ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, and Industrial Energy Users-Ohio	:	**Supreme Court Case No. 09-2022**
Appellants,	:	**Appeal From the Public Utilities Commission of Ohio**
v.	:	
The Public Utilities Commission of Ohio,	:	**Public Utilities Commission of Ohio Case Nos. 08-917-EL-SSO**
Appellee,	:	**08-918-EL-SSO**

MERIT BRIEF AND APPENDIX OF
INTERVENING APPELLEES
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IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, and Industrial Energy Users-Ohio	:	
Appellants,	:	**Supreme Court Case No. 09-2022**
	:	
	:	**Appeal From the Public**
v.	:	**Utilities Commission of Ohio**
The Public Utilities Commission of Ohio,	:	**Case Nos. 08-917-EL-SSO**
Appellee,	:	**08-918-EL-SSO**

MERIT BRIEF AND APPENDIX OF INTERVENING APPELLEES
COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

INTRODUCTION

This appeal arises from the applications filed by Columbus Southern Power Company (CSP) and Ohio Power Company (OPCO) (collectively, the Companies) for approval of Electric Security Plans (ESPs) pursuant to R.C. 4928.143. (IEU Supp. pp. 1-21). An ESP is one of two alternative bases for establishing a Standard Service Offer (SSO) pursuant to R.C. 4928.141. A Market Rate Offer (MRO) under R.C. 4928.142 is the other alternative. These statutes were enacted as part of Am. Sub. Sen. Bill No. 221 (SB 221).

The Public Utilities Commission of Ohio's (Commission's) decision making process in ESP proceedings is markedly different than in its traditional ratemaking process under R.C. Chapter 4909. The valuation of property under R.C. 4909.05 is not required in an ESP proceeding; nor is there a Staff Report of Investigation prepared in an ESP as it is for compliance with R.C. 4909.19. An ESP proceeding has no date certain or test year, as would be required in traditional ratemaking under R.C. 4909.15 (B). A "fair

and reasonable rate of return," which the Commission "shall determine" in traditional ratemaking, is mentioned in R.C. 4928.143, but only in conjunction with an ESP provision regarding the EDU's distribution infrastructure modernization plan.[1] Of great significance to this appeal, an ESP does not involve the Commission's determination of the overall cost to the utility of rendering service, or the gross annual revenue to which the EDU is entitled by following the formula set out in R.C. 4909.15 – dollar amount of return on investment to which the utility is entitled plus the cost of rendering service.

Instead of the well-established ratemaking formula in R.C. 4909.15, the General Assembly provided that the contents of an ESP are left to the EDU to propose and the Commission to approve, modify or disapprove. The contents of an ESP are addressed in R.C. 4928.143 (B) (1) and (2). The ESP "shall include provisions relating to the supply and pricing of electric generation service." Further, the ESP "may provide for or include, *without limitation*, any of the following:...." (emphasis added). The statute goes on to list nine examples of adjustments that may be included in the ESP. Those adjustments specify recovery of certain costs, and the "without limitation" provision clearly permits other adjustments to the pre-ESP rates, whether or not those adjustments are cost-based. That, however, does not permit converting the ESP ratemaking process into a traditional overall cost-of-service analysis.

The General Assembly directed the Commission to make but one determination regarding the proposed ESP. R.C. 4928.143 (C) directs that the Commission:

> by order shall approve or modify and approve an application [for an ESP] if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including

[1] R.C. 4928.143 (B) (2) (h) provides for the recovery of costs related to the modernization plan, including a just and reasonable rate of return on such infrastructure modernization.

> 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....Otherwise, the commission by order shall disapprove the application. (emphasis added).

That's it. No rate base, no date certain, no test year, no test year cost of service and no formula for the Commission to follow. The simple stated required determination for the Commission to make is whether the ESP is better than the results expected under an MRO.

Against this backdrop, the Office of Consumers' Counsel (OCC) and Industrial Energy Users-Ohio (IEU) have challenged the Commission's approval of the Companies' ESP applications, as modified by the Commission. Collectively, OCC and IEU raise a variety of issues on which they ask this Court to substitute its judgment for that of the Commission. The Court's reluctance to substitute its judgment for that of the Commission's is well established. In the context of an ESP proceeding to establish a Standard Service Offer, where the General Assembly replaced the rigid ratemaking formula used in traditional rate cases in favor of a standard that provides substantial discretion to the Commission, the Court's deference to the Commission's application of the ESP versus MRO test is even more appropriate.

The handful of legal issues appealed by OCC and IEU are subject to the Court's greater scrutiny. The Commission's rulings on those issues, however, are deserving of deference by the Court because the Commission's rulings are based on its expertise and discretion to which the General Assembly left many of the details for implementing SB 221. In any case, the Commission's Order is lawful and reasonable and Appellants' claims should be rejected.

The Commission's factual determinations challenged in these appeals are just and reasonable and are supported by the record. Its legal determinations challenged in these appeals are well founded and represent a just and reasonable implementation of SB 221. The Court should affirm the Commission's ESP orders with regard to these issues as well.

STATEMENT OF FACTS

On July 31, 2008, Columbus Southern Power Company (CSP) and Ohio Power Company (OPCO), collectively, the Companies, filed applications for approval of ESPs for 2009-2011. (IEU Supp. pp. 1-21). On that same date, applications for approval of ESPs were filed by the three FirstEnergy electric utility companies and by Duke Energy Ohio. The hearing date for the Companies' applications was set, and then was continued at the request of the Ohio Consumers' Counsel. (Entries dated August 5, and September 5, 2008). (Co. App. pp. 20-26). From the time that the hearing schedule was set, let alone after being extended to begin on November 17, 2008, it was apparent that the Commission would not be able to complete its consideration of the record and issue an order by December 28, 2008, the 150th day after the applications were filed, as provided for by R.C. 4928.143 (C).

On March 18, 2009, the Commission issued its Opinion and Order (Order) addressing the applications. (IEU App. pp. 161-237). Based on many determinations made by the Commission (both granting and rejecting adjustments proposed by the Companies), CSP was authorized to increase its total rates 7% for 2009, and 6% for both 2010 and 2011. OPCO's authorized increases for the same period were 8%, 7% and 8%. (Order, p. 22; IEU Supp. p. 182). The Commission authorized both Companies to set

their initial rates to provide for the recovery of the authorized rate increases over the approximate nine months remaining in 2009. Those rates were implemented effective March 30, 2009. (March 30, 2009 Entry; IEU Supp. pp. 95-99).

Since that time many parties, including the Companies, have pursued their rights to rehearing under R.C. 4903.10 and three parties, OCC and IEU in this docket and the Companies in Supreme Court Case No. 09-2298, are pursuing appeals from the Commission's orders.

In considering the issues raised on appeal by IEU and OCC, it is helpful to recall that when SB3 was enacted the Companies' rates were frozen for five years (2001-2005). The fuel adjustment clause mechanism that had been in effect for years was abandoned and the fuel rates in effect at the start of the Market Development Period also were frozen. (Co. Ex. 7, p.9; Co. Supp. p. 28). To implement the proposed ESP it therefore was necessary to unbundle the Companies' charges for generation service into fuel (FAC) and non-FAC components. (*Id.* at 8).

The Companies also proposed increases to their Provider of Last Resort (POLR) charges. The Companies' POLR obligation gives customers an option to shop for generation service when market prices are low relative to the ESP prices, and take advantage of the ESP prices when market prices are comparatively high. This advantage for customers creates an opposite disadvantage for the Companies of having to be prepared to serve customers at regulated rates instead of selling the power at higher market prices or conversely having uncommitted energy when the market prices are depressed. (Co. Ex. 2A, p. 26; Co. Supp p._20). The Companies submitted expert evidence using an economic model (the Black-Scholes Model) to quantify the value of

the option available to customers. (Co Ex. 2A, pp. 30-32; Co. Supp. pp. 21-23). The Commission accepted this evidence in approving the Companies' POLR charge.

The Companies also proposed limited adjustments to their charges for distribution service. The Commission authorized limiting such charges based on the implementation of a gridSMART program in a portion of CSP's service area and an enhanced vegetation treatment program designed to improve the reliability of the Companies' distribution service. Another adjustment to the Companies' rates that the Commission authorized related to the recovery of carrying charges that the Companies incur in the 2009-2011 period on previously-made environmental investments.

In addition, OCC raises an issue arguing that an adjustment that should have been made to the ESP was not made. That issue relates to sharing of profits from Off-System Sales made on behalf of the Companies. A sharing of these profits is embedded in the ESP and OCC is simply asking for a greater share. (OCC Brief, p. 25; Tr. XIV, p. 150; Co. Supp. p. 15).

All of these adjustments were considered by the Commission based on the evidence offered by all parties either in support of the adjustment or in opposition to the adjustment. In light of the number of factual issues raised by the Appellants (as well as a variety of legal issues) the Companies will further discuss the evidence concerning these issues in the context of the related Proposition of Law.

STANDARD OF REVIEW

Both OCC and IEU set forth the standards employed by the Court in considering issues of fact and issues of law. Neither Appellant, when discussing issues of law, mention that "[d]ue deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility." *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St. 3d 15, 17-18. This aspect of the standard of review is particularly instructive in light of the broad authority given the Commission in an ESP proceeding.

Additionally, while not strictly a matter of the Court's standard of review, the requirements set forth in R.C. 4903.09, which both Appellants argue were not met, will be considered by the Court. "In 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.*, 117 Ohio St. 3d 486, 493 (2008 Ohio 990 ¶ 30) quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312. Strict compliance with the terms of R.C. 4903.09, which requires the Commission to file a written opinion setting forth its reasons for its decision, is not required but the Commission needs to have record support for its orders. *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St. 3d 87, 90, 1999 Ohio 206; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 163, 166, 1996 Ohio 296. Thus, as long as there is a basic rationale and record supporting the Order, no violation of R.C. 4903.09 exists.

As will be discussed in the Argument portion of this Brief, the Appellants' arguments in this regard amount to nothing more than their disagreement with the

Commission's reasoning and ultimate decisions. Their disagreements do not support an argument based on R.C. 4903.09.

ARGUMENT

PROPOSITION OF LAW NO. 1

> **"No party shall in any Court urge or rely on any ground for reversal, vacation, or modification not so set forth in the Application for Rehearing." R.C. 4903.10.**

As pointed out in other Propositions of Law in this Brief, OCC and IEU both argue matters that they did not raise before the Commission on rehearing and, in some instances, were not included in their Notice of Appeal to this Court. R.C. 4903.10, as quoted in this Proposition of Law, precludes the Appellants from raising those arguments on appeal.

In *Travis v. Pub. Util. Comm.*, (1931) 123 Ohio St. 355, 356, at paragraph 6 of the syllabus, this Court held, in accordance with that provision of R.C. 4903.10, that "the filing of an application for rehearing before the Public Utilities Commission is a jurisdictional prerequisite to an error proceeding from the order of the Commission to this Court, *and only such matters as are set forth in such application can be urged or relied upon in an error proceeding in this Court.*" (emphasis added.) The Court reiterated this requirement of R.C. 4903.10 in *Communications Workers v. Pub. Util. Comm.*, (1979), 57 Ohio St. 2d 76. Moreover, R.C. 4903.13 requires that the Notice of Appeal must set forth "the errors complained of." This statute establishes yet another basis for not considering those issues that are not properly raised on appeal. "[Appellant] did not set forth this specific claimed error in its notice of appeal to this court, and the failure to set

forth alleged errors in the notice of appeal delimits the issues for our consideration." (*Discount Cellular, Inc. v. Pub. Util. Comm.* 112 Ohio St. 3d 360; 2007-Ohio-53, ¶66).

PROPOSITION OF LAW NO. 2 (Response to IEU Proposition of Law No. I)

> **The Public Utilities Commission of Ohio has jurisdiction to issue an order authorizing a Standard Service Offer under R.C. 4928.143 more than 150 days after the application is filed pursuant to that statute.**

IEU argues that because the Commission was unable to issue its order in the Companies' ESP cases within the 150-day period set out in R.C. 4928.143 (C) (1), the Commission lost jurisdiction to issue its ESP order. Since this issue was not raised in either of IEU's rehearing applications, as required by R.C. 4903.10, it is not properly before the Court on appeal. (See IEU App. pp. 14-76 and 77-94).

When the Companies moved in this appeal to strike IEU's allegation that the Commission had lost jurisdiction in the case below (which the Court denied), IEU argued that lack of subject matter jurisdiction can always be raised, even if not preserved on rehearing in accordance with R.C. 4903.10. This argument already has been rejected by the Court in *Office of Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, 247, where the Court held that the failure to raise issues on rehearing, even issues the Commission could not resolve, such as the constitutionality of a statute, "is fatal."

