ORIGINAL

IN THE SUPREME COURT 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 Generation Assets, 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.	Supreme Court Case No. 09-2022 Appeal from the Public Utilities Commission of Ohio Case Nos. 08-917-EL-SSO and 08-918-EL-SSO
(The Office of the Ohio Consumers' Counsel v The Public Utilities Commission of Ohio)	

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REPLY BRIEF AND SECOND APPENDIX OF APPELLANT THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel

Maureen R. Grady, Counsel of Record
(Reg. No. 0020847)
Terry L. Etter
(Reg. No.0067445)
Richard C. Reese
(Reg. No. 0076211)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 - Telephone
(614) 466-9475 - Facsimile
grady@occ.state.oh.us
etter@occ.state.oh.us
reese@occ.state.oh.us

Richard Cordray
(Reg. No. 0038034)
Attorney General of Ohio

Duane W. Luckey
(Reg. No. 0023557)
Chief, Public Utilities Section
Werner L. Margard III
(Reg. No. 0024858)
Thomas G. Lindgren
(Reg. No. 0039210)
John H. Jones
(Reg. No. 0051913)
Assistant Attorneys General

Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 644-8698 - Telephone
(614) 644-8764 - Facsimile

Attorneys for Appellant
Office of the Ohio Consumers' Counsel

Samuel C. Randazzo, Counsel of Record
(Reg. No. 0016386)
Lisa G. McAlister
(Reg. No. 0075043)
Joseph M. Clark
(Reg. No. 0080711)

McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Attorneys for Appellant
Industrial Energy Users-Ohio

duane.luckey@puc.state.oh.us
werner.margard@puc.state.oh.us
thomas.lindgren@puc.state.oh.us
john.jones@puc.state.oh.us

Attorneys for Appellee
Public Utilities Commission of Ohio

Marvin I. Resnik Counsel of Record
(Reg. No. 0005695)
Counsel of Record
Kevin F. Duffy
(Reg. No. 0005867)
Steven T. Nourse
(Reg. No. 0046705)
Matthew J. Satterwhite
(Reg. No. 0071972)

American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1606
Facsimile: (614) 716-2950
miresnik@aep.com
stnourse@aep.com
mjsatterwhite@aep.com
kfduffy@aep.com

Daniel R. Conway
(Reg. No. 0023058)

Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2270
Facsimile: (614) 227-2100
dconway@porterwright.com

Attorneys for Intervening Appellee
Columbus Southern Power Company
and Ohio Power Company

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I. ARGUMENT

Proposition of Law 1: The Public Utilities Commission of Ohio is prohibited by R.C. 4928.141(A) from authorizing a public utility to charge customers anything other than existing rates if no first-authorized standard service offer has been approved by January 1, 2009.

The PUCO argues that it did not "replace," "retract," or "countermand" the continued rates. (PUCO Brief at 7-9). Rather it approved "higher prospective incremental rates, properly applying the new ratemaking standard." (PUCO Brief at 7). AEP concludes that OCC's statutory arguments must fail because they are premised on a faulty characterization of the modified ESP being unlawful retroactive ratemaking. (AEP Brief at 43).

A. The PUCO's ESP order allowed AEP to collect first-authorized rates from customers starting January 1, 2009, despite the fact that continued rates were in effect and first-authorized rates were not approved until March 18, 2009.

R.C. 4928.141(A) (OCC Appx. 703) precludes anything but continued rates from being charged if there is no first-authorized SSO. Thus, the PUCO could not replace or retract the continued rates that were lawfully charged customers in January through March 2009. The PUCO settled upon an indirect approach that had the very same effect. That artifice was the term of the ESP. By reaching back and starting the term of the ESP plan in January 2009 the PUCO enabled the company to collect $63 million in revenues that it would have collected if first-authorized rates had been in place. The PUCO circumvented the R.C. 4928.141 restrictions, in the name of alleged fairness.[1] Its actions are unlawful, and should be overturned.

[1] The Commission described the offset as "an adjustment that the Commission believed to be *fair* in calculating the incrementally higher revenue authorized for 2009, in light of the timing of the Commission's decision on the ESP and the need for an interim plan." (OCC Appx. 138) (emphasis added). But the General Assembly already decided what was fair in enacting the statute—the statute upon which the PUCO has now engrafted its own view of fairness.

B. While the General Assembly allowed incremental recovery of costs for utilities whose rate plans extend beyond December 31, 2008, it did not do so for utilities with rate plans that expire December 31, 2008.

S.B. 221 (OCC Appx. 242) establishes a framework to provide customers with electric generation services. The PUCO described the framework, conveyed under Chapter 4928 as a "roadmap of regulation in which specific provisions were put forth to advance state polices of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges."[2]

Under the General Assembly's roadmap there is no provision to reconcile the Companies' continued rates charged to customers with later, first-authorized rates. The PUCO Staff acknowledged there is no reconciliation in its brief, and argued that there was no guarantee that the Companies would be made whole. (R. 161 at 2). Had the General Assembly intended a reconciliation, it would have fashioned one. It did not.

What the General Assembly did recognize is limited circumstances under which certain utilities could seek incremental recovery of costs incurred when continued rates are in effect, prior to first-authorized rates. This can be seen in R.C. 4928.143(D). (OCC Appx. 707). That provision pertains to an electric distribution utility ("EDU") whose rate plan, that is in effect on July 31, 2008, extends beyond December 31, 2008. For such an EDU, the rate plan continues until the date it is scheduled to expire. For such an EDU, the General Assembly allowed the utility to request "incremental recovery" of costs incurred during the continued rate period.[3] But AEP is not such an EDU whose rate plan, that was in effect on July 31, 2008, extends beyond

[2] *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service,* Case No. 08-936-EL-SSO, Opinion and Order at 5 (Nov. 25, 2008) ("*FirstEnergy MRO* Order"). (OCC Second Appx. 1).

[3] See R.C. 4928.143(D). (OCC Appx. 707).

December 31, 2008.[4] Since AEP is not such an EDU, the PUCO cannot lawfully authorize AEP to have incremental recovery of costs from customers.

That the General Assembly provided limited conditions under which there may be incremental cost recovery from customers reflects the legislative intent to otherwise disallow incremental cost recovery under other conditions not specified. The legislative canon expressio unius est exclusio alterius applies--the inclusion of one thing implies exclusion of the other.[5] The inclusion of authority to allow incremental cost recovery for utilities whose rate plans extend beyond December 31, 2008, and not to other utilities whose rate plans did not extend beyond December 31, 2008, was intended. The General Assembly, in its wisdom, enacted no provision for incremental cost recovery by utilities like AEP whose rate plan did not extend beyond December 31, 2008. The PUCO thus, had no authority to allow the Companies incremental cost recovery. It violated the law.

Proposition of Law 2: The Public Utilities Commission of Ohio is not statutorily authorized, in setting first-authorized rates under R.C. 4928.143, to charge customers for revenues foregone under continued rates.

Much time and energy is spent by both AEP and the PUCO protesting that the PUCO's actions are not retroactive ratemaking. Additionally, PUCO and AEP argue that the issue is moot because the $63 million has been collected. (PUCO Brief at 9; AEP Brief at 43).

The PUCO argues that it is prospectively adjusting rates and thus, there is no retroactive ratemaking. In a similar vein, the Companies argue that they did not back-bill customers, which

[4] The rate plans of the Companies were scheduled to expire on December 30, 2008. The Companies received PUCO approval to modify the expiration date of the tariffs to continue the Companies' rates until new schedules with first-authorized rates were approved. See (OCC Appx. at 543-549). The only EDU whose rate plan extended beyond December 31, 2008 was DP&L.

