6 (OCC/OEG Supp. 35).

IV. CONCLUSION

Under R.C. 4905.31, the Commission has plenary authority over reasonable arrangements entered into between a mercantile customer and an electric distribution utility. The Commission may change, alter or modify every reasonable arrangement. No reasonable arrangement is lawful unless it is approved by the Commission. As part of the Commission's duties under R.C. 4905.31, it must review the "costs incurred" and the "revenue foregone" in conjunction with a reasonable arrangement. It has the authority and duty to determine whether the arrangement is in the public interest, and if it is not, it must modify the arrangement accordingly.

The Commission in the proceeding below reviewed the Ormet arrangement and determined that a number of modifications were needed before the arrangement could be approved. Its approach presented a balanced solution between all of the interested parties—the customers funding the discounted rates, the customer seeking discounted rates, and the utility providing service. Moreover the PUCO's approach was tailored to save 900 jobs in eastern Ohio that Ormet alleged were in jeopardy without discounted electric rates.

The Commission's solution was to approve, with modifications, the reasonable arrangement whereby AEP was to become the exclusive supplier to Ormet for the next ten years. The PUCO deemed it appropriate for AEP customers to fund 100% of the discounted rates for services provided to Ormet, but ordered the costs of the discount to be mitigated. Customers funding the discount were to be credited with provider of last resort revenues collected from Ormet. Indeed the Commission found that under exclusive arrangement, there was no risk that Ormet would shop, and thus no need to compensate AEP for a risk it would not incur and POLR services it would not be providing.

The Companies have failed to show that the Commission's actions were unlawful. The Commission has full authority under R.C. 4905.31 to consider "costs incurred" and to offset "revenue foregone" by costs avoided by the utility. Here there will be no costs incurred for POLR services because Ormet cannot shop under the exclusive contract. Rather, there will be avoided costs for AEP, which may properly be offset against "revenue foregone." Additionally, the PUCO found that permitting the reasonable arrangement to go forward is consistent with numerous policy mandates of R.C. 4928.02, including customer choice, regulatory flexibility, and facilitating Ohio's competitiveness in the global economy. In fact, Ormet testified that without the reasonable arrangement, it did not believe it could sustain operations in Ohio.

The Companies have failed as well to show that these Commission actions were unreasonable. In seeking to overturn the Commission on factual findings, the Companies bear a heavy burden. They have not sustained this burden. The Companies have not shown that the Commission's Order shows misapprehension, mistake, or willful disregard of duty.

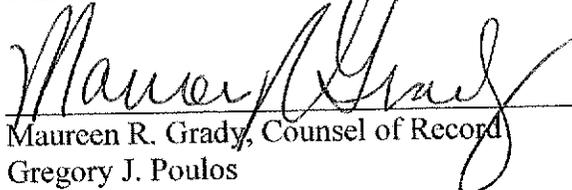
The Court should affirm the Commission's solution to sustain jobs in Ohio, while at the same time, recognizing the resources of other customers to subsidize discounted rates are not unlimited. AEP has been held harmless—it will be receiving 100% of the revenues for services provided to Ormet. But AEP wants more. It seeks to line its pockets, at customers' expense, with additional POLR revenues—revenues that it would have received if it had to provide POLR services and had POLR risk under this reasonable arrangement. The PUCO ruled, however, that AEP did not have to provide POLR service and had no POLR risk under the ten-year arrangement.

AEP's quest to squeeze more revenues from its customers for service it is not providing should be denied. Accordingly, AEP's appeal should be rejected. This Court should affirm the

PUCO's ruling and ensure that Ohio customers have the rate protections intended by the General Assembly—those in particular that include ensuring reasonably priced retail electric service is available to consumers.

Respectfully submitted,

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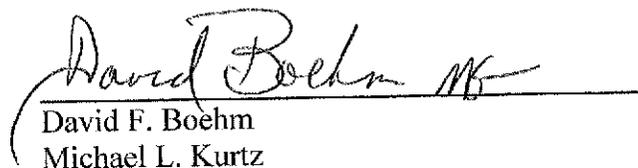
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IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ormet)
Primary Aluminum Corporation For) Supreme Court Case No. 09-2060
Approval of a Unique Arrangement with)
Ohio Power Company and Columbus)
Southern Power Company)
)
)
)
(Columbus Southern Power Company And) Appeal from the Public Utilities
Ohio Power Company) Commission of Ohio
v.) Case No. 09-119-EL-AEC
The Public Utilities Commission of Ohio))

**APPENDIX TO MERIT BRIEF OF INTERVENING APPELLEES,
OFFICE OF OHIO CONSUMERS' COUNSEL AND
OHIO ENERGY GROUP**

**APPENDIX
TABLE OF CONTENTS**

Appx. Page

STATUTES:

R.C. 4903.09	000001
R.C. 4903.10	000001A
R.C. 4905.22	000002
R.C. 4905.33	000003
R.C. 4905.35	000004

OHIO ADMINISTRATIVE CODE PROVISIONS:

Ohio Admin. Code 4901:1-38-01	000005
Ohio Admin. Code 4901:1-38-08	000006

CONSTITUTIONAL PROVISIONS:

Section 1, Article II, Ohio Constitution	000007
Section 1, Article IV, Ohio Constitution	000008

MISCELLANEOUS:

Am.Sub. S.B. No. 221.....	000009
---------------------------	--------

DECISIONS OF THE PUBLIC UTILITIES COMMISSION OF OHIO:

<i>In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Recover Commission-Authorized Deferrals Through Each Company's Fuel Adjustment Clause,</i> PUCO Case No. 09-1095, Finding and Order (Jan. 7, 2010).....	000069
--	--------

*In the Matter of the Application for Establishment of a Reasonable Arrangement
Between Eramet Marietta, Inc. and Columbus Southern Power Company,*
PUCO Case No. 09-516-EL-AEC,
Entry on Rehearing (Dec. 11, 2009)000082

*In the Matter of the Application for Approval of a Contract for Electric Service
Between Columbus Southern Power Company and Solsil, Inc. and In the Matter
of the Application for Approval of a Contract for Electric Service between Ohio
Power and Globe Metallurgical, Inc.,*
PUCO Case Nos. 08-883-EL-AEC, 08-884-EL-AEC,
Finding and Order (July 31, 2008).....000087

4903.09 Written opinions filed by commission in all contested cases.

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

Effective Date: 10-26-1953

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

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

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

4905.22 Service and facilities required - unreasonable charge prohibited.

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.

Effective Date: 10-01-1953

4905.33 Rebates, special rates, and free service prohibited.

(A) 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., and 4923. 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.

(B) No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

Effective Date: 01-01-2001

4905.35 Prohibiting discrimination.

(A) 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.

(B)(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

Effective Date: 09-17-1996

4901:1-38-01 Definitions.

(A) "Affidavit" means a written declaration made under oath before a notary public or other authorized officer.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Delta revenue" means the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission.

(D) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(E) "Energy efficiency production facilities" means any customer that manufactures or assembles products that promote the more efficient use of energy (i.e., increase the ratio of energy end use services (i.e., heat, light, and drive power) derived from a device or process to energy inputs necessary to derive such end use services as compared with other devices or processes that are commonly installed to derive the same energy use services); or, any customer that manufactures, assembles or distributes products that are used in the production of clean, renewable energy.

(F) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(G) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 or 4928.141 of the Revised Code, or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by the electric utility.

(H) "Staff" means the staff of the commission or its authorized representative.

Effective: 04/02/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04, 4905.06

Rule Amplifies: 4905.31, 4928.02

4901:1-38-08 Revenue recovery.

(A) Each electric utility that is serving customers pursuant to approved reasonable arrangements, may apply for a rider for the recovery of certain costs associated with its delta revenue for serving those customers pursuant to reasonable arrangements in accordance with the following:

(1) The approval of the request for revenue recovery, including the level of such recovery, shall be at the commission's discretion.

(2) The electric utility may request recovery of direct incremental administrative costs related to the programs as part of the rider. Such cost recovery shall be subject to audit, review, and approval by the commission.

(3) For reasonable arrangements in which incentives are given based upon cost savings to the electric utility (including, but not limited to, nonfirm arrangements, on/off peak pricing, seasonal rates, time-of-day rates, real-time-pricing rates), the cost savings shall be an offset to the recovery of the delta revenues.

(4) The amount of the revenue recovery rider shall be spread to all customers in proportion to the current revenue distribution between and among classes, subject to change, alteration, or modification by the commission. The electric utility shall file the projected impact of the proposed rider on all customers, by customer class.

(5) The rider shall be updated and reconciled, by application to the commission, semiannually. All data submitted in support of the rider update is subject to commission review and audit.

(B) If it appears to the commission that the proposals in the application may be unjust and unreasonable, the commission shall set the matter for hearing.

(1) At such hearing, the burden of proof to show that the revenue recovery rider proposal in the application is just and reasonable shall be upon the electric utility.

(2) The revenue recovery rider shall be subject to change, alteration, or modification by the commission.

(3) The staff shall have access to all customer and electric utility information related to service provided pursuant to the reasonable arrangements that created the delta revenue triggering the electric utility's application to recover the costs associated with said delta revenue.

(C) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

Effective: 04/02/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04, 4905.06

Rule Amplifies: 4905.31, 4928.02



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§ 2.01 In whom power vested

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The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

(As amended Nov. 3, 1953; 125 v 1095.)

[[Back to Main Table of Contents](#)] - [[Back to Top of Page](#)]

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- [Rules of the Senate](#)
- [Joint Rules of the Senate and House of Representatives](#)
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§ 4.01 In whom power vested

[[View Article Table of Contents](#)]

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

(Amended 7-7, 1968; Nov. 6, 1973; SJR No.30.)

[[Back to Main Table of Contents](#)]-[[Back to Top of Page](#)]

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AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 be amended and sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051 of the Revised Code be enacted to read as follows:

Sec. 9.835. (A) As used in this section:

(1) "Energy price risk management contract" means a contract that

mitigates for the term of the contract the price volatility of energy sources, including, but not limited to, natural gas, gasoline, oil, and diesel fuel, and that is a budgetary and financial tool only and not a contract for the procurement of an energy source.

(2) "Political subdivision" means a county, city, village, township, park district, or school district.

(3) "State entity" means the general assembly, the supreme court, the court of claims, the office of an elected state officer, or a department, bureau, board, office, commission, agency, institution, or other instrumentality of this state established by the constitution or laws of this state for the exercise of any function of state government, but excludes a political subdivision, an institution of higher education, the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, or the city of Cincinnati retirement system.

(4) "State official" means the elected or appointed official, or that person's designee, charged with the management of a state entity.