In addition, one of the cases upon which IEU relied for that argument was *Pratts v. Hurley* 102 Ohio St.3d 81, 2004-Ohio-1980. In the *Pratts* case this Court made clear the distinction between subject matter jurisdiction and whether that jurisdiction is properly exercised. The Court held that the term "jurisdiction" encompasses jurisdiction over the subject matter and over the person. (¶11). The Court went, however, to note that "'jurisdiction' is also used when referring to a court's exercise of its jurisdiction over a

particular case." (¶12). This third category of jurisdiction relates to "the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction. It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable." (*Id.*). The Court concluded this discussion by holding that: "Once a tribunal has jurisdiction over both the subject matter of an action and the parties to it, * * * the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred * * *. " (*Id.*).

In applying these principles to the issue brought to this Court by IEU, it is apparent that the Commission has subject matter jurisdiction over ESP cases brought under R.C. 4928.143 and had jurisdiction over the Companies. Therefore, using the Court's terminology, the Commission's right to hear and determine the ESP applications was perfect. The issue raised by IEU concerns itself with how the Commission exercised its jurisdiction. If its exercise of jurisdiction was unlawful (which as discussed below it was not), the Commission's order would not be void, but merely voidable, assuming IEU had properly preserved the issue for appeal. IEU failed to properly bring this issue to the Court and the Court should not consider it.

Even if IEU has properly raised this issue on appeal, its legal analysis must be rejected. The Supreme Court of the United States has considered the question of whether an administrative agency loses jurisdiction to act when it misses the time set by the legislature to act. *Brock v. Pierce County*, (1986), 476 U.S. 253, 106 S. Ct. 1834, 90 L. Ed..2d 248 considered statutory language which required that the Secretary of Labor " 'shall' issue a final determination as to the misuse of CETA (Comprehensive

Employment and Training Act) funds by a grant recipient within 120 days after receiving a complaint alleging such misuse." (*Id.* at 255). The question before the Court was whether the Secretary lost the power to recover misused funds after the expiration of the 120-day period. The Court stated that it:

> would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act. (*Id.* at 260, footnote deleted).

The Court went on to note that the statute in question:

> does not merely command the Secretary to file a complaint within a specified time, but requires him to resolve the entire dispute within that time. This is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control. There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline. (*Id.* at 261).

The Court concluded that "the mere use of the word "shall" in Sec. 106 (b), standing alone, is not enough to remove the Secretary's power to act after 120 days." (*Id.* at 262, footnote deleted). The U.S. Sixth Circuit Court of Appeals ruled consistently with the *Brock* decision. When faced with an agency's inability to comply with a statutory deadline to complete an administrative proceeding that Court held that, "courts must apply remedies that, as nearly as possible, promote the primary purpose of the Act." *United States v. Alcan Foil Products Div. of Alcan Aluminum Corp.* 889 F. 2d 1513 (6th Cir. 1989).

When the Court's reasoning in the *Brock* case is applied to the Commission's authority to rule on an ESP application within 150 days of the application being filed, it is

clear that the Commission does not lose its authority to act beyond the 150-day period. First, there is no statutory language in R. C. 4928.143, or elsewhere in R. C. Chapter 4928, that precludes the Commission from acting after the passage of the 150-day period. Absent such language, it should not be assumed that the General Assembly "intended the agency to lose its power to act." As for there being less drastic remedies available, the General Assembly addressed the issue of what rates would be effective between the end of the 150-day period and the Commission's authorization of the Companies' ESP, making it clear that the Commission does not lose its ESP jurisdiction at the conclusion of the 150-day period.

Further, the Commission's task was far more significant than IEU's proposed consequence would suggest. The Commission not only had to "resolve the entire dispute" but the ESP case was a case of first impression as the Companies' application was filed on the day that R.C. 4928.143 became effective. Being a case of first impression was enough to present significant difficulties for resolving the Companies' ESP application within 150 days even if that were the only ESP case the Commission had to decide within that 150 days. However, as is evident from the Commission's August 5, 2008, Entry in the Companies' ESP proceeding, ESP proceedings by other EDUs were filed on the same date as the Companies' application and the Companies' application was scheduled for hearing after hearings on the other applications were scheduled to begin. (Entry, pp. 1, 2; Co. App. pp. 20, 21).

Because of the Commission Staff's limited availability, the Companies' hearing was scheduled to begin on November 3, 2008 – just 55 days before the conclusion of the 150-day period to rule on their application. Then, at the request of certain intervenors,

and over the Companies' objection, the hearing date was set back 14 days, leaving only 41 days from the start of the hearing to the 150-day deadline. (Entry, September 5, 2008, pp. 1, 2; Co. App. pp 24, 25).

With or without the postponement of the hearing, the Commission faced a "substantial task" with real world difficulties "beyond [its] control." Based on these factors affecting the Commission's new responsibilities arising from SB 221 and all of the Commission's long-standing responsibilities to regulate other utility industries, there is no reason to believe that the General Assembly "intended such drastic consequences to follow" from the Commission's inability to meet the 150-day deadline.

IEU misinterprets R.C. 4928.141, the statutory provision on which it bases its argument. R.C. 4928.141 requires EDUs to apply for either an ESP or MRO. It does not, however, specify a time by which such an application must be filed. While the Companies filed their applications on July 31, 2008, the first date that SB 221 became effective, a September filing would have resulted in the 150-day time period expiring well beyond the end of 2008. The significance of the lack of specificity regarding when a SSO application could be filed relates to the portion of R.C. 4928.141 (A) on which IEU relies:

> 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 ****

R.C. 4928.141 (A) is not a permanent default for failure to meet the 150-day time period. The continuation of the rate plan applies only where there is not sufficient time for the 150-day period to be completed before the existing rate plan would expire. There

is nothing in R.C. 4928.141 (A) or 4928.143 (C)(1) that suggests that, if the Commission does not meet the 150-day time period for ruling on the Companies' ESP application, the Commission loses its authority to ever act on that application. Nor is there any reason to believe that if the General Assembly intended to specify a remedy for the Commission not meeting that time period that such a remedy would have been placed in a provision other than the provision which sets out the requirement itself.

IEU also contrasts R.C. 4928.143(C) (1) with R.C. 4909.42 as an example of statutes that "explicitly provide for continued jurisdiction if the Commission misses a statutory deadline...." (IEU Brief p. 11) That argument is unpersuasive. R.C. 4909.42 permits a utility to put into effect its proposed rates, subject to refund, if the Commission has not ruled on a rate increase application within 275 days of the application being filed. If after 545 days the Commission still has not ruled on the application, the proposed rates can remain in effect with no ongoing refund obligation. To be sure the Commission meets its responsibility to set rates even once the 545-day period has been reached, the statute provides that "[n]othing in this section shall be construed to mitigate any duty of the commission to issue a final order under section 4909.19 of the Revised Code." This sentence was not a grant to the Commission of authority to act even after 545 days. Instead, it is a directive to the Commission to meet its responsibility to set rates.

IEU asserts that the Commission did not follow the instructions provided to it in R.C. 4928.143 and R.C. 4928.141 (C) (1) and "nobody claims otherwise." (IEU Brief, p.11). The Commission's ESP orders prove that it does not agree with IEU's sweeping statement; nor do the Companies. To the extent the Court considers IEU's claim (which

it should not) the Court should find that the Commission's issuance of its ESP orders after the 150-day period had passed is lawful and should be affirmed on appeal.

PROPOSITION OF LAW NO. 3 (Response to OCC Proposition of Law No. 4)

> **SB 221 does not require that off-system sales margins be used as an offset to Electric Security Plan rates. The Public Utilities Commission of Ohio's decision to continue to reflect the existing level of sharing with customers of such margins was reasonable and within the scope of the Commission's discretion in an ESP case.**

OCC argues that the Commission erred by not reducing the ESP rates to reflect a sharing of margins from the Companies' Off-System Sales (OSS). The concise response to this argument is found in OCC's own brief, where it acknowledges that its proposed treatment is "not required, under the broad language of R.C. 4928.143 (B)(2)." (OCC's Brief, p. 23). Stated more broadly. "S.B. 221 does not require profits from off-system sales to be included in the ESP rates," (*Id.* at 28). Given OCC's rejoinder to its own arguments — that sharing of OSS margins is not required — there is hardly a basis for reversing the Commission.

OCC's extensive reliance on prior Commission decisions regarding the treatment of OSS margins is not compelling. As noted at the outset of this Brief, the ESP ratemaking process bears little resemblance to the ratemaking process in those earlier cases. An ESP case is not a "cost-of-service" exercise. While sharing OSS margins may have made sense when the ultimate Commission determination to be made was the utility's revenue requirement, that determination is not being made in an ESP proceeding.

Further, OCC's reliance on CSP's 1991 rate case undercuts OCC's position. As OCC notes, the pre-ESP rates "contain credits for off-system sales profits." (*Id.* at 25). OPCO's pre-ESP rates also reflect a credit for OSS margins. (Tr, XIV, p. 150; Co. Supp.

p. 15). Those pre-ESP rates were not adjusted to remove the OSS credits that customers have been receiving since those rates became effective. Therefore, contrary to OCC's claim that the Companies "excluded all of [the OSS] profits from their rates," (OCC Brief, p. 22) the ESP continues to reflect sharing of OSS margins with customers. OCC's argument amounts to nothing more than dissatisfaction with the *amount* of OSS margins being shared. Given the Commission's broad discretion in ESP proceedings and the nature of the applicable test to be applied by the Commission — whether the ESP, in the aggregate, is more favorable than an MRO — OCC has not met its burden of demonstrating that the Commission erred regarding its treatment of OSS margins.

OCC also argues that the Commission's OSS ruling, coupled with its ruling that OSS margins would be excluded from earnings in the Significantly Excessive Earnings Test (SEET) left customers losing both sides of the OSS margin issue.[2] (*Id.* at 23, 24). OCC fails to point out that on rehearing the Commission agreed to reconsider the treatment of OSS in the SEET process. (July 23, 2009 Entry on Rehearing, p. 49; IEU App. p. 151, ¶129).

Finally, OCC argues that the Commission failed to comply with R.C. 4903.09. OCC believes the Commission was required to explain why it did not follow its prior precedents concerning OSS margins. The response to this aspect of OCC's argument is that the earlier cases on which OCC relies are not valid precedent as they are based on an entirely different regulatory regime. There are no precedents for ESP cases. OCC's complaint that the Commission failed to explain why the precedents were not relevant is without merit.

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[2] The SEET is applied to the Companies' earnings following the end of each year of the ESP. R.C. 4928.143 (F).

PROPOSITION OF LAW NO. 4 (Response to IEU Proposition of Law No. IV)

R.C. 4928.143 permits adjustments based on cost to existing Standard Service Offer rates.

IEU argues that the cost recovery adjustments in the ESP related to CSP's contractual generation entitlement with AEP Generating Company (which owns the Lawrenceburg Generation Station) and both Companies' contractual generating entitlements with Ohio Valley Electric Corporation (OVEC) are contrary to R.C. 4928.143 and unsupported by the record. IEU's statutory argument is based on its incorrect premise that since ESP ratemaking is not a cost-of-service exercise, individual adjustments to the pre-ESP rates based on cost are not permitted. IEU's other argument is that there is "nothing in the evidence of record that would allow a determination of what revenues might be warranted based on the cost of providing generating service from the units." (IEU Br. p. 32). IEU is wrong on both counts.

As noted in the Introduction to this Brief, ESP rates are to be tested against the expected results of a Standard Service Offer set by an MRO. Rate of return on rate base, test year cost of service and revenue requirement determinations required in R.C. Chapter 4909 rate cases are not applicable to the Commission's ESP determinations. That does not mean, however, that individual adjustments that use a cost basis are prohibited from the Commission's consideration under R.C. 4928.143.

Even a casual review of that statute reveals that the General Assembly provided for individual cost-based adjustments being included in the ESP. For example, *see* divisions (B)(2)(a) ("recovery of ... the *cost* of fuel ... *cost* of purchased power including the *cost* of energy and capacity ... *cost* of emission allowances ... *cost* of federally mandated carbon or energy taxes"); (B)(2)(b) (an allowance for construction work in

progress for the *cost* of constructing a generating facility); (B)(2)(f) ("recovery of the utility's *cost* of securitization"); (B)(2)(g) ("recovery of any *cost*" of transmission, ancillary or congestion service); and (B)(2)(h) (regarding distribution infrastructure/modernization, "any plan providing for the utility's recovery of *costs*." (emphasis added). These statutorily permitted adjustments, coupled with the "without limitation" provision which introduces division (B)(2), make clear that the Commission-authorized recovery of the jurisdictional share of the costs associated with these contractual entitlements is statutorily permitted.