[5] See *Crawford –Cole v. Lucas Co. Dept. of Jobs & Family Services*, 121 Ohio St.3d 560, 566, 2009-Ohio-1355, 906 N.E.2d 409, ¶42.

they deem to be necessary for the action to be "retroactive. The PUCO also latches onto decisions by this Court where no retroactive ratemaking was found.

AEP asserts that OCC's opposition to recovering 12 months of revenue over 9 months is engrained in traditional cost-based ratemaking under R.C. Chapter 4909. (AEP Brief at 45-46). The only relevant standard is the "more favorable in the aggregate" standard of R.C. 4928.143(C)(1) (OCC Appx. 707), it opines. OCC's reliance on traditional ratemaking is a fundamental flaw, espouses AEP. The PUCO also picks up on this theme and argues that prior case law (*Lucas County Comm'rs. v. Pub. Util. Comm.*)[6] is inapplicable because the ESP standard is not like the standards under R.C. Chapter 4909. (PUCO Brief at 12-13).

A. The Commission engaged in retroactive ratemaking.

1. Retroactive ratemaking can be found where there are prospective adjustments and no back-billing.

To assist the Court in the sorting though the various arguments, OCC provides the following vignette: Mr. Smith, an incurable romantic, buys a dozen red roses from CSP Florist every month for his wife. In 2009, for the first three months, Mr. Smith paid $30 each time he purchased roses. In April 2009, Mr. Smith visits CSP Florist. When Mr. Smith pulls out $30 for the roses, the clerk advises him that the price has increased to $40 a dozen starting in April. Mr. Smith, somewhat reluctantly, fishes another $10 from his pocket. The clerk then explains that the recently approved $10 increase was made effective back to January 2009, and as a result, Mr. Smith owes an additional $30 for the roses he purchased in the first three months of the year ($10 increase times 3 monthly purchases). By now Mr. Smith is frowning and makes no move to retrieve additional money. But the clerk then says to Mr. Smith that there is some good news. The clerk informs Mr. Smith that he will not be back-billed for the $30 he owes for his January

[6] *Lucas County Comm'rs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 686 N.E.2d 501.

through March purchases. Rather, the clerk informs that CSP Florist will bill Mr. Smith for the additional $30 over the next nine months of 2009. So today's charge will be $40 plus $3.33 (the pro rata portion of the $30 owed, divided over nine months). Mr. Smith, dumbfounded, stuffs his bills back into his pocket, and leaves CSP Florist.

In this analogy, CSP seeks to collect from Mr. Smith the increased price as if the increased rate ($40/per dozen) had been in effect since January. The increased price ($40 per dozen) effectively replaces the $30 price paid by Mr. Smith during January through March. CSP Florist essentially retracted the $30 per dozen price paid during January through March and substituted it with the $40 price. CSP Florist sought to collect the incrementally higher price for the roses ($40/dozen) during the remainder of the year. The floral pricing plan to recoup the incrementally higher price was presented as if prospective--it will recoup the incrementally higher rose prices for the first three months of 2009 during the subsequent nine months.

Was the $10 per dozen price increase retroactive? There was no rebilling. And price adjustments were proposed on a going forward basis. The reality is, unfortunately for Mr. Smith and for other customers of CSP, that the increase was retroactive, in spite of the way it was packaged. Like Mr. Smith, AEP customers were obliged to pay established rates during January through March 2009. Customers paid those rates, as did Mr. Smith, when he walked out of the florist in January, February, and March. Both Mr. Smith and the customers of the Companies had vested rights in paying no more than the published and approved rates. The retroactive application of the increased rates undermines those vested rights by imposing new obligations on customers to pay increased rates to compensate the Companies for the lower revenues they received under rates in effect January through March 2009. Customers are now saddled with new obligations to pay $63 million in rate increases, tacked onto future rates, to make the

Companies "whole." This is retroactive ratemaking, notwithstanding the fact that it occurred without back-billing and on a prospective basis.

2. The case authority cited by the PUCO where the Court found no retroactive ratemaking is factually distinguishable.

The PUCO argues that certain matters are not "ratemaking" and thus cannot be "retroactive ratemaking," according to Court precedent. (PUCO Brief at 10). The PUCO cites to the cases of *River Gas Co. v. Pub. Util. Comm.*[7] and *Consumers Counsel v. Pub. Util. Comm.*[8] as authority for finding no ratemaking. (PUCO Brief at 10). The PUCO implies that S.B. 221 does not involve ratemaking, and thus cannot involve retroactive ratemaking.

The PUCO's arguments fail to recognize that the $63 million adjustment here is not premised upon a fuel cost adjustment (*River Gas)* or an accounting order related to post-in-service AFUDC (*Consumers' Counsel*). While the Court found such cases did not amount to ratemaking, there is no correlation between those cases and the case at hand.

Not only is the adjustment vastly different, the procedure employed by the PUCO to review the adjustment is dissimilar. In *River Gas* the fuel cost adjustment clause allowed the utility to pass variable fuel costs directly through to customers without prior approval of the Commission and independently of the formal ratemaking processes. In *Consumers' Counsel,* the case was derived from an application seeking accounting deferral and was approved without need for a hearing.

Though S.B. 221 establishes rates differently than in the past, the process is still founded upon prior Commission approval, accompanied by hearing, notice, and other provisions.[9]

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[7] *River Gas Co. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 509, 23 O.O.3d 443, 433 N.E.2d 568.
[8] *Consumers' Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St.3d 377, 6 OBR 428, 453 N.E.2d 673.
[9] See R.C. 4928.141(B). (OCC Appx. 703).

Moreover, under the Companies' ESP application, rates are established for a standard service offer proposal.

While the PUCO also argues that the $63 million adjustment could be part of the S.B. 221 "automatic or pre-determined rate adjustments" found in R.C. 4938.143(B)(2), it is not. The $63 million adjustment is derived solely from the difference between first-authorized and continued rate levels—it is not attributable to a simple variable fuel cost, an accounting deferral, or an automatic or pre-determined rate adjustment. There is no such provision found in S.B. 221, or elsewhere, that permits the $63 million adjustment. The PUCO Staff acknowleged there is no provision permitting the $63 million adjustment in its post-hearing brief. (R. 161 at 2).

B. There are no provisions in S.B. 221 that expressly allow ESP rates to be set on anything other than a prospective basis.

The PUCO and the Company would have this Court believe that S.B. 221 expressly nullifies the fundamental tenet of ratemaking that prohibits retroactive ratemaking. They argue that the only standard the Court must be concerned with is whether the ESP plan is more favorable in the aggregate as compared to the expected results that would otherwise apply under a market rate option.[10] Thus, AEP argues, just because a method for implementing new rates might not be permitted under traditional ratemaking does not mean that the same method is not permitted as part of an ESP. (AEP Brief at 45).

While the more favorable in the aggregate standard applies to an EDU's ESP plan, it nonetheless cannot be applied in a vacuum. A finding that the ESP plan is more favorable in the aggregate does not automatically nullify or trump every other section of Title 49 or precedent. It is a standard of review, but it does not abrogate the law and what is lawful. The "pricing and other terms and conditions" must be individually examined in light of the policy objectives of

[10] See R.C. 4928.143(C)(1). (OCC Appx. 707).