(B) If it determines that doing so is in the best interest of the state entity or the political subdivision, and subject to, respectively, state or local appropriation to pay amounts due, a state official or the legislative or other governing authority of a political subdivision may enter into an energy price risk management contract. Money received pursuant to such a contract entered into by a state official shall be deposited to the credit of the general revenue fund of this state, and, unless otherwise provided by ordinance or resolution enacted or adopted by the legislative authority of the political subdivision authorizing any such contract, money received under the contract shall be deposited to the credit of the general fund of the political subdivision.

Sec. 3318.112. (A) As used in this section, "solar ready" means capable of accommodating the eventual installation of roof top, solar photovoltaic energy equipment.

(B) The Ohio school facilities commission shall adopt rules prescribing standards for solar ready equipment in school buildings under their jurisdiction. The rules shall include, but not be limited to, standards regarding roof space limitations, shading and obstruction, building orientation, roof loading capacity, and electric systems.

(C) A school district may seek, and the commission may grant for good cause shown, a waiver from part or all of the standards prescribed under division (B) of this section.

Sec. 4905.31. ~~Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:~~

~~(A) The division or distribution of its surplus profits;~~

~~(B) A sliding scale of charges, including variations in rates based upon either of the following:~~

~~(1) Stipulated stipulated variations in cost as provided in the schedule or arrangement;~~

~~(2) Any emissions fee levied upon an electric light company under Substitute Senate Bill No. 359 of the 119th general assembly as provided in the schedule. The public utilities commission shall permit an electric light company to recover the emissions fee pursuant to such a variable rate schedule.~~

~~(3) Any emissions fee levied upon an electric light company under division (C) or (D) of section 3745.11 of the Revised Code as provided in the schedule. The public utilities commission shall permit an electric light company to recover any such emission fee pursuant to such a variable rate schedule.~~

~~(4) Any schedule of variable rates filed under division (B) of this section shall provide for the recovery of any such emissions fee by applying a uniform percentage increase to the base rate charged each customer of the electric light company for service during the period that the variable rate is in effect.~~

~~(C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;~~

~~(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;~~

~~(E) Any other financial device that may be practicable or advantageous to the parties interested. No In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with~~

any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate.

No such ~~schedule or arrangement, sliding scale, minimum charge, classification, variable rate, or device~~ is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs. ~~The commission shall review the cost data or factors upon which a variable rate schedule filed under division (B)(2) or (3) of this section is based and shall adjust the base rates of the electric light company or order the company to refund any charges that it has collected under the variable rate schedule that the commission finds to have resulted from errors or erroneous reporting. After recovery of all of the emissions fees upon which a variable rate authorized under division (B)(2) or (3) of this section is based, collection of the variable rate shall end and the variable rate schedule shall be terminated.~~

Every such ~~schedule or reasonable~~ arrangement, ~~sliding scale, minimum charge, classification, variable rate, or device~~ shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

Sec. 4928.01. (A) As used in this chapter:

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

reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code as amended by Sub. S.B. No. 3 of the 123rd general assembly.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces ~~or to the extent it, sells that electricity for resale electricity it so produces, or obtains electricity from a generating facility it hosts on its premises.~~

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

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

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

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

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

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

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

(19) "Mercantile ~~commercial~~ customer" means a commercial or

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

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

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

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

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

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

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users. ~~Such energy includes, including, but is not limited to, wind power, geothermal energy, solar thermal energy, and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric generation, landfill gas, or hydroelectric generation advanced energy resources and renewable energy resources.~~ "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been

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

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

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

~~(29)~~(28) "Starting date of competitive retail electric service" means January 1, 2001, ~~except as provided in division (C) of this section.~~

~~(30)~~(29) "Customer-generator" means a user of a net metering system.

~~(31)~~(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

~~(32)~~(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's

requirements for electricity.

~~(33)~~(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to ~~retail electric service providers~~ another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously, primarily to meet the energy needs of the customer's facilities;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model

(WARM).

(g) Demand-side management and any energy efficiency improvement.

(35) "Renewable energy resource" means solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. "Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy. As used in division (A)(35) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(a) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(b) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(c) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromus fish.

(d) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(e) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(f) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(g) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(h) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

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

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

Sec. 4928.02. It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small

generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

~~(G)~~(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

~~(H)~~(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

~~(H)~~(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Sec. 4928.05. (A)(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except ~~section~~ 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 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.

Sec. 4928.09. (A)(1) No person shall operate in this state as an electric utility, an electric services company, ~~or~~ a billing and collection agent, ~~or a regional transmission organization approved by the federal energy regulatory commission and having the responsibility for maintaining reliability in all or part of this state~~ on and after the starting date of competitive retail electric service unless that person first does both of the following:

(a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;

(b) Designates an agent authorized to receive that service of process in this state, by filing with the commission a document designating that agent.

(2) No person shall continue to operate as such an electric utility, electric services company, ~~or~~ billing and collection agent, ~~or regional transmission organization described in division (A)(1) of this section~~ unless that person continues to consent to such jurisdiction and service of process in this state and continues to designate an agent as provided under this division, by refile in accordance with division (A)(4) of this section the appropriate documents filed under division (A)(1) of this section or, as

applicable, the appropriate amended documents filed under division (A)(3) of this section. Such refiling shall occur during the month of December of every fourth year after the initial filing of a document under division (A)(1) of this section.

(3) If the address of the person filing a document under division (A)(1) or (2) of this section changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person shall file an amended document containing the new information.

(4) The consent and designation required by divisions (A)(1) to (3) of this section shall be in writing, on forms prescribed by the public utilities commission. The original of each such document or amended document shall be legible and shall be filed with the commission, with a copy filed with the office of the consumers' counsel and with the attorney general's office.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into this state pursuant to such summons, subpoena, or other form of process.

(C) Divisions (A) and (B) of this section do not apply to any of the following:

(1) A corporation incorporated under the laws of this state that has appointed a statutory agent pursuant to section 1701.07 or 1702.06 of the Revised Code;

(2) A foreign corporation licensed to transact business in this state that has appointed a designated agent pursuant to section 1703.041 of the Revised Code;

(3) Any other person that is a resident of this state or that files consent to service of process and designates a statutory agent pursuant to other laws of this state.

~~Sec. 4928.14. (A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.~~

~~(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined~~

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

~~(C) After the market development period, the~~ The failure of a supplier to provide retail electric generation service to customers within the certified territory of the an 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~~ sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this ~~division~~ 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:

~~(1)(A)~~ The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

~~(2)(B)~~ The supplier is no longer capable of providing the service.

~~(3)(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.

~~(4)(D)~~ The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Sec. 4928.141. (A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a 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. To that end, the electric distribution utility shall apply to the public utilities

commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Sec. 4928.142. (A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

(a) Open, fair, and transparent competitive solicitation;

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners.

No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect.

An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis.

The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric

distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility.

All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of the effective date of this section, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one and not less than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the

actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs.

In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.

Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency

that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

Sec. 4928.143. (A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the

supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the

commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code; and provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer.

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution

utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a

rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the

commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

Sec. 4928.144. The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of

regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

Sec. 4928.145. During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

Sec. 4928.146. Nothing in sections 4928.141 to 4928.145 of the Revised Code precludes or prohibits an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Sec. 4928.151. The public utilities commission shall adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities, so that, on and after the effective date of the initial rules so adopted, all such utilities apply the same policies and charges to those customers. Initial rules shall be adopted not later than six months after the effective date of this section. The rules shall address the just and reasonable allocation to and utility recovery from the requesting customer or other customers of the utility of all costs of any such line extension and any requisite substation or related facility, including, but not limited to, the costs of necessary technical studies, operations and maintenance costs, and capital costs, including a return on capital costs.

Sec. 4928.17. (A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities

commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

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

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

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

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

reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

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

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

(E) ~~Notwithstanding section 4905.20, 4905.21, 4905.46, or 4905.48 of the Revised Code, an~~ No electric distribution utility may divest itself of shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval, subject to the provisions of Title XLIX of the Revised Code relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset.

Sec. 4928.20. (A) The legislative authority of a municipal corporation may adopt an ordinance, or the board of township trustees of a township or the board of county commissioners of a county may adopt a resolution, under which, on or after the starting date of competitive retail electric service, it may aggregate in accordance with this section the retail electrical loads located, respectively, within the municipal corporation, township, or unincorporated area of the county and, for that purpose, may enter into service agreements to facilitate for those loads the sale and purchase of electricity. The legislative authority or board also may exercise such authority jointly with any other such legislative authority or board. For customers that are not mercantile ~~commercial~~ customers, an ordinance or resolution under this division shall specify whether the aggregation will occur only with the prior, affirmative consent of each person owning, occupying, controlling, or using an electric load center proposed to be

aggregated or will occur automatically for all such persons pursuant to the opt-out requirements of division (D) of this section. The aggregation of mercantile ~~commercial~~ customers shall occur only with the prior, affirmative consent of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated. Nothing in this division, however, authorizes the aggregation of the retail electric loads of an electric load center, as defined in section 4933.81 of the Revised Code, that is located in the certified territory of a nonprofit electric supplier under sections 4933.81 to 4933.90 of the Revised Code or an electric load center served by transmission or distribution facilities of a municipal electric utility.

(B) If an ordinance or resolution adopted under division (A) of this section specifies that aggregation of customers that are not mercantile ~~commercial~~ customers will occur automatically as described in that division, the ordinance or resolution shall direct the board of elections to submit the question of the authority to aggregate to the electors of the respective municipal corporation, township, or unincorporated area of a county at a special election on the day of the next primary or general election in the municipal corporation, township, or county. The legislative authority or board shall certify a copy of the ordinance or resolution to the board of elections not less than seventy-five days before the day of the special election. No ordinance or resolution adopted under division (A) of this section that provides for an election under this division shall take effect unless approved by a majority of the electors voting upon the ordinance or resolution at the election held pursuant to this division.

(C) Upon the applicable requisite authority under divisions (A) and (B) of this section, the legislative authority or board shall develop a plan of operation and governance for the aggregation program so authorized. Before adopting a plan under this division, the legislative authority or board shall hold at least two public hearings on the plan. Before the first hearing, the legislative authority or board shall publish notice of the hearings once a week for two consecutive weeks in a newspaper of general circulation in the jurisdiction. The notice shall summarize the plan and state the date, time, and location of each hearing.

(D) No legislative authority or board, pursuant to an ordinance or resolution under divisions (A) and (B) of this section that provides for automatic aggregation of customers that are not mercantile ~~commercial~~ customers as described in division (A) of this section, shall aggregate the electrical load of any electric load center located within its jurisdiction unless it in advance clearly discloses to the person owning, occupying,

controlling, or using the load center that the person will be enrolled automatically in the aggregation program and will remain so enrolled unless the person affirmatively elects by a stated procedure not to be so enrolled. The disclosure shall state prominently the rates, charges, and other terms and conditions of enrollment. The stated procedure shall allow any person enrolled in the aggregation program the opportunity to opt out of the program every ~~two~~ three years, without paying a switching fee. Any such person that opts out before the commencement of the aggregation program pursuant to the stated procedure shall default to the standard service offer provided under ~~division (A) of~~ section 4928.14 or division (D) of section 4928.35 of the Revised Code until the person chooses an alternative supplier.