IEU's argument concerning the absence of record support also is unpersuasive. The Companies' witness, Mr. Baker, specifically testified that, regarding these contractual entitlements:

> any expense not recovered by the FAC (Fuel Adjustment Clause) should be recovered in the non-FAC rate.... With respect to the OVEC entitlements the demand charge should be included in the FAC and be recoverable from internal load customers. The demand charge is about $70 [million] annually. (Co. Ex. 2E, p. 21; Tr. XIV, p. 127; Co. Supp. pp. 25, 14).

Based on its statutory authority and the unrebutted record evidence supporting the adjustment being challenged by IEU, the Commission-approved FAC provides for Lawrenceburg and OVEC costs to be recovered by the Companies. (Order, p. 52; IEU App. p. 212). R.C. 4928.143 (B)(2)(a) specifically provides for recovery in a FAC of the cost of energy and capacity, *i.e.* demand charges, associated with purchased power. Therefore, the Commission's decision is within the framework of R.C. 4928.143, is supported by the record and within the Commission's discretion to make as part of the statutory test of whether the ESP is more favorable, in the aggregate, than the expected

result of an MRO.[3] Therefore, the Court should reject IEU's challenge regarding the Commission's Lawrenceburg and OVEC determinations.

PROPOSITION OF LAW NO. 5 (Response to IEU Proposition of Law No. III and OCC Proposition of Law No. 5)

The adjustment to the Companies' Provider of Last Resort charge by the Public Utilities Commission of Ohio in approving an Electric Security Plan was permitted under R.C. 4928.143 and supported by the record.

IEU and OCC both challenge the portion of the Commission's order authorizing a Provider of Last Resort (POLR) charge for each Company. IEU and OCC both present extensive discussions inviting the Court to substitute its judgment for that of the Commission on the setting of these charges. The Court cannot accept those claims without second-guessing the specific POLR findings made by the Commission. Further, IEU raises two legal arguments concerning this portion of the Commission's order that can be easily addressed.

IEU's first legal argument is that the POLR charge is unlawful since it is a distribution service-related charge approved outside of a rate case and based on hypothetical costs. Not only is IEU's argument without merit, it is not properly before the Court. IEU refers to page 16 of its rehearing application to claim that this issue was raised on rehearing. (IEU App., p. 32) That portion of its rehearing application contains no more than a passing observation that "one might expect that the Commission's determination, at page 32 of the Order, would apply to defeat this rate increase proposal."

[3] In contrast to the Commission's inclusion of this adjustment in its ESP versus MRO determination, it reversed on rehearing a $51 million adjustment it had included in CSP's ESP rates related to costs associated with CSP's recent acquisition of two generating units which costs never had been reflected in CSP's rates. The Commission's reversal was based on its reverting back to "revenue requirement" conclusions for which there was no record, instead of the required ESP versus MRO analysis. CSP is appealing that ruling in Case No. 09-2298.

IEU's actual POLR-related issues raised on rehearing are listed on page 27 of its rehearing application (IEU App. p. 43). The five reasons IEU listed there do not include its "distribution rate case" argument. IEU's misdirection to page 16 of its rehearing application, instead of page 27 where it listed the reasons the Commission's authorization of "POLR revenue requirement is unjust, unreasonable and unlawful" strongly suggests that this issue was not raised on rehearing. Further, this issue was not raised in IEU's detailed Paragraph A of its Notice of Appeal as required by R.C. 4903.13. (IEU App. pp. 3,4). Based on the arguments set out in Proposition of Law No. 1 to this Brief, the Court should not consider IEU's "distribution rate case" arguments at pages 18-21 and the full paragraph on page 22 of its Merit Brief.

Even if this legal argument were properly before the Court it should be rejected. IEU's reliance on *Indus. Energy Users-Ohio v. Pub. Util. Comm.* 117 Ohio St. 3d 486, 2008-Ohio-990 is misplaced. SB 221, which was not the applicable law considered in that case, contemplates a broad set of acceptable provisions in an ESP. This conclusion is consistent with the "without limitation" phrase in R.C. 4928.143 (B)(2)(a). Moreover, R.C. 4928.143 (B)(2)(d) specifically authorizes an ESP to include charges relating to limits on customer shopping and default, *i.e.*, POLR, service. Therefore, IEU's legal argument is without merit.

IEU also relies on R.C. 4903.09 to present what it casts as a legal argument. However, its discussion of this argument really amounts to a disagreement with the evidence on which the Commission relied for its POLR charge determination. R.C. 4903.09 requires that the Commission set forth the reasons prompting its decisions. A review of pages 38-40 of the Order demonstrates that the Commission has met this

requirement. (IEU App. pp. 198-200). After spelling out the parties' positions concerning the proposed POLR charges, the Commission set out its decision and the reasons therefore. As the Commission stated:

> the Commission believes 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. However, we agree with the intervenors and Staff that the POLR charge as proposed by the Companies is too high, but we do not agree that there is no risk or a very minimal risk as suggested by some.... [T]he risk of returning customers may be mitigated, not eliminated, by requiring customers that switch to an alternative supplier to agree to return to market price, for the remaining period of the ESP term or until the customer switches to another alternative supplier. In exchange for this commitment, those customers shall avoid paying the POLR charge. We believe that this outcome is consistent with the requirement in Section 4928.20 (J), Revised Code, which allows governmental aggregations to elect not to pay standby service charges, in exchange for agreeing to pay market price for power if they return to the electric utility.... [W]e conclude that the Companies' proposed ESP should be modified such that the POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith, including the migration risk. The Commission accepts the Companies' witness' quantification of that risk to equal 90 percent of the estimated POLR costs (footnote omitted).... [T]he POLR rider shall be avoidable for those customers who shop and agree to return at a market price and pay the market price of power incurred by the Companies to serve the returning customers. (Order, p.40; IEU App. p. 200).

As can be seen, the Commission's explanation meets the requirements of R.C. 4903.09. IEU's arguments to the contrary amount to nothing more than its disagreement with the Commission's analysis and decision regarding this issue.

The remainder of IEU's arguments, and all of OCC's arguments concerning the POLR charge focus on those parties' disagreement with the Commission's analysis of the record. Their argument that the Companies do not face any risk in their POLR capacity (OCC's Brief, pp. 31, 35; IEU's Brief, p. 16) refuses to recognize the nature of the risk associated with the unique (sometimes referred to as hybrid) nature of SB 221.

After the Market Development Period created by SB 3, customers had the choice of purchasing generation service from a competitive supplier or from their EDU at market-based rates. (former R.C. 4928.14, amended by SB 221; Co. App. pp. 18, 19). Under SB 221 customers retained the right of choice, but under an ESP, an EDU is precluded from charging market rates.

The result of this "hybrid" form of regulation is that when market prices are below ESP rates, customers can be expected to switch from the EDU to the competitive generation provider, leaving the EDU with uncommitted energy to sell into a depressed market. When the market rebounds, however, and market prices exceed ESP rates, customers can be expected to return to the EDU and its then-lower ESP rates. As the Companies' witness, Mr. Baker, explained this "hybrid" structure built into SB 221 leaves the Companies:

> exposed to losing generation service load when the market price is low but needing to stand ready to begin serving that load again when the market price is high, and in the case of a CRES or other supplier default, doing so at a moment's notice. (Co. Ex. 2A, p. 26; Co Supp. p. 20).

From the customers' perspective they have the option of switching and if they switch, the option of returning. Since all customers have the right to switch, they likewise all have the right to return. The optionality of the customers' right to switch and to return, as a result of the Companies' POLR obligation, carries with it a cost.

Contrary to the assertions that IEU and OCC make in their briefs, the Companies were not alone in recognizing the risk, and the cost, associated with the Companies' POLR obligation. Mr. Frye, a witness for a large group of intervening school boards and administrators, acknowledged that in a prior proceeding he testified that "POLR is a financial obligation an electric distribution company (EDU) incurs in the competitive

generation market created by SB 3 whereby the EDU accepts revenue in return for the obligation to sell power to returning customers at its market-based standard service offer." (Tr. XII, pp. 48, 49; Co. Supp. pp. 8, 9). This "financial obligation" is even greater in an ESP under SB 221 since that SSO rate available to returning customers is not market-based.

In addition to Mr. Frye's testimony, the Staff's witness Mr. Cahaan, testified:

> There are actually two risks involved. The risk that is usually discussed in the context of the POLR obligation is the risk of customers coming back. But before a customer comes back, the customer must leave in the first place, so there is also the optionality associated with leaving. The companies are claiming that this optionality also has a value for which compensation must be made. (Staff Ex. 10, p. 6; Co. Supp. p. 32).[4]

Mr. Cahaan further testified:

> If the Commission allows customers to return to the standard service offer without any conditions or barriers, and if they can take the standard service offer price, then the company is bearing a risk that has been traditionally identified as a POLR risk. (Tr. XIII, pp. 36, 37; Co. Supp.10, 11).

In addition, Mr. Barron, a witness for intervenor Ohio Energy Group (OEG), while not endorsing the Companies' POLR charge computation, "certainly accept[s] the concept of a POLR charge and that there are risks....OEG and I agree that the concept of a POLR charge to recognize some measure of risk is not unreasonable." (Tr. II, 146; Co. Supp. p. 1).

Even OCC's witness, Ms. Medine, testified that there is a POLR cost associated with customers that switch to a rate from a competitive supplier offering a rate below the ESP rate. She agreed during cross-examination that "the POLR cost is the difference

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[4] While the Staff thought there were ways to reduce the compensation associated with these POLR risks, the Companies, and more importantly the Commission, rejected Staff's alternatives.

between the standard service offer price and what [the Companies] were able to realize on that power that they previously had been using to serve those customers [,] at $35 a megawatt-hour compared to $45 a megawatt-hour [ESP rate]. (Tr. VI, p. 221; Co. Supp. p. 4). All of this evidence abundantly and cumulatively supports the Commission findings that POLR risks exist and should be compensated.

IEU and OCC are wrong not only in asserting that there is no POLR risk, and cost associated with that risk, they also are wrong when they argue that there is no record evidence to support the increase in the pre-ESP POLR charge authorized by the Commission. In considering this evidence it is helpful to understand how the Companies' pre-ESP POLR rates were set.

At the conclusion of the five-year Market Development Period under SB 3, the Companies were encouraged by the Commission to submit Rate Stablization Plans (RSP) in lieu of implementing full market-based rates as contemplated by SB 3.[5] Despite the Companies not requesting a POLR charge in their RSP, the Commission authorized such a charge. As Mr. Baker testified in the ESP proceeding, the RSP POLR charges were equivalent to "costs that we were trying to recover for PJM costs as well as environmental costs and [the Commission] designated that POLR."[6] (Tr. X, p. 217; Co. Supp. p. 5). The RSP POLR rates were POLR rates in name only; there was no POLR analysis in the Commission's RSP order.

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[5] "At the outset, we will note that AEP proposed an RSP because we requested it." *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-119-EL-UNC, Opinion and Order, p. 13 - - the "*RSP*" case. (IEU App. p. 258).

[6] These were administrative costs related to the Companies' integration into the PJM regional transmission organization.

Instead the Commission ruled that the RTO charges and environmental-related charges the Companies proposed to recover in the *RSP* case each "constitute a reasonable and not excessive compensation to AEP for part of the cost of fulfilling its POLR responsibilities...." (*RSP* Opinion and Order, pp. 27, 29; IEU App. pp. 272, 274). Now for the first time, the Companies presented the Commission with a "scientific approach to determining what the value of POLR is...." (Tr. X, pp. 217, 218; Co. Supp. pp. 5, 6). That approach was the application of the Black-Scholes Model to value the optionality available to customers under SB 221, and the associated cost to the Companies of meeting that optionality.

The Companies' use of the Black-Scholes Model was fully supported on the record by the testimony of Mr. Baker. He addressed why the use of an option model is an appropriate way to value the POLR obligation.

> When determining the cost of AEP's POLR obligation, it is important to realize that in financial terms, such one-sided rights that customers receive through retail choice are equivalent to a series of options on power. When it becomes apparent that there are economic benefits from switching between a competitive supplier and the ESP price, the rational customer will exercise his or her flexibility to change providers. AEP, however, will bear the difference between market and ESP prices as a loss. Thus, an option pricing model provides an effective way to calculate the cost of AEP's POLR obligation.... The Black-Scholes option pricing model is the widely used option model. Among its many applications, it is used extensively to provide basic benchmark pricing for equity and commodity options. (Co. Ex. 2A, pp. 30, 31; Co. Supp. pp. 21, 22).[7]

[7] Contrary to the assertions of IEU and OCC, use of an option model to guide the level of POLR charges is not unheard of. In *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, DP&L relied on testimony "that the right of switching customers to return to DP&L's [Standard Service Offer] is equivalent to granting customers a financial option to purchase generation from DP&L at a fixed price." (Opinion and Order, p. 6; Co. App. pp. 35).