R.C. 4928.02 (OCC Appx. 695).[11] The statutes must also be applied in a constitutionally permissible way, consistent with the statutory construction rules of Ohio, including R.C. 1.48. (OCC Appx. 683).

In Ohio, R.C. 1.48 works in conjunction with Article II, Section 28 of the Ohio Constitution. (OCC Appx. 711). Under R.C. 1.48, statutes in Ohio are presumed to be prospective, unless expressly made retroactive. Article II, Section 28 of the Ohio Constitution precludes the General Assembly from passing retroactive laws. In reviewing statutes that are applied retroactively, the Court has acknowledged that it must first focus on whether the General Assembly expressly made the statute retroactive. This requires a clear proclamation that the statute is retroactive. S.B. 221 has no such proclamation.[12]

While S.B. 221 changes how rates are developed and implemented by electric distribution utilities, it does not expressly permit retroactive rates.[13] Under the Ohio Constitution and Ohio rules of statutory construction described above, this law is therefore to be applied prospectively and not retroactively. A nebulous standard of "more favorable in the aggregate"

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[11] *First Energy MRO* Opinion and Order at 5, 13-14 (Nov. 25, 2008) (OCC Second Appx. 1); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code in the Form of an Electric Security Plan,* Opinion and Order at 8, 12 (Dec. 19, 2008) (IEU Appx. 290).

[12] The PUCO did not address OCC's constitutional argument. AEP in one sentence summarily concludes that OCC's arguments should not be entertained. AEP Brief at 48.

[13] In fact, numerous sections of S.B. 221 are laden with concepts that perpetuate prospective, not retroactive, cost recovery. For example under R.C. 4928.141(A) an SSO under R.C. 4928.142 or 4928.143 "shall exclude any previously authorized allowances for transition costs." R.C. 4928.143(B)(2)(b) permits a reasonable allowance for CWIP, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. R.C. 4928.143(B)(2) allows for the establishment of a nonbypassable surcharge for the life of an electric generating facility that*** is newly used and useful on and after January 1, 2009***." R.C. 4928.143(B)(2)(g) permits cost recovery for transmission, ancillary, congestion, or any related service required for a standard service offer, including recovery of any cost of that the electric utility incurs on or after the date of the standard service offer.

does not overcome the presumption that S.B. 221 must be applied prospectively, not retroactively. The arguments of AEP and the PUCO should be rejected.

C. An appeal is not moot where the issues raised are capable of repetition yet evading review.

The Company and PUCO argue that the appeal is moot even if the $63 million adjustment was retroactive, since the rates have been collected. (PUCO Brief at 14; AEP Brief at 42). AEP avers that the filed rate doctrine precludes any relief that would reverse the collection, and cites *Keco*.[14]

The PUCO correctly notes that this Court has determined a case is not moot if the issues are "capable of repetition, yet evading review."[15] (PUCO Brief at 15). The PUCO further notes that this exception requires (1) that the challenged action is too short in duration to be fully litigated before it expires and (2) a reasonable expectation that the complaining party will be subject to the same action again. (PUCO Brief at 16). The PUCO avers that even if the issues can be repeated, a timely judicial review process exists to ensure the orders do not evade review and OCC has not availed itself of such.[16]

Here, the PUCO adopted a period of nine months for the collection of the $63 million from customers. No "final" appealable order was issued until November 4, 2009, eight months

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[14] *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 151 N.E.2d 465. OCC addressed why *Keco* should not be applied to preclude a refund here in its initial brief. See Brief at 44-47.

[15] See for example *In re: Appeal of Suspension of Huffer from Circleville High School* (1989), 47 Ohio St.3d 12, 546 N.E.2d 1308, syllabus ¶1(citation omitted).

[16] The Commission claims that "[a]ny argument that the Commission's order evaded review is directly attributable to OCC's failure to pursue remedies available to it." PUCO Brief at 16. This argument is nonsense. OCC initially sought a stay from the PUCO. OCC also sought to have rates collected subject to refund. These requests were followed by OCC's filing of an original action in prohibition at the Supreme Court. Then OCC filed an appeal and a request for a stay at the Supreme Court. After OCC's first appeal (and stay) were dismissed, OCC filed another appeal and with it a motion to suspend or in the alternative a motion to collect rates subject to refund. Among all these efforts that the PUCO opposed, the PUCO believes that the motion to suspend was not sufficient because it was not a "motion to stay."

into the nine month collection period. The nine-month collection was so short that it could not possibly have been fully appealed before it expired.

Moreover, there is a reasonable expectation that customers will be subject to future attempts by other electric distribution utilities to collect retroactive rates in the next round of ESP filings under the same law.[17] There are other EDUs (Duke,DP&L, and FirstEnergy) which could file ESP plans when the currently approved ESP plans expire. While there will no longer be a deadline of January 1, 2009 for SSO rates, there will be ESP rate plans that are due to expire on certain dates. If the PUCO fails to render a decision before the ESP rate plan expires, the same issue will arise. The EDU will have continued existing rates and could seek to recoup through its new ESP rate plan higher rates to make it whole for the lower rates collected under the continued rates.

There is no question that the PUCO's interpretation will be applied to other ESP plans in the future[18] and will be dispositive of similar issues.[19] Thus, the issue is capable of repetition. Consumers will be subject to retroactive ratemaking in the future if the PUCO's ruling is upheld.

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[17] In contrast is the case of *Travis et al. v. Pub. Util. Comm.* (1931), 123 Ohio St. 355, 9 Ohio Law Abs. 443, 175 N.E. 586, cited in the PUCO's brief. In *Travis*, there was no possibility that the issue appealed would be entertained again by the PUCO. There the issue was whether the passenger and freight service of the railway company should be abandoned or continued. By the time the issue reached the court, the property had been dismantled and reversal of the PUCO would not have resulted in the re-establishment of the utility. Additionally, the appellants took no steps to stay or postpone enforcement of the order from the commission or the court. Here, OCC took extraordinary efforts. See OCC Initial Brief at 46.

[18] See *State of Ohio v. Bistricky* (1990), 51 Ohio St.3d 157,159, 555 N.E.2d 644, 645, on remand (1990), 66 Ohio App.3d 395, 584 N.E.2d 75, where the Court determined that a trial court's interpretation of the statute will be applied to other state appeals, and therefore is not moot.

[19] See *Moore et al. v. Ogilvie, Gov. of Illinois, et al.* (1969), 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1, where the U.S. Supreme Court found that where the lower court's ruling remains and controls future events, the problem is capable of repetition, yet evading review.

D. Although a case may be moot with respect to one of the litigants, this Court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of public or great general interest.[20]

Even if the Court determines that the case is moot, and does not fall within the "capable of repetition yet evading review" exception, the Court may still hear the appeal. This Court has acknowledged a "public interest" exception that vests it with jurisdiction to entertain the appeal even though the controversy may be moot with respect to the appellants.[21] The public interest exception allows the Court to hear the appeal where there is a debatable constitutional question to resolve, or where the matter appealed is one of public or great general interest.[22]

The OCC appeal of the $63 million adjustment presents both a debatable constitutional question and a matter of public interest. The constitutional question is whether S.B. 221 can be used to apply ESP rates in a retroactive manner despite the Ohio constitutional prohibition against retroactive laws. It is an issue of first impression. Whether the Companies' collection of the $63 million from customers was unlawful and can be refunded is a matter of public interest. AEP's 1.2 million customers, from whom the $63 million was collected, will be directly affected. Given the likely precedential value of the PUCO's decision, customers of the other Ohio electric utilities may be affected as well in the second round of ESP cases expected to be filed.