(E)(1) With respect to a governmental aggregation for a municipal corporation that is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.41 of the Revised Code.

(2) With respect to a governmental aggregation for a township or the unincorporated area of a county, which aggregation is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.40 of the Revised Code, except that:

(a) The petitions shall be filed, respectively, with the township fiscal officer or the board of county commissioners, who shall perform those duties imposed under those sections upon the city auditor or village clerk.

(b) The petitions shall contain the signatures of not less than ten per cent of the total number of electors in, respectively, the township or the unincorporated area of the county who voted for the office of governor at the preceding general election for that office in that area.

(F) A governmental aggregator under division (A) of this section is not a public utility engaging in the wholesale purchase and resale of electricity, and provision of the aggregated service is not a wholesale utility transaction. ~~A governmental aggregator shall be subject to supervision and regulation by the public utilities commission only to the extent of any competitive retail electric service it provides and commission authority under this chapter.~~

(G) This section does not apply in the case of a municipal corporation that supplies such aggregated service to electric load centers to which its municipal electric utility also supplies a noncompetitive retail electric service through transmission or distribution facilities the utility singly or jointly owns or operates.

(H) A governmental aggregator shall not include in its aggregation the

accounts of any of the following:

- (1) A customer that has opted out of the aggregation;
- (2) A customer in contract with a certified ~~competitive~~ electric services company retail electric services provider;
- (3) A customer that has a special contract with an electric distribution utility;
- (4) A customer that is not located within the governmental aggregator's governmental boundaries;
- (5) Subject to division (C) of section 4928.21 of the Revised Code, a customer who appears on the "do not aggregate" list maintained under that section.

(I) Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that the governmental aggregation's customers as an aggregated group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this section shall result in less than full recovery by an electric distribution utility of any surcharge authorized under section 4928.144 of the Revised Code.

(J) On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(e) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer. Such market price shall include, but not be limited to, capacity and energy charges; all charges associated with the provision of that power supply through the regional transmission organization, including, but not limited to, transmission,

ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the commission. The period of time during which the market price and alternative energy resource amount shall be so assessed on the consumer shall be from the time the consumer so returns to the electric distribution utility until the expiration of the electric security plan. However, if that period of time is expected to be more than two years, the commission may reduce the time period to a period of not less than two years.

(K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charge that relates to a cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

Sec. 4928.24. The public utilities commission shall employ a federal energy advocate to monitor the activities of the federal energy regulatory commission and other federal agencies and to advocate on behalf of the interests of retail electric service consumers in this state. The attorney general shall represent the advocate before the federal energy regulatory commission and other federal agencies. Among other duties assigned to the advocate by the commission, the advocate shall examine the value of the participation of this state's electric utilities in regional transmission organizations and submit a report to the public utilities commission on whether continued participation of those utilities is in the interest of those consumers.

Sec. 4928.31. (A) Not later than ninety days after the effective date of this section, an electric utility supplying retail electric service in this state on that date shall file with the public utilities commission a plan for the utility's provision of retail electric service in this state during the market development period. This transition plan shall be in such form as the commission shall prescribe by rule adopted under division (A) of section

4928.06 of the Revised Code and shall include all of the following:

(1) A rate unbundling plan that specifies, consistent with divisions (A)(1) to (7) of section 4928.34 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, the unbundles components for electric generation, transmission, and distribution service and such other unbundled service components as the commission requires, to be charged by the utility beginning on the starting date of competitive retail electric service and that includes information the commission requires to fix and determine those components;

(2) A corporate separation plan consistent with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(3) Such plan or plans as the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(4) An employee assistance plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter;

(5) A consumer education plan consistent with ~~former~~ section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

A transition plan under this section may include tariff terms and conditions to address reasonable requirements for changing suppliers, length of commitment by a customer for service, and such other matters as are necessary to accommodate electric restructuring. Additionally, a transition plan under this section may include an application for the opportunity to receive transition revenues as authorized under sections 4928.31 to 4928.40 of the Revised Code, which application shall be consistent with those sections and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. ~~The transition plan also may include a plan for the independent operation of the utility's transmission facilities consistent with section 4928.12 of the Revised Code, division (A)(13) of section 4928.34 of the Revised Code, and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.~~

The commission may reject and require refiling, in whole or in part, of any substantially inadequate transition plan.

(B) The electric utility shall provide public notice of its filing under division (A) of this section, in a form and manner that the commission shall

prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code. However, the adoption of rules regarding the public notice under this division, regarding the form of the transition plan under division (A) of this section, and regarding procedures for expedited discovery under division (A) of section 4928.32 of the Revised Code are not subject to division (D) of section 111.15 of the Revised Code.

Sec. 4928.34. (A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been

adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the ~~123rd~~ 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the

effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with ~~former~~ section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with ~~section 4928.12 of the Revised Code and any rules adopted by the~~ commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been

adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code.

In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

Sec. 4928.35. (A) Upon approval of its transition plan under sections 4928.31 to 4928.40 of the Revised Code, an electric utility shall file in accordance with section 4905.30 of the Revised Code schedules containing the unbundled rate components set in the approved plan in accordance with section 4928.34 of the Revised Code. The schedules shall be in effect for the duration of the utility's market development period, shall be subject to the cap specified in division (A)(6) of section 4928.34 of the Revised Code, and shall not be adjusted during that period by the public utilities commission except as otherwise authorized by division (B) of this section or as otherwise authorized by federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility.

(B) Efforts shall be made to reach agreements with electric utilities in matters of litigation regarding property valuation issues. Irrespective of those efforts, the unbundled components for an electric utility's retail electric generation service and distribution service, as provided in division (A) of this section, are not subject to adjustment for the utility's market development period, except that the commission shall order an equitable reduction in those components for all customer classes to reflect any refund a utility receives as a result of the resolution of utility personal property tax valuation litigation that is resolved on or after the effective date of this section and not later than December 31, 2005. Immediately upon the issuance of that order, the electric utility shall file revised rate schedules under section 4909.18 of the Revised Code to effect the order.

(C) The schedule under division (A) of this section containing the unbundled distribution components shall provide that electric distribution

service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule also shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(D) During the market development period, an electric distribution utility shall provide consumers on a comparable and nondiscriminatory basis within its certified territory a 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 priced in accordance with the schedule containing the utility's unbundled generation service component. Immediately upon approval of its transition plan, the utility shall file the standard service offer with the commission under section 4909.18 of the Revised Code, during the market development period. The failure of a supplier to deliver retail electric generation service shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under this division until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to deliver such service if any of the conditions specified in ~~divisions (B)(1) to (4)~~ of section 4928.14 of the Revised Code is met.

(E) An amendment of a corporate separation plan contained in a transition plan approved by the commission under section 4928.33 of the Revised Code shall be filed and approved as a corporate separation plan pursuant to section 4928.17 of the Revised Code.

(F) Any change to an electric utility's opportunity to receive transition revenues under a transition plan approved in accordance with section 4928.33 of the Revised Code shall be authorized only as provided in sections 4928.31 to 4928.40 of the Revised Code.

(G) The commission, by order, shall require each electric utility whose approved transition plan did not include an independent transmission plan as described in division (A)(13) of section 4928.34 of the Revised Code to be a member of, and transfer control of transmission facilities it owns or controls in this state to, one or more qualifying transmission entities, as described in division (B) of section 4928.12 of the Revised Code, that are planned to be operational on and after December 31, 2003. However, the commission may extend that date if, for reasons beyond the control of the utility, a qualifying

transmission entity is not planned to be operational on that date. The commission's order may specify an earlier date on which the transmission entity or entities are planned to be operational if the commission considers it necessary to carry out the policy specified in section 4928.02 of the Revised Code or to encourage effective competition in retail electric service in this state.

Upon the issuance of the order, each such utility shall file with the commission a plan for such independent operation of the utility's transmission facilities consistent with this division. The commission may reject and require refile of any substantially inadequate plan submitted under this division.

After reasonable notice and opportunity for hearing, the commission shall approve the plan upon a finding that the plan will result in the utility's compliance with the order, this division, and any rules adopted under division (A) of section 4928.06 of the Revised Code. The approved independent transmission plan shall be deemed a part of the utility's transition plan for purposes of sections 4928.31 to 4928.40 of the Revised Code.

Sec. 4928.61. (A) There is hereby established in the state treasury the advanced energy fund, into which shall be deposited all advanced energy revenues remitted to the director of development under division (B) of this section, for the exclusive purposes of funding the advanced energy program created under section 4928.62 of the Revised Code and paying the program's administrative costs. Interest on the fund shall be credited to the fund.

(B) Advanced energy revenues shall include all of the following:

(1) Revenues remitted to the director after collection by each electric distribution utility in this state of a temporary rider on retail electric distribution service rates as such rates are determined by the public utilities commission pursuant to this chapter. The rider shall be a uniform amount statewide, determined by the director of development, after consultation with the public benefits advisory board created by section 4928.58 of the Revised Code. The amount shall be determined by dividing an aggregate revenue target for a given year as determined by the director, after consultation with the advisory board, by the number of customers of electric distribution utilities in this state in the prior year. Such aggregate revenue target shall not exceed more than fifteen million dollars in any year through 2005 and shall not exceed more than five million dollars in any year after 2005. The rider shall be imposed beginning on the effective date of the amendment of this section by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, and shall terminate at the end of ten years following the

starting date of competitive retail electric service or until the advanced energy fund, including interest, reaches one hundred million dollars, whichever is first.

(2) Revenues from payments, repayments, and collections under the advanced energy program and from program income;

(3) Revenues remitted to the director after collection by a municipal electric utility or electric cooperative in this state upon the utility's or cooperative's decision to participate in the advanced energy fund;

(4) Revenues from renewable energy compliance payments as provided under division (C)(2) of section 4928.64 of the Revised Code;

(5) Revenue from forfeitures under division (C) of section 4928.66 of the Revised Code;

(6) Interest earnings on the advanced energy fund.

(C)(1) Each electric distribution utility in this state shall remit to the director on a quarterly basis the revenues described in divisions (B)(1) and (2) of this section. Such remittances shall occur within thirty days after the end of each calendar quarter.

(2) Each participating electric cooperative and participating municipal electric utility shall remit to the director on a quarterly basis the revenues described in division (B)(3) of this section. Such remittances shall occur within thirty days after the end of each calendar quarter. For the purpose of division (B)(3) of this section, the participation of an electric cooperative or municipal electric utility in the energy efficiency revolving loan program as it existed immediately prior to the effective date of the amendment of this section by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, does not constitute a decision to participate in the advanced energy fund under this section as so amended.