Mr. Baker went on to identify the inputs used in the Black-Scholes model to calculate the price of the customers' option. (Co. Ex. 2A, pp. 31,32; Co. Supp. pp. 22, 23). In addition, he testified that about 90 percent of the POLR risk is associated with customers shopping as a result of a drop in the market price since the risk of customers returning to the Companies' generation when market prices escalate is not triggered unless customers have switched to a competitive generation provider when market prices dropped. (Tr. XIV, p. 205; Co. Supp. p. 16).

Despite Mr. Baker's testimony, IEU and OCC disagree with the Commission's adoption of the Black-Scholes model for valuing the cost to the Companies of bearing the POLR obligation. Disagreement on technical matters such as this that are brought before the Commission is not unusual; nor is it a basis for reversing the Commission's resolution of such an issue.

IEU invites the Court to overturn this evidentiary finding based on a "sound-bite" argument that the Black-Scholes model is the cause of "sending the Nation's and The World's economy into an abyss." (IEU Brief, p. 23, fn. 56). However, the model, which won a Nobel prize for its authors, is a valuable economic model when, as the Commission found here, it is properly applied. (Tr. XI, p. 222 Co. Supp. p. 7).

Commissioner Roberto's Concurring Opinion in the Commission's July 23, 2009 Entry on Rehearing, on which OCC relies, demonstrates nothing more than the reality that informed individuals can reach different conclusions based on the same set of facts. What is instructive, however, is that Commissioner Roberto characterized the Commission's decision on the POLR charge as one of several "policy decisions." (Concurring Opinion, p. 2; IEU App. p. 157). Moreover, Commissioner Roberto went on

to observe that even with the POLR charge included as part of the ESP and even if that charge were removed from the expected results of an MRO for the MRO versus ESP comparison "the modified ESP is still more favorable in the aggregate as compared to the expected results of an MRO." (*Id.*).

IEU and OCC are asking the Court to substitute its judgment for the Commission's ruling based on the record and on the Commission's ruling based on the Commission's policy regarding compensating the Companies for bearing the POLR obligation resulting from SB 221. This is particularly true given the Commission's determination, with which Commissioner Roberto specifically concurred, that:

> even if we do not include the POLR obligation in the calculation of the MRO versus ESP comparison, the Commission finds that the ESP is still more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code. (July 23, 2009 Entry on Rehearing, p. 51; IEU App. p. 153).

Therefore, the Court should affirm the Commission's POLR charge authorization.

PROPOSITION OF LAW NO. 6 (Response to IEU Proposition of Law No. VI)

Use of a "proxy" measure of 2008 costs to separate an electric distribution utility's existing generation rate into fuel related and non-fuel related components does not result in recovery of more than actual fuel related costs and does not violate R.C. 4928.143(B)(2).

R.C. 4928.143(B)(2)(a) allows an electric distribution utility (EDU) to establish, as part of its ESP, an automatic adjustment mechanism that enables the EDU to recover its prudently incurred costs of fuel, purchased power, emission allowances, and federally mandated carbon and energy taxes. CSP and OPCO each proposed, and the Commission approved, as part of their ESPs fuel adjustment clauses (FACs) consistent with R.C. 4928.143(B)(2)(a). Through their FACs the Companies will recover their actual fuel and

fuel-related costs that they incur during the course of their 2009-2011 ESPs. The timing of the Companies' recovery of their FAC costs is determined, in part, by the caps on annual rate increases that the Commission, pursuant to R.C. 4928.144, established for the Companies during their ESPs. The Commission directed the Companies to defer, for recovery during 2012-2018, the portions of the FAC costs incurred during their ESPs (along with carrying charges on the deferrals) that exceed the amounts that can be recovered by the capped annual rate increases. In the end, the Companies will recover through their FAC mechanisms during the 2009-2011 ESP, and then through the subsequent recovery of the deferred costs during 2012-2018, only the actual prudently incurred fuel and fuel-related costs incurred during the 2009-2011 ESP that R.C. 4928.143(B)(2)(a) allows them to recover. (Order, pp. 22, 23; IEU App. pp. 182, 183).

In its sixth proposition of law IEU contends that the Commission violated R.C. 4928.143(B)(2)(a) by using a "proxy" measure of 2008 costs, instead of actual 2008 costs, to separate the Companies' existing generation rates into their FAC and non-FAC components. IEU argues, at page 37 of its Brief, that "[t]he Commission's use of a "proxy" is unlawful inasmuch as it is, by definition, not the prudently incurred costs authorized in R.C. 4928.143(B)(2)(a)." IEU also claims that the decision not to use 2008 actual fuel costs will not only affect the calculation of FAC rates in 2009, but also the 2010 and 2011 FAC rates: "FAC rates for 2010 and 2011 will be set using the unlawful proxy as a baseline, thereby making the 2010 and 2011 FAC rates unlawful as well." *Id.*

IEU's arguments are without basis. First, the Companies' recovery of fuel and fuel-related costs that they incur during their 2009-2011 ESPs is not, and will not be, based upon 2008 costs, proxy or actual, or upon the unbundling of the existing 2008 (pre-

ESP) generation rates into their FAC and non-FAC components. As explained above, the Companies will recover their actual costs, no more and no less, through the capped FAC rates charged during the 2009-2011 ESP, and through rates in 2012-2018 that recover deferred FAC costs. R.C. 4928.143(B)(2)(a) (coupled with the cost deferral and recovery authority that R.C. 4928.144 provides to the Commission) allows the Companies to recover their actual FAC costs and also allows them to recover them in the manner that the Commission directed (*i.e.* a combination of current and deferred recovery). Accordingly, the Commission-ordered separation of the existing 2008 (pre-ESP) generation rates into their FAC and non-FAC components using proxy costs for 2008 does not violate R.C. 4928.143(B)(2)(a). Indeed, that unbundling is not germane to whether the Companies' FAC mechanisms comply with that section.

The primary purpose of unbundling the pre-ESP generation rates was to identify the non-FAC components of those rates. As the Companies' witness, Mr. Nelson, testified, "it is necessary to properly identify the FAC costs in [the pre-ESP rates] so the remaining base rate component of the SSO can be established." (Co. Ex. 7, p. 8; Co. Supp. p. 27). That was accomplished by first identifying the FAC components of the pre-ESP generation rates. The remainders were the non-FAC components of the pre-ESP generation rates. The unbundling process that the Commission performed in order to identify the non-FAC components of the pre-ESP rates is not governed by R.C. 4928.143(B)(2)(a). Indeed, that provision is not relevant to the non-FAC component of the generation rate.

In any event, the Commission properly rejected arguments by IEU (and OCC), during the proceeding below, to use 2008 actual costs to perform the unbundling. As the

Commission observed in its Order, at page 19, there was no – indeed there could not have been any – record evidence of calendar year 2008 actual costs because the Application was filed on July 31, 2008, and the hearing took place and the record was closed before the end of 2008. (IEU App. p. 179) The Commission's decision to adopt Staff's "proxy" for the actual 2008 FAC in the pre-ESP generation rate is supported by not only the Staff's and Companies' testimony cited at page 19 of the Order, but also by the testimony of OCC's witness Smith, who argued that the Companies "should be required to make such an estimate [of the 2008 FAC costs]", (OCC Ex. 10, p.14; Co. Supp. p. 30)

It was neither possible nor appropriate to try to belatedly inject evidence of actual 2008 costs into the proceeding by reopening the record in 2009 in order to further litigate the matter and delay the decision. The Court should affirm the Commission's judgment regarding the determination of FAC and non-FAC generation rate components.

PROPOSITION OF LAW NO. 7 (Response to OCC Proposition of Law No. 6)

> **Recovery by an electric distribution utility of carrying costs incurred during the term of an electric security plan on capital investments made during 2001-2008 is authorized by R.C. 4928.143(b)(2).**

The Companies proposed, and the Commission approved, provisions in their ESPs that enable them to recover the capital carrying costs of investments in environmental control facilities made during 2001-2008 but not already reflected in their rates through adjustments made during their prior RSP proceedings. Although the incremental capital expenditures involved in that provision of the ESPs were made in 2001-2008, the carrying costs that the provision enables the Companies to recover are being incurred during 2009-2011. The Companies relied upon the introductory language of R.C. 4928.143(B)(2) to support this aspect of their ESPs. That provision states that

"the [ESP] may provide for or include, *without limitation*," any of the provisions specifically identified in the following paragraphs (a) through (i) of R.C. 4928.143(B)(2). (emphasis added). The Commission approved the Companies' proposal for recovery of the carrying costs on the incremental capital expenditures and, in its July 23rd Entry on Rehearing, at page 12, confirmed that the carrying costs "fall within the ESP period and, therefore, may be included in the ESP pursuant to the broad language of Section 4928.143(B)(2), Revised Code, permitting recovery for unenumerated expenses." (IEU App. p. 114, ¶38).

In its sixth proposition of law, OCC contends that the Commission's approval of that provision was unlawful in three respects. First, OCC argues, at pages 37 through 41 of its Brief, that in order to be eligible for inclusion in the ESP the provision must fall within one of the enumerated categories described by paragraphs (a) through (i) of R.C. 4928.143(B)(2). OCC asserts, at page 37 of its Brief, that "[t]he broad prefatory language [i.e., the "without limitation" language] serves to convey that there is no limit on the type of ratemaking adjustments *so long as such adjustments fall within one of the enumerated components*." (emphasis added). OCC argues that because the incremental environmental investment carrying cost recovery provision does not fit within any of the paragraphs (a) through (i), the provision conflicts with R.C. 4928.143(B)(2).

The premise of OCC's argument, that the broad prefatory "without limitation" language of R.C. 4928.143(B)(2) should be interpreted to preclude provisions except those specified in paragraphs (a) through (i) is plainly wrong. OCC's interpretation would render the "without limitation" language meaningless. The Commission properly concluded that the plain meaning of the "without limitation" language of R.C.

4928.143(B)(2) is that provisions other than those specifically enumerated in paragraphs (a) through (i) may be included in an ESP and that the Companies' incremental environmental investment carrying cost provision is authorized by R.C. 4928.143(B)(2).

In any event, division (B)(2)(b) of R.C. 4928.143 would provide an alternative basis for the Companies' incremental environmental investment carrying cost provisions. Division (B)(2)(b), in pertinent part, allows inclusion in an ESP of a provision that provides cost recovery "for an environmental expenditure for an electric generating facility of the [EDU], provided the cost is incurred or the expenditure occurs on or after January 1, 2009". OCC's effort, at page 39 of its Brief, to disqualify the carrying costs from recovery under division (B)(2)(b), on the basis that the underlying capital expenditures were made before January 1, 2009 and the carrying costs for those investments are simply "bookkeeping entries", not actual costs, also fails. The provisions in the Companies' ESPs recover the carrying costs for the capital expenditures, not the capital expenditures themselves; and the record confirms that while the capital expenditures were made prior to January 1, 2009, "the carrying cost itself is the carrying cost [the Companies are] going to incur in 2009" and thereafter. (Tr. XIV, pp. 93, 114; Co. Supp. pp. 12, 13). Consequently, the Commission correctly found in its Entry on Rehearing, at page 12, that "[t]he carrying costs on the environmental investments fall within the ESP period" and properly concluded that the carrying costs "therefore may be included in the ESP pursuant to the broad language of Section 4928.143(B)(2), Revised Code, permitting recovery for unenumerated expenses." (IEU App. p. 114,¶38).

OCC's second argument in support of its sixth proposition of law, at pages 41-42 of its Brief, asserts that allowing the Companies to recover carrying costs during the ESP

for the environmental capital expenditures made during 2001-2008 is equivalent to allowing the Companies to receive generation transition revenues. OCC contends that because R.C. 4928.38 prohibits the receipt of generation transition revenues after the end of an EDU's Market Development Period, which for the Companies terminated at the end of 2005, the Commission's orders violated that section also.