To conclude the matter is moot, and not hear the case, sends the wrong signal to the PUCO and the public. Justice Pfeifer, in his dissent in *Cincinnati Gas & Electric Co. v. Pub.*

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[20] *Franchise Developers Inc. et al v.City of Cincinnati et al.* (1987), 30 Ohio St.3d 28, 30 OBR 33, 505 N.E.2d 966, syllabus. The syllabus was corrected in a later decision of the Court, *In re appeal of Suspension of Huffer from Circleville High School*, 47 Ohio St.3d at footnote 5.
[21] *Franchise Developers Inc. et al v. City of Cincinnati et al.*, 30 Ohio St.3d at 31, 505 N.E.2d at 969. Accord *State ex rel White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 755 N.E.2d 508, ¶16.
[22] Id.

Util. Comm.[23], spoke to the problem of declaring an action before the PUCO moot: Such a holding "feeds into what increasingly appears to be the commission's belief that its decisions are not reviewable. (citation omitted). Herein, the commission dismisses the idea that it has accountability for its orders, right or wrong, by arguing that it cannot 'unring the bell.' I view the institutional arrogance of the commission to be a continuing problem and one that could be dealt with by addressing the legitimate issues raised by parties in cases like these. The bell needs to be answered, not unrung." OCC has raised legitimate issues that the Court could address. This Court should answer that bell now.

Proposition of Law 4: Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the Commission's opinion and order were based, such order fails to comply with the requirements of R.C. 4903.09, and is, therefore, unlawful.

The PUCO alleges that the evidence of record clearly supports its decision to exclude profits from off-system sales from the ESP rates. Sharing of off-system sales profits between the utility and its customers is based on fundamental principles of fairness—customers of a utility should be entitled to share in the profits that flow from assets they have funded and continue to fund in rates. The PUCO's exclusion of these profits meant that customers who funded a return on and a return of generation assets that enabled off-system sales would not be entitled to a reasonable share in the profits. A reasonable sharing of profits from off-system sales would have promoted the state policy to ensure consumers have reasonably priced electric service.[24]

Both the PUCO and the Companies aver that the PUCO has great discretion and should be deferred to. (PUCO Brief at 47; AEP Brief at 15). CSP reiterates that the "more favorable in

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[23] *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶29-31 (Pfeifer dissent).

[24] See R.C. 4928.02(A)(OCC Appx. 695).

the aggregate standard" is the standard that should be applied and OCC has not shown that the PUCO's decision fails to meet that standard. (AEP Brief at 15).

The PUCO and CSP also focus on the merits of the PUCO's decision. The PUCO argues that it correctly found that the "cited precedents were made in the context of the electric fuel clause (EFC) cases, and that this case was not an EFC proceeding." (PUCO Brief at 46).[25] The PUCO further argues that "both" rate cases (84-188-EL-AIR and 95-656-GA-GCR) cited in OCC's merit brief are not on point.[26] (PUCO at 47). The Company notes that the ESP process bears little resemblance to the ratemaking process described in the precedent cited by OCC. There is no cost of service or revenue requirement being set here it claims. The Company also notes that SB 221 does not require off-system sales to be used as an offset and maintains that undefined[27] "existing levels of sharing are reasonable." (AEP Brief at 15).

The PUCO and Companies' arguments are not germane to the issues presented by OCC. The issue before the Court is restricted to whether the PUCO complied with R.C. 4903.09. In particular, where the PUCO issues a decision departing from precedent, it has a heightened responsibility to explain its decision, in order to comply with R.C. 4903.09.[28] It is not a matter of discretion whether the PUCO needs to comply with R.C. 4903.09. Nor is it a matter of applying the "more favorable in the aggregate standard." The Court must merely determine here whether the Commission adequately explained why its long-standing precedent, of sharing off-system

[25] See (OCC Appx. 98) (where the Commission concluded the same).
[26] The PUCO declines to address the litany of cases OCC cited in its merit brief, evincing long standing precedent for sharing off-system sales between customers and shareholders, with customers receiving 50% or more of the profits. The PUCO's arguments are directed to two cases alone. See (PUCO Brief at 47).
[27] There is nothing in the record that establishes the level of off-system sales included in the ESP rates.
[28] See for e.g. *Office of Consumers' Counsel v. Pub. Util. Comm.* (1985), 16 Ohio St.3d 21, 23, 16 OBR 371, 475 N.E.2d 786, 788; *Office of Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50-51, 10 OBR 312, 461 N.E.2d 303, 304-305.

sales profits between utilities and customers who paid for the plant that is used to earn the profits, should be overruled.

The Commission failed to explain in its order why its prior precedent is not applicable in the post-S.B. 221 era. While the Companies tender some arguments in this respect,[29] these arguments were not found in the PUCO's original order or its order on rehearing. The PUCO did not meet its duty under R.C. 4903.09. In fact, the Commission's order was based on a mistaken belief that OCC presented EFC precedent to support its arguments. OCC did not.[30]

Because the Commission failed to meet its statutory obligations under R.C. 4903.09, the Court should reverse the PUCO. The PUCO should be ordered to conduct further proceedings to establish customers' share of the off-system sales profits that were earned with the use of the utility plant for which customers paid.

Proposition of Law 5: Where the Public Utilities Commission grants a utility a provider-of-last-resort charge, contrary to the manifest weight of the evidence, and fails to supply supporting rationale for its decision so as to constitute mistake, the Court should reverse the decision of the Commission. R.C. 4903.13.

The PUCO and AEP argue that the Companies' provider-of-last-resort ("POLR") rider is intended to recover the cost of serving customers simply because such customers have the "right" to switch. (PUCO Brief at 4, AEP Ohio Brief at 22). But the so-called "migration risk," constitutes nothing more than the Company's obligation to serve and should not result in collecting millions of dollars from customers.[31]

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[29] The Companies' arguments fail to address, however, how S.B. 221 has changed the fact that customers have funded and continue to fund the generation assets of the Companies. These are the assets that are being utilized to generate significant profits for the Companies' shareholders.
[30] See (OCC App. 186) (citing to Case No. 84-188-EL-AIR and 95-656-GA-AIR).
[31] Tr. VI at 213 (November 24, 2008)(OCC Witness Medine).

The PUCO and AEP Ohio also claim OCC does not recognize that the Companies are subjected to any POLR risk. (PUCO Brief at 41, AEP Ohio Brief at 21). That is a misstatement of OCC's position. OCC's position is that the Company's POLR charge, which collects many millions of dollars from customers, should not be based solely on a modified version of a pricing model designed for options, not utility POLR risk.[32] OCC and other parties to the case noted that the model has never been used to calculate POLR risk.[33] The evidence does not support the use of the model as an appropriate tool for calculating a POLR rider.

The PUCO noted that five inputs were "required" for AEP's model. (PUCO Brief at 43). The Company, however, modified or manipulated these "required" inputs to the model in order to calculate what it refers to as its POLR risk. The PUCO noted merely that there was some disagreement among the parties about the "appropriateness" of the Company's inputs. (PUCO Brief at 43-44). The PUCO's narrow analysis of the surrogate inputs was confined to reiterating the testimony of AEP Ohio's' witness, finding merely that the novel inputs were "reasonable." (PUCO Brief at 44).

