ORIGINAL

In The
SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, and **Industrial Energy Users-Ohio,** Appellants, v. **The Public Utilities Commission of Ohio,** Appellee.	: : : : : : : : : : : : : :	Case No. 09-2022 Appeal from the Public Utilities Commission of Ohio, *In re Columbus Southern Power Company*, Case No. 08-917-EL-SSO, and *In re Ohio Power Company*, Case No. 08-918-EL-SSO.

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

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In The
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The Office of the Ohio Consumers' Counsel,	:	
	:	Case No. 09-2022
and	:	
	:	Appeal from the Public Utilities Commission of Ohio, *In re Columbus Southern Power Company*, Case No. 08-917-EL-SSO, and *In re Ohio Power Company*, Case No. 08-918-EL-SSO.
Industrial Energy Users-Ohio,	:	
Appellants,	:	
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

Amended Substitute Senate Bill No. 221 (S.B. 221) became effective on July 31, 2008. The same day, Columbus Southern Power and the Ohio Power Company (the Companies) filed an application for a Standard Service Offer. The application sought approval of an Electric Security Plan authorized by S.B. 221.

S.B. 221 represents a fundamental change in the way that rates are determined in Ohio. With the advent of competition for generation services concerns about the stability and viability of the electric distribution utilities grew. The Commission addressed these concerns through a series of rate stabilization plans, including one for the Companies. The General Assembly addressed the issue by adopting S.B. 221.

Unlike traditional cost-of-service ratemaking, S.B. 221 does not require that the Standard Service Offer price be cost-based. Indeed, S.B. 221 authorizes electric utilities to include provisions in their Electric Security Plan to automatically increase any component of the Standard Service Offer price.

STATEMENT OF THE FACTS

R.C. 4928.141 (A) requires electric distribution utilities to establish a Standard Service Offer (SSO) for all competitive retail electric services based on a Market-Rate Offer (MRO) under R.C. 4928.142, or on an Electric Security Plan (ESP) under R.C. 4928.143. The SSO is to serve as the electric utility's default generation price. The Companies filed their application for an SSO on July 31, 2008, the effective date of S.B. 221. *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, et al.*, Case Nos. 08-917-EL-SSO, *et al.* (hereinafter *In re AEP*) (Opinion and Order at 6) (March 18, 2009), OCC App. at 15, IEU App. at 166.[1]

R.C. 4928.143 sets out the requirements for an Electric Security Plan (ESP). Under R.C. 4928.143(B), an ESP must include provisions relating to the supply and pricing of generation service. An ESP may also provide for, among other things, the automatic recovery of certain costs, conditions or charges relating to customer shopping, automatic increases or decreases, provisions related to distribution service, and provisions regarding economic development. Ohio

1 References to appellant OCC's appendix are denoted "OCC App. at ___;" references to appellant OCC's supplement are denoted "OCC Supp. at ___;" references to appellant IEU's appendix are denoted "IEU App. at ___;" references to IEU's supplement are denoted "IEU Supp. at ___;" references to appellee's appendix attached hereto are denoted "App. at ___;" and references to appellee's second supplement are denoted "Sec. Supp. at ___."

Rev. Code Ann. § 4928.143(B) (West 2010), App. at 12. The Commission is required to approve, or modify and approve, the ESP if the plan, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under an R.C. 4928.142 Market-Rate Offer (MRO). Ohio Rev. Code Ann. § 4928.143(B)(2) (West 2010), App. at 12.

The Companies proposed implementing an adjustment mechanism that would apply to the cost of fuel and fuel-related components, termed the Fuel Adjustment Clause (FAC). *In re AEP* (Opinion and Order at 14) (March 18, 2009), OCC App. at 23, IEU App. at 174. In order to determine the FAC, it was necessary to establish a baseline to ensure that the FAC did not recover fuel costs already being recovered in rates. The difference between projected costs and the baseline would determine costs to be recovered through the FAC. *Id.* at 18-19, OCC App. at 27-28, IEU App. at 178-179. In order to limit the increases that customers might see from these increases, the Companies planned both to phase in the FAC during the ESP period, and limit the amount of each annual increase, deferring the balance for recovery in future years. *Id.* at 20, OCC App. at 29, IEU App. at 180.

The Companies also proposed to increase the non-fuel related (non-FAC) portion of the generation rate to recover current year carrying costs associated with capitalized investments made between 2001 and 2008 to comply with environmental requirements. *Id.* at 24, OCC App. at 33, IEU App. at 184. The Companies further proposed to recover additional carrying costs incurred for environmental investments made during the three years of the ESP. *Id.* at 28-29, OCC App. at 37-38, IEU App. at 188-189.

R.C. 4928.143(B)(2) also permits electric distribution utilities to request a wide range of other services, charges, and increases as part of their ESP proposals. Although the statute specifically permits nine categories of provisions that could be included in an ESP, it does so "without limitation." Ohio Rev. Code Ann. § 4928.143(B)(2) (West 2010), App. at 12. The Companies' ESP included adjustments to current distribution rates. The Companies sought to increase rates to recover costs associated with enhanced distribution service reliability and its obligations to serve as the provider of last resort (POLR), among other items.

R.C. 4928.143(B)(2)(h) authorizes the recovery of a utility's cost of a long-term energy delivery infrastructure modernization plan included in a utility's ESP. The Companies proposed riders to recover costs associated with their Enhanced Service Reliability Plan (ESRP) and their gridSMART program. *In re AEP* (Opinion and Order at 38) (March 18, 2009) , OCC App. at 47, IEU App. at 198. Both initiatives will improve the companies' distribution system and service to its customers, and allow customers to better manage their energy usage and reduce their energy costs. *Id.* at 34, OCC App. at 43, IEU App. at 194.

The Companies also proposed to include in their ESP a distribution POLR rider to recover the cost to the Companies of allowing a customer to remain with the Companies, or to switch to a Competitive Retail Electric Service (CRES) provider and then return to the Companies' SSO after shopping. *Id.* at 38, OCC App. at 47, IEU App. at 198.

Before approving the Companies' ESP, with modifications, the Commission carefully considered each of the Companies' proposals, and evidence supporting and opposing them. The Commission's decisions thoroughly summarized the evidence of record, which in turn fully supports the Commission's orders in this case.

ARGUMENT

Proposition of Law No. I:

> **Failure to act within a period prescribed by statute does not deprive a tribunal of jurisdiction.**

Industrial Energy Users-Ohio (IEU) argues that the Commission lost jurisdiction over the Companies' application when it did not authorize an ESP within the 150-day period prescribed by R.C. 4928.143. This argument lacks merit.

As an initial matter, IEU failed to raise this issue in its application for rehearing before the Commission. This failure bars IEU from raising the issue before this Court. R.C. 4903.10 provides:

> 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.

Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1-2. Applying this statute, the Court has consistently held that setting forth an argument in an application for rehearing is a jurisdictional prerequisite for the Court's review. *Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247, 638 N.E.2d 550, 553 (1994); *Akron v. Pub. Util. Comm'n*, 55 Ohio St. 2d 155, 161-162, 378 N.E.2d 480, 485 (1978); *Agin v. Pub. Util. Comm'n*, 12 Ohio St. 2d 97, 98-99, 232 N.E.2d 828, 829 (1967). The Court should therefore decline to consider this issue. IEU may argue that it was not required to raise this issue on rehearing because it concerns subject matter jurisdiction. As shown below, however, the time limitation is not a jurisdictional matter.

Should the Court nevertheless examine the merits of this argument, it should conclude that the Commission did not lose jurisdiction over the ESP application. The 150-day period specified in R.C. 4928.143(C)(1) does not limit the Commission's jurisdiction. The general rule is that "a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure." *Hardy v. Delaware Cty. Bd. of Revision*, 106 Ohio St. 3d 359, 363, 835 N.E.2d 348, 353 (2005), quoting *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 66 N.E.2d 531, ¶ 3 of the syllabus (1946). As the Court has explained:

> Statutes which relate to the manner or time in which power or jurisdiction vested in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, may be construed to be directory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated.

Schick v. Cincinnati, 116 Ohio St. 16, 155 N.E. 555, ¶ 1 of the syllabus (1927).

This Court has repeatedly held that a tribunal does not lose jurisdiction for failing to act within a prescribed time absent an express intent to restrict jurisdiction for untimeliness. *See, e.g. In re Davis*, 84 Ohio St. 3d 520, 705 N.E.2d 1219 (1999); *State v. Bellman*, 86 Ohio St. 3d 208, 714 N.E.2d 381 (1999). There is no such expression of intent in R.C. 4928.143(C)(1) or elsewhere in S.B. 221. The statute expresses no purpose for the requirement that an application be approved within 150 days. Absent a discernable purpose in the text of the statute, the time for performance is viewed as directory, not mandatory. *State ex rel. Smith v. Barnell*, 109 Ohio St. 246, 142 N.E.2d 611 (1924). The Commission, thus, retained jurisdiction to act on the ESP application.

Proposition of Law No. II:

> **No public utility shall charge or collect a different rate for any service than that specified in its schedule filed with the Commission. Ohio Rev. Code Ann. § 4905.32 (West 2010), App. at 3. A public utility has no option but to collect rates set by the Commission, and is clearly forbidden to refund any part of rates so collected. *Keco Industries, Inc. v. Cincinnati & Suburban Tele. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).**

The Office of the Ohio Consumers' Counsel (OCC) argues that the Commission's decision constitutes improper retroactive ratemaking, and that it permitted rates to be collected in violation of R.C. 4928.141(A). But the Commission did not replace or retract rates that OCC acknowledges were lawfully in effect. Rather, the Commission approved higher prospective incremental rates, properly applying the new ratemaking standard prescribed by the General Assembly. The Commission's order was lawful and reasonable.