OCC's second argument is also untenable. At the outset, OCC improperly raises an issue on appeal that it did not first advance in its application for rehearing or include in its Notice of Appeal. OCC's assignment of error 10 in its application for rehearing (OCC App. p. 168) and II in its Notice of Appeal (OCC App. p. 4) represent the only assignment of error that addresses the carrying costs on the incremental 2001-2008 environmental capital expenditures. In that assignment of error on rehearing and in the Notice of Appeal OCC's sole basis for its contention that the Commission erred was that R.C. 4928.143(B)(2)(a) and (b) do not permit the Companies to recover these costs in their ESPs. There is no mention of R.C. 4928.38 in OCC's application for rehearing or Notice of Appeal, let alone the argument that allowing the Companies to include a provision for recovery of the carrying costs somehow violates R.C. 4928.38. Therefore, based on the Companies' arguments in Proposition of Law No. 1 in this Brief, OCC's second agrument is not properly before the Court.

Even if OCC included this argument in its application for rehearing and Notice of Appeal and, thus, had laid a jurisdictional basis for raising it on appeal, it is without merit. The revenues authorized by the Commission as part of the Companies' ESPs that recover carrying costs on the incremental environmental capital expenditures made during 2001-2008 that the Companies are incurring during their ESP are not "transition

revenues" under R.C. 4928.38. The transition revenues to which R.C. 4928.38 refers are revenues that recoup the transition costs that the Commission determined, in accordance with R.C. 4928.39, to be appropriate for recovery through transition charges approved by the Commission as part of the EDU's electric transition plans for 2001-2005. The transition costs to which those sections refer, and which the authorized transition revenues recoup during the EDU's Market Development Period, are costs incurred prior to 2001. Consequently, R.C. 4928.38's prohibition against an EDU receiving transition revenues after the end of its Market Development Period is not applicable to either the incremental environmental capital expenditures made during 2001-2008 or the carrying costs on those capital expenditures incurred during the ESP.

OCC's third argument in support of its sixth proposition of law, at pages 42-44 of its Brief, is that by allowing the Companies to collect carrying costs on the incremental 2001-2008 environmental investments, the Commission engaged in unauthorized retroactive ratemaking, in violation of R.C. 1.48 and Article II, Section 28 of the Ohio Constitution. As is the case with its second argument, OCC's third argument presents an issue on appeal that OCC did not first advance in either its application for rehearing or Notice of Appeal and should not be considered on appeal. (OCC App. pp. 4, 168). In any event, OCC's argument is meritless. There is nothing retroactive about the rate recovery that the Commission authorized for the ongoing carrying costs on the incremental environmental capital expenditures. The carrying costs are being incurred during the term of the ESP, which is the same period when the rates that recover them are being charged.

Proposition of Law No. 8 (Response to IEU Proposition of Law No. V)

The distribution riders established for the gridSMART and enhanced service reliability program initiatives are lawful and reasonable under R.C. 4928.143 and 4928.02.

IEU challenges the Commission's decision to approve separate riders for CSP's proposed gridSMART[sm] Phase I initiative and the Companies' Enhanced Service Reliability Program initiative. (IEU Brief at 33-36.) Single-issue rate making proposals for distribution infrastructure and modernization are explicitly permitted to be included in an ESP under R.C. 4928.143(B)(2)(h). This provision was enacted as a key part of the legislative package contained within SB 221 to enable an EDU to propose a long-term energy delivery infrastructure modernization plan such as the gridSMART Phase I and Enhanced Service Reliability initiatives. IEU disputes the reasonableness of the Commission in accepting some of the Companies' distribution-related proposals and rejecting others – as if the Commission must make an "all of nothing" decision for separate issues that fall into a larger single topic. The Commission's adoption of the gridSMART and Enhanced Service Reliability initiatives was both lawful, being authorized under R.C. 4928.143(B)(2)(h), and reasonable, being supported by the Commission's record-based findings.

The Order specifically recognized the features and benefits of the proposed gridSMART Phase I initiative, as evidenced by detailed recitations of the pertinent record evidence on pages 34-37 of the Order. The Order proceeds to make specific findings that gridSMART Phase I "will provide CSP with beneficial information as to implementation, equipment preferences, customer expectations, and customer education requirements" and that "these advanced technologies are the foundation for AEP-Ohio providing its

customers the ability to better manage their energy usage and reduce their energy costs." (Order, p. 37; IEU App. p. 197). These evidence recitations and findings are sufficient to explain the Commission's rationale for adopting the gridSMART Phase I initiative.

IEU invokes R.C. 4928.02(D) for the proposition that advanced metering must be cost-effective in some sense – which CSP's gridSMART Phase I initiative is. It is also significant to note that the same policy statement also specifically includes deployment of advanced metering infrastructure as an example of cost-effective demand-side retail electric service. Another portion of that same policy is to "encourage innovation and market access" for supply- and demand-side options such as time-differentiated pricing. Time-differentiated pricing that emulates market prices will be facilitated by deployment of gridSMART Phase I, as was explained through the Companies' testimony. (Co. Ex. 1, p. 6; Co. Supp. p. 18; Tr. III, pp. 304-305; Co. Supp. pp. 2, 3). Further, IEU's argument focuses solely on one policy while the Commission's responsibility is to consider all of the policies within R.C. 4928.02. And the concept of being cost-effective does not mean that a network component (or group of components like the gridSMART initiative) pays for itself but, rather, that it is a reasonable and prudent approach to deploying needed functionalities and features.

Similarly, the Order found that the proposed enhanced vegetation initiative, with Staff's additional recommendations, is a reasonable program that will advance the state policy. The Order approved the Enhanced Service Reliability Program (ESRP) Rider under R.C. 4928.143 (B)(2)(h). (Order, p. 34; IEU App. p 194). Per the Order, only prudently-incurred incremental vegetation management costs will be collected through the ESRP Rider. (*Id.*). The Commission further provided that the ESRP Rider will be

"subject to Commission review and reconciliation on an annual basis." (*Id*). There can be no doubt that the Commission made clear that a proper review of the costs is integral to the ESRP Rider approved in the Order. In short, the Commission's reasoning and record basis for adopting a rider is more than sufficient. The Commission found that is was "satisfied that the Companies have demonstrated in the record that the costs associated with the proposed vegetation initiative, included as part of the proposed three-year ESRP, are incremental to the current Distribution Vegetation Management Program and the costs embedded in distribution rates." (Order, p.33; IEU App. p. 193).

The Commission's decision to adopt the vegetation management initiative was supported by a key finding that customer expectations are better aligned with the Companies' expectations under the enhanced vegetation management initiative, consistent with R.C. 4928.143 (B)(2)(h). (Order, pp. 33-34; IEU App. pp. 193, 194). The Commission also cited Companies' witness Boyd's testimony as record support for finding that increased spending earmarked for specific vegetation management initiatives can reduce tree-caused outages, resulting in better reliability. (Order, p. 33; IEU App. p. 193). Consequently, the Commission had sufficient record basis for adopting the enhanced vegetation management initiative and IEU's attempt to merely re-argue the same determination on appeal should be rejected.

Though IEU does not like the idea of allowing distribution-related cost recovery outside the context of a traditional rate case, the General Assembly has made that choice already. The Commission has exercised that option, using its discretion, by adopting the gridSMART and Enhanced Service Reliability initiatives. The Commission's findings were adequately explained and supported by the record. IEU's challenge in this regard is

another example of inviting the Court to second-guess the Commission's appraisal of the record evidence and merely reveals that IEU disagrees with this aspect of the Commission's decision.

PROPOSITION OF LAW NO. 9 (Response to IEU Proposition of Law No. II)

> **Neither R.C. 4928.141 nor R.C. 4928.143 prevent the Public Utilities Commission of Ohio from approving rates for an Electric Security Plan merely because the Electric Distribution Utility involved has exercised its statutory rights to pursue rehearing and appeal.**

IEU argues that during the statutory rehearing and appeal process the Companies could not reserve the right to withdraw their ESP applications under R.C. 4928.143(C)(2)(a) where the Commission has approved rates under a modified ESP. (IEU Brief at 12-15.) The right to withdraw from ESP modifications not consented to by the utility makes sense given that the ESP under R.C. 4928.143 is a voluntary filing and a utility could instead choose to establish its SSO by filing a Market Rate Offer under R.C. 4928.142. IEU complains that the Companies could not simultaneously reserve the right to withdraw and collect the new rates authorized under the modified ESP during the statutory rehearing and appeal process. In reaching this conclusion, IEU relies primarily upon R.C. 4928.141, which provides that a utility's existing rate plan will stay in place until an SSO is first authorized by the Commission under either R.C. 4928.142 (Market Rate Offer) or R.C. 4928.143 (Electric Security Plan). IEU's arguments are misguided and should be rejected. The right to withdraw an ESP application under R.C. 4928.143 (C) (2) contains no time restriction. And it is only logical that an affected utility would want to wait "until the dust settles" through the rehearing and appeal process, which could result in further changes to the ESP, before permanently deciding not to withdraw.

IEU's reliance on R.C. 4928.141 offers no support for its argument. An SSO was authorized by the Commission. The March 30, 2009 Entry authorizing tariffs conforming to the Order to become effective is clear evidence of this fact.

> The Companies' proposed tariff filing on March 23, 2009, implementing our March 18, 2009, order approving the ESP, with modifications, was reasonable and consistent with that order. Accordingly, the new rates should be implemented with the first billing cycle of April.

(March 30, 2009 Entry at 4; IEU App. p. 98). IEU itself admits that the Commission had approved the new ESP rates when Appellant stated (at 13 of its Brief) that the Companies billed and collected rates and charges "pursuant to the March 18 Order" and when it argued (at 14 of its Brief) that the Commission failed "to prohibit AEP Ohio from taking the benefits of the ESP." Given that the Commission has approved an SSO under R.C. 4928.143, R.C. 4928.141's requirement that a utility must charge its pre-ESP rates until an SSO under R.C. 4928.143 has been authorized by the Commission was not applicable and IEU's position should be rejected.

In its Second Entry on Rehearing, the Commission also found IEU's argument in this regard to be not ripe for consideration. "Given that AEP-Ohio has not filed notice with the Commission that it wishes to withdraw its ESP, as modified and approved, it is unnecessary to address this issue on rehearing." (November 4, 2009 Second Entry on Rehearing at 7; IEU App. p. 244) Because the Companies have not attempted to withdraw and terminate the modified ESP, the Commission was correct in finding that there is no present need to address what would happen if they did attempt to withdraw or terminate the modified ESP. As the Commission did, so should this Court find that IEU's concern is not ripe for consideration. *Ohio Edison Co. v. Pub. Util. Comm.*

(1992), 63 Ohio St. 3d 555 (appellant must show prejudice); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280 (same).

In any case, there is no support anywhere in R.C. Chapter 4928 or elsewhere in Ohio law for IEU's position that the Companies' exercise of their statutory right to file for rehearing and appeal in some manner precludes them from implementing the dictates of the Commission's Opinion and Order. The right to withdraw an ESP application under R.C. 4928.143 (C) (2) contains no time restriction; nor is there any suggestion in that provision that filing for rehearing or waiting for a Commission order on rehearing before determining whether to withdraw an ESP application precludes the electric utility from implementing the rates authorized by the Commission. Surely if the General Assembly had intended to create such a novel process within R.C. Title 49, it would have explicitly so indicated.

Being a procedural matter governed by the integrated rehearing and appeal process under R.C. Chapter 4903, the review process for orders issued under R.C. Chapter 4928 is also governed by R.C. 4903.10, 4903.11, 4903.12, 4903.13, 4903.16 and 4903.17. If a utility seeks rehearing and appeal from a Commission order providing benefits to the utility in the form of increased rates, the utility need not postpone the implementation of the increased rates. *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 259. IEU's argument is essentially another attempt to undercut the implementation of the approved ESP rates during the integrated rehearing and appeal process set forth in R.C. Chapter 4903. This is confirmed by the relief requested (at 15 of IEU's Brief) in advancing this argument: IEU asks the Court to order the Commission to order the Companies to "cease and desist" from charging the

approved ESP rates and require that the pre-ESP rates apply. Such relief is a *non-sequitur* for a merit decision –the Court's merit decision will either affirm or reverse and remand the Commission's decision to be implemented prospectively. Absent a stay of execution by the Commission during the rehearing process or by this Court on appeal under R.C. 4903.16, rate orders of the Commission are implemented during the rehearing and appeal process pursuant to R.C. 4903.15 and 4905.32. The Commission rejected the parties' request for a stay in the proceeding below. (March 30, 2009 Entry at 3; IEU App. p. 97) This Court also denied a request to stay the approved ESP rates on appeal. (February 3, 2010 Entry.)

In sum, there is nothing in R.C. Chapter 4928 to support IEU's notion that an electric utility must exercise a "Hobson's choice" between: (1) foregoing its right to rehearing and registering immediate withdrawal from a modified ESP (even though the Commission's order is not final and the decision could be modified on rehearing or appeal), or (2) pursuing rehearing/appeal and continuing to charge its pre-ESP rates while rehearing applications are filed and considered by the Commission. Rather, the Companies' decision of whether to exercise its right of withdrawal can only be meaningfully exercised after the Commission issues a final order and appeals are decided (including any potential remand proceeding). The Court should not disturb the Commission's intent, and the General Assembly's design, that the approved ESP rates be implemented during the rehearing and appeal process.