The PUCO states that the record "adequately demonstrates" the POLR risks which the Company is subject to. (PUCO Brief at 41). Each surrogate input, however, was defined subjectively by the Company.[34] OCC's Witness Medine aptly identified the problems with the model and the Company's use of its own inputs: "It suggests a process where a certain result was being sought. I sort of made the analogy to Goldilocks, not too hard, not too soft, just right ***."[35] For instance, AEP uses the current market price of power as its first input in lieu of the

[32] (R.9). AEP Ohio Ex. 2A at 31 (Baker). See also PUCO Brief at 42: "The Companies must serve customers who choose not to shop."
[33] OCC Ex. 11 at 17 (Medine)(OCC Supp. 68).
[34] Id. at 15-16.
[35] Tr. VI at 251 (Nov. 24, 2008)(Medine).

model's traditional input – the current price of stock – to measure the impact of customers returning.[36] This input is inappropriate because the market price when customers choose to return is unknown and renders any calculation of migration risk meaningless. As OCC Witness Medine stated: "When the market price is used as the equivalent to the current price of stock, that would model the impact of returning customers where the ESP becomes the option."[37] AEP set up the model assuming customers had departed and valued the option of returning by setting the current price at the MRO and the option price at the ESP.[38]

PUCO Commissioner Roberto disparaged the use of the model to calculate POLR risk.[39] AEP attempts to minimize her concurring opinion by merely stating that she thought the ESP was better in the aggregate than the MRO. (AEP Ohio Brief at 26-27). No other parties supported the concept that the "migration risk" is a POLR risk,[40] much less supported the magnitude of the risk as determined by the Companies' hybrid model.[41] The Company conducted no analysis of shopping behavior in quantifying the shopping risk. AEP Ohio's own witness undermined the model by testifying that there is probably less risk of a customer shopping now than when SB 3 was passed.[42]

Thus, the Commission's decision to grant AEP ninety percent of its requested POLR rider was against the manifest weight of the evidence presented in the case.[43] The PUCO's decision to approve an exorbitant POLR rider for AEP to charge customers--arrived at through

[36] Id at 248.
[37] Tr. VI at 246 (Nov. 24, 2008)(Medine)
[38] Id. at 248.
[39] (R.265). Entry on Rehearing, Concurring Opinion of Commissioner Roberto at 1.
[40] Tr. XII at 257 (Dec. 4, 2008)(Cahaan) and Tr. XIII at 34 (Dec. 5, 2008)(Cahaan).
[41](OCC Supp. 65). OCC Ex. 11 at 14 (Medine).
[42] Tr. XIV at 195 (December 10, 2008) (Baker).
[43] ESP Order at 40. (OCC Appx. 49).

the use of a hybrid mathematical model unsuited for measuring consumer behavior (shopping risk)--is so "against the manifest weight of the evidence *** as to show misapprehension, mistake or willful disregard of duty."[44] OCC has shown that the PUCO's use of the model as a vehicle for AEP to collect from customers $456 million in POLR charges was "clearly unsupported by the evidence."[45] The result is a misapprehension and mistake in a PUCO decision that the Court should reverse.

Proposition of Law 6: When the Public Utilities Commission allows a utility to collect carrying charges on environmental investments in violation of R.C. 4928.143(B)(2) and R.C. 4928.38, the Commission's order should be reversed.

Proposition 6 relates to the limitations on the type of expenses permitted in electric security plans for collection from customers under R.C. 4928.143(B)(2). (Appx. 707). The nine components listed in that statute (R.C. 4928.143(B)(2)(a)-(i)) evince the General Assembly's intent that there is no limit on the type of ratemaking adjustments that may be included in an electric security plan so long as such adjustments fall within one of the enumerated components. Regarding carrying charges on environmental investments, R.C. 4928.143(B)(2)(b) allows electric distribution utilities to recover "[a] reasonable allowance *** 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." (Appx. 707).

In the proceeding below, the Commission misapplied R.C. 4928.143(B)(2), because the carrying charges were determined in proceedings that took place before January 1, 2009 and do not represent expenditures that the Companies may actually make after January 1, 2009. As a

[44] *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 312, 513 N.E.2d 337 citing *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 4 OBR 241, 447 N.E.2d 733, *Columbus v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 103, 12 O.O.3d 112, 388 N.E.2d 1237.
[45] See *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 765 N.E.2d 862.

result, the PUCO allowed the Companies to collect from customers approximately $330 million in environmental investment carrying charges not permitted under the statute.

The PUCO and AEP argue that the Commission acted within its discretion to allow the Companies to collect carrying costs on environmental investments that occurred before January 1, 2009. In its brief, the PUCO asserts that "[o]nly carrying costs incurred after January 1, 2009 and during the ESP period by the Companies are allowed to be recovered. The Commission's decision is based on R.C. 4928.143(B)(2), which provides 'without limitation' language that supports a broader scope for recovery of costs for a utility."[46] The PUCO contends that "[w]hile the nine subsections to R.C. 4928.143(B)(2) are illustrative, they are not exhaustive."[47] Appellees are wrong.

The phrase "without limitation" is used twice within R.C. 4928.143(B)(2). It is used as a modifier for all the subsections of the statute. But it is again used in subsection (h) of the statute, in a manner meant to make the items listed in subsection (h) illustrative but not exhaustive: "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." (Emphasis added.) If the General Assembly had meant for the "without limitation" language in R.C. 4928.143(B)(2) to make the nine subsections only illustrative, then there would have been no need to include the same phrase in subsection (h).

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[46] PUCO Brief at 22.
[47] Id.

Under R.C. 1.47 (OCC Appx. 642), the entire statute is intended to be effective and there is a presumption that every word in the statute is intended to have some legal effect.[48] In keeping with this principle, it must be assumed that the second use of the "without limitation" language was needed. Thus, the first use of the "without limitation" phrase in R.C. 4928.143(B)(2) cannot be intended to provide the Commission with the broad discretion that Appellees contend. Otherwise there would have been no need for the second "without limitation" phrase. Instead, the language expressed a legislative intent regarding the recovery of the costs, and not the types of costs that may be recovered.

As a result of the PUCO's action, the capital carrying cost for the 2001-2008 investments will continue to increase the Companies' non-fuel component generation rates during the ESP period, meaning customers will pay higher rates than what the General Assembly intended.[49] Customers thus will be harmed because of the PUCO's misapplication of the law. The Court should reverse the PUCO's decision.

II. CONCLUSION

The PUCO committed several errors in its Opinion and Order. In some instances (off-system sales) a remand will be necessary with instructions to the PUCO to correct the error. As to the remaining errors, OCC asks this Court to reverse the PUCO. In order to ensure customers are made whole, the Court should direct the Companies to refund those portions of the rate increase found to be unlawful. A refund is necessary so that customers can be afforded a viable remedy in connection with their appellate rights established by the General Assembly.[50] Only then will

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[48] See *Richards v. Market Exch. Bank Co.* (1910), 81 Ohio St. 348, 90 N.E. 1000.
[49] See PUCO Brief at 21-22.
[50] See OCC Initial Brief at 44-47.

customers be afforded a remedy for the unlawful and unreasonable rates they continue to pay until the Court reverses and new rates are set reflecting appropriate reductions in rates to customers.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL

Maureen R. Grady

Maureen R. Grady, Counsel of Record
Terry L. Etter
Richard C. Reese

Office of the Ohio Consumers' Counsel
10 W. Broad Street, Suite 1800
Columbus, OH 43215
(614) 466-8574 – Telephone
(614) 466-9475 – Facsimile
grady@occ.state.oh.us
etter@occ.state.oh.us
reese@occ.state.oh.us