As OCC noted, the General Assembly addressed what rates should apply before an electric utility's first SSO is approved under S.B. 221. R.C. 4928.141(A) provides in part that:

> 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.

Ohio Rev. Code Ann. § 4928.141(A) (West 2010), App. at 8. There is no issue about the appropriateness of the rates charged by the Companies in the interim before their SSO was approved. OCC acknowledges that, until the Companies' SSO rates were placed into effect, "customers paid rates under the Companies' continued rate plan." OCC Brief at 7.

The Commission issued finding and orders on December 19, 2008 and February 25, 2009 approving rates until it could issue an order on the ESP. *In the Matter of the Application of*

Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders, Case No. 08-1302-EL-ATA (Finding and Order) (December 19, 2008), OCC App. at 543-542, IEU App. at 286-289; *In re Columbus Southern Power Company*, Case No. 08-1302-EL-ATA (Finding and Order) (February 25, 2009), OCC App. at 547-549. Those rates became effective with the first billing cycle in January 2009 and continued until the first-authorized rates went into effect. As a result, the rates as determined in Case No. 08-1302-EL-ATA remained the lawfully effective and published rates as required by R.C. 4905.30 and 4905.32 during the interim period.

The Commission issued its Opinion and Order on March 18, 2009. It ordered that the Companies' revised tariffs be approved effective January 1, 2009. *In re AEP* (Opinion and Order at 74) (March 18, 2009), OCC App. at 83, IEU App. at 234. It later revised that order so that the tariffs would not become effective "on a date not earlier than the beginning of the Companies' April 2009 billing cycle." *In re AEP* (Entry Nunc Pro Tunc at 2) (March 30, 2009), OCC App. at 88, IEU App. at 101.

OCC claims that the Commission violated R.C. 4928.141(A) by "replacing continued rates with first-authorized rates," effectively "retract[ing]" the rates charged. OCC Brief at 9. But OCC mischaracterizes the Orders as permitting the Companies to collect retroactive rates for the period of January 2009 through March 2009. OCC argues that the rates for 2009 are retroactive in nature because they are designed to collect twelve months of revenue in the remaining nine months of 2009. This characterization is inaccurate, ignores the effect of the Entry *Nunc Pro Tunc*, and is otherwise based on flawed assumptions.

The Orders authorized approval of the three-year term for the Electric Security Plans from January 1, 2009 through December 31, 2011. *In re AEP* (Opinion and Order at 64) (March

18, 2009), OCC App. at 73, IEU App. at 224. In doing so, the Commission also provided that the revenues collected during the interim period (as authorized by the orders in Case No. 08-1302-EL-ATA) must be recognized through an offset in calculating the new rates. Thus, the Commission did not establish retroactive rates but instead allowed for a prospective rate mechanism to implement its decision to approve the ESP for the full three-year term. The approved tariffs did not provide for new rates *replacing* rates already billed during the first quarter of 2009. Individual customers were not, as OCC acknowledged, backbilled at a different rate for service already provided and billed for. No rates were replaced, no rates were retracted. Rather, the Orders and the Companies' implementing tariffs provide for incrementally higher rates during the nine remaining months of 2009. The rates are designed to prospectively collect, on a total company basis, the revenue authorized by the Orders for 2009. There was no retro-active application of the new rates.

OCC characterizes the ESP term as "the period over which rate increases are collected from customers." This is simply not true. The Commission Order, as clarified in the Entry *Nunc Pro Tunc*, provides for a modified ESP with a term commencing January 1, 2009 and ending December 31, 2011. *In re AEP* (Entry *Nunc Pro Tunc* at 1) (March 30, 2009), OCC App. at 87, IEU App. at 101. The ESP itself includes a number of services and provisions. It also allows for increased rates to be charged. But the Commission provided that increased rates could only be charged beginning with the first billing cycle in April 2009. While the plan was deemed to begin January 1, 2009, rate increase was not permitted until the first billing cycle in April 1, 2009.

Nor did the Commission "enabl[e] the Companies to collect first-authorized rates from customers for January through March 2009." OCC Brief at 8. What the Commission enabled was the recovery of "X" dollars, an amount that the Commission determined to be reasonable, over the time that increased rates are in effect.

Justice Douglas once accurately noted that there are "no specific sections of the Revised Code which prohibit the commission from retroactive ratemaking." *Columbus S. Power Co. v. Pub. Util. Comm'n*, 67 Ohio St. 3d 535, 547, 620 N.E.2d 835, 847 (1993). Indeed, there are none. Justice Douglas continued to observe that the prohibition against retroactive ratemaking "obviously" had a judicial rather than a legislative genesis. *Id.*

The Court has, over time, indicated that certain matters are not retroactive ratemaking. At the outset, "[i]t is axiomatic that before there can be retroactive ratemaking, there must, at the very least, be ratemaking." *River Gas Co. v. Pub. Util. Comm'n*, 69 Ohio St. 2d 509, 512, 433 N.E.2d 568, 571 (1982). So, for example, the Court has said that fuel cost adjustment provisions are independent from the formal ratemaking process, and do not constitute ratemaking in its usual and customary sense. *Id.*

S.B. 221 extends the Commission's authority to approve such adjustment clauses as part of ESPs. For example, the Commission can approve cost-based riders that include automatic or pre-determined rate adjustments. Ohio Rev. Code Ann. § 4928.143(B)(2) (West 2010), App. at 12.

Similarly, the Court has held that deferral of costs incurred in the past does not constitute ratemaking. *River Gas Co.*, 69 Ohio St. 2d at 512; *Consumers' Counsel v. Pub. Util. Comm'n*, 6 Ohio St. 3d 377, 379, 453 N.E.2d 673, 675 (1983). And S.B. 221 also extends the Commission's authority to approve ESP provisions that permit the future recovery of deferrals. Ohio Rev. Code Ann. § 4928.143(B)(2) (West 2010), App. at 12.

The body of case law that has developed regarding retroactive ratemaking primarily concerns what is, in essence, Ohio's "filed rate doctrine." That doctrine has been codified in Sections 4905.22 and 4905.32 of the Revised Code. Under those sections, a public utility may neither charge nor collect a different rate than that specified in Commission-approved schedules that were in effect at the time the service was rendered. Specifically, R.C. 4905.22 provides that:

> 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.

Ohio Rev. Code Ann. § 4905.22 (West 2010), App. at 2. And R.C. 4905.32 provides that:

> No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.
>
> No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Ohio Rev. Code Ann. § 4905.32 (West 2010), App. at 3.

The Commission did not violate R.C. 4928.141(A) by "replacing continued rates with first-authorized rates," or effectively "retract" the rates charged. OCC Brief at 9. By charging the rates authorized by the Commission in effect at the time that bills were issued the Companies complied with the "filed rate doctrine" as embodied in Ohio law. There is nothing in the record before this Court that any customer paid any rate for any service received that had not been approved by the Commission.

But OCC argues that the Commission engaged in unlawful retroactive ratemaking as defined by the Court in the *Lucas County* case. OCC Brief at 12. *Lucas County v. Pub. Util. Comm'n*, 80 Ohio St. 3d 344, 686 N.E.2d 501 (1997). In *Lucas County*, the Court noted that, "while a rate is in effect, a public utility must charge its consumers in accordance with the commission-approved rate schedule. R.C. 4905.32." *Id.* at 347, 686 N.E.2d at 503.

While the Court in *Lucas County* found that the Commission was not authorized to order refunds or service credits to consumers, its ruling was extremely limited. The Court noted that the Commission's complaint statute could only be applied to a utility rate that "is" unjust or unreasonable. Because the rates complained of had expired, appellants could not avail themselves of the Commission's complaint statute.

Nonetheless, the *Lucas County* Court purported to rely on the *Keco* case for its conclusion that utility ratemaking is prospective only, and that retroactive ratemaking is not permitted under Ohio's comprehensive statutory scheme. *Id.* at 348, 686 N.E.2d at 504. In *Keco*, a consumer filed a complaint for restitution after the Court reversed a Commission order that resulted in lower rates being set on remand. The Court held that such action would not lie because a "utility must collect the rates set by the commission." *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465, 468 (1957).

In *Columbus S. Power Co.*, the Court considered the converse situation, where reversal resulted in *higher* rates being set. There the appellant sought to prevent the utility from recovering revenues not collected during the pendency of an appeal. The Court, however, rejected that argument because the Commission's initial order specifically authorized recovery of the deferred revenues in question and, thus, did not violate the proscription against retroactive ratemaking. *Columbus S. Power Co., supra* citing *Ohio Edison Co. v. Pub. Util. Comm'n*, 56 Ohio St. 2d 419, 424-425, 384 N.E.2d 283, 286 (1978).

OCC tries to analogize the current situation to *Lucas County*. It asserts that AEP's rates in effect for the first quarter "expired." OCC further argues that that there was no mechanism in place, as in *Columbus S. Power Co.*, that would allow for future adjustments. By recognizing and offsetting the interim rates against the new rates, OCC claims that the Commission impermissibly balanced future rates with past rates. OCC Brief at 11.

In fact, the "interim rates" did not expire but were superseded by the newly approved rates. While it is true that there was no adjustment mechanism in place in the Commission's orders, the situation here is fundamentally different than those previously considered by the Court.

The rule against retroactive ratemaking in general restricts the right or ability of the Commission to permit a public utility to recover *past losses* through *future rates*. It also prevents *refunds* to consumers of profits of a utility which are subsequently found to have been *excessive*. Thus, when the Commission hears and determines a rate case, the Commission may only look to the future in determining appropriate utility rates.