PROPOSITION OF LAW NO. 10 (Response to OCC Proposition of Law Nos. 1, 2, and 3)

OCC'S claims are moot and should not be considered, but the rates established by the Electric Security Plan orders below did not violate R.C. 4928.141 or the Court's retroactive rate doctrine.

OCC's arguments under its first three propositions of law are now moot because the Companies are no longer collecting the 2009 rates that are the focus of OCC's arguments. Even leaving aside the mootness, OCC's arguments are still without merit.

A. OCC's arguments concerning 2009 rates are moot.

OCC's argument that the Commission approved a retroactive collection of rates is moot. Its arguments were based on the premise that the rates being collected in calendar year 2009 were improper. Calendar year 2009 is now over and the rates OCC challenges are no longer being collected, so the filed rate doctrine precludes any relief that would reverse collection of the 2009 rates. *Keco Industries, Inc. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St. 254, 258-259. OCC already pursued (unsuccessfully) its opportunities to stay implementation of the 2009 rates. Consequently, at this point, any ruling by the Court on this issue would amount to an advisory opinion. *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.* (2004), 103 Ohio St. 398, 401.

B. The rates established by the Electric Security Plan Orders did not violate R.C. 4928.141 or retroactively supersede the Companies' prior rate plan. [OCC Proposition of Law No. 1]

OCC again argues that the Commission's decision violated R.C. 4928.141. (OCC Brief at 4-10.) Specifically, OCC submits that the Commission's March 18, 2009 adoption of the modified ESP "annulled" its prior decision to continue the Companies' existing rate plan as of January 1, 2009 "by extending the first-authorized rates back to the first three months of 2009." (OCC Brief at 8.) OCC's argument is premised on its

faulty characterization of the modified ESP being unlawful retroactive ratemaking. This same retroactive ratemaking theory has been unsuccessfully raised in attempting to attack the same Commission decision before this Court on multiple occasions.[8]

OCC mischaracterizes the Commission's Order as instituting an improper rate and permitting the Companies to collect retroactive rates for the period of January-March 2009. OCC argues that the retroactive character of the Order is confirmed because the rates for 2009 are designed to collect twelve months of revenue in the remaining nine months of 2009. (OCC Brief at 8.) As a related matter, OCC asserts that the provision in the Order for offsetting the new rates with revenue received by the Companies in the first quarter of 2009 had the effect of "countermanding" the rates in effect during the first three months of 2009. (*Id.*) These characterizations of the Order are inaccurate, ignore the effect of the March 30, 2009 Entry *Nunc Pro Tunc* and gloss over the new statutory standard for establishing rates as part of an ESP.

The Order approving the three-year term for the modified ESPs also provided that the revenues collected during the interim period must be recognized through an offset in calculating the new rates. (Order at 64; IEU App. p. 224) The Commission did not establish retroactive rates but instead allowed for a prospective rate mechanism to implement its decision to approve the ESP for a three-year term. While the Commission's decision may yield a similar financial impact as would have occurred if a decision had been issued by December 28, 2008 (the time for deciding the Companies' case under

[8] Case No. 2009-2022 February 3, 2010 Entry denying Motion to Suspend Commission Orders Approving Rates and Motion to Require Past Collection of Retroactive Rates to be Escrowed; Case No. 2009-1620 October 29, 2009 Entry denying Motion for Stay of Execution based on retroactive rate claim; and Case No. 2009-710 June 17, 2009 Entry dismissing Prohibition Action based on retroactive rate claim.

R.C. 4928.143(C)(1)), that is not the same as making rates retroactive by backbilling individual customers for service already provided and billed for. To further illustrate how the ESP Orders were implemented by the Companies in a prospective fashion, those customers who used service during January through March and then moved or disconnected service were never re-billed for that service after the new ESP rates became effective; likewise, new customers that signed up after the new ESP rates became effective were only billed for subsequent service. The Order and the Companies' tariffs implementing the Order did not result in customers being re-billed for consumption during the first three months of 2009 at the new ESP rates. The rates for the first three months of the year were valid rates that were already collected. The ESP decision established the rate for the remaining nine months. Thus, OCC is wrong in claiming that the ESP rates were retroactively applied prior to the time the first SSO was approved under R.C. 4928.141

OCC's opposition to the concept of recovering twelve months of revenue over nine months is inappropriately engrained in the traditional cost-based ratemaking formula under R.C. Chapter 4909. The Commission's approval of an ESP under SB 221 need not be based on cost and the time period when rates are in effect need not match the costs incurred during that period. The Commission is required to approve, or modify, the ESP if the plan is more favorable in the aggregate as compared to the expected results that would otherwise apply under a Market Rate Option. R.C. 4928.143(B)(2). In contrast, traditional ratemaking is concerned with establishing rates that are cost justified and with matching the expected expenses to the time period of revenues authorized. Reliance on the traditional structure is the fundamental flaw behind OCC's position that the

incrementally higher 2009 rates authorized by the Order amount to retroactive ratemaking.

OCC's perspective ignores the fundamental changes adopted both as part of SB 221 and the prior electric restructuring law, SB 3. The entirety of R.C. Chapter 4909 (including the prescriptive ratemaking formula found in R.C. 4909.15) does not apply when setting ESP rates under R.C. 4928.143. Hence, just because a method for implementing new rates might not be permitted under the traditional ratemaking statutes does not mean that the same method is not permitted as part of an ESP adopted under SB 221. In other words, even if an aspect of the Order could be interpreted as retroactive ratemaking in a traditional sense (which it should not), the provisions within R.C. Chapter 4928 determine whether it is prohibited – not a traditional concept that was developed in the context of R.C. Chapter 4909. The ESP rates established by the Order below did not countermand or annul the interim rates previously established by the Commission.[9]

C. The Commission's approval of the Companies' Electric Security Plan did not constitute retroactive ratemaking under this Court's *Keco* and *Lucas County* decisions. [OCC Proposition of Law No. 2]

OCC's faulty characterization of the Commission's decision as a retroactive ratemaking issue, in its Proposition of Law No. 2, is a misapplication of the facts and the statutory framework. OCC's insinuation that the Commission "improvised around the

[9] In accordance with R.C. 4928.141(A), the Commission approved the continuation of the Companies' prior rate plan until a Standard Service Offer is first authorized under R.C. 4928.142 or 4928.143. (Case No. 08-1302-EL-ATA, December 19, 2008 Finding and Order; Co. App. pp. 27-30). The prior rate plan was subsequently extended through a February 25, 2009 Finding and Order in the same case, such that the prior rate plan continued in effect until the first billing cycle of April 2009 when the ESP rates became effective. (Co. App. pp. 31-33).

law" highlights its continued reliance on the traditional cost-based ratemaking formula under R.C. Chapter 4909 rather than the Commission's authority provided under SB 221. SB 221 changed the regulatory environment by creating ESPs and provided the Commission with a great deal of discretion in setting the rates within those plans. The Court typically respects the Commission's application of statutes, giving due deference to the Commission's application as the agency with substantial expertise and the agency to which the General Assembly has delegated enforcement responsibility. *Weiss*, 90 Ohio St. 3d 15, 17.

The retroactive rate prohibition under *Keco* and *Lucas County Commissioners v. Pub. Util. Comm.*, (1979) 80 Ohio St.3d 344 relied upon by OCC deals with the prohibition against retroactively applying a rate that was implemented and later considered on appeal to be unjust or unreasonable. In the present case the Commission did not find the previous rate unjust and did not set the new ESP rates to provide a correction to a prior improper rate. Rather, the Commission established an initial rate under R.C. Chapter 4928 . The Commission's Entry *Nunc Pro Tunc*, ignored by OCC, clearly explained that "it was not the Commission's intent to allow the Companies to re-bill customers at a higher rate for their first quarter usage" and also made clear that "the new rates would not become effective until the first billing cycle of April." (March 30, 2009 Entry *Nunc Pro Tunc*, at 1-2, IEU App. at 100, 101). This is a key point in understanding the inapplicability of the prohibition against retroactive ratemaking.

The basis of OCC's flawed premise is found in its reliance on a case involving traditional ratemaking under R.C. Chapter 4909, *Lucas County,* as supporting a conclusion in the case at bar that setting a rate under R.C. Chapter 4928 to recover an

annualized revenue level in less than twelve months amounts to unlawful retroactive ratemaking. The *Lucas County* decision actually stands for the proposition that the Commission is not statutorily authorized *to order a refund of, or credit for, charges previously collected* by a public utility. The holding of the case is important because its focus on retroactive ratemaking is in the context of ordering a refund of, or credit for charges unjustly collected in the past. In the case below, the Commission established an entirely new rate without any determination that the previous rate was unjust or unreasonable. In other words, it is not intended to correct problems with the previous rate, but is simply the new rate offering approved by the Commission under the broad parameters of R.C. 4928.143.

The issue in this appeal involves neither a refund of, nor credit for charges previously collected by a utility which have been found to be unlawful or unreasonable. This case involves the Commission's approval of an ESP under R.C. 4928.143. In *Lucas County* the appellant filed a complaint asserting the utility had collected excessive charges due to its collection of rates associated with a terminated pilot program. In other words, it was a direct appeal concerning the *refund of, or credit for charges previously approved by the Commission and collected by the utility* that the Court assumed to be unjust for purposes of reviewing the Commissions dismissal of appellants' complaint. This appeal, as it relates to charges collected from January 2009 through March 2009, does not involve a refund of or credit for charges found to be unlawful or unreasonable. In contrast to *Keco* and *Lucas County*, this appeal challenges the rates approved and in effect from April 2009 through December 2011 – rates that were approved by the Commission and prospectively applied by the Companies. The rates approved by the

Commission did not seek to serve as a refund of, or credit for charges previously collected unjustly. The Commission set the rates necessary to implement its approval of the ESP plan prospectively.

OCC's arguments concerning the General Assembly's authority to issue retroactive laws and its constitutional claims should not be entertained. As discussed above, the Commission's actions were taken pursuant to its broad discretion awarded by the statutes restructuring the electric industry. OCC chooses not to accept the General Assembly's new regulatory system for setting generation rates and therefore attempts to repackage the actions taken by the Commission in an attempt to portray them as violating statutory and regulatory principles. That is simply not the case. Under its statutory charge to oversee all aspects of the industry, the Commission approved an ESP pursuant to R.C. 4928.143 and recognized all of the relevant factors concerning the Companies in ordering the method to implement the Commission's approval.

D. The General Assembly has already provided a system for appeals and stays of Commission orders. [OCC Proposition of Law No. 3]

OCC asserts that the Commission acts unreasonably when it fails to make its orders subject to refund. (OCC Brief, pp. 16-19). OCC lays out all of its efforts to appeal, prohibit, suspend and stay the Commission's actions in this case. The argument results in the accusation that the Commission left customers unprotected when it could simply have ordered rates collected, subject to refund, with little financial harm to the Companies. OCC's assertion is more a complaint about the statutory structure of appeals from the Commission than it is a challenge of how the Commission exercised its discretion.

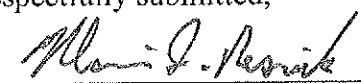
The Court has long recognized that the appellate process is governed by statute and that a utility has no choice but to collect the rates set by the order of the Commission. *City of Columbus v. Pub. Util. Comm.* (1959) 170 Ohio St. 105, citing *Keco*. This process also includes rehearing rights, opportunities for stays from the Commission, stay opportunities before the Court, and the right of direct appeal to the Court.

While the discretion to make an order subject to refund may be available to the Commission, creation of such a refund obligation should be the exception, not the rule. A refund obligation will inhibit the utility from implementing needed programs. Programs such as the enhanced tree trimming program to increase customer reliability and implementation of an advanced metering infrastructure, would be delayed if the funds earmarked for these activities were collected subject to refund. The statutory framework allows the utility to continue serving customers based on the Commission's order pending an appellate review. The statutory process was followed in this case and there is no issue for the Court to rule upon in response to OCC's Proposition of Law 3.

CONCLUSION

Appellants have not sustained their burden of proving that the Commission's factual determinations and legal conclusions should be reversed by the Court. All five Commissioners agreed that the modified ESP is more favorable in the aggregate than the expected results that would otherwise apply under a Market Rate Offer. That is the ultimate test of the ESP and its component parts. The Court should affirm the Commission's Orders being appealed.