IN THE SUPREME COURT 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 Generation Assets, 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.	)	Supreme Court Case No. 09-2022 Appeal from the Public Utilities Commission of Ohio Case Nos. 08-917-EL-SSO and 08-918-EL-SSO
(The Office of the Ohio Consumers' Counsel v The Public Utilities Commission of Ohio)	)	

SECOND APPENDIX OF
APPELLANT
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service.	)	Case No. 08-936-EL-SSO

OPINION AND ORDER

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

APPEARANCES:

James W. Burk, Mark A. Hayden, Ebony Miller, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308, and Jones Day, by David A. Kutik, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114-1190, Mark A. Whitt, 325 John H. McConnell Boulevard, Suite 600, Columbus, Ohio 43215-2673, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

Sheryl Creed Maxfield, First Assistant Attorney General of the State of Ohio, by Duane W. Luckey, Section Chief, by William L. Wright and John H. Jones, 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, Jacqueline Lake Roberts, Richard C. Reese, and Gregory J. Poulos, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

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

Chester, Willcox & Saxbe, LLP, by John W. Bentine, Mark S. Yurick, and Matthew S. White, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of The Kroger Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

David C. Reinbolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Brickfield, Burchette, Ritts & Stone, P.C., by Michael K. Lavanga and Garrett A. Stone, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of Nucor Steel Marion, Inc.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Gary A. Jefferies, Dominion Resources Services, Inc., 501 Martindale Street, Suite 400, Pittsburgh, Pennsylvania 15212-5817, on behalf of Dominion Retail, Inc.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Cynthia A. Fonner, Constellation Energy Group, Inc., 550 West Washington Street, Suite 3000, Chicago, Illinois 60661, on behalf of Constellation NewEnergy, Inc., and Constellation Energy Commodities Group, Inc.

Robert J. Triozzi, Director of Law, and Steven Beeler, Assistant Director of Law, City of Cleveland, and Schottenstein, Zox & Dunn Co., LPA, by Gregory H. Dunn, Christopher L. Miller, and Andre T. Porter, 250 West Street, Columbus, Ohio 43215, on behalf of the city of Cleveland.

Brickfield, Burchette, Ritts & Stone, P.C., by Damon E. Xenopoulos, 1025 Thomas Jefferson Street, N.W., 8th Floor, West Tower, Washington, D.C. 20007, on behalf of OmniSource Corporation.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Nolan Moser and Trent A. Dougherty, Ohio Environmental Council, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of Ohio Environmental Council.

Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Ohio Hospital Association.

The Legal Aid Society of Cleveland, by Joseph P. Meissner, 1223 West 6th Street, Cleveland, Ohio 44113, on behalf of The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates.

Leslie A. Kovacik, city of Toledo, 420 Madison Avenue, Suite 100, Toledo Ohio 43604-1219; Lance M. Keiffer, Lucas County, 711 Adams Street, 2nd Floor, Toledo, Ohio 43624-1680; Marsh & McAdams, by Sheilah H. McAdams, city of Maumee, 204 West Wayne Street, Maumee, Ohio 43537; Ballenger & Moore, by Brian J. Ballenger, city of Northwood, 3401 Woodville Road, Suite C, Toledo, Ohio 43619; Paul S. Goldberg and Phillip D. Wurster, city of Oregon, 5330 Seaman Road, Oregon, Ohio 43616; James E. Moan, city of Sylvania, 4930 Holland-Sylvania Road, Sylvania, Ohio 43560; Leatherman, Witzler, by Paul Skaff, city of Holland, 353 Elm Street, Perrysburg, Ohio 43551; and Thomas R. Hayes, Lake Township, 3315 Centennial Road, Suite A-2, Sylvania, Ohio 43560, on behalf of Northwest Ohio Aggregation Group.

Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Natural Resources Defense Council.

Craig G. Goodman, 3333 K. Street, N.W., Suite 110, Washington, D.C. 20007, on behalf of National Energy Marketers Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, and Bobby Singh, 300 West Wilson Bridge Road, Suite 350, Worthington, Ohio 43085, on behalf of Integrys Energy Services, Inc.

Sean W. Vollman and David A Muntean, 161 South High Street, Suite 202, Akron, Ohio 44308, on behalf of the city of Akron.

Bell & Royer Co., LPA, by Langdon D. Bell, 33 South Grant Avenue, Columbus, Ohio 43215-3927, and Kevin Schmidt, 33 North High Street, Columbus, Ohio 43215-3005, on behalf of Ohio Manufacturers' Association.

Vorys, Sater, Seymour & Pease, LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Direct Energy Services, LLC.

F. Mitchell Dutton, FPL Energy Power Marketing, Inc., 700 Universe Boulevard, Juno Beach, Florida 33408, on behalf of FPL Energy Power Marketing, Inc., and Gexa Energy Holdings, LLC.

Henry W. Eckhart, 50 West Broad Street, Suite 2117, Columbus, Ohio 43215, on behalf of the Sierra Club, Ohio Chapter.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Northeast Ohio Public Energy Council.

Larry Gearhardt, 280 North High Street, P.O. Box 182383, Columbus, Ohio 43218-2383, on behalf of Ohio Farm Bureau Federation.

Bricker & Eckler, LLP, by Sally W. Bloomfield and Terrence O'Donnell, 100 South Third Street, Columbus, Ohio 43215, on behalf of American Wind Energy Association, Wind on the Wires, and Ohio Advanced Energy.

Theodore S. Robinson, 2121 Murray Avenue, Pittsburgh, Pennsylvania 15217, on behalf of Citizens Power, Inc.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Grace C. Wung, 600 Thirteenth Street, N.W., Washington D.C., 20005, on behalf of Wal-Mart Stores East, LP, and Sam's East, Inc., LP, Macy's, Inc., and BJ's Wholesale Club, Inc.

Craig I. Smith, 2824 Coventry Road, Cleveland, Ohio 44120, on behalf of Material Sciences Corporation.

Bricker & Eckler, LLP, by Glenn S. Krassen, 1375 East Ninth Street, Suite 1500, Cleveland, Ohio 44114, and E. Brett Breitschwerdt, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Schools Council.

McDermott, Will & Emery, LLP, by Douglas M. Mancino, 2049 Century Park East, Suite 3800, Los Angeles, California, 90067-3218, and Gregory K. Lawrence, 28 State Street, Boston, Massachusetts 02109, on behalf of Morgan Stanley Capital Group, Inc.

Tucker, Ellis & West, LLP, by Nicholas C. York and Eric D. Weldele, 1225 Huntington Center, 41 South High Street, Columbus, Ohio 43215-6197, and Steve Millard, 100 Public Square, Suite 201, Cleveland, Ohio 44113, on behalf of Council of Smaller Enterprises.

OPINION:

I. HISTORY OF THE PROCEEDING

On July 31, 2008, Ohio Edison Company, The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (FirstEnergy or the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for a market rate offer (MRO) in accordance with Section 4928.142, Revised Code. Contemporaneously, in Case No. 08-935-EL-SSO, FirstEnergy filed a separate application for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code (ESP case).

On August 18, 2008, a technical conference was held regarding FirstEnergy's applications. Moreover, on August 25, 2008, a prehearing conference was held in order to discuss procedural issues in the above-captioned case. Subsequently, by entry dated August 28, 2008, the attorney examiner set this matter for hearing on September 16, 2008.