While it is clear that the rates approved by the Commission in this case were intended to permit the companies to recover 12 months of revenue over a 9-month period, there is no indication whatsoever that the intent was to allow the companies to recover *losses* associated with the delay in issuing the decision. Prior to S.B. 221, the Commission was required to fix and determine just and reasonable rates based on a complex and detailed formulaic process. Ohio Rev. Code Ann. § 4909.15 (West 2010), App. at 3-6. But in order to approve an ESP, the legal standard is *not* whether the rates are just and reasonable. The detailed and prescriptive regulatory formula traditionally associated with rate determinations has no application when approving an ESP. Instead, the General Assembly ordered the Commission to approve a utility's proposal if it compares favorably in the aggregate with the expected result under a Section 4928.142 market rate offer (MRO). Ohio Rev. Code Ann. § 4928.143(C)(1) (West 2010), App. at 14.

That is exactly what the Commission did in this case. The Commission found that "the ESP, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, as modified by its order, was more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code." *In re AEP* (Opinion and Order at 72) (March 18, 2009), OCC App. at 81, IEU App. at 232. The Commission did not alter this finding when it issued its Entry *Nunc Pro Tunc*.

But even if this Court were to determine that the ordered offset transformed the prospect rates into retroactive recovery, those rates are no longer in effect. This issue is, simply put, moot.

Ohio courts have long refused to entertain purely academic questions. This Court long ago declared that:

> The duty of . . . every. . . judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it . . .

Miner v. Witt, 82 Ohio St. 237, 238, 92 N.E. 21, 22 (1910), quoting *Mills v. Green*, 169 U.S. 651, 653 (1895). When an appellate court becomes aware that an event has rendered an issue moot, the Court need not consider such issue. *Hagerman v. Dayton,* 147 Ohio St. 313, 71 N.E.2d 246 (1947), syllabus.

These principles have long been applied to appeals from Commission orders. Only five years after the creation of the Commission, the Court held that where a Commission order had been carried out, no stay had been granted, and there was nothing left upon which the Court's decision could operate, the appeal was moot and should be dismissed. *Pollitz v. Pub. Util. Comm'n*, 93 Ohio St. 483, 113 N.E. 1071 (1916). A later case involved an appeal of a Commission order allowing a railroad to cease operation. *Travis v. Pub. Util. Comm'n*, 123 Ohio St. 355, 175 N.E. 586 (1931). After the Commission's order was entered, the railroad's assets were sold for scrap and its employees laid off. This Court dismissed the appeal because any order the Court would have issued would have been a vain act; no order could have reconstituted the railroad. *Id.* at 359, 175 N.E. at 587.

The present situation is similar to that in *Travis*. OCC's first two propositions of law concern the approval of rates already recovered, and no longer in effect. In light of this fact, any order of the Court would have no effect. The Court should not waste its time on a vain act.

Nor is the OCC's retroactive ratemaking claim excepted from being moot on the ground that it is "capable of repetition, yet evading review." *State ex rel. Dispatch Printing Co. v. Geer*, 114 Ohio St. 3d 511, 513, 873 N.E.2d 314, 316 (2007). OCC has not demonstrated that the Commission's decision to incrementally increase rates prospectively is anything but an exceptional occurrence. Nor would such a decision evade review for any reason other than inaction.

The Commission was faced with an application filed under a new statute establishing new regulatory schemes and procedures. It was compelled to act within a compressed time to adopt a first authorized rate plan, the only time it would adopt such a plan for the Companies. At the same time, OCC itself was insisting on further delays in the proceedings. The circumstances in which the Commission acted are not capable of repetition.

Even were the Commission's action capable of repetition, the General Assembly has provided a process for timely judicial review of Commission orders to ensure that they do not evade review. That process includes a procedure for obtaining a stay under R.C. 4903.16. OCC had this remedy available to it. Rather than seek a stay under the statutory procedure, however, the OCC filed a motion to suspend Commission orders approving rates. Any argument that the Commission's order evaded review is directly attributable to OCC's failure to pursue remedies available to it.

Furthermore, "[t]his [repetition] exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St. 3d 229, 231, 729 N.E.2d 1182 (2000). As noted above, appellants had the opportunity to seek a stay from the Court after the Commission issued its final order. Neither did. Nor has OCC alleged any reasonable expectation that it would again be subjected to the same action.

The "capable of repetition, yet evading review" exception to the mootness doctrine simply does not apply in this case. The Commission's action is not capable of repetition. Even if it was, OCC had remedies available to ensure that that action did not evade review, but elected not to pursue that course. It should not now be heard to complain.

In the absence of the possibility of an effective remedy this case constitutes only a request for an advisory ruling from the Court. The Court should decline the invitation to undertake such an abstract inquiry. Such is not the proper function of the judiciary, as this Court has previously observed:

> It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments, which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

Fortner v. Thomas, 22 Ohio St. 2d 13, 14, 257 N.E.2d 371, 372 (1970).

Even if the Court reversed the Commission, no purpose can be served because the Companies have already fully complied with the order with respect to the complained of rates. No purpose would be served by the issuance of an advisory opinion.

This Court has repeatedly stated that it will not indulge in advisory opinions. *See, e.g., In re Contested Election on November 7, 1995*, 76 Ohio St. 3d 234, 236, 667 N.E.2d 362, 363 (1996); *North Canton v. Hutchinson*, 75 Ohio St. 3d 112, 114, 661 N.E.2d 1000, 1002 (1996). Because these issues do not present a factual context in which to address specific errors, it should be rejected in accord with prior decisions of the Court. *Armco, Inc. v. Pub. Util. Comm'n*, 69 Ohio St. 2d 401, 406, 433 N.E.2d 923, 926 (1982); *Ohio Contract Carriers Ass'n v. Pub. Util. Comm'n*, 140 Ohio St. 160, 42 N.E.2d 758 (1942); *see also Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 706 N.E.2d 255 (1999) (Douglas J., dissenting).

Proposition of Law No. III:

> **R.C. 4928.143(C)(2)(a) permits an electric distribution utility to withdraw an ESP without limitation.**

IEU argues that the Commission acted unlawfully when it failed to prohibit the Companies from accepting the benefits of the rates approved in the ESP while simultaneously preserving its right to withdraw and terminate the approved ESP. This argument also lacks merit.

The Commission declined to address this argument on rehearing, noting that the Companies had not filed a notice of its intent to withdraw its ESP, and stating that it was unnecessary to address the issue. *In re AEP* (Second Entry on Rehearing at 7) (November 4, 2009), IEU App. at 244, OCC App. at 153-160. The Commission thus prudently declined to issue an advisory opinion on a contingency that had not occurred and might never occur.

This Court should likewise decline the invitation to undertake such an abstract inquiry. Such is not the proper function of the judiciary. *Fortner v. Thomas*, 22 Ohio St. 2d 13, 14, 257 N.E.2d 371, 372 (1970). This Court has repeatedly stated that it will not indulge in advisory opinions. *See, e.g. State ex rel. Keyes v. Ohio Public Employees Retirement System*, 123 Ohio St. 3d 29, 34, 913 N.E.2d 972, 977 (2009); *State ex rel. Baldzicki v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St. 3d 238, 242, 736 N.E.2d 893, 897 (2000). The Court should therefore decline to address this issue.

Should the Court nevertheless proceed to examine the merits of this argument, it should conclude that nothing in S.B. 221 precludes an electric utility from charging the rates approved in the ESP while retaining the right to withdraw the ESP. R.C. 4928.143(C)(2)(a) grants an electric distribution utility the right to withdraw an application in the event that the Commission modifies and approves the application. Ohio Rev. Code Ann. § 4928.143(C)(2)(a) (West 2010), App. at 14. The statute places no limitation on that right. There is no time limit placed on the right to withdraw, nor does the statute bar withdrawal if the utility exercises its right to apply for rehearing.

There is no support in the statute for IEU's argument that an electric utility forfeits its right to withdraw an ESP application if it begins to charge the approved ESP rates. Neither the Commission nor the Court should insert conditions not found in the statutory text. *State v.*

Hughes, 86 Ohio St. 3d 424, 427, 715 N.E.2d 540, 543 (1999) ("In construing a statute, we may not add or delete words"). Indeed, an electric utility is required by statute to charge an approved ESP rate, regardless of whether it is contemplating withdrawal of the ESP. R.C. 4905.32 provides, in pertinent part:

> No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

Ohio Rev. Code Ann. § 4905.32 (West 2010), App. at 3. The Commission thus acted lawfully when it permitted the Companies to charge the new ESP rates while preserving their right to withdraw the ESP.

Proposition of Law No. IV:

The Commission has no legal duty to anticipate that its decisions will be reversed on appeal.

OCC argues that the Commission should be required to provide a mechanism for customers to obtain refunds in the event that its rulings are reversed on appeal. OCC cites no authority to impose such a requirement. Moreover, OCC's argument reverses the presumption of legality that attaches to Commission decisions.

First, OCC's argument would require the Commission to presume that its orders are unlawful. This is contrary to well-established law. The Court has declared:

> Where the commission, in a cause properly before it, fixes the rates or charges for a utility and renders an order to that effect, a presumption arises that the commission's determination is fair and reasonable. A party who contends otherwise on appeal to this

> court has the burden of showing that it is unjust, unreasonable, or unlawful.