(3) All remittances under divisions (C)(1) and (2) of this section shall continue only until the end of ten years following the starting date of competitive retail electric service or until the advanced energy fund, including interest, reaches one hundred million dollars, whichever is first.

(D) ~~Any moneys collected in rates for non-low-income customer energy efficiency programs, as of October 5, 1999, and not contributed to the energy efficiency revolving loan fund authorized under this section prior to the effective date of its amendment by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, shall be used to continue to fund cost-effective, residential energy efficiency programs, be contributed into the universal service fund as a supplement to that required under section 4928.53 of the Revised Code, or be returned to ratepayers in the form of a rate reduction at the option of the affected electric distribution utility.~~

Sec. 4928.621. (A) Any Edison technology center in this state is eligible to apply for and receive assistance pursuant to section 4928.62 of the Revised Code for the purposes of creating an advanced energy manufacturing center in this state that will provide for the exchange of information and expertise regarding advanced energy, assisting with the design of advanced energy projects, developing workforce training programs for such projects, and encouraging investment in advanced energy manufacturing technologies for advanced energy products and investment in sustainable manufacturing operations that create high-paying jobs in this state.

(B) Any university or group of universities in this state that conducts research on any advanced energy resource or any not-for-profit corporation formed to address issues affecting the price and availability of electricity and having members that are small businesses may apply for and receive assistance pursuant to section 4928.62 of the Revised Code for the purpose of encouraging research in this state that is directed at innovation in or the refinement of those resources or for the purpose of educational outreach regarding those resources and, to that end, shall use that assistance to establish such a program of research or education outreach. Any such educational outreach shall be directed at an increase in innovation regarding, or refinement of access by or of application or understanding of businesses and consumers in this state regarding, advanced energy resources.

(C) Any independent group located in this state the express objective of which is to educate small businesses in this state regarding renewable energy resources and energy efficiency programs, or any small business located in this state electing to utilize an advanced energy project or participate in an energy efficiency program, is eligible to apply for and receive assistance pursuant to section 4928.62 of the Revised Code.

(D) Nothing in this section shall be construed as limiting the eligibility of any qualifying entity to apply for or receive assistance pursuant to section 4928.62 of the Revised Code.

Sec. 4928.64. (A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; or a mercantile customer-sited advance energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division

(B)(2)(b) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

(1) Half may be generated from advanced energy resources;

(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

<u>By end of year</u>	<u>Renewable energy resources</u>	<u>Solar energy resources</u>
<u>2009</u>	<u>0.25%</u>	<u>0.004%</u>
<u>2010</u>	<u>0.50%</u>	<u>0.010%</u>
<u>2011</u>	<u>1%</u>	<u>0.030%</u>
<u>2012</u>	<u>1.5%</u>	<u>0.060%</u>
<u>2013</u>	<u>2%</u>	<u>0.090%</u>
<u>2014</u>	<u>2.5%</u>	<u>0.12%</u>
<u>2015</u>	<u>3.5%</u>	<u>0.15%</u>
<u>2016</u>	<u>4.5%</u>	<u>0.18%</u>
<u>2017</u>	<u>5.5%</u>	<u>0.22%</u>
<u>2018</u>	<u>6.5%</u>	<u>0.26%</u>
<u>2019</u>	<u>7.5%</u>	<u>0.3%</u>
<u>2020</u>	<u>8.5%</u>	<u>0.34%</u>
<u>2021</u>	<u>9.5%</u>	<u>0.38%</u>
<u>2022</u>	<u>10.5%</u>	<u>0.42%</u>
<u>2023</u>	<u>11.5%</u>	<u>0.46%</u>
<u>2024 and each calendar year thereafter</u>	<u>12.5%</u>	<u>0.5%</u>

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the

utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.

(4)(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric

distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the

commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing the compliance of electric distribution utilities and electric services companies with division (B) of this section and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

Sec. 4928.65. An electric distribution utility or electric services company may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity, including, but not limited to, a mercantile customer or an owner or operator of a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state, or within or bordering an adjoining state, for the purpose of complying with the renewable energy and solar energy resource requirements of division (B)(2) of section 4928.64 of the Revised Code. The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources. The rules also shall provide for this state a system of registering renewable energy credits by specifying which of any generally available registries shall be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits shall allow a hydroelectric generating

facility to be eligible for obtaining renewable energy credits and shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.

Sec. 4928.66. (A)(1)(a) Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.

(b) Beginning in 2009, an electric distribution utility shall implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018. In 2018, the standing committees in the house of representatives and the senate primarily dealing with energy issues shall make recommendations to the general assembly regarding future peak demand reduction targets.

(2) For the purposes of divisions (A)(1)(a) and (b) of this section:

(a) The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

(b) The commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.

(c) Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors. Any mechanism designed to recover the cost of energy efficiency and peak demand reduction

programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs. If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline. The baseline also shall be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

(d) Programs implemented by a utility may include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.

(e) No programs or improvements described in division (A)(2)(d) of this section shall conflict with any statewide building code adopted by the board of building standards.

(B) In accordance with rules it shall adopt, the public utilities commission shall produce and docket at the commission an annual report containing the results of its verification of the annual levels of energy efficiency and of peak demand reductions achieved by each electric distribution utility pursuant to division (A) of this section. A copy of the report shall be provided to the consumers' counsel.

(C) If the commission determines, after notice and opportunity for hearing and based upon its report under division (B) of this section, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement of division (A) of this section, the commission shall assess a forfeiture on the utility as provided under sections

4905.55 to 4905.60 and 4905.64 of the Revised Code, either in the amount, per day per undercompliance or noncompliance, relative to the period of the report, equal to that prescribed for noncompliances under section 4905.54 of the Revised Code, or in an amount equal to the then existing market value of one renewable energy credit per megawatt hour of undercompliance or noncompliance. Revenue from any forfeiture assessed under this division shall be deposited to the credit of the advanced energy fund created under section 4928.61 of the Revised Code.

(D) The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism under this division. Such an application shall not be considered an application to increase rates and may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs. The commission by order may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

(E) The commission additionally shall adopt rules that require an electric distribution utility to provide a customer upon request with two years' consumption data in an accessible form.

Sec. 4928.67. (A)(1) Beginning on the starting date of competitive retail electric service, a retail electric service provider in this state Except as provided in division (A)(2) of this section, an electric utility shall develop a standard contract or tariff providing for net energy metering.

Any time that the total rated generating capacity used by customer generators is less than one per cent of the provider's aggregate customer peak demand in this state, the provider shall make this contract or tariff available to customer generators, upon request and on a first come, first served basis. The

That contract or tariff shall be identical in rate structure, all retail rate components, and any monthly charges, to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.

(2) An electric utility shall also develop a separate standard contract or tariff providing for net metering for a hospital, as defined in section 3701.01 of the Revised Code, that is also a customer-generator, subject to all of the following:

(a) No limitation, including that in divisions (A)(31)(a) and (d) of section 4928.01 of the Revised Code, shall apply regarding the availability of the contract or tariff to such hospital customer-generators.

(b) The contract or tariff shall be based both upon the rate structure, rate components, and any charges to which the hospital would otherwise be assigned if the hospital were not a customer-generator and upon the market value of the customer-generated electricity at the time it is generated.

(c) The contract or tariff shall allow the hospital customer-generator to operate its electric generating facilities individually or collectively without any wattage limitation on size.

~~(2)(B)(1)~~ Net metering under this section shall be accomplished using a single meter capable of registering the flow of electricity in each direction. If its existing electrical meter is not capable of measuring the flow of electricity in two directions, the customer-generator shall be responsible for all expenses involved in purchasing and installing a meter that is capable of measuring electricity flow in two directions.

~~(3) Such an (2)~~ The electric service provider utility, at its own expense and with the written consent of the customer-generator, may install one or more additional meters to monitor the flow of electricity in each direction.

~~(B)(3)~~ Consistent with the other provisions of this section, the measurement of net electricity supplied or generated shall be calculated in the following manner:

~~(1)(a)~~ The electric service provider utility shall measure the net electricity produced or consumed during the billing period, in accordance with normal metering practices.

~~(2)(b)~~ If the electricity supplied by the electric service provider utility exceeds the electricity generated by the customer-generator and fed back to the electric service provider utility during the billing period, the customer-generator shall be billed for the net electricity supplied by the electric service provider utility, in accordance with normal metering practices. If electricity is provided to the electric service provider utility, the credits for that electricity shall appear in the next billing cycle.

~~(C)(1)(4)~~ A net metering system used by a customer-generator shall meet all applicable safety and performance standards established by the national electrical code, the institute of electrical and electronics engineers, and underwriters laboratories.

~~(2)(C)~~ The public utilities commission shall adopt rules relating to additional control and testing requirements for customer-generators which that the commission determines are necessary to protect public and worker safety and system reliability.

(D) An electric ~~service-provider~~ utility shall not require a customer-generator whose net metering system meets the standards and requirements provided for in divisions ~~(B)(4) and (C)(1) and (D)~~ of this section to do any of the following:

- (1) Comply with additional safety or performance standards;
- (2) Perform or pay for additional tests;
- (3) Purchase additional liability insurance.

Sec. 4928.68. To the extent permitted by federal law, the public utilities commission shall adopt rules establishing greenhouse gas emission reporting requirements, including participation in the climate registry, and carbon dioxide control planning requirements for each electric generating facility that is located in this state, is owned or operated by a public utility that is subject to the commission's jurisdiction, and emits greenhouse gases, including facilities in operation on the effective date of this section.

Sec. 4928.69. Notwithstanding any provision of Chapter 4928, of the Revised Code and except as otherwise provided in an agreement filed with and approved by the public utilities commission under section 4905.31 of the Revised Code, an electric distribution utility shall not charge any person that is a customer of a municipal electric utility that is in existence on or before January 1, 2008, any surcharge, service termination charge, exit fee, or transition charge.

Sec. 4929.01. As used in this chapter:

(A) "Alternative rate plan" means a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges, under which rates and charges may be established for a commodity sales service or ancillary service that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; ~~or provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges; or establish revenue decoupling mechanisms.~~ Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.

(B) "Ancillary service" means a service that is ancillary to the receipt or

delivery of natural gas to consumers, including, but not limited to, storage, pooling, balancing, and transmission.

(C) "Commodity sales service" means the sale of natural gas to consumers, exclusive of any distribution or ancillary service.

(D) "Comparable service" means any regulated service or goods whose availability, quality, price, terms, and conditions are the same as or better than those of the services or goods that the natural gas company provides to a person with which it is affiliated or which it controls, or, as to any consumer, that the natural gas company offers to that consumer as part of a bundled service that includes both regulated and exempt services or goods.

(E) "Consumer" means any person or association of persons purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas, including industrial consumers, commercial consumers, and residential consumers, but not including natural gas companies.