On August 29, 2008, the Ohio Consumers' Counsel (OCC) filed a motion for bifurcated hearings in Case No. 08-936-EL-SSO, and a motion to consolidate Case No. 08-936-EL-SSO with Case No. 08-935-EL-SSO. On September 8, 2008, FirstEnergy filed a memorandum contra OCC's motions. The city of Cleveland (Cleveland) filed a motion for bifurcated hearings and a memorandum in support of OCC's motion on September 9, 2008. OCC filed a reply to FirstEnergy's memorandum contra on September 11, 2008. The motions to bifurcate the hearings and OCC's motion to consolidate the cases were denied by the attorney examiner on September 12, 2008.

The following parties were granted intervention by entry dated September 15, 2008: Ohio Energy Group (OEG); OCC; Kroger Company (Kroger); Ohio Environmental Council (OEC); Industrial Energy Users-Ohio (IEU-Ohio); Ohio Partners for Affordable Energy (OPAE); Nucor Steel Marion, Inc. (Nucor); Northwest Ohio Aggregation Coalition (NOAC); Constellation NewEnergy and Constellation Energy Commodities Group, Inc. (Constellation); Dominion Retail, Inc. (Dominion); Ohio Hospital Association (OHA); Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, Cleveland Housing Network, and The Consumers for Fair Utility Rates (Citizens' Coalition); Natural Resources Defense Council (NRDC); Sierra Club; National Energy Marketers Association (NEMA); Integrys Energy Service, Inc. (Integrys); Direct Energy Services, LLC (Direct Energy); city of Akron; Ohio Manufacturers' Association (OMA); FPL Energy Power Marketing, Inc and Gexa Energy Holdings, LLC (FPL); Cleveland; Northeast Ohio Public Energy Council (NOPEC); Ohio Farm Bureau Federation (OFBF); American Wind Association, Wind on Wires, and Ohio Advance Energy; Citizens Power, Inc. (Citizens); Omnisource Corporation (OmniSource); Material Sciences Corporation (Material Sciences); Ohio Schools Council (OSC); Council of

Smaller Enterprises (COSE); Morgan Stanley Capital Group; and Wal-Mart Stores East, LP and Sam's East, Inc., Macy's, Inc., and BJ's Wholesale Club, Inc. (Commercial Group).

The hearing in this proceeding commenced on September 16, 2008, and concluded on September 22, 2008. Four witnesses testified on behalf of FirstEnergy, eight witnesses testified on behalf of various intervenors, and three witnesses testified on behalf of the Staff. Briefs and reply briefs were filed on October 6, 2008, and October 14, 2008, respectively.

II. APPLICABLE LAW

The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

Chapter 4928 of the Revised Code provides a roadmap of regulation in which specific provisions were put forth to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing the Companies' application for an MRO, the Commission is aware of the challenges facing Ohioans and the electric power industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code, as amended by Amended Substitute Senate Bill No. 221 (SB 221), effective July 31, 2008.

Section 4928.02, Revised Code, states that it is the policy of the state to, *inter alia*:

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

(2) ensure the availability of unbundled and comparable retail electric service;

(3) ensure diversity of electric supplies and suppliers;

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

(5) encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems in order to promote both effective customer choice and the development of performance standards and targets for service quality;

(6) ensure effective retail competition by avoiding anticompetitive subsidies;

(7) ensure retail consumers protection against unreasonable sales practices, market deficiencies, and market power;

(8) provide a means of giving incentives to technologies that can adapt to potential environmental mandates;

(9) encourage implementation of distributed generation across customer classes by reviewing and updating rules governing issues such as interconnection, standby charges, and net metering; and

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

Among the provisions of SB 221 were changes to Section 4928.14, Revised Code, requiring electric utilities to provide consumers with an SSO, consisting of either an MRO or an ESP. The SSO is to serve as the electric utility's default SSO. The law provides that utilities may apply simultaneously for both an MRO and an ESP; however, at a minimum, the first SSO application must include an application for an ESP.

Section 4928.142, Revised Code, authorizes electric utilities to file an MRO as their SSO, whereby retail electric generation pricing will be based, in part, upon the results of a competitive bid process (CBP). Paragraphs (A) and (B) of Section 4928.142, Revised Code, set forth the specific requirements that an electric utility must meet in order to demonstrate that the competitive bidding process and the MRO proposal comply with the statute. In determining whether an MRO meets the requirements of Section 4928.142(A) and (B), Revised Code, the Commission must read those provisions together with the policies of this state as set forth in Section 4928.02, Revised Code. Accordingly, the policy provisions of Section 4928.02, Revised Code, will guide the Commission in its implementation of the statutory requirements of Section 4928.142(A) and (B), Revised Code.

By finding and order issued September 17, 2008, in Case No. 08-777-EL-ORD, the Commission adopted new rules concerning SSO, corporate separation, and reasonable arrangements for electric utilities pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code.[1] Section 4928.142(B), Revised Code, provides that a utility may file its

1 *See In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-177-EL-ORD, Finding and Order (September 17, 2008).*

application for an MRO prior to the effective date of the Commission rules required under the statute; however, as the Commission determines necessary, the utility shall immediately conform its filing to the rules upon the rules taking effect.

III. DISCUSSION

A. Background and Summary of Application

The Companies are currently providing service to their customers in accordance with their rate stabilization plan and rate certainty plan (RCP) approved by the Commission (Co. Ex. 4 at 2).[2] The Companies procure their full requirements power to supply generation service to their retail generation customers (SSO customers) through a wholesale power purchase agreement which is scheduled to terminate on December 31, 2008 (Co. Ex. 4 at 8).

In their application, the Companies set forth a proposed MRO whereby they will conduct a CBP designed to procure supply for the provision of SSO electric generation service beginning January 1, 2009, to the Companies' retail electric customers who do not purchase electric generation service from a competitive retail electric supplier (Co. Ex. 4 at 1). The retail customers who will be served under the MRO include all retail customers served under special contracts approved under Section 4905.31, Revised Code, as well as existing and future contracts entered into under Section 4905.34, Revised Code (Co. Ex. 4 at 8-9).

The Companies are requesting that the Commission determine that their proposed MRO meets the requirements found in Section 4928.142(A) and (B), Revised Code. If this application is found to meet the statutory criteria, the earliest date the bid could be conducted would be December 29, 2008. Thus, the Companies have proposed a very aggressive CBP timeline because the retail rates based upon the results of the CBP must go into effect on January 1, 2009, because, according to the Companies, they have no wholesale power arrangements beyond 2008. The Companies note that, as part of their ESP case, which was filed contemporaneously with this case, they have proposed a short-term ESP that contains an SSO pricing proposal for January 1, 2009, through April 30, 2009. According to the applicants, approval of the short-term ESP would allow extra time for the Commission to issue a final decision on the long-term ESP and, in the event the long-term

2 *See In the Matter of the Applications of FirstEnergy for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period*, Case No. 03-2144-EL-ATA, Opinion and Order (June 9, 2004); and *In the Matter of the Application of FirstEnergy for Authority to Modify Certain Accounting Practices and for Tariff Approvals*, Case No. 05-1125-EL-ATA et. al., Opinion and Order (January 4, 2006).

ESP is not implemented, it would allow time for the CBP that is part of the MRO process to be completed in a more measured fashion (Co. Ex. 4 at 2-3).

B. Competitive Bid Process - Section 4928.142(A)(1), Revised Code

Section 4928.142(A)(1), Revised Code, requires that an MRO be determined through a CBP that provides for all of the following: an open, fair, and transparent competitive solicitation; a clear product definition; standardized bid evaluation criteria; oversight by an independent third party; and evaluation of submitted bids prior to selection of the least-cost bid winner or winners.