Masury Water Co. v. Pub. Util. Comm'n, 58 Ohio St. 2d 147, 151, 389 N.E.2d 478, 482 (1979). *See also Franklin Cty. Welfare Rights Org. v. Pub. Util. Comm'n*, 55 Ohio St. 2d 1, 12-13, 377 N.E.2d 990, 998 (1978). OCC's contention would further require the Commission to presume that each of its orders will be appealed and then will be reversed on appeal. Not only are such presumptions without any legal support, but they would undermine the certainty of Commission orders to the detriment of both ratepayers and utilities.

The rehearing procedure delineated in R.C. 4903.10 provides an opportunity for all parties to present arguments regarding the lawfulness and reasonableness of an order. After considering these arguments the Commission may change, abrogate, or modify any aspect of the order. Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1-2. If the Commission denies a rehearing application, it has necessarily rejected the arguments made in the application. To nevertheless require the Commission to presume those arguments are correct would be absurd.

The General Assembly has provided a process for judicial review of Commission orders in Chapter 4903 of the Revised Code. That process includes a procedure for obtaining a stay under R.C. 4903.16. OCC had this remedy available to it. Rather than seek a stay under the statutory procedure, however, the OCC filed a motion to suspend Commission orders approving rates. That motion was denied by the Court on February 3, 2010.

OCC maintains that it is financially incapable of meeting the bond required by R.C. 4903.16. OCC thus characterizes a stay from this Court as an "illusory remedy." Because of this limitation, OCC argues that it is inequitable for the Commission not to create a refund mechanism. The Commission, however, has no duty to assist parties in circumventing the requirements of R.C. 4903.16. If OCC finds the statute overly burdensome, it may seek an amendment from the General Assembly.

OCC also argues that the Commission failed to comply with R.C. 4903.09 because the Commission did not explain why it was not making the rate subject to refund. This argument lacks merit. This Court has an independent power to issue a stay under R.C. 4903.16. Where an appellant has either not sought a stay, or has unsuccessfully applied for a stay, there can be no harm to the appellant from the *Commission's* lack of detailed explanation for not granting similar relief. In the absence of harm, this Court will not reverse a Commission order. *Myers v. Pub. Util. Comm'n*, 69 Ohio St. 3d 299, 302, 595 N.E.2d 873, 876 (1992); *Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175, syllabus (1980).

Proposition of Law No. V:

> **Capital carrying costs for environmental investments incurred after January 1, 2009 can be recovered by a utility under an unenumerated provision that is not limited by R.C. 4928.143(B)(2).**

A. Capital carrying costs incurred by the Companies after January 1, 2009, for environmental investments they made from 2001-2008, are recoverable under R.C. 4928.143(B)(2).

The Companies have made significant capital investments in environmental facilities. Co. Ex. 7 (Direct Testimony of P. Nelson) at 15, Sec. Supp. at 50. In this case, the Companies requested the capital carrying cost on those facilities that are not currently reflected in rates. *Id.* The Commission approved the Companies' request to recover, in their ESPs, carrying costs for the incremental amounts of the investments made during the 2001-2008 period. *In re AEP* (Opinion and Order) (March 18, 2009), OCC App. at 10-86, IEU App. at 161-238. The capital carrying cost for those 2001-2008 investments will continue to increase the Companies' base (non-FAC) generation rates during the ESP period. The non-FAC refers to the non-fuel generation component of the Companies' generation rate.

The ESP period in this case is January 1, 2009, through December 31, 2011. *Id.* Only carrying costs incurred after January 1, 2009 and during the ESP period by the Companies are allowed to be recovered. *In re AEP* (Opinion and Order at 28) (March 18, 2009), OCC App. at 37, IEU App. at 188. The Commission's decision is based on R.C. 4928.143(B)(2), which provides "without limitation" language that supports a broader scope for recovery of costs for a utility.

OCC argues the Companies' capital costs are not recoverable under any of the nine subsections to R.C. 4928.143(B)(2) because they don't explicitly provide for the recovery of these types of costs. While the nine subsections to R.C. 4928.143(B)(2) are illustrative, they are not exhaustive. Consequently, the Commission properly found that the Companies' carrying costs may be included in the ESP pursuant to the broad language of R.C. 4928.143(B)(2), permitting recovery for unenumerated expenses. *In re AEP* (Entry on Rehearing at 12) (July 23, 2009), OCC App. at 106, IEU App. at 114.

The "without limitation" language does not mean, as OCC argues, that only items listed in subsections (a) through (i) of R.C. 4928.143(B)(2) can be included in the Companies' ESP. The Commission properly interpreted this provision as granting it broader authority over approving the recovery of costs, when it authorized the Companies' recovery of capital costs incurred after January 1, 2009. OCC's argument that the broad prefatory language "without limitation" should be interpreted to preclude the recovery of unenumerated expenses is plain wrong.

OCC also argues that the Companies' capital costs are not recoverable under this provision because they are not incurred after January 2009. But, on this issue of fact, the Commission held, on rehearing, that the carrying costs on the environmental investments do fall within the ESP period. *In re AEP* (Entry on Rehearing at 12) (July 23, 2009), OCC App. at 106, IEU App. at 114. The Companies explained that the carrying costs themselves are the costs that the Companies will incur after January 1, 2009. Tr. XIV at 93, Sec. Supp. at 177.

The capital carrying cost is the annual cost associated with the investment of a dollar of capital asset investment. Co. Ex. 7 (Direct Testimony of P. Nelson) at 15-16, Sec. Supp. at 50-51. Capital investments are typically long-lived assets that are recovered over the life of the asset. *Id.* at 16, Sec. Supp. at 51. The capital carrying cost is determined by applying an annual carrying cost rate, expressed as a percent of the capital expenditures, to the total amount spent on a capital project or projects. *Id.*

During the ESP period, the Companies' 2009 carrying cost is the cumulative capital expenditure through 2009 times the carrying cost rate. *Id.* at 17, Sec. Supp. at 52. The Companies' 2010 carrying cost is the cumulative capital expenditures through 2010 times the carrying cost rate. *Id.* And, the Companies' 2011 carrying cost is the cumulative capital expenditures through 2011 times the carrying cost rate. *Id.* While the environmental investments involved were made prior to January 1, 2009, the carrying cost itself is incurred by the Companies in 2009, and afterwards. Tr. XIV at 93, 114, Sec. Supp. at 177, 178.

For these reasons, OCC's arguments, challenging the Commission's authority to grant the Companies recovery of capital costs for environmental investments incurred during the period of the Companies' ESP period of 2009-2011 under R.C. 4928.143(B)(2), have no merit and should be denied.

B. OCC's argument that R.C. 4928.38 excludes from rates any carrying charges for environmental investments made during the market development period of the Companies' previous rate structure is being raised, for the first time.

OCC failed to raise this R.C. 4928.39 argument as part of its assignment of error regarding capital carrying charges in OCC's "Application for Rehearing by the Office of the Ohio Consumers' Counsel," which was filed in the record below on April 17, 2009. Thus, the Commission did not have an opportunity to address the argument. OCC also failed to raise this argument as part of its "Notice of Appeal by The Office of the Ohio Consumers' Counsel" that triggered the Court's jurisdiction over this appeal on November 5, 2009.

OCC waived this argument by not including it in its application for rehearing and notice of appeal. *See, e.g., Consumers' Counsel v. Pub. Util. Comm'n,* 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007) (OCC waived the issue of test for reviewing settlement stipulations by not including it in application for rehearing or in notice of appeal from Commission's decision approving stipulation involving electric utility). As a result of OCC raising this argument for the first time, on brief, the Court has no jurisdiction to review this argument.

C. OCC's argument that the Commission violated statutory prohibitions against retroactive ratemaking by authorizing the collection of carrying charges on environmental investments made from 2001 through 2008 is a new issue that was not raised below.

In its Application for Rehearing below, OCC raised an argument on the capital carrying cost issue that was limited in scope to R.C. 4928.143(B)(2) and its subsections. The argument against the recovery of capital costs appears on pages 37-39 of OCC's Application for Rehearing, which was filed on April 17, 2009. OCC's Application for Rehearing argument is straightforward. It disputes the Commission's authority to grant the Companies recovery of capital carrying costs for environmental investment under R.C. 4928.143(B)(2) and/or any of its subsections under (a) through (i). OCC argues that none of the subsections under this statutory provision provide for the recovery of capital carrying costs for a utility's environmental investments.

An example is provided in OCC's Application for Rehearing, where it quotes the words "prudently incurred" from R.C. 4928.143(B)(2)(a) to support its argument that the Commission's decision does not meet the requirements of this subsection. OCC then concludes its overall argument on carrying cost by stating that: "[b]ecause the statute [R.C. 4928.143(B)(2)(a)] requires an after-the-fact examination of whether the costs were prudently incurred, it was unlawful for the Commission to allow AEP-Ohio to collect the carrying charges from customers before conducting such an examination." OCC's Application for Rehearing at 38, OCC App. at 161-241.

The only place where OCC can claim it raised the retroactive ratemaking issue on the carrying charges, in its Application for Rehearing, is in the context of a brief reference to what "OCEA members" supposedly showed to be retroactive ratemaking. *Id.* OCC's reference, in this regard, connects the OCEA members with an argument they supposedly made earlier on the recovery of capital carrying costs during the ESP period. *Id.*

In other words, the retroactive ratemaking reference OCC made here wasn't the focus or point of its argument on carrying charges in the application for rehearing. Instead, it was an ambiguous reference to what OCC claimed OCEA members showed earlier. The Commission's Entry on Rehearing properly characterizes OCC's carrying charge argument as a claim that the Commission violated R.C. 4928.143(B)(2) and its subsections; and nothing else. *In re AEP*

(Entry on Rehearing at 11) (July 23, 2009), OCC App. at 105, IEU App. at 113. Without OCC raising this argument specifically, the Commission was left to guess what OCC meant.