(F) "Distribution service" means the delivery of natural gas to a consumer at the consumer's facilities, by and through the instrumentalities and facilities of a natural gas company, regardless of the party having title to the natural gas.

(G) "Natural gas company" means a natural gas company, as defined in section 4905.03 of the Revised Code, that is a public utility as defined in section 4905.02 of the Revised Code and excludes a retail natural gas supplier.

(H) "Person," except as provided in division (N) of this section, has the same meaning as in section 1.59 of the Revised Code, and includes this state and any political subdivision, agency, or other instrumentality of this state and includes the United States and any agency or other instrumentality of the United States.

(I) "Billing or collection agent" means a fully independent agent, not affiliated with or otherwise controlled by a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent that the agent is under contract with such supplier or aggregator solely to provide billing and collection for competitive retail natural gas service on behalf of the supplier or aggregator.

(J) "Competitive retail natural gas service" means any retail natural gas service that may be competitively offered to consumers in this state as a result of revised schedules approved under division (C) of section 4929.29 of the Revised Code, a rule or order adopted or issued by the public utilities commission under Chapter 4905. of the Revised Code, or an exemption granted by the commission under sections 4929.04 to 4929.08 of the

Revised Code.

(K) "Governmental aggregator" means either of the following:

(1) A legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting exclusively under section 4929.26 or 4929.27 of the Revised Code as an aggregator for the provision of competitive retail natural gas service;

(2) A municipal corporation acting exclusively under Section 4 of Article XVIII, Ohio Constitution, as an aggregator for the provision of competitive retail natural gas service.

(L)(1) "Mercantile customer" means a customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside of this state. "Mercantile customer" excludes a customer for which a declaration under division (L)(2) of this section is in effect pursuant to that division.

(2) A not-for-profit customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside this state may file a declaration under division (L)(2) of this section with the public utilities commission. The declaration shall take effect upon the date of filing, and by virtue of the declaration, the customer is not a mercantile customer for the purposes of this section and sections 4929.20 to 4929.29 of the Revised Code or the purposes of a governmental natural gas aggregation or arrangement or other contract entered into after the declaration's effective date for the supply or arranging of the supply of natural gas to the customer to a location within this state. The customer may file a rescission of the declaration with the commission at any time. The rescission shall not affect any governmental natural gas aggregation or arrangement or other contract entered into by the customer prior to the date of the filing of the rescission and shall have effect only with respect to any subsequent such aggregation or arrangement or other contract. The commission shall prescribe rules under section 4929.10 of the Revised Code specifying the form of the declaration or a rescission and procedures by which a declaration or rescission may be filed.

(M) "Retail natural gas service" means commodity sales service, ancillary service, natural gas aggregation service, natural gas marketing service, or natural gas brokerage service.

(N) "Retail natural gas supplier" means any person, as defined in section

1.59 of the Revised Code, that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of a competitive retail natural gas service to consumers in this state that are not mercantile customers. "Retail natural gas supplier" includes a marketer, broker, or aggregator, but excludes a natural gas company, a governmental aggregator as defined in division (K)(1) or (2) of this section, an entity described in division (B) or (C) of section 4905.02 of the Revised Code, or a billing or collection agent, and excludes a producer or gatherer of gas to the extent such producer or gatherer is not a natural gas company under section 4905.03 of the Revised Code.

(O) "Revenue decoupling mechanism" means a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.

Sec. 4929.02. (A) It is the policy of this state to, throughout this state:

(1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

(2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;

(4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;

(5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;

(6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;

(7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;

(8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated

natural gas services and goods;

(9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;

(10) Facilitate the state's competitiveness in the global economy;

(11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in ~~carrying out~~ exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

Sec. 4929.051. An alternative rate plan filed by a natural gas company under section 4929.05 of the Revised Code and proposing a revenue decoupling mechanism may be an application not for an increase in rates if the rates, joint rates, tolls, classifications, charges, or rentals are based upon the billing determinants and revenue requirement authorized by the public utilities commission in the company's most recent rate case proceeding and the plan also establishes, continues, or expands an energy efficiency or energy conservation program.

SECTION 2. That existing sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 and sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code are hereby repealed.

SECTION 3. Nothing in this act affects the legal validity or the force and effect of an electric distribution utility's rate plan, as defined in section 4928.01 of the Revised Code as amended by this act, or the plan's terms and conditions, including any provisions regarding cost recovery.

SECTION 4. Section 4929.051 of the Revised Code, as enacted by this

act, shall not be applied in favor of a claim or finding that an application described in that section but submitted to the Public Utilities Commission prior to the act's effective date is an application to increase rates.

SECTION 5. The Governor's Energy Advisor periodically shall submit a written report to the General Assembly pursuant to section 101.68 of the Revised Code and report in person to and as requested by the standing committees of the House of Representatives and the Senate that have primary responsibility for energy efficiency and conservation issues regarding initiatives undertaken by the Advisor and state government pursuant to numbered paragraphs 3 and 4 of Executive Order 2007-02S, "Coordinating Ohio Energy Policy and State Energy Utilization. The first written report shall be submitted not later than sixty days after the effective date of this act.

Joe O. Hooper

Speaker _____ of the House of Representatives.

Bill Harris

President _____ of the Senate.

Passed April 23, 2008

Approved May 1, 2008

Jed Strickland

Governor.

Am. Sub. S. B. No. 221

127th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Mark C. Flanders

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the
1st day of *May*, A. D. 20 *08*.

James B. ...

Secretary of State.

File No. *69*

Effective Date *7/31/08*

File # 69

(127th General Assembly)
(Amended Substitute Senate Bill Number 221)

AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Introduced by

Senator Schuler
(By Request)
Cosponsors: Senators Jacobson, Harris, Fedor, Bocieri, Miller, R., Morano, Mumper, Niehaus, Padgett, Roberts, Wilson, Spada
Representatives Hagan, J., Blessing, Jones, Uecker, Budish, Chandler, Domenick, Evans, Flowers, McGregor, J., Yuko

9/13/08

Passed by the Senate.

October 31 2007

Passed by the House of Representatives.

concurrent in House amendments
April 23, 2008

April 22 2008

Filed in the office of the Secretary of State at Columbus, Ohio, on the

1st day of May A. D. 20 08

[Signature]
Secretary of State

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company to Adjust Their) Case No. 09-1095-EL-RDR
Economic Development Cost Recovery)
Rider Rates.)

FINDING AND ORDER

The Commission finds:

- (1) On November 13, 2009, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, AEP-Ohio) filed an application (Application) to adjust their respective economic development cost rider (EDR) rates to collect estimated deferred delta revenues and carrying costs associated with a unique arrangement with Ormet Primary Aluminum Corporation (Ormet), which was approved in *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009) and Entry on Rehearing (September 15, 2009) (09-119), and a reasonable arrangement with Eramet Marietta, Inc. (Eramet), which was approved in *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Opinion and Order (October 15, 2009) (09-516).
- (2) In its Application, AEP-Ohio proposes that its EDR rates, to be applied to its customers' distribution charges, should be set at 13.18314 percent for CSP and 9.37456 percent for OP, effective with bills rendered in the first billing cycle of January 2010. Recognizing, however, the Commission's requirement in 09-119, as well as 09-516, that AEP-Ohio credit any POLR charges paid by Ormet or Eramet as offsets to its EDR rates, AEP-Ohio alternatively proposes EDR rates of 10.52701 percent for CSP and 8.33091 for OP, which include POLR credits. AEP-Ohio's Application also proposes to set EDR rates on a levelized basis, to recover over 12 months the projected under-recoveries associated with the Eramet contract, beginning from the effective date of the contract through December 31, 2010, and

the Ormet unique arrangement, from its effective date through December 31, 2010. AEP-Ohio contends that it is proposing the levelized approach to EDR rates so that customers will avoid experiencing the large swings in EDR rates every six months that would otherwise be attributable to the pricing structure of the Ormet unique arrangement.

- (3) On November 19, 2009, the Ohio Energy Group (OEG) filed a motion to intervene, asserting that it has a real and substantial interest in the proceeding, and that the Commission's disposition of the proceeding may impair or impede OEG's ability to protect that interest.
- (4) On November 25, 2009, Ormet filed a motion to intervene, asserting that it has an interest in the instant proceeding, as it is a party to one of the unique arrangements at issue, and this proceeding has the potential of affecting that arrangement. With its motion to intervene, Ormet also filed a motion to permit Clifton A. Vince, Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand, counsel for Ormet, to practice before the Commission pro hac vice in this proceeding.
- (5) On November 25, 2009, the Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene and, as more fully explained below, a motion to set the matter for hearing. In its motion to intervene, IEU-Ohio asserts that AEP-Ohio's Application may result in increases to the rates charged to IEU-Ohio members for electric service, and impact the quality of service that IEU-Ohio members receive from AEP-Ohio.
- (6) On November 30, 2009, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene, arguing that it is the advocate for the residential utility customers of AEP-Ohio who may be affected by the EDR rates proposed by AEP-Ohio, and that its interest is different than that of any other party to the proceeding.
- (7) The Commission finds that OEG, Ormet, IEU-Ohio, and OCC have set forth reasonable grounds for intervention. Accordingly, their motions to intervene should be granted. Additionally, the Commission finds that Ormet's motion for admission pro hac vice, requesting that Clifton A. Vince,

Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand be permitted to practice before the Commission in this matter, is reasonable and should be granted.

- (8) In support of its motion to set the matter for hearing, IEU-Ohio cites Rule 4901:1-38-08, Ohio Administrative Code (O.A.C.), which states that if it appears to the Commission that the proposals in the Application may be unjust and unreasonable, the Commission must set the matter for hearing. IEU-Ohio argues that the following issues make AEP-Ohio's Application appear to be unjust and unreasonable:

- (a) When Ormet sought to return to service from AEP, AEP argued that since it had not planned to provide service to Ormet, it was losing the opportunity to sell its generation at market-based rates, and that it should be compensated for its lost opportunity costs. However, in this Application, AEP has proposed to calculate the delta revenue associated with providing service to Ormet as the difference between the price Ormet pays under the Commission approved reasonable arrangement and the otherwise applicable tariff rate, rather than basing delta revenues on its current lost opportunity costs. AEP's flip flop in position is a heads I win, tails you lose proposition for AEP's other customers. AEP has failed to demonstrate why any change in the methodology to calculate delta revenue associated with the Ormet contract is warranted.
- (b) Section 4905.31(E), Revised Code, specifically states that the public utility may recover costs incurred in conjunction with any economic development and job retention program. Both Ormet and Eramet filed "unique arrangements" and not "economic development arrangements" under the Commission's rules. Thus, AEP has failed to demonstrate it is appropriate to recover delta

revenue associated with these reasonable arrangements, particularly under the rider it proposes to use.