Respectfully submitted,



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APPENDIX

Ohio Revised Code

4903.07 Certified copy as evidence.
A transcribed copy of the evidence and proceedings on an investigation, or a specific part thereof, taken by a stenographer appointed by the public utilities commission, certified by such stenographer to be a true and correct transcript of such evidence and proceedings, and carefully compared by him with his original notes, shall be received in evidence as if such stenographer was present and testified to the facts as certified. A copy of such transcript shall be furnished on demand, free of cost, to a party to such investigation, and to all other persons upon payment of a reasonable amount for it.
Effective Date: 01-10-1961

4903.09 Written opinions filed by commission in all contested cases.
In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.
Effective Date: 10-26-1953

4903.10 Application for rehearing.
After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:
(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,
(B) The interests of the applicant were not adequately considered in the proceeding.
Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or

operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.
Effective Date: 09-29-1997

4903.11 Proceeding deemed commenced.
No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.
Effective Date: 09-29-1997

4903.12 Jurisdiction.
No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.
Effective Date: 10-01-1953

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.
Effective Date: 10-01-1953

4903.15 Orders effective immediately - notice.
Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.
Effective Date: 10-25-1961

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.
Effective Date: 10-01-1953

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.
Effective Date: 10-01-1953

4909.05 Report of valuation of property.
As used in this section:
(A) A "lease purchase agreement" is an agreement pursuant to which a public utility leasing property is required to make rental payments for the term of the agreement and

either the utility is granted the right to purchase the property upon the completion of the term of the agreement and upon the payment of an additional fixed sum of money or title to the property vests in the utility upon the making of the final rental payment.
(B) A "leaseback" is the sale or transfer of property by a public utility to another person contemporaneously followed by the leasing of the property to the public utility on a long-term basis. The public utilities commission shall prescribe the form and details of the valuation report of the property of each public utility or railroad in the state. Such report shall include all the kinds and classes of property, with the value of each, owned or held by each public utility or railroad used and useful for the service and convenience of the public. Such report shall contain the following facts in detail:
(C) The original cost of each parcel of land owned in fee and in use at the date certain determined by the commission; and also a statement of the conditions of acquisition, whether by direct purchase, by donation, by exercise of the power of eminent domain, or otherwise;
(D) The actual acquisition cost, not including periodic rental fees, of rights-of-way, trailways, or other land rights held by virtue of easements, leases, or other forms of grants of rights as to usage;
(E) The original cost of all other kinds and classes of property used and useful in the rendition of service to the public. Such original costs of property, other than land owned in fee, shall be the cost, as determined to be reasonable by the commission, to the person that first dedicated the property to the public use and shall be set forth in property accounts and subaccounts as prescribed by the commission. To the extent that the costs of property comprising a coal research and development facility, as defined in section 1555.01 of the Revised Code, or a coal development project, as defined in section 1551.30 of the Revised Code, have been allowed for recovery as Ohio coal research and development costs under section 4905.304 of the Revised Code, none of those costs shall be included as a cost of property under this division.
(F) The cost of property constituting all or part of a project leased to or used by the utility under Chapter 165., 3706., 6121., or 6123. of the Revised Code and not included under division (E) of this section exclusive of any interest directly or indirectly paid by the utility with respect thereto whether or not capitalized;
(G) In the discretion of the commission, the cost to a utility, in an amount determined to be reasonable by the commission, of property constituting all or part of a project leased to the utility under a lease purchase agreement or a leaseback and not included under division (E) of this section exclusive of any interest directly or indirectly paid by the utility with respect thereto whether or not capitalized;
(H) The proper and adequate reserve for depreciation, as determined to be reasonable by the commission;
(I) Any sums of money or property that the company may have received as total or partial defrayal of the cost of its property;
(J) The valuation of the property of the company, which shall be the sum of the amounts contained in the report pursuant to divisions (C), (D), (E), (F), and (G) of this section, less the sum of the amounts contained in the report pursuant to divisions (H) and (I) of this section. The report shall show separately the property used and useful to such public utility or railroad in the furnishing of the service to the public, and the property held by such public utility or railroad for other purposes, and such other items as the commission

considers proper. The commission may require an additional report showing the extent to which the property is used and useful. Such reports shall be filed in the office of the commission for the information of the governor and the general assembly.
Effective Date: 01-01-2001

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.
Effective Date: 11-24-1999

4909.19 Publication - investigation.
Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable. If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers. If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility. When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it. In all proceedings before the commission in which the taking of testimony is required, except

when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.
Effective Date: 01-11-1983

4909.42 Commission fails to issue timely order.
If the proceeding on an application filed with the public utilities commission under section 4909.18 of the Revised Code by any public utility requesting an increase on any rate, joint rate, toll, classification, charge, or rental or requesting a change in a regulation or practice affecting the same has not been concluded and an order entered pursuant to section 4909.19 of the Revised Code at the expiration of two hundred seventy-five days from the date of filing the application, the proposed increase shall go into effect upon the filing of an undertaking by the public utility. The undertaking shall be filed with the commission and shall be payable to the state for the use and benefit of the customers affected by the proposed increase or change. The undertaking must be signed by two of the officers of the utility, under oath, and must contain a promise to refund any amounts collected by the utility over the rate, joint rate, toll, classification, charge, or rental, as determined in the final order of the commission. All refunds shall include interest at the rate stated in section 1343.03 of the Revised Code. The refund shall be in the form of a temporary reduction in rates following the final order of the commission, and shall be accomplished in such manner as shall be prescribed by the commission in its final order. The commission shall exercise continuing and exclusive jurisdiction over such refunds. If the public utilities commission has not entered a final order within five hundred forty-five days from the date of the filing of an application for an increase in rates under section 4909.18 of the Revised Code, a public utility shall have no obligation to make a refund of amounts collected after the five hundred forty-fifth day which exceed the amounts authorized by the commission's final order. Nothing in this section shall be construed to mitigate any duty of the commission to issue a final order under section 4909.19 of the Revised Code.
Effective Date: 07-06-2001

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.
Effective Date: 2008 SB221 07-31-2008

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.
Effective Date: 2008 SB221 07-31-2008; 2008 HB562 09-22-2008

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.
Effective Date: 2008 SB221 07-31-2008

4928.144 Phase-in of electric distribution utility rate or price.
The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.
Effective Date: 2008 SB221 07-31-2008

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.
Effective Date: 10-05-1999

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.
Effective Date: 10-05-1999

PRIOR VERSION 4928.14 effective 10-05-99 through (2008 SB221) 07-31-2008
(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code

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

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

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met.

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

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

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

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

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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.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

4903.17 Order in case of stay.

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

Effective Date: 10-01-1953

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets.	)	Case No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	Case No. 08-918-EL-SSO

ENTRY

The attorney examiner finds:

(1) Columbus Southern Power Company and Ohio Power Company (AEP) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On July 31, 2008, AEP filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for an electric security plan in accordance with Section 4928.143, Revised Code.

(3) The attorney examiner notes that AEP's application was filed on the same day as applications for SSOs filed by Duke Energy Ohio, Inc. (Duke), and Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (FirstEnergy). As required, each applicant served its SSO application upon the parties to its last rate stabilization plan proceeding. A review of these service lists indicates numerous common intervenors to the applicants' rate stabilization plan proceedings. It may be assumed from this review that there will be similar common intervenors to the SSO proceedings. The SSO applications also include alternative energy, renewable energy, energy efficiency and economic development provisions which may result in intervention by

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other interested parties. Therefore, in order to avoid undue burdens and prejudice to these potential common intervenors, the attorney examiners have staggered the hearings in the three SSO proceedings. The FirstEnergy proceeding will be the first hearing because it appears from its application that FirstEnergy no longer owns any generation capacity and it may be necessary for FirstEnergy to arrange for such capacity within a reasonable period prior to January 1, 2009, in the event that the Commission approves its electric security plan. Due to staff availability and schedules, Duke will be the next hearing on the schedule. Therefore, AEP will be the third hearing scheduled. This schedule, if maintained, will allow the Commission to issue an order on all three SSO applications within the 150-day time period required by Section 4928.143, Revised Code.

(4) Accordingly, the following schedule is established for this proceeding:

(a) Motions to intervene should be filed by September 4, 2008.

(b) A technical conference should be scheduled to allow interested persons the opportunity to better understand AEP's application. The conference will be held on August 19, 2008, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-E, Columbus, Ohio.

(c) Testimony on behalf of intervenors should be filed by October 17, 2008.

(d) Testimony on behalf of the Commission staff should be filed by October 24, 2008.

(e) Discovery requests, except for notices of deposition, should be served by October 21, 2008.

(f) The evidentiary hearing shall commence on November 3, 2008, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-C, 180 E. Broad Street, Columbus, Ohio.

(5) Local public hearings will be scheduled, and publication of notice required, by subsequent entry.

(6) In light of the time frame for preparation for the hearing in this matter, the examiner requires that, in the event that any motion is made in this proceeding, any memoranda contra shall be required to be filed within five business days after the service of such motion, and any reply memorandum within three business days after the service of a memorandum contra. Paragraph (B) of Rule 4901-1-07, O.A.C., which permits three additional days to take action if service is made by mail, will not apply. Parties are encouraged to take advantage of paragraph (C) of Rule 4901-1-05, O.A.C., which provides that service of pleadings may occur by facsimile transmission or electronic message. In addition, response time for discovery should be shortened to 10 days. Discovery requests and replies shall be served by hand delivery, e-mail or facsimile (unless otherwise agreed by the parties). An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him/her that a request will be forthcoming (unless otherwise agreed by the parties). To the extent that a party has difficulty responding to a particular discovery request within the 10-day period, counsel for the parties should discuss the problem and work out a mutually satisfactory solution.

It is, therefore,

ORDERED, That the procedural schedule for this proceeding be adopted as set forth in Finding (4). It is, further,

ORDERED, That a technical conference will be held on August 19, 2008, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-E, Columbus, Ohio. It is, further,

ORDERED, That the evidentiary hearing in this proceeding commence on November 3, 2008, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-C, 180 E. Broad Street, Columbus, Ohio. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Kimberly W. Bojko
Attorney Examiner

RRG/ct

Entered in the Journal
AUG 5 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	Case No. 08-918-EL-SSO

ENTRY

The attorney examiner finds:

(1) On July 31, 2008, Columbus Southern Power Company and Ohio Power Company (AEP-Ohio) each filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. Each application is for an electric security plan in accordance with Section 4928.143, Revised Code.

(2) By entry issued August 5, 2008, the attorney examiner established a procedural schedule for these proceedings.

(3) On August 28, 2008, the office of the Ohio Consumers' Counsel, the Ohio Environmental Council, The Sierra Club Ohio Chapter and Ohio Partners for Affordable Energy jointly filed a motion for a continuance of the hearing and extensions of time. The movants request a 60-day continuance of the hearing date and other deadlines established in the proceedings. In the alternative, the movants request a 15-day continuance and extension of the schedule.

(4) On September 2, 2008, AEP-Ohio filed a memorandum contra the joint motion to continue the hearing and the extensions.

(5) The examiner finds that it is appropriate to allow the parties additional time to prepare for the hearing in these proceedings. However, in light of the statutory deadline for resolution of

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these issues, the examiner will only grant a continuance of 14 days. Therefore, the schedule for the proceedings shall now be as follows:

(a) Testimony on behalf of intervenors should be filed by October 31, 2008.

(b) Discovery requests, except for notices of deposition, should be served by November 3, 2008.

(c) Testimony on behalf of the Commission staff should be filed by November 7, 2008.

(d) A procedural conference shall be scheduled for November 10, 2008, at 10:00 a.m., at the office of the Commission, in Hearing Room 11-C, 180 East Broad Street, Columbus, Ohio.

(e) The evidentiary hearing shall commence on November 17, 2008, at 10:00 a.m., at the office of the Commission, Hearing Room 11-C, 180 East Broad Street, Columbus, Ohio.

(6) Local hearings will be scheduled, and publication of notice required, by subsequent examiner entry.

(7) It has come to the attention of the examiner that various pleadings in these proceedings have been submitted to the Commission's docketing division in electronic format. Rule 4901-1-02, Ohio Administrative Code, only allows for the filing of hard copies of pleadings or, under specified circumstances, by facsimile filings followed by hard copies. Electronic filing has been specifically authorized by Commission entry in limited situations. Electronic filing has not been authorized in these proceedings. Therefore, such filings do not comply with the Commission's rules and should not have been accepted. However, in order to avoid any inequitable effect of this error on any party, the examiner will allow parties who have filed pleadings electronically to refile those same pleadings pursuant to the standard rules. If a party refiles such a document by no later than September 12, 2008, then such document will be deemed to have been received on the date when the electronic copy was initially accepted by the docketing division.