Aside from making a passing reference to retroactive ratemaking, OCC did not raise this issue in its application for rehearing filed with the Commission. R.C. 4903.10 provides:

> 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.

Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1-2. The Court has strictly applied the specificity requirement. *See, e.g., Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247, 638 N.E.2d 550, 553 (1994) (substantial compliance argument rejected); *Agin v. Pub. Util. Comm'n*, 12 Ohio St. 3d 97, 98, 232 N.E.2d 828, 829 (1967) (some similarity between grounds in rehearing application and arguments in brief insufficient to comply with statute). As the Court has explained:

> It may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of a rifle to hit that question.

Cincinnati v. Pub. Util. Comm'n, 151 Ohio St. 353, 378, 86 N.E.2d 10, 23 (1949). Having failed to raise the issue of retroactive ratemaking on the carrying charges in its application for rehearing, OCC is precluded from doing so on appeal.

Likewise, OCC failed to raise the retroactive ratemaking issue on the carrying charges in its notice of appeal. R.C. 4903.13 requires that an appellant file a notice of appeal "setting forth the order appealed from and the errors complained of." Ohio Rev. Code Ann. § 4903.13 (West 2010), App. at 2. The Court has held that it has no jurisdiction to consider arguments not set forth in a notice of appeal. *Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 349, 872 N.E.2d 269, 278 (2007); *Cincinnati Gas & Electric Co. v. Pub. Util. Comm'n*, 103 Ohio St. 3d 398, 816 N.E.2d 238 (2004). The Court should therefore decline to consider this issue.

Proposition of Law No. VI:

> **The Commission's authorization of recovery of the revenue requirement associated with the Companies contractual output entitlements, from the Lawrenceburg Generation Station and Ohio Valley Electric Corporation, for generation supply, is reasonable and lawful.**

IEU argues that the Commission, by granting the Companies recovery of expenses related to the contractual output entitlements from the Lawrenceburg Generation Station ("Lawrenceburg") and Ohio Valley Electric Corporation ("OVEC"), exceeded its authority under S.B. 221 and violated traditional ratemaking concepts. The Commission authorized the Companies to recover Ohio customers' jurisdictional share of any costs associated with maintaining the Lawrenceburg and OVEC entitlements. *In re AEP* (Opinion and Order at 52) (March 18, 2009), OCC App. at 61, IEU App. at 212. The Commission stated any expense related to the contract entitlements that are not recovered in the FAC shall be recoverable in the non-FAC portion of the generation rates. *Id.*

The Companies' witness, Mr. Baker, provided testimony in support of the Companies' annual demand charge or cost for its entitlement to purchased power from OVEC and Lawrenceburg. Co. Ex. 2E (Rebuttal Testimony of J. Craig Baker) at 21, Sec. Supp. at 48. Mr. Baker also testified in support of the Commission's finding that expenses not covered by the FAC should be recovered through the non-FAC. *Id.*

The Commission, after reviewing and considering the issue on the recovery of costs for generation supply, denied IEU's application for rehearing. *In re AEP* (Entry on Rehearing at 2, ¶

6) (July 23, 2009), OCC App. at 96, IEU App. at 104. The Commission's decision is lawful under the "without limitation" language of R.C. 4928.143(B)(2). In comparison to traditional rate making, the legislature provided greater flexibility for the recovery of costs under the "without limitation" language of R.C. 4928.143(B)(2). Unlike traditional cost-of-service ratemaking under Chapter 4909, ESP rates under R.C. 4928.143(B)(2) are not required to be cost-based. The Commission's decision authorizing the recovery of costs associated with the Companies' purchase of power is also consistent with the general framework of R.C. 4928.143(B)(2). Specifically, combining the "without limitation" language with R.C. 4928.143(B)(2)(a), a utility can receive an automatic recovery of costs for energy and capacity, and purchased power, in a FAC or non-FAC.

The adjustments related to the Companies purchases from Lawrenceburg and OVEC can be recovered, since there are no limits to the components that can be included in an ESP under R.C. 4928.143(B)(2). Moreover, even with the adjustment to include Lawrenceburg and OVEC the Companies ESP is still more favorable in the aggregate than the MRO alternative.

The Court should reject IEU's argument that the Commission exceeded its authority and violated traditional ratemaking concepts in approving the recovery of costs associated with the Companies' entitlements for the supply of power. IEU's argument is without merit and should be denied.

Proposition of Law No. VII:

> **The Commission's decision approving initiatives and riders on enhanced vegetation management and gridSMART for the Companies' distribution service is reasonable and lawful.**

The Commission modified the Companies' proposed ESP plan to include an Enhanced Service Reliability Plan ("ESRP") Rider and a gridSMART Rider. *In re AEP* (Opinion and

Order at 38) (March 18, 2009), OCC App. at 47, IEU App. at 198. The ESRP Rider was established by the Commission, as a mechanism under R.C. 4928.143(B)(2)(h), for the Companies to recover the costs of their Commission-approved enhanced vegetation initiative. *Id.* at 34, OCC App. at 43, IEU App. at 197. The Commission also established the gridSMART Rider, as a mechanism under R.C. 4928.143(B)(2)(h), so the Companies can recover the costs of their Commission-approved gridSMART Phase I initiative.

Both Riders are cost recovery mechanisms for ESP initiatives that will improve the Companies' distribution system and service to its customers. Through R.C. 4928.143(B)(2)(h), the General Assembly authorized the recovery of a utility's cost of a long-term energy delivery infrastructure modernization plan included in a utility's ESP. The General Assembly, through R.C. 4928.143(B)(2)(h), allows the recovery of distribution-related investments outside the context of a traditional rate case. Using its discretion, the Commission exercised this grant of authority by adopting the gridSMART and enhanced service reliability initiatives.

IEU makes two arguments for its proposition that the Commission's decision, approving these two initiatives and riders, was unreasonable and unlawful. First, IEU argues that the Companies' vegetation management and gridSMART initiatives have not been proven cost effective under R.C. 4928.02(D). And, secondly, IEU argues the Commission's decision to approve the Companies' two initiatives outside the context of a distribution rate case was not reasonable and lawful. IEU's arguments have no merit.

R.C. 4903.13 provides that "[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." Ohio Rev. Code Ann. § 4903.13 (West 2010), App. at 2. Applying this statute to an appeal from the Commission, the Court stated that it "will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n,* 115 Ohio St. 3d 208, 210, 874 N.E.2d 764, 767 (2007); *Monongahela Power Co. v. Pub. Util. Comm'n,* 104 Ohio St. 3d 571, 577-578, 820 N.E.2d 921, 927 (2004).

The appellant bears the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *AK Steel Corp. v. Pub. Util. Comm'n,* 95 Ohio St. 3d 81, 765 N.E.2d 862, 867 (2002). In matters involving the agency's special expertise and the exercise of discretion, the Court will generally defer to the judgment of the agency. *Constellation New Energy, Inc. v. Pub. Util. Comm'n,* 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n,* 92 Ohio St. 3d 177, 180, 749 N.E.2d 262, 264 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n,* 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990). The Court has consistently refused to substitute its judgment for that of the agency on evidentiary matters. *AK Steel Corp.,* 95 Ohio St. 3d at 84, 765 N.E.2d 866. IEU has not met its burden in this appeal.

A. The Commission's approval of the enhanced vegetation management initiative and ESRP Rider is lawful and reasonable under R.C. 4928.143(B)(2)(h) and R.C. 4928.02.

1. The Commission's decision is reasonable and lawful under R.C. 4928.143(B)(2)(h).

The Commission's decision, approving the Companies' enhanced vegetation initiative and ESRP Rider, is reasonable and supported by R.C. 4928.143(B)(2)(h). The enhanced vegetation initiative will improve the customer's overall service experience by reducing and/or eliminating momentary interruptions and/or sustained outages caused by vegetation. *In re AEP* (Opinion and Order at 31) (March 18, 2009) , OCC App. at 40, IEU App. at 191.

Under this initiative, the Companies will employ additional resources; place a greater emphasis on cycle-based planning and scheduling; increase the level of work performed so that all distribution rights-of-way can be inspected and maintained; and, utilize improved technologies to collect tree inventory data to optimize planning and scheduling by predicting problem areas before outages occur. *Id.* There was sufficient evidence in the record to show that the Companies faced increased costs for vegetation management and that a specific need exists for this initiative to support an incremental level of reliability activities in order to maintain and improve service levels. The Commission's decision is lawful because the Companies' vegetation management initiative satisfies the criteria under R.C. 4928.143(B)(2)(h).

The Companies' current approach to vegetation management is mostly reactive. Staff Ex. 2 (Prefiled Testimony of R. Cahaan) at 10, Sec. Supp. at 27. This initiative can help the Companies be more proactive by earmarking the increase for specific vegetation initiatives that can reduce tree-caused outages, resulting in better reliability. Co. Ex. 11 (Direct Testimony of K. Boyd) at 27-31, Sec. Supp. at 81-85. OCC and the Commission's staff recognized a problem with the Companies' current vegetation program and recommended a cycle-based approach to improve it. OCC Ex. 13 (Direct Testimony of D. Cleaver) at 30, 35, Sec. Supp. at 130, 135; Staff Ex. 2 (Direct Testimony of D. Roberts) at 13, Sec. Supp. at 13. Furthermore, the Commission found that customer expectations regarding outages, service interruptions, and reliability of service, were not aligned with the Companies' expectations. *In re AEP* (Opinion and Order at 33) (March 18, 2009), OCC App. at 42, IEU App. at 193. In approving this initiative under R.C. 4928.143(B)(2)(h), it is the Commission's belief that the customers' and Companies' expectations on those issues will be aligned with the emergence of new technology. *In re AEP* (Opinion and Order at 33-34) (March 18, 2009), OCC App. at 42-43, IEU App. at 193-194.