- (c) In calculating the carrying costs, AEP proposes to use the weighted average costs of each company's respective long-term debt. AEP has failed to demonstrate why any carrying charges should not be based on short-term debt, given that the recovery period is not greater than twelve months.
- (d) AEP's application is also procedurally deficient. Rule 4901:1-38-08, O.A.C., requires utilities seeking recovery of reasonable arrangement delta revenue to file the projected impact of the proposed rider on all customers, by customer class, which AEP did not do.

IEU-Ohio Motion to Set Matter for Hearing at 4-5.

- (9) On December 3, 2009, Ormet filed comments on AEP-Ohio's Application, asserting that AEP-Ohio must produce further information before the Commission can make a decision regarding its Application with respect to calendar year 2010. Ormet explains that under the Commission-approved unique arrangement in 09-119, the delta revenues AEP-Ohio is entitled to collect are based upon the difference between the tariff rates for Ormet and the rate resulting from the unique arrangement. Ormet contends that AEP-Ohio has offered no explanation or justification for the proposed 2010 tariff rate, that the rate assumed in the Application has not been submitted to the Commission for approval, and that it appears to be higher than the rate increase permitted in *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO; and *In the Matter of the Application of Ohio Power Company for Approval of an Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, Opinion and Order (March 18, 2009); Entry Nunc Pro Tunc (March 30, 2009); First Entry on Rehearing (July 23, 2009);

Finding and Order (July 29, 2009); Second Entry on Rehearing (November 4, 2009) (ESP proceedings). Accordingly, Ormet requests that the Commission set the matter for hearing, or, in the alternative, explain the basis for AEP-Ohio's proposed 2010 tariff rate prior to approving the Application.

- (10) OCC and OEG also filed comments on December 3, 2009, in which they argue that AEP-Ohio failed to support its applications with the appropriate information, that any provider of last resort (POLR) charges paid to AEP-Ohio under its contracts with Ormet and Eramet should be credited to the economic development rider (EDR), and that AEP-Ohio unreasonably requests to accrue carrying costs on any under-recovery of delta revenues caused by levelized rates, but failed to request a mechanism for protecting customers from an accrual of carrying costs on over-recovery. In their comments, OCC and OEG also posit that AEP-Ohio's EDR should be audited every six months to verify that AEP-Ohio, Ormet, and Eramet have met and maintained compliance with Commission-ordered conditions. OCC and OEG advocate for Commission rejection of AEP-Ohio's Application, or in the alternative, a determination that the Application may be unjust and unreasonable, and that a hearing is necessary.
- (11) On December 9, 2009, AEP-Ohio replied and submitted supplemental information, which provided the projected impact of the proposed EDR rider on all CSP and OP customers, by customer class.
- (12) Commission Staff (Staff) reviewed AEP-Ohio's application and supplemental information, and issued its recommendation on December 10, 2009. Staff recommended that the Commission approve AEP-Ohio's Application, using the proposed EDR rates that include POLR credits, as filed on December 9, 2010. Staff noted that it is Staff's understanding that AEP-Ohio is requesting to accrue carrying costs on any under-recovery of delta revenues caused by the levelized EDR rates. In connection with this request, Staff recommended that the Commission require a symmetrical credit to carrying costs in the event of over-recovery caused by the levelized rate structure.

- (13) On December 11, 2009, IEU-Ohio filed a motion to consolidate Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, 09-1906-EL-ATA, 09-1095-EL-FAC, and 09-1095-EL-UNC, arguing that the interconnected nature of the proposals addressed by the cases demands that the Commission resolve the cases by means of one proceeding. IEU-Ohio also contends that, although AEP-Ohio implicitly argues otherwise, adjustments to AEP-Ohio's EDR riders are not exempt from the limitations imposed on rate increases in the ESP proceedings.
- (14) On December 14, 2009, AEP-Ohio filed a memorandum contra IEU-Ohio's motion to consolidate, stating that cost increases associated with new government mandates, such as AEP-Ohio's delta revenue costs, are not included under the rate increase limitations set forth in the ESP.
- (15) On December 15, 2009, IEU-Ohio filed a reply to AEP-Ohio's memorandum contra, contending that the Commission did not adopt, in the ESP proceedings, AEP-Ohio's argument that cost increases associated with new government mandates fall outside the rate increase limitations.
- (16) On December 22, 2009, Ormet also filed a reply to AEP-Ohio's memorandum contra, arguing that the EDR should be subject to the Commission-mandated limitations on AEP-Ohio's rate increases.
- (17) As an initial matter, IEU-Ohio contends that AEP-Ohio has failed to demonstrate that it is appropriate for it to recover delta revenue associated with the Ormet unique arrangement and the Eramet reasonable arrangement. In support of its argument, IEU-Ohio cites Section 4905.31(E), Revised Code, which provides that a public utility electric light company may recover costs incurred in conjunction with any economic development and job retention program. IEU-Ohio contends that because Ormet's unique arrangement and Eramet's reasonable arrangement were not filed specifically as economic development arrangements under the Commission's rules, it is inappropriate for AEP-Ohio to recover delta revenue associated with the respective arrangements.

(18) Despite IEU-Ohio's argument, the Commission finds that AEP-Ohio is authorized to recover delta revenue related to the Ormet unique arrangement and the Eramet reasonable arrangement. Section 4905.31, Revised Code, permits recovery of foregone revenue by the electric utility incurred in conjunction with economic development and job retention programs. Both the Ormet unique arrangement and the Eramet reasonable arrangement advance, as underlying goals, either economic growth or job retention. Chapter 4901:1-38, O.A.C., titled "Arrangements," implements Section 4905.31, Revised Code. Chapter 4901:1-38, O.A.C., encompasses all types of arrangements, including economic development arrangements, energy efficiency arrangements, and unique arrangements. Rule 4901:1-38-02, O.A.C., details that the purpose of Chapter 4901:1-38, O.A.C., in part, is to facilitate Ohio's effectiveness in the global economy, to promote job growth and retention in the state, and to ensure the availability of reasonably priced electric service. Each of these factors was a goal of the Ormet and Eramet arrangements. Further, Rule 4901:1-38-08, O.A.C., which permits revenue recovery pertaining to agreements, provides that "each electric utility that is serving customers pursuant to approved reasonable arrangements may apply for a rider for the recovery of certain costs associated with its delta revenue for serving those customers pursuant to reasonable arrangements[.]" The rule provides an opportunity to seek recovery of delta revenues resulting from arrangements. It does not limit the recovery of revenue to a narrow type of arrangement, as IEU-Ohio suggests. Moreover, 09-119 and 09-516 specifically contemplated such filings by AEP-Ohio, seeking recovery of the approved revenue foregone as a result of arrangements. See 09-119 Opinion and Order at 6-10; 09-516 Opinion and Order at 8, 9.

(19) In its Application, AEP-Ohio proposes to recover expected unrecovered costs based on the estimated delta revenues created by the Ormet and Eramet arrangements during 2010. The estimated delta revenues AEP-Ohio sets forth in its Application are calculated as the difference between the proposed 2010 tariff rates and the Commission-approved prices under the Ormet unique arrangement and the Eramet reasonable arrangement. IEU-Ohio argues that AEP-Ohio has

not demonstrated why its proposed change in the method of calculating delta revenue is warranted.

- (20) Rule 4901-38-01(C), O.A.C., which defines delta revenue, states that "[d]elta revenue" means the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the [C]ommission." The method by which AEP-Ohio proposes to calculate delta revenue in this Application directly follows the definition set forth in the rule, as well as the Commission's orders in 09-119 and 09-516. The Commission believes this is the proper method for calculating delta revenue, and that AEP-Ohio is warranted in its use of this method.
- (21) In its comments, Ormet expresses concern that AEP-Ohio's proposed 2010 tariff rate has not been submitted to the Commission for approval. Likewise, OCC and OEG express concern over assumptions they allege AEP-Ohio has made in its delta revenue calculations. Moreover, Ormet expresses concerns that the proposed 2010 tariff rate AEP-Ohio used in its Application appears to be higher than the rate increase permitted under the ESP proceedings, which is 6 percent for CSP and 7 percent for OP for 2010. Since filing its Application in this case, AEP-Ohio filed an application to modify its standard service offer rates in Case No. 09-1906-EL-ATA. The proposed 2010 tariff rate AEP-Ohio used to calculate delta revenue for purposes of its EDR rates is the same rate submitted to the Commission for approval in Case No. 09-1906-EL-ATA in 2010. On December 10, 2010, Staff filed its review and recommendation in Case No. 09-1906-EL-ATA, indicating that it finds that the rates proposed in the applications provide for increases no greater than those authorized by the Commission in the ESP proceedings. In accordance with this review and our decision issued simultaneously with this order in Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, and 09-1906-EL-ATA, the Commission finds that the parties' arguments that the proposed 2010 tariff rates utilized by AEP-Ohio in its delta revenue calculations are unjustified is without merit.
- (22) IEU-Ohio, OCC, and OEG have also expressed concerns that AEP-Ohio's Application is procedurally deficient, in that it initially did not file the projected impact of the EDR rider on all

customers, by customer class. As noted above, however, on December 9, 2009, AEP-Ohio filed supplemental information that provided the projected impact of the EDR rider. With this information in the docket, it appears that the Application provides a clear picture for the Commission's evaluation of the EDR rates proposed.

(23) In its Application, AEP-Ohio proposes to recover the 2009 deferred unrecovered costs, or delta revenues, resulting from the Ormet and Eramet reasonable arrangements, as well as the carrying costs at the weighted average cost of CSP's and OP's respective long-term debt. AEP-Ohio's estimated recovery for 2009 is based on the following: estimates provided by Ormet of its production level and associated MWh of consumption for the period beginning with the effective date of the unique arrangement through the end of 2009; and a projection for Eramet's electricity consumption from the effective date of its contract, pursuant to the reasonable arrangement, through the end of 2009. AEP-Ohio also proposes to continue accruing carrying costs on the combined Ormet and Eramet balance of unrecovered deferred costs until the deferral and related carrying costs are fully recovered.

(24) IEU-Ohio asserts, in its motion to set the matter for hearing, that AEP-Ohio has failed to demonstrate why any carrying charges should not be based on the average cost of each company's short-term debt. However, under the semiannual reconciliation process prescribed for EDR rates under Rule 4901:1-38-08, O.A.C., the use of each company's average cost of long-term debt is a more appropriate mechanism for calculating carrying charges than short-term debt, and, therefore, should be utilized.

(25) The Commission finds AEP-Ohio's proposal to recover the 2009 deferred unrecovered costs resulting from the Ormet and Eramet arrangements, as well as the carrying costs at the weighted average cost of CSP's and OP's respective long-term debt, which are 5.73 percent for CSP, and 5.71 percent for OP, to be reasonable. The Commission additionally finds that, on a going-forward basis, AEP-Ohio shall utilize the interest rates from its latest-approved filing for the calculation of carrying costs.