1. Open, fair, and transparent competitive solicitation - Section 4928.142(A)(1)(a), Revised Code

The Companies state that the CBP will consist of, among other things: pre-solicitation activities to promote bidder interest and participation; bidder education and communication; and competitive safeguards to guard against anti-competitive behavior during bidding (Co. Ex. 1 at 11). As part of the application, the Companies have presented proposed CBP rules which establish the process under which the CBP manager will conduct the CBP. The CBP rules address: the information provided to bidders; the application process; the qualification and credit processes; the bidding rules and process; conclusion of the bidding; and confidentiality requirements (Co. Ex. 3 at 8; Co. Ex. 4, Ex. A). As part of the application, the Companies have also included a document containing proposed communication protocols, which describes the information made available during the CBP and the treatment of confidential information (Co. Ex. 4, Ex. G). In addition, the Companies state that they will make available a CBP website in order to keep interested parties informed of developments and notices related to the CBP. The Companies believe that, consistent with Section 4928.142(A), Revised Code, affiliates of the Companies may participate as bidders in the CBP solicitations and win the right to provide SSO supply (Co. Ex. 4 at 17).

The Companies explain that the bidders in the CBP would provide SSO supply for tranches comprised of all SSO customer voltage classes for all three companies (Co. Ex. 4 at 18). The Companies peak load is approximately 11,500 megawatts (MW). In the initial solicitation, the nominal size per tranche will be 100 MW, which equates to 115 tranches and each tranche represents 0.87 percent of peak load (Co. Ex. 1 at 11). As proposed by the Companies, the initial MRO competitive solicitation would procure one-third of the total SSO load for all three companies for the period from January 1, 2009, through May 31, 2010; one-third of the total SSO load for all three companies for the period January 1, 2009, through May 31, 2011; and one-third of the total SSO load for all three companies for the period from January 1, 2009, through May 31, 2012 (Co. Ex. 1 at 7; Co. Ex. 4 at 4). After the initial solicitation, beginning in 2009 and during each calendar year thereafter, the

Companies will hold two competitive solicitations, one in October and one in the subsequent January. During these solicitations, one-third of the power requirements of all three Companies' provider of last resort (POLR) load for a three-year period will be bid out as part of each of the two competitive solicitations. The results of these solicitations will be blended to formulate the generation price paid by the Companies' retail electric customers (Co. Ex. 4 at 4). The Companies submit that this approach will help balance out wholesale market price fluctuations and provide retail electric customers with a more stable price for a specified period of time (Co. Ex. 4 at 9).

The Companies explain that this MRO proposal utilizes a slice-of-system approach (Co. Ex. 4 at 5). The total amount of SSO supply to be procured will be divided into equal tranches, with each tranche representing a fixed percentage of the Companies' SSO hourly load. Bidders will bid through a descending clock (reverse auction) format to provide SSO supply (Co. Ex. 4 at 12). The winning bid price will reflect a blending of the pricing from the applicable solicitations. Once a winning bid price is known, a rate conversion process will be used to convert the blended competitive bid price to a retail rate. The rate-specific generation prices will be derived through the application of distribution line loss factors and seasonality factors, and grossing up for applicable taxes (Co. Ex. 2 at 4; Co. Ex. 4 at 5 and Ex. C at 1). Furthermore, the proposal includes a reconciliation mechanism to ensure a neutral financial outcome with regard to the Companies' provision of SSO generation service (Co. Ex. 4 at 5).

The Companies' posit that the descending clock format promotes a competitive bid format that is open, fair, and transparent. The Companies explain that, through this format, bidders can clearly understand how the final solicitation prices are determined and how to compete for a winning position. In addition, the Companies submit that the informational session and the additional training before the solicitation ensure that the bidders are fully aware of the mechanics of the bidding process (Co. Ex. 3 at 11). Constellation supports the basic form and substance of FirstEnergy's MRO and the MRO procurement process, including the provision of data and information, and the communication protocols, and believes that it meets the criteria set forth in the statute (Const. Ex. 1 at 4 and 17)

OEG argues that FirstEnergy's proposed reverse auction is not an "open, fair and transparent competitive solicitation," and would not result in the least-cost rate for consumers (OEG Ex. 1 at 3). According to OEG, outsourcing to third-party bidders of POLR risk through a reverse auction results in an unreasonable retail risk premium of between 17 and 40 percent above the Federal Energy Regulatory Commission (FERC) regulated wholesale market generation rates (OEG Ex. 1 at 3 and 14).

Cleveland submits that the rate conversion process proposed by the Companies to derive the retail rate is not an appropriate method to use because it fails to give proper recognition to the load characteristics of the individual rate classes (Cleve. Ex. A at 4). Cleveland maintains that the Companies have the ability to account for the differences between each rate class. According to Cleveland, if the load characteristics are recognized with specificity, customers will be charged rates appropriate to the way they use electricity, thereby resulting in appropriate pricing and cost savings (Cleve. Br. at 4). Similarly, Nucor states that the result of utilizing a slice-of-system approach and a uniform blended cost to service all loads will be a set of MRO rates that indirectly create interclass subsidies, effectively ignoring the market realities and the fact that it takes lower average cost to serve higher load factor classes (Nucor Ex. 1 at 17).

Included with the application is a form of the Master SSO Supply Agreement for the CBP (Co. Ex. 4, Ex. F). The Consumer Advocates[3] point out that the provision of the Master SSO Supply Agreement that makes the SSO supplier solely responsible for payment of all MISO charges discourages bidder involvement by not protecting them against new MISO and other regulatory charges (Co Ex. 4, Ex. F at 18; Con. Adv. Br. at 10). Therefore, the Consumer Advocates recommend that the Commission require that "net" changes in MISO and regulatory charges be allowed outside of the bidding. Furthermore, the Consumer Advocates state that the agreement is not fair to all potential bidders and will not encourage vigorous participation by a wide range of bidders because the agreement and the bidding process place all risk of forecasting and supply on suppliers who are not the Companies' affiliate supplier (Con. Adv. Br. at 10).

The Consumer Advocates and OPAE agree that the Companies' affiliate, FirstEnergy Solutions (FES), has an unfair advantage in the bidding process (Con. Adv. Br. at 11; OPAE Ex. 1 at 10). Consumer Advocates claim that the Master SSO Supply Agreement should not be approved until all bidders have the same information that FES has gained through supplying generation service to the Companies' territory (Con. Adv. Br. at 11). OEG agrees that the Companies have ignored the fact that FES may be able to influence the market clearing price by virtue of its concentration of generation ownership. OEG contends that, if FES has market power and the ability to control pricing, the result would not be a fair price that reflects effective competition. OEG notes that the application fails to address market power or transmission constraints that may result in market power. Absent convincing evidence that FES does not have market dominance, OEG contends that the Commission should not approve a reverse auction (OEG Ex. 1 at 7-11).

OEG recommends that, if the reverse auction proposed by FirstEnergy is rejected by the Commission, FirstEnergy's market rate offer should be procured by a third-party portfolio manager through a sealed competitive bid or request for proposal process to achieve the lowest and best price for consumers. OEG claims that a procurement process

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3 OCC, Citizen Power, Lucas County, city of Toledo, and NOAC filed joint initial and reply briefs; therefore, when referring to the arguments in these documents these parties will be referred to as the Consumer