The Commission recognizes that R.C. 4928.143(B)(2)(h) authorizes the Companies to include rate increases for distribution infrastructure and modernization incentives in its ESP. But this does not mean that a utility will have every incentive, included in its ESP, approved *carte blanche* by the Commission under this statutory provision. Instead, R.C. 4928.143(B)(2)(h) requires the Commission to consider each proposed initiative in a utility's ESP and determine how it will improve the reliability of the utility's distribution system. And, how it will ensure that customers' and the electric utilities' expectations are aligned, to ensure that the electric utility is emphasizing and dedicating sufficient resources to the reliability of its distribution system.

In this case, the Commission reviewed all of the Companies' proposed ESRP initiatives and denied three out of four, because the Commission decided that there was insufficient evidence available in this record to approve those other three initiatives, based on the criteria provided by R.C. 4928.143(B)(2)(h). *In re AEP* (Opinion and Order at 32, 34) (March 18, 2009), OCC App. at 41, 43, IEU App. at 192, 194. As the Commission recognized in its order, the three initiatives denied in the ESP case can still be reviewed by the Commission in the context of a distribution rate case. *Id.* IEU's argument that approval of one initiative and denial of three others under the ESRP, and approval of the gridSMART initiative, is inconsistent, fails to distinguish between what was and wasn't supported by the evidence in this case.

2. The Commission's decision is reasonable and advances state policy under R.C. 4928.02.

The Companies demonstrated, in the record, that costs associated with the proposed vegetation initiative are incremental to the current Distribution Vegetation Management Program and the costs embedded in distribution rates. Co. Ex. 11 (Direct Testimony of K. Boyd) at 26-31, Sec. Supp. at 80-85. So found the Commission. *In re AEP* (Opinion and Order at 33) (March 18, 2009), OCC App. at 42, IEU App. at 193. In accordance with the policy of R.C. 4928.02, only prudently-incurred incremental vegetation management costs will be collected through the ESRP. *Id.* at 34, OCC App. at 43, IEU App. at 194.

IEU complains the Commission failed to meet the state policy of R.C. 4928.02(D), which provides that it is the policy of the state to:

> (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.

The Commission found the Companies' enhanced vegetation management initiative to be cost-effective, because it will incrementally improve the reliability of the system in preventing outages. This is especially important at a time when the Companies are currently in a reactive mode and expect increased costs for vegetation management. The record contained sufficient evidence to support the Companies' enhanced vegetation initiative and its associated costs. Co. Ex. 11 (Direct Testimony of K. Boyd), Sec. Supp. at 53-93; OCC Ex. 13 (Direct Testimony of D. Cleaver), Sec. Supp. at 99-156; Staff Ex. 2 (Direct Testimony of D. Roberts), Sec. Supp. at 1-23; Tr. VII at 64-65, 84, 87-88, Sec. Supp. at 161-162, 163, 164-165; Tr. VIII at 60-62, Sec. Supp. at 167-169.

The Commission created the ESRP Rider as a mechanism to recover the actual costs so that the expenditures could be tracked, reviewed to determine that they were prudent and incremental to costs included in base rates, and reconciled annually. *In re AEP* (Entry on Rehearing at 17) (July 23, 2009), OCC App. at 111, IEU App. at 119. The Commission advanced the policy of R.C. 4928.02(D) by approving the Companies' enhanced vegetation management initiative and ESRP Rider.

B. The Commission's approval of the Companies' gridSMART Phase I initiative and Rider is reasonable and lawful under R.C. 4928.143(B)(2)(h) and 4928.02.

1. The Commission's decision is reasonable and lawful under R.C. 4928.143(B)(2)(h).

Another plan proposed under the Companies ESP is the Phase 1 gridSMART initiative, which has three technology components: Advanced Meter Infrastructure (AMI), Distribution Automation (DA), and Home Area Network (HAN). The AMI component includes smart meters, two-way communications networks, and the information technology systems to support system interaction. *In re AEP* (Opinion and Order at 34) (March 18, 2009) , OCC App. at 43, IEU App. at 194. The DA component provides real-time control and monitoring of select electrical components with the distribution system. *Id.* And, finally, there is the HAN component that involves the installation of a programmable communicating thermostat and a load control switch in the customers' home or business that provides the customer with information to allow the customer to conserve energy. *Id.* at 35, OCC App. at 44, IEU App. at 195. The Companies' phase-in implementation of Phase 1 goes to approximately a 100 square mile area within Columbus Southern Power's ("CSP") service territory. *Id.*

In approving the Companies' gridSMART initiative, the Commission believed it was important for electric utilities to explore and implement technologies, such as AMI, which will provide long-term benefits to customers and the electric utility. *Id.* at 37, OCC App. at 46, IEU App. at 197. The Commission found that the gridSMART initiative can provide more reliable service to customers by decreasing the scope and duration of electric outages. *Id.* In addition, the Commission found that this initiative will provide CSP with beneficial information as to implementation, equipment preferences, customer expectations, and customer educational requirements. *In re AEP* (Opinion and Order at 37) (March 18, 2009), OCC App. at 46, IEU App. at 197. The advanced technologies of AMI, DA, and HAN, can help customers better manage their energy usage and reduce their energy costs. *Id.*

The Commission strongly supports the Companies' gridSMART Phase I initiative to implement AMI, DA, and HAN. *Id.* at 37, OCC App. at 46, IEU App. at 197. In the specific context of the Companies' ESP, the Commission had authority to approve the gridSMART initiative, because the General Assembly included a long-term energy delivery infrastructure modernization plan as an item that can be included in an ESP under R.C. 4928.143(B)(2)(h).

The Commission's approval of the gridSMART Phase I initiative is based on the projects' ability to drive a broad range of potential economic benefits both to consumers and the utilities. *In re AEP* (Entry on Rehearing at 22-23) (July 23, 2009), OCC App. at 116-117, IEU App. at 124-125. The legislature's policy directives, under R.C. 4928.02, are being met with the implementation of this gridSMART initiative, which implements infrastructure and technological advancements to enhance service efficiencies and improve electric usage. From the utility infrastructure side, gridSMART can lead to much-needed improvements in reliability. While consumers are given the capabilities to reduce their bills, utilities earn the capability to better and more efficiently manage their systems. *Id.* at 23, OCC App. at 117, IEU App. at 125.

2. The Commission's decision is reasonable and advances state policy under R.C. 4928.02.

The Commission directed the Companies to pursue federal matching funds under the American Recovery and Reinvestment Act of 2009 (ARR Act) to reduce costs for Ohio taxpayers, in regard to the installation of the gridSMART Phase I initiative. *In re AEP* (Entry on Rehearing at 18, 23) (July 23, 2009), OCC App. at 112, 117, IEU App. at 120, 125. CSP had originally requested an incremental revenue requirement of $64 million for the ESP period, but the Commission only approved an incremental revenue requirement of $32 million. *Id.* at 20, OCC App. at 114, IEU App. at 122.

The technologies included in gridSMART should also provide cost-effective energy savings, which customers and utilities are expected to experience during the ESP period with gridSMART. The ability to have real-time price information and the ability to respond to such prices means customers may develop consumption patterns that save them dollars, while helping utilities shave their peaks. *Id.* at 23, OCC App. at 117, IEU App. at 125. This price-responsive demand not only reduces the need for high-cost generation capacity, but also reduces the need to continually expand the costly transmission and distribution components. *Id.* The gridSMART initiative provides for advanced metering, dynamic pricing, information feedback to customers, automation hardware, education, and energy efficiency programs. *Id.*

R.C. 4928.02(D) encourages the deployment of technologies, like AMI, as an example of cost-effective, demand-side, retail electric service. Time-differentiated pricing will be facilitated by the deployment of gridSMART Phase I. Co. Ex. 1 (Direct Testimony of D. Roush) at 6, IEU Supp. at 46; Tr. III at 304-305, Sec. Supp. at 158-159. While cost-effectiveness is one aspect of state policy, the Commission is charged with the responsibility of considering all of the policies presented in R.C. 4928.02. The gridSMART initiative approved by the Commission not only encourages innovation and market access for cost-effective supply-and demand-side retail electric service, but, also, ensures the availability of reliable, safe and efficient electric service to customers, which is another consideration required to be undertaken by the Commission under R.C. 4928.02(A).

Moreover, the Companies provided evidence showing that, in the context of a phased approach to implementation, not all of the operational savings materialize in the initial phase and additional savings will occur as full implementation is pursued. Co. Ex. 4 (Direct Testimony of K. Sloneker) at 17, Sec. Supp. at 95. In any case, the state policy, as applied in combination with R.C. 4928.143(B)(2)(h) to a utility's ESP, does not require a utility to monetize and mathematically demonstrate that the benefits equal or exceed the net costs.

In addition, the Commission modified the Companies' ESP to include a rider for the recovery of costs of the gridSMART initiative, as opposed to the automatic increase proposed by the Companies. *In re AEP* (Entry on Rehearing at 23-24) (July 23, 2009) , OCC App. at 117-118, IEU App. at 125-126. The Commission's decision requires a separate accounting for the gridSMART plan. The plan must be reviewed and updated annually to ensure that expenditures were prudently made prior to the Companies' recovery of any gridSMART costs. *Id.* at 24, OCC App. at 118, IEU App. at 126. IEU's argument is an attempt to second-guess the Commission's appraisal of the record evidence. In other words, IEU's argument merely puts forth a difference of opinion with the Commission's findings.