(26) As noted above, IEU-Ohio and Ormet contend that the EDR should be subject to the Commission-mandated limitations on AEP-Ohio's rate increases. AEP-Ohio contends that because the cost increases associated with the EDR constitute government mandates, they are not included in the rate increase limitations imposed in the ESP. IEU-Ohio contends that the Commission did not adopt AEP-Ohio's new government mandate exception to its rate increase limitations. IEU-Ohio also argues that the Commission specifically listed those mechanisms that are exempt from the applicable rate increase limitations in the ESP first entry on rehearing, and the EDR was not among those listed.

(27) While the Commission enumerated a few of the riders and other mechanisms that are exempt from the ESP rate increase limitations in the first entry on rehearing, the list was not, as IEU-Ohio suggests, exhaustive. Although the rider was named and established in the ESP, we believe that the statute, as well as our rules, permit recovery of the delta revenues created by reasonable arrangements. As explained in 09-119 and 09-516 and herein, the reasonable arrangements approved further the policy of this state, and are consistent with Sections 4905.31 and 4928.02, Revised Code, and Chapter 4901:1-38, O.A.C. Accordingly, we find that the EDR is not subject to the limitations on AEP-Ohio's rate increases set forth in the ESP. Finding otherwise would result in considerable deferrals being created, including carrying costs, which would be passed on to customers.

(28) Although we find that the EDR is not subject to the limitations on rate increases set forth in the ESP, we are not persuaded by, and decline to adopt, AEP-Ohio's argument that the cost increases associated with the EDR constitute government mandates. As IEU-Ohio notes in its memorandum contra, to interpret any Commission order pertaining to rates with which an electric utility does not agree as a new government mandate, not subject to rate increase limitations, overextends the meaning of the phrase.

(29) The Commission finds that AEP-Ohio's proposal to utilize EDR rates of 10.52701 percent for CSP and 8.33091 percent for OP, which include POLR credits, is reasonable. Likewise, the

Commission finds that the levelized approach proposed by AEP-Ohio for the collection of EDR costs is a just and reasonable means of collection, as it will operate to avoid the extreme swings in EDR costs linked to the structure of the Ormet unique arrangement.

- (30) As detailed by AEP-Ohio in its Application, the structure of the Ormet contract frontloads Ormet's price discount over the first eight months of each year. Based upon its use of the levelized rate approach to temper swings in EDR costs for its customers, AEP-Ohio anticipates the under-recovery of EDR costs during the first eight months of each year. In light of this situation, AEP-Ohio proposes to accrue carrying costs, at the weighted average costs of CSP's and OP's respective long-term debt, caused by the levelized rates. OCC and OEG object that while AEP-Ohio requests to accrue carrying costs on the under-recovery of delta revenues due to levelized rates, it does not request a symmetrical mechanism for protecting consumers in the event of the over-recovery of delta revenues. Staff agrees with the position of OCC and OEG on the issue.
- (31) The Commission finds that AEP-Ohio's request to accrue carrying costs on the under-recovery of delta revenues due to levelized rates is reasonable and should be permitted. However, to the extent that OCC, OEG, and Staff assert that in the event of over-recovery of delta revenues, customers should be afforded symmetrical treatment to that afforded to AEP-Ohio in the event of an under-recovery, we find their argument persuasive. Therefore, if the over-recovery of delta revenues occurs, AEP-Ohio shall credit customers with the value of the equivalent carrying costs, calculated according to the weighted average costs of long term debt, 5.73 percent for CSP, and 5.71 percent for OP.
- (32) As noted above, Rule 4901-38-08, O.A.C., prescribes that the EDR shall be updated and reconciled semiannually. Additionally, all data submitted in support of any rider update is subject to Commission review and audit. Pursuant to this provision, as well as Staff's recommendation, the Commission finds that the EDR should be updated and reconciled, by application to the Commission, semiannually. By this process, the estimated delta revenues will be tried to actual delta

revenues, and any over- or under-recovery will be reconciled. The semiannual adjustments to the EDR rates of CSP and OP will be effective with the first billing cycle of April and October in each year. AEP-Ohio is cautioned, therefore, to submit its applications in a timely fashion, such that the Commission will have sufficient time to review the filings and perform due diligence with regard to its review of the proposed rates.

- (33) Upon review of the extensive pleadings and comments filed by numerous parties, the Commission finds that AEP-Ohio's Application to adjust its EDR rates, as supplemented on December 9, 2009, and as modified herein, does not appear to be unjust or unreasonable, and should be approved as modified herein. Therefore, the Commission finds that it is unnecessary to hold a hearing in this matter, and, thus, the requests for hearing advanced by several parties should be denied. The Commission additionally authorizes AEP-Ohio to implement its adjusted EDR rates of 10.52701 percent for CSP and 8.33091 percent for OP, effective with bills rendered in the first billing cycle of January 2010.
- (34) Finally, the Commission finds that the case herein, which was originally docketed as Case No. 09-1095-EL-UNC, is more appropriately docketed with the new RDR case code, as it specifically addresses economic development riders. Accordingly, now and hereafter, Case No. 09-1095-EL-UNC should be designated as Case No. 09-1095-EL-RDR.

It is, therefore,

ORDERED, That the motions of OEG, Ormet, IEU-Ohio, and OCC to intervene be granted. It is, further,

ORDERED, That Ormet's motion to admit Clifton A. Vince, Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand to practice pro hac vice before the Commission in this proceeding be granted. It is, further,

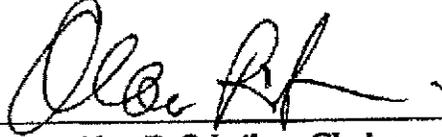
ORDERED, That AEP-Ohio's Application to adjust its EDR rates, as supplemented on December 9, 2009, be approved as modified herein. It is, further,

ORDERED, That AEP-Ohio implement its adjusted EDR rates of 10.52701 percent for CSP and 8.33091 percent for OP, effective with bills rendered in the first billing cycle of January 2010. It is, further,

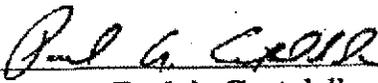
ORDERED, That the requests for a hearing be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO



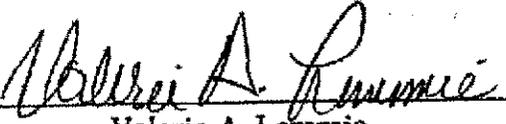
Alan R. Schriber, Chairman



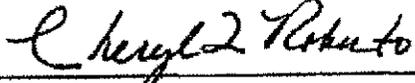
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

RLH:ct

Entered in the Journal

JAN 07 2010



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for)
Establishment of a Reasonable Arrangement)
Between Eramet Marietta, Inc. and) Case No. 09-516-EL-AEC
Columbus Southern Power Company.)

ENTRY ON REHEARING

The Commission finds:

- (1) On June 19, 2009, Eramet Marietta, Inc. (Eramet) filed an application pursuant to Section 4905.31, Revised Code, to establish a reasonable arrangement with Columbus Southern Power Company (CSP) for electric service to its manganese alloy-producing facility in Marietta, Ohio (Application). In its application, Eramet requests that the Commission establish a reasonable arrangement for electric service with CSP that will permit Eramet to secure a reliable supply of electricity with a reasonable, predictable price over a term that will allow for the investment of approximately \$40 million in capital investments to upgrade the Marietta facility.
- (2) A hearing on the matter commenced on August 4, 2009. During the course of the hearing, on August 5, 2009, Eramet and Staff filed a Joint Stipulation and Recommendation (Stipulation), which addressed several of the issues and concerns related to Eramet's Application.
- (3) On October 15, 2009, the Commission issued its Opinion and Order, approving the Stipulation, with modifications.
- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.
- (5) On November 13, 2009, CSP filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

- (a) The Commission's finding that Eramet cannot shop through the period ending with the expiration of CSP's Electric Security Plan (ESP) is contrary to the evidence in the record and to the public policy codified in Ohio law.
 - (b) Basing the determination of whether Eramet can shop under the terms of a ten-year contract on only three of those ten years is unreasonable and unlawful.
 - (c) Basing the determination of whether Eramet can shop under the terms of a ten-year contract on the period of time for which CSP's current provider of last resort (POLR) charge has been authorized is unreasonable and unlawful.
 - (d) Finding that there is not a risk that Eramet will be permitted, at some point during the term of the unique arrangement, to shop for competitive generation and then return to generation service under CSP's standard service offer is unreasonable and unlawful.
 - (e) Requiring CSP to reduce its recovery of delta revenues (i.e., revenue foregone) as a result of the contract with Eramet is unreasonable and unlawful.
 - (f) Requiring CSP to credit any POLR charges paid by Eramet under the CSP/Eramet contract to CSP's economic development rider is unreasonable and unlawful.
 - (g) Requiring CSP to enter into a contract with Eramet, which conforms to the Commission's order, is unreasonable and unlawful.
 - (h) Requiring CSP to enter into a contract, which results in a reduction in CSP's revenues, and not permitting CSP to recover the full amount of that reduction, is unreasonable and unlawful.
- (6) Moreover, on November 16, 2009, the Office of the Ohio Consumers' Counsel (OCC) and the Ohio Energy Group (OEG) jointly filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

- (a) The Commission erred in failing to adopt the regulatory principle established in the *Ormet* case, specifying how CSP will apply the credit for the full amount of POLR charges that will reduce what customers will have to pay for Eramet's unique arrangement.
- (b) The Commission erred by failing to adopt the regulatory principle established in the *Ormet* case, specifying that CSP and Eramet shall not be permitted to reduce the delta revenue credit, for example, by negotiating a discount to the POLR charge, that is intended by the Commission to reduce what customers will have to pay for Eramet's unique arrangement.
- (c) The two-party Stipulation does not benefit the public and is not in the public interest because it does not set a hard cap or ceiling on the subsidy that customers could be asked to pay.
 - (i) The Commission's failure to establish a hard cap on the delta revenues is a violation of the precedent set in *Ormet* that a reasonable arrangement should set a maximum amount of delta revenues which the ratepayers should be expected to pay. Thus, the two-party Stipulation fails to meet the third prong of the Commission's stipulation criteria.
 - (ii) The Commission's failure to establish a hard cap on the delta revenues also resulted in the two-party Stipulation failing to meet the second prong of the stipulation criteria - that this Stipulation benefits ratepayers and is in the public interest.
- (d) The Commission erred by failing to meet the requirements of Section 4903.09, Revised Code, to set forth reasons prompting its decision, based upon findings of fact, with regard to the arguments of OCC and OEG on a hard cap or ceiling.
- (e) The two-party Stipulation does not benefit the public and is not in the public interest because it requires customers to

fund electric rate discounts to Eramet before Eramet has obtained corporate approval for the capital investment, which is the basis for granting Eramet the discounts.