(8) All parties are reminded that 20 copies of all pleadings should be filed with the docketing division. The parties are encouraged to arrange for electronic service among themselves. If electronic service is agreed to, the parties are also directed to provide electronic copies to the examiners.

It is, therefore,

ORDERED, That the evidentiary hearing in these proceedings be continued until November 17, 2008, and that the procedural schedule be extended as set forth in finding (5). It is, further,

ORDERED, That the parties comply with the filing and service requirements set forth in findings (7) and (8). It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See

By: Greta See
Attorney Examiner

JRJ/vrm

Entered in the Journal
SEP 05 2008

Reneé J. Jenkins

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders.	)))))	Case No. 08-1302-EL-ATA

FINDING AND ORDER

The Commission finds:

(1) Columbus Southern Power Company (CSP) and Ohio Power (OP) (collectively, the Companies) are Ohio corporations engaged in the business of providing electric service to customers in Ohio and, as such, are public utilities as defined by Sections 4905.02 and 4905.03(A)(4), Revised Code.

(2) On December 15, 2008, CSP and OP filed an application to modify the expiration dates on certain rate schedules and riders in order to reflect the continuation of current standard service offer schedules until new schedules are approved by the Commission pursuant to the Companies' applications to establish an electric security plan currently pending in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO.[1] The Companies state that, without a Commission order authorizing new rates for standard service offer generation service before the end of the year, the modification is necessary given that the current standard service offer schedules and riders are scheduled to expire on December 30, 2008.

(3) The application requests that the modified standard service offer schedules remain in effect until the Companies file new standard service offer schedules upon approval of the Commission of its electric security plan, or until the last billing cycle of January 2009, whichever occurs first in time.

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[1] *In the Matter of the Application of Columbus Southern Power Co. for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO; *In the Matter of the Application of Ohio Power Co. for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO.

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The Companies explain that the new expiration date will apply to all standard service offer rate schedules; however, certain tariff schedules will nevertheless expire at the end of 2008. A complete list of the affected tariff schedules is attached to the application as Attachment A, which identifies the proposed modification to each schedule.

(4) The Companies aver that the modification to the expiration dates will not result in changing any rates in their current rate schedules.

(5) Section 4928.141(A), Revised Code, requires an electric utility to apply to the Commission to establish the standard service offer it intends to provide to consumers beginning January 1, 2009. The standard service offer may be established in accordance with Sections 4928.142 or 4928.143, Revised Code. Section 4928.141(A), Revised Code, further provides 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 * * *." "Rate plan" is defined in Section 4928.01(A)(33), Revised Code, as "the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly." Amended Substitute Senate Bill 221 became effective on July 31, 2008.

(6) Pursuant to Section 4928.141(A), Revised Code, the Commission finds that until a standard service offer is first approved by the Commission in accordance with Section 4928.142 or Section 4928.143, Revised Code, the electric utility's standard service offer in effect on July 31, 2008 shall continue. Therefore, the Companies' standard service offer rates contained in the tariff schedules in effect on July 31, 2008 should continue from January 1, 2009 until such time as the Commission approves new standard service offer rates in accordance with Section 4928.142 or Section 4928.143.

(7) Given the scheduled expiration of the Companies' tariffs, the Commission finds that the Companies' request to modify the expiration date of the tariffs to continue the Companies' current standard service offer schedules, until new schedules

are approved by the Commission pursuant to the Companies' pending electric security plan applications, is consistent with Section 4928.141(A), Revised Code, and should be approved.

(8) *The Commission notes that it will endeavor to complete its* review of the pending electric security plan applications as expeditiously as possible; however, given the briefing schedule established in the proceeding,[2] the Commission believes that it would be more reasonable to include in the tariff schedules the last billing cycle of February 2009 as the new expiration date. Accordingly, the modified standard service offer schedules will remain in effect until the Companies file new standard service offer schedules upon the Commission's approval of its electric security plan, or until the last billing cycle of February 2009, whichever date occurs first.

(9) The Commission finds, as the Companies allege, that the application is not for an increase in any rate, joint rate, toll, classification, charge, or rental and does not appear to be unjust or unreasonable. Therefore, the Commission finds that it is unnecessary to hold a hearing in this matter.

(10) The Commission finds that the Companies should file revised tariffs consistent with this order by December 23, 2008. In light of the short timeframe remaining before these tariffs by necessity must go into effect, the Commission finds that the revised tariffs shall be approved effective with the commencement of the Companies' January 2009 billing cycle, contingent upon final review and approval by the Commission.

It is, therefore,

ORDERED, That the application of CSP and OP to modify the expiration dates on certain rate schedules and riders in order to reflect the continuation of current standard service offer schedules is approved as set forth in Findings (7) and (8). It is, further,

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[2] Initial briefs are due on December 30, 2008 and reply briefs are due on January 14, 2009. (Tr. Vol. XIV at 269.)

ORDERED, That CSP and OP be authorized to file in final form four complete copies of tariffs consistent with this finding and order, and to cancel and withdraw its superseded tariffs. CSP and OP shall file one copy in this case docket and one copy in each Company's TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to Staff. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than both the commencement of the Companies' January 2009 billing cycle, and the date upon which four complete copies of final tariffs are filed with the Commission. The new tariffs shall be effective for services rendered on or after the effective date. It is, further,

ORDERED, That nothing in this Entry shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this entry be served upon CSP and OP.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

KWB:ct

Entered in the Journal

DEC 19 2008

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders.	)))))	Case No. 08-1302-EL-ATA

FINDING AND ORDER

The Commission finds:

(1) Columbus Southern Power Company and Ohio Power (collectively, the Companies) are Ohio corporations engaged in the business of providing electric service to customers in Ohio and, as such, are public utilities as defined by Sections 4905.02 and 4905.03(A)(4), Revised Code.

(2) On December 15, 2008, the Companies filed an application to modify the expiration dates on certain rate schedules and riders in order to reflect the continuation of the standard service offer schedules until new schedules are approved by the Commission pursuant to the Companies' applications to establish an electric security plan, currently pending in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO.[1] The Companies stated that the modification was necessary given that the standard service offer schedules and riders were scheduled to expire on December 30, 2008. In their application, the Companies also explained that the modification to the expiration dates would not result in changing any rates in their current rate schedules.

(3) On December 19, 2008, the Commission issued a finding and order approving the Companies' application to modify the expiration dates on certain rate schedules and riders in order to reflect the continuation of the standard service offer schedules. Specifically, the Commission found that, pursuant to Section 4928.141(A), Revised Code, until a standard service offer is first approved by the Commission in accordance with Section

[1] *In the Matter of the Application of Columbus Southern Power Co. for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO; *In the Matter of the Application of Ohio Power Co. for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO.

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4928.142 or 4928.143, Revised Code, the electric utility's standard service offer in effect on July 31, 2008, shall continue. As such, we concluded that the Companies' standard service offer rates and tariff schedules in effect on July 31, 2008, should continue from January 1, 2009, until such time as we approve new standard service offer rates in accordance with Section 4928.142 or 4928.143, Revised Code.

(4) In the December 19, 2008, order, the Commission also stated that it would endeavor to complete its review of the pending electric security plan applications as expeditiously as possible, and included in the tariff schedules the last billing cycle of February 2009 as the new expiration date. Despite our efforts to complete our review of the pending applications prior to the last billing cycle of February 2009, we believe that additional time is necessary for consideration of the matters addressed therein. Therefore, the Commission finds that the current standard service offer schedules should be extended.

(5) Accordingly, the modified standard service offer schedules will remain in effect until the Companies file new standard service offer schedules upon approval of the Commission of its electric security plan, or until the last billing cycle of March 2009, whichever date comes first.

(6) The Commission directs the Companies to file revised tariffs consistent with this order by February 28, 2009. In light of the short timeframe remaining before these tariffs by necessity must go into effect, the Commission finds that the revised tariffs shall be approved effective with the commencement of the Companies' March 2009 billing cycle, contingent upon final review by the Commission.

It is, therefore,

ORDERED, That the Companies modify the expiration dates on certain rate schedules and riders in order to reflect the continuation of the standard service offer schedules as set forth in Findings (5) and (6). It is, further,

ORDERED, That the Companies be authorized to file in final form four complete copies of tariffs consistent with this finding and order, and to cancel and withdraw its superseded tariffs. The Companies shall file one copy in this case docket and one copy in

each Company's TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to Staff.

ORDERED, That the effective date of the new tariffs shall be a date not earlier than both the commencement of the Companies' March 2009 billing cycle, and the date upon which four complete copies of final tariffs are filed with the Commission. The new tariffs shall be effective for services rendered on or after the effective date.

ORDERED, That nothing in this finding and order shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

KWB:ct

Entered in the Journal

FEB 25 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase.	)))))	Case No. 05-276-EL-AIR

OPINION AND ORDER

The Commission, considering the above-entitled application, hereby issues its opinion and order in this matter.

APPEARANCES:

Faruki, Ireland & Cox, P.L.L., by Charles J. Faruki and Jeffrey S. Sharkey, 500 Courthouse Plaza, S.W., 10 Ludlow Street, Dayton, Ohio 45402, on behalf of Dayton Power and Light Company.

Jim Petro, Attorney General of the State of Ohio, by Duane W. Luckey, Senior Deputy Attorney General, by Werner L. Margard, III, Steven A. Reilly and Steven L. Beeler, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small and Ann M. Hotz, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential consumers of Dayton Power and Light Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister and Daniel J. Neilsen, 21 East State Street, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Cargill, Inc.

David C. Rinebolt, 231 W. Lima Street, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, by M. Howard Petricoff, 52 East Gay Street, Columbus, Ohio 43215, on behalf of Honda of America Mfg., Inc.

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representative of each customer class signs the proposed stipulation (DP&L reply at 2, *quoting Dominion Retail v. Dayton Power and Light, supra,* at 17).

The Commission has previously held that it will not require any individual party's approval of stipulations in order to meet the first criterion of our three-prong standard of review. *Dominion Retail v. Dayton Power and Light,* at 18. In considering whether there was serious bargaining among capable and knowledgeable parties, the Commission evaluates the level of negotiations that appear to have occurred and takes notice of the experience and sophistication of the negotiating parties. In this case, it is clear from the record that all parties participated in negotiations. Neither OCC nor OPAE argue that they were kept away from the negotiating table. The signatory parties all routinely participate in complex cases before the Commission and are all represented by counsel who practice before the Commission on a regular basis. Moreover, although no parties representing residential consumers signed the stipulation, the signatory parties do represent a diversity of interests including the utility and industrial and commercial consumers as well as a competitive retail electric service provider. Therefore, the Commission finds that the first prong of the test is met by the stipulation.

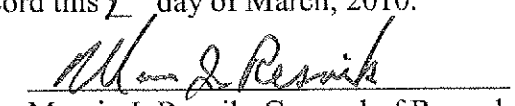
(2) Does the settlement, as a package, benefit ratepayers and the public interest?

DP&L argues that the stipulation provides below-market prices and that the stipulation protects its standard service offer customers from volatility and rate shock (DP&L brief at 7-9). DP&L argues that there is no dispute that the stipulation will provide residential customers $262 million in savings versus projected market rates from 2006 through 2010 (*id.* at 8).

Moreover, DP&L states that the stipulation will promote competition. According to DP&L, conducting Voluntary Enrollment Procedure (VEP) one additional time in 2007 will promote competition (DP&L brief at 9). Moreover, the fact that the increases in the EIR for 2009 and 2010 are avoidable will increase the shopping credits and promote competition. Finally, DP&L argues that shopping customers impose costs on DP&L because of its statutory provider of last resort obligation. DP&L argues that the value of these costs substantially exceeds the unavoidable portions of the rate stabilization charge and the EIR. In support of this, DP&L cites the testimony of its witness Strunk, who testified that the right of switching customers to return to DP&L's MBSSO is equivalent to granting customers a financial option to purchase generation from DP&L at a fixed price (*id.* at 10-13; DP&L Ex. 13C at 2-4). According to DP&L, Mr. Strunk's testimony established that the value of this option provided to switching customers substantially exceeds the price of the unavoidable portions of the rate stabilization charge and the EIR (DP&L brief at 13; DP&L Ex. 13C at 6). Therefore, DP&L argues that the stipulation promotes competition because the stipulation does not require switching customers to pay full value for their ability to return to the MBSSO.

PROOF OF SERVICE

I certify that Intervening Appellees Columbus Southern Power Company's and Ohio Power Company's Merit Brief and Appendix was served by First Class U.S. Mail upon counsel identified below for all parties of record this 5th day of March, 2010.



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