For these reasons, the Companies' gridSMART initiative and rider meet the policy objectives of R.C. 4928.02, by ensuring the availability of adequate, reliable, safe, efficient, reasonably priced and cost-effective electric service. *Id.* at 22-24, OCC App. at 116-118, IEU App. at 124-126. The gridSMART initiative is a cost-effective project that, in addition to generating cost savings to customers and utilities when its technology components are implemented and used, also qualifies for stimulus funding to offset costs. Finally, the Commission saw a compelling need to alter the paradigm that has traditionally governed the relationship between customer and utility. Accordingly, the Commission ordered the Companies to transition to an integrated smart grid within its Phase I project area, so the expectations of customers and utilities can be aligned.

Proposition of Law No. VIII:

> **The Commission was authorized to approve POLR charges under R.C. 4928.143.**

Electric distribution utilities have an obligation to serve as the provider of last resort (POLR). They must provide a standard service offer, comprised of all competitive retail electric services necessary to provide essential electric service, including a firm supply of generation service, to all of their customers. Ohio Rev. Code Ann. § 4928.141(A) (West 2010), App. at 8. The Companies proposed increasing their then existing POLR Riders as part of their application. *In re AEP* (Application at 6-8) (July 31, 2008), IEU Supp. at 6-8. The POLR rider is intended to compensate for the possibility that a standard service customer will leave the standard service and buy power from another supplier. *In re AEP* (Opinion and Order at 38-40) (March 18, 2009), OCC App. at 47-49, IEU App. at 198-200.

IEU argues that the Commission violated Ohio law when it approved a distribution charge for POLR outside of a distribution rate case. IEU Brief at 19. IEU relies on this Court's decision concerning the Companies' proposed IGCC generation facility where the Commission was directed that it could allow recovery of certain costs only in accordance with traditional ratemaking statutes. *Indus. Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 885 N.E.2d 195 (2008).

But IEU's reliance is misplaced. The *Indus. Energy Users-Ohio* decision was issued before and without regard to the effective date of S.B. 221. S.B. 221 gave the Commission broad latitude to consider a wide range of provisions in ESP proposals free of the constraints of traditional ratemaking. For example, R.C. 4928.143 provides in part that:

> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary * * *:
>
> * * *
>
> (2) The plan may provide for or include, without limitation, any of the following:
>
> (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;

The Commission is specifically directed to consider and approve "charges relating to . . . default service," including POLR charges, as part of an ESP proposal. In contrast to this Court's decision in *Indus. Energy Users-Ohio*, the General Assembly specifically provided that the Commission could allow recovery of noncompetitive costs associated with securing competitive retail electric service in furtherance of the statutory obligation to serve without regard to R.C. Chapters 4905 and 4909.

Moreover, IEU's reliance on the Commission's decision in FirstEnergy's ESP case is similarly misplaced. In that case, the Commission determined that a specific distribution service improvement and modernization rider proposed under R.C. 4928.143(B)(2)(h) must be based on prudently incurred costs. *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO (Opinion and Order) (December 19, 2008), IEU App. at 291-360. Unlike the rider under consideration in the FirstEnergy case, the Companies' POLR riders are not distribution service improvement and modernization riders as contemplated by R.C. 4928.143(B)(2)(h). Rather, the POLR charge is a default service charge contemplated by R.C. 4928.143(B)(2)(d). R.C. 4928.143(B)(2)(d) has no requirement that the charge be based on prudently incurred costs.

The Commission violated neither the Revised Code nor its own precedents. The Commission's approval of the proposed POLR charge was lawful and reasonable under R.C. 4928.143(B)(2)(d) and should be affirmed.

Proposition of Law No. IX:

> **The Commission's decision satisfies the requirements of R.C. 4903.09 where it shows the facts in the record upon which the order is based in sufficient detail, and the reasoning followed in reaching its conclusion. *Indus. Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486 (2008).**

Both appellants claim that the Commission failed to adequately set forth the reasons for its decision on a number of issues in violation of R.C. 4903.09. The Commission's decisions thoroughly summarize the facts and proceedings before it. Moreover, the evidence of record clearly supports the Commission's factual determinations in this case.

The Court will not reverse factual determinations of the Commission unless they are against the manifest weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000) quoting *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1980). The Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. *See, e.g. Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). The appellant bears the burden of showing that the Commission's decision is against the manifest weight of the evidence or clearly unsupported by the evidence. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 765 N.E.2d 862 (2002).

As this Court has held, "[i]n order to meet the requirements of R.C. 4903.09, * * * the PUCO's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *Indus. Energy Users-Ohio v. Pub. Util. Comm'n*, 117 Ohio St. 3d 486, 885 N.E.2d 195 (2008), quoting *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 32 Ohio St. 3d 306, 312, 513 N.E.2d 337 (1987). Strict compliance with the terms of R.C. 4903.09 is not required, but the Commission must have record support for its orders. *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 90, 706 N.E.2d 1255 (1999); *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 76 Ohio St. 3d 163, 166, 666 N.E.2d 1372 (1996). As long as there is a basic rationale and record supporting the Order, no violation of R.C. 4903.09 exists.

A. The Commission's Order Approving the POLR Rider meets the requirements of R.C. 4903.09.

Both OCC and IEU argue that the record demonstrates that the Companies face no risk associated with their obligation to serve as the provider of last resort. To the extent that they do face such a risk, appellants argue that the Companies were already compensated for the risk by their prior POLR charges, and that the increase granted was unwarranted. The record adequately demonstrates the risk faced by the Companies. *In re AEP* (Opinion and Order at 39-40) (March 18, 2009), OCC App. at 48-49, IEU App. at 199-200. Moreover, there is sufficient evidence to support the Commission's finding that the Companies' proposal was reasonable and should be approved.

The Companies must provide a standard service offer to all customers regardless of whether they choose to shop. Ohio Rev. Code Ann. § 4928.141(A) (West 2010), App. at 8. The Companies must serve customers who choose not to shop. They must stand ready to provide service to customers who shopped, but who return to the utility's service for any reason, including failure in the competitive market. Ohio Rev. Code Ann. § 4928.14 (West 2010), App. at 7-8. The Companies must also stand ready to provide service to customers who shop and have migrated from system sales and have not returned.

The Companies claimed that their risk is two-fold: that customers will leave the system and purchase their generation from a competitive retail electric service (CRES) provider, and that those same customers will later return to the Companies for their generation service. Co. Ex. 2A (Direct Testimony of J. Craig Baker) at 25-26, Sec. Supp. at 41-42. The Commission agreed, finding that the Companies' statutory obligations create risk. *In re AEP* (Opinion and Order at 40) (March 18, 2009), OCC App. at 49, IEU App. at 200. OCC's claim that the Commission did not consider the POLR risk to include the risk of customers returning is unfounded. OCC Brief at 34. The Commission agreed "that the Companies do have some risks associated with customers switching to CRES providers and returning to the electric utility's SSO rate at the conclusion of CRES contracts or during times of rising prices." *Id.*

According to the Companies, POLR service gives customers the option to remain with the Companies or switch to a CRES provider, as well as the option to return to the Companies' Standard Service Offer. The Companies presented the Black-Scholes Model as a method of calculating the cost of fulfilling their POLR obligation. The Companies described their financial risks of POLR service as a put (the risk of customers migrating from the Companies' to CRES providers) and a call (the risk of customers returning), and quantified the value of these risks using the model.

There are a number of inputs required by the model, all detailed and quantified by Companies' witness Baker. Those inputs include the: (1) market price of the asset; (2) "strike price," or level at which the customer has the right to buy or sell the asset; (3) time period; (4) risk free interest rate; and (5) volatility of the underlying asset. Co. Ex. 2A (Direct Testimony of J. Craig Baker) at 31-32, Sec. Supp. at 43-44.

The record demonstrates that the inputs used by the Companies were conservative and reasonable. Companies witness Baker used the Competitive Benchmark used in the comparison of the ESP versus MRO as the market price in the model. He detailed the components included in the determination of the Benchmark and how those components were priced. *Id.* at 7-15, Sec. Supp. at 31-39. His proposed market price was higher than prices urged by other parties, including the Commission staff, lowering the likelihood that customers would migrate and thereby devaluing the option. Tr. XI, pp. 41, 44, 156, Sec. Supp. at 171, 172, 173. The Companies used the proposed first year ESP price as the strike price. Co. Ex. 2A (Direct Testimony of J. Craig Baker) at 32, Sec. Supp. at 44. By assuming that the ESP price would remain in effect for all three years of the plan, rather than increasing as proposed, the Companies minimized the risk of migration, further devaluing the value of the option price. The Companies used the three-year period of the ESP as the timeframe of the option, and the London Interbank Offered Rate (LIBOR) as a proxy for the risk-free interest rate. Company witness Baker demonstrated that using the LIBOR rate rather than a U.S. treasury rate resulted in conservatively lower POLR rates. *Id.* at 18, Sec. Supp. at 40. Finally, the Companies reflected the highly volatile nature of electricity markets. While there was considerable disagreement among the parties about the appropriateness of the Companies' inputs, the Commission found them to be reasonable, and accepted the Companies' quantification of the POLR risk using the Black-Scholes model. *In re AEP* (Opinion and Order at 40) (March 18, 2009) , OCC App. at 49, IEU App. at 200.

OCC argues that the Black-Scholes model is not capable of measuring shopping behavior, and that it is shopping behavior that causes the risk intended to be hedged by the POLR charge. Both OCC and IEU note that the POLR charge is the same whether 5% or 95% of the customers choose to shop. The reason is obvious, and was well supported by the Companies. It is not the fact that customers do shop that creates the POLR risk, but rather the fact that all customers can shop, and can choose to return, that creates risk.