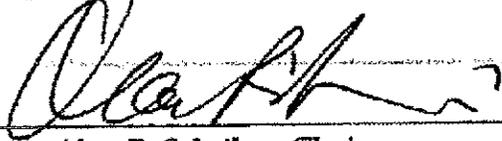
- (f) The Commission erred in concluding that the two-party Stipulation meets the first prong of the stipulation criteria. Because the two-party Stipulation does not reflect any diverse interests, it must fail.
- (7) Further, on November 16, 2009, Eramet filed a motion for rehearing, requesting that the Commission grant rehearing for the purpose of confirming that it approved the Stipulation, including, without modification, the provision in which Eramet committed to work in good faith with CSP to determine how and to what extent Eramet's customer-sited capabilities might be committed to CSP for integration into its portfolio for purposes of complying with Ohio's portfolio requirements.
- (8) On November 23, 2009, Eramet filed a memorandum contra the applications for rehearing of CSP, OCC, and OEG. On the same day, OCC and OEG jointly filed a memorandum contra CSP's application for rehearing. Additionally, on November 25, 2009, CSP filed memoranda contra Eramet's application for rehearing and the application for rehearing filed by OCC and OEG.
- (9) The Commission grants the applications for rehearing filed by CSP, OCC and OEG, and Eramet. We believe that sufficient reason has been set forth by the parties seeking rehearing to warrant further consideration of the matters specified in the applications for rehearing.

It is, therefore,

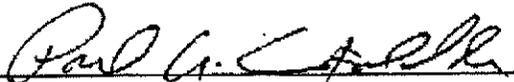
ORDERED, That the applications for rehearing filed by CSP, OCC and OEG, and Eramet be granted. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

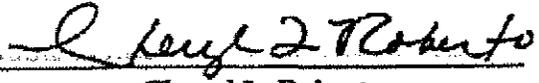


Alan R. Schriber, Chairman



Paul A. Centolella

Ronda Hartman Fergus



Cheryl L. Roberto

Valerie A. Lemmie

RLH:ct

Entered in the Journal

DEC 11 2009



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for)
Approval of a Contract for Electric)
Service Between Columbus Southern) Case No. 08-883-EL-AEC
Power Company and Solsil, Inc.)

In the Matter of the Application for)
Approval of a Contract for Electric)
Service Between Ohio Power) Case No. 08-884-EL-AEC
Power Company and Globe)
Metallurgical, Inc.)

FINDING AND ORDER

The Commission finds:

- (1) The Applicants, Columbus Southern Power Company (CSP) and Ohio Power Company (OP), are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On July 16, 2008, CSP petitioned this Commission for approval of a contract and contract addendum with Solsil, Inc. (Solsil). Solsil manufactures high-purity silicon metal for the solar industry in Beverly, Ohio, at a facility on Wells Road. According to Arden Sims, President of Solsil, Solsil plans on investing \$46,000,000 to build a state-of-the-art plant for producing solar grade silicon in Beverly, Ohio. The Solsil plant will depend on Globe Metallurgical, Inc. (Globe), also in Beverly, Ohio, to produce and supply metallurgical grade silicon to upgrade to solar grade silicon. Solsil's solar grade silicon will be used by the photovoltaic industry to generate solar power. Mr. Sims represents that a shortage of solar grade silicon has caused many solar cell producers to not open up United States production, thereby preventing the solar industry from reaching its full potential.

Mr. Sims states that an economic power rate is key to making Solsil's investment justifiable and operation viable, since power accounts for 30 percent of total production costs. The rates

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proposed in this application will facilitate a significant expansion at the Solsil facility. Solsil has represented that at its peak capacity after expansion it will employ 350 workers with a payroll exceeding \$18 million annually.

- (3) The contract is for a ten-year term beginning January 1, 2009. The contract capacity is 19,500 kVA. Since Solsil is not projecting to meet that level of demand until 2010, CSP agrees to use the greater of 60 percent of Solsil's previously established billing demand or 1,000 KVA as the minimum billing demand until January 1, 2010. After that date, the standard minimum demand provisions of Schedule General Service Large, which include a minimum billing demand of 11,700 KVA, shall apply. The price shall be based on Solsil's rate for generation service being equal to 40 percent of the winning supply bids received in response to requests for proposals (RFPs) to serve the load and on any deviations from Solsil's load forecast. Solsil shall also pay CSP's prevailing tariffs for transmission and distribution, including all applicable Commission-approved riders.
- (4) The request for approval of the contract is conditioned on the Commission approving, as part of its order, the full recovery of CSP, over the ten-year period of the contract, of the cost of the generation service resulting from the requests for proposals, offset by the amount paid by Solsil for generation service.
- (5) On July 16, 2008, OP petitioned this Commission for approval of a contract and contract addendum with Globe. Globe manufactures silicon metal, specialty alloys, and ferroalloys in Beverly, Ohio, at a facility on Sparling Road. The rates proposed in this application will facilitate the continuation of the operations at this facility. Globe has represented that it employs 180 workers to which it has paid \$15 million in payroll and benefits through the 11 months of the current fiscal year. Globe asserts that the rates proposed are critical to maintaining the competitiveness of its facilities so that it can continue to provide employment and other economic benefits in Ohio.
- (6) The contract is for a ten-year term beginning January 1, 2009. The price shall be based on ninety percent of Globe's rate for generation service on the otherwise applicable schedule for firm and interruptible. Globe shall also pay OP's prevailing tariffs

for transmission and distribution, including all applicable Commission-approved riders.

- (7) The request for approval of the contract is conditioned on the Commission approving, as part of its order, the full recovery of OP, over the ten-year period of the contract, of the difference between what Globe's bill would have been under the applicable standard service offer schedules and the amount paid by Globe for generation service.
- (8) Motions to intervene in these cases were filed by the Ohio Energy Group (OEG) and the Office of the Ohio Consumers' Counsel (OCC). OEG's objection is limited to the Solsil contract being a discount off of the market price of generation instead of a tariff rate. OCC objects to various terms of the contracts and proposed cost recovery mechanisms.
- (9) The motions to intervene should be granted and the parties' comments considered in our consideration of the applications.
- (10) The applications were filed pursuant to Section 4905.31, Revised Code. The contracts for electric service and corresponding addendums entered into between CSP and Solsil and OP and Globe appear to enhance the retention and growth of local industry. However, the Commission does not need to reach in this case the question of whether such contracts should be approved based on their economic development benefits. Consideration of special contracts for economic development will be governed by rules addressing the approval of reasonable arrangements. Such rules are pending before the Commission in Case No. 08-777-EL-ORD. Consideration of the contracts in this case will be based upon their potential impact on advancing policies set forth in Section 4928.02, Revised Code, by reducing the cost of solar energy resources needed to meet portfolio standards; expanding the State's solar energy industry and its effectiveness in the global economy; and encouraging development of technologies that can adapt successfully to potential environmental mandates, distributed generation, and innovative supply-side services for a modern grid. After considering the applications, the Commission finds that the agreement between OP and Globe should be approved. However, the Commission is concerned with the discount

mechanism in the Solsil contract and the delta revenue/cost created by the contract. Accordingly, the Commission approves the agreement provided that the contract is modified to provide that the market rate at the outset of the contract shall be estimated in accordance with generally accepted statistical criteria as arrived at by consultation with Commission staff (Staff) and for the purpose of establishing the discount benchmark. The Solsil discount shall then be calculated as a discount from the then applicable standard service offer in a proportion to that which would be equivalent to the 60 percent discount from the benchmark. The difference between the standard service offer and the Solsil rate shall then become recoverable as the delta revenue/cost. The Commission recognizes that the approval of each special arrangement must be considered on its own merits. The approval of these contracts is based on the unique circumstances of Solsil and Globe and an effort to maintain the viability of these operations. The Commission recognizes that these agreements were entered into prior to the effective date of Amended Substitute Senate Bill No. 221 (SB 221) and prior to the filing of any application pursuant to SB 221. Therefore, the Commission's decision in this case should not be viewed as precedent applicable to consideration of any similar issue that might arise in any electric utility's filing under SB 221.

With respect to the recovery of the difference between what the customers are charged and tariff rates, the Commission will permit the recovery of those delta revenues/costs pursuant to recently revised Section 4905.31(E) of the Revised Code. The mechanism for the recovery of those delta revenues/costs shall be determined as part of the utilities' standard service offer applications made pursuant to Section 4928.141, Revised Code.

It is, therefore,

ORDERED, that the motions to intervene filed by OEG and OCC are granted. It is, further,

ORDERED, that the proposed contracts and addendums are approved subject to the finding (10) set forth above. It is further,

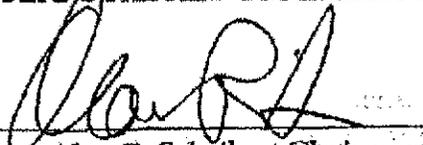
ORDERED, That OP and CSP file revised contracts consistent with this Finding and Order within 20 days of the issuance of the Finding and Order. It is, further

ORDERED, That the revenue recovery requested by CSP and OP is approved, subject to finding (10). However, the mechanism for recovery shall be determined as part of the utilities' standard service offer applications made pursuant to Section 4928.141, Revised Code. It is, further,

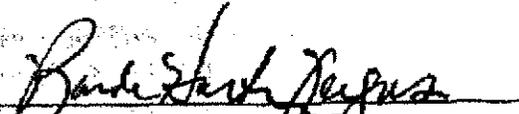
ORDERED, That the Commission's approval of these agreements does not constitute state action for the purpose of antitrust laws. It is, further,

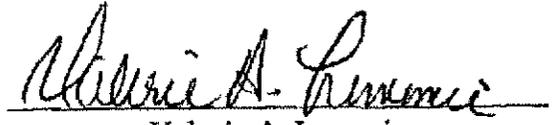
ORDERED, That a copy this Finding and Order be served upon the Applicants and all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Paul A. Centolella


Ronda Hartman Fergus


Valerie A. Lemmie

Cheryl L. Roberto

RRG/BF:ct

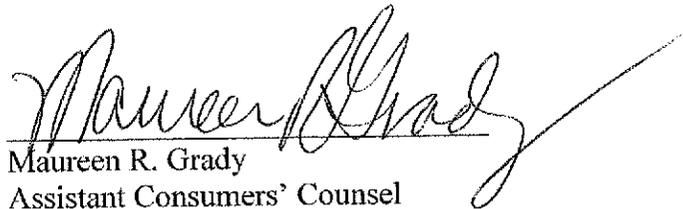
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JUL 31 2008


Renee J. Jenkins
Secretary

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Merit Brief and Appendix of Intervening Appellees Office of the Ohio Consumers' Counsel and Ohio Energy Group* has been served upon the below-named counsel via First Class mail, postage prepaid this 4th day of March, 2010.


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