The Black-Sholes model is an appropriate tool for measuring the Companies' risk associated with meeting their obligations as providers of last resort. The Commission's reliance on the model's results was reasonable and well within the bounds of determinations the Commission can make in an ESP proceeding.

The Companies provided adequate evidentiary basis for their proposal, and that basis was deemed sufficient by the Commission. The Commission rejected IEU's arguments that there was no risk, finding that, as the provider of last resort, the Companies face a risk associated with customers switching to alternative providers and then returning to the SSO rate at the end of their contracts or during times of rising prices. *In re AEP* (Opinion and Order at 40) (March 18, 2009), OCC App. at 49, IEU App. at 200.

The Commission accepted the Companies' witness' quantification of that risk, and its proposed calculation of the POLR charge, rejecting criticisms of the model used to calculate the cost of that risk. *Id.*; Co. Ex. 1 (Direct Testimony of D. Roush), Exhibit DMR-5, Sec. Supp. at 29.

OCC's claim that "[t]here is nothing on the record that supports the PUCO's guesstimate that of the POLR charge produced by the model, 90% of it solely relates to the risk of customers leaving" completely ignores the Commission's reasoning. The Commission accepted Companies' witness Baker's testimony that migration risk equals approximately 90% percent of the Companies' total POLR costs. *In re AEP* (Opinion and Order at 39) (March 18, 2009), OCC App. at 48, IEU App. at 199. The Commission's decision was clearly supported by evidence of record presented by the Companies in this case. The Commission modified the Companies' proposal to reflect this 10% mitigation of POLR risk relying on testimony provided by Staff witness Cahaan. *Id.* at 40, OCC App. at 49, IEU App. at 200.

Deference should be shown to Commission determinations in matters, like here, where the Commission applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000) (citation omitted). The Commission's decision approving the Companies' proposed POLR charge, as modified, was reasonable, justified, and supported by evidence of record, and should be upheld.

B. The Commission's order finding the ESP to be more favorable in the aggregate than an MRO meets the requirements of R.C. 4903.09.

In addition to its criticism of the Commission's adoption of the Companies' proposed POLR charge, addressed above, IEU claims Commission violated R.C. 4903.09 by providing virtually no detail as to why the approved ESP meets the new threshold test of being "more favorable in the aggregate" than an MRO. But, as the Commission reiterated in its Entry on Rehearing, the Commission provided a detailed explanation of its rationale.

The Commission reviewed and summarized all of the market price proposals offered by the different parties, including OCC. It adopted its staff's estimated market prices. Specifically, it adopted Staff witness Johnson's estimated market rates. *In re AEP* (Entry on Rehearing at 50-51) (July 23, 2009) , OCC App. at 144-145, IEU App. at 152-153. The Commission further adopted the methodology for quantifying the comparison between the ESP and an MRO proposed by Staff witness Hess. *Id.* at 50-51, OCC App. at 144-145, IEU App. at 152-153. Significantly, the Commission noted that both OCC and its staff concluded that the ESP, if modified, was more favorable in the aggregate than an MRO. *In re AEP* (Opinion and Order at 70-71) (March 18, 2009), OCC App. at 79-80, IEU App. at 231-232. Consequently, based on the record before it, it was reasonable for the Commission to adopt its staff's estimated market rates and methodology to quantify the ESP - MRO comparison. *In re AEP* (Entry on Rehearing at 50-51) (July 23, 2009), OCC App. at 144-145, IEU App. at 152-153.

C. The Commission's order excluding off-system sales revenues meets the requirements of R.C. 4903.09.

OCC claims that the Commission departed from past precedent in its treatment of the Companies' off-system sales without sufficient explanation. The Companies' made no proposal for the treatment of off-system sales, and the Commission found that it was not legally obliged to do so.

OCC claims that "persuasive precedent existed establishing a policy of requiring electric utilities to share profits of off-system sales with customers." OCC Brief at 24. But the Commission distinguished those cases, noting that they were irrelevant for purposes of the ESP proceeding. Specifically, the Commission found that the cited precedents were made in the context of electric fuel clause (EFC) cases, and that this case was not an EFC proceeding. Indeed, the statutory provisions regarding the EFC were repealed years ago. OCC's cited precedent is irrelevant in the context of an ESP case. There was no unexplained departure from precedent. Indeed, there was just no relevant precedent.

Neither of the cases cited in OCC's merit brief in this appeal are on point. Both relate to base rate cases. In the first decision, the Commission determined to include a portion of off-system sales as part of jurisdictional revenues, but noted that neither the Staff nor the company included these revenues in the cost of service for ratemaking purposes in recent cases. *In the Matter of the Application of the Cleveland Electric Illuminating Company for an Increase in Rates*, Case No. 84-188-EL-AIR (Opinion and Order) (March 7, 1985), OCC App. at 331. The second decision relates to a gas rate case. The Commission found that the gas company's proposal to retain off-system sales merited consideration, but that the record was not sufficiently developed to grant the company's request. *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-GCR (Entry on Rehearing) (February 12, 1997), OCC App. at 308.

Deference should be shown to Commission determinations in matters, like here, where the Commission applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000) (citation omitted). The evidence of record clearly supports the Commission's decision in this case, and the Commission so found in its Order.

Proposition of Law No. X:

> **The Commission's decision adopting actual fuel costs to determine the Fuel Adjustment Clause (FAC) baseline is reasonable and lawful.**

The Companies propose a Fuel Adjustment Clause (FAC) to recover the cost of fuel and fuel-related components such as purchased power, emission allowances, and consumables related to environmental compliance, as well as the costs associated with carbon-related regulation. Co. Ex. 1 (Direct Testimony of D. Roush) at 4, IEU Supp. at 44. The first step in determining the FAC was to establish a baseline, to ensure that the FAC did not recover fuel costs already being recovered in rates. The difference between projected costs and the baseline would determine costs to be recovered through the FAC.

The Commission's staff recommended using actual data for determining the baseline amount. Staff Ex. 10 (Direct Testimony of R. Cahaan) at 3-4, Sec. Supp. at 25-26. Staff witness Cahaan recommended using 2007 data since all of that information would be readily available and would be a reasonable proxy for the current year. *Id.* Mr. Cahaan testified that using actual costs was appropriate because the Companies were currently recovering all of their fuel-related costs. Tr. XII at 244, sec. Supp. at 175. The Commission agreed, finding that, "in the absence of known actual costs, a proxy is appropriate to establish a baseline." *In re AEP* (Opinion and Order at 19) (March 18, 2009) , OCC App. at 28, IEU App. at 179. It adopted its staff's recommendation to determine the FAC baseline component using 2007 actual cost data, escalated by 3 percent for CSP and 7 percent for OPCO, as a proxy for 2008 costs. *Id.*

IEU claims that the Commission's decision to use a proxy rather than actual fuel costs to set the baseline for the Companies' fuel cost mechanism violated R.C. 4928.143(B)(2)(a). The IEU argues that the proxy used by the Commission is not the prudently incurred costs authorized by statute, and that the Commission should have used 2008 actual costs.

But the Commission did use actual fuel costs, albeit from 2007 rather than 2008. The actual 2008 fuel costs were not known at the time of the hearing. *Id.* Therefore, the Commission determined that a proxy was necessary to calculate the appropriate baseline. The Commission reviewed all evidence in the record and adopted staff's methodology and resulting value as the appropriate FAC baseline.

Deference should be shown to Commission determinations in matters, like here, where the Commission applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000) (citation omitted). The Commission's decision adopting adjusted 2007 actual fuel costs to determine that FAC baseline was justified and should be upheld.

CONCLUSION

S.B. 221 represents a fundamental change in the way that rates are determined in Ohio. This appeal is about how the Commission exercised its responsibility and authority in responding to that change. As the Commission's orders reflect, the Commission understood and fully discussed those changes, their effect, and the options for responding to them. The Commission exercised its jurisdiction, applied its expertise, and exercised its discretion in making its decisions in a reasonable and lawful manner.

Based on the foregoing, the Commission respectfully requests its decision be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief,** submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage pre-paid, or hand-delivered, upon the following parties of record, this 5th day of March, 2010.

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APPENDIX

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

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

§ 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.

§ 4903.13. Reversal of final order - notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4903.16. Stay of execution

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

§ 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.

§ 4905.30. Printed schedules of rates must be filed

Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. Such schedules shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such schedule, and may prescribe, by order, changes in the form of such schedules. The commission may establish and modify rules and regulations for keeping such schedules open to public inspection. A copy of such schedules, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

§ 4905.32. Schedule rate collected

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

§ 4909.15. Fixation of reasonable rate

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

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission. The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete. In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff. A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress. Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (J) of

section 4909.05 of the Revised Code. From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division. The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change. In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown. In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation. In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected. In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

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

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

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

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

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

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

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

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

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

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

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

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

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

§ 4928.02. State policy

It is the policy of this state to do the following throughout this state :

(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;

(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;

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

(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.

§ 4928.14. Failure of supplier to provide service

The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

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

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

(C) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

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

§ 4928.141. Distribution utility to provide standard service offer

(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.

§ 4928.142. Standard generation service offer price - competitive bidding

(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 July 31, 2008, 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, not more 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.

§ 4928.143. Application for approval of electric security plan - testing

(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.

§ 4928.38. Commencing and terminating transition revenues

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

§ 4928.39. Determining total allowable transition costs

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs. Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section. Further, the commission's order under this section shall separately identify regulatory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code. The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated or unregulated products or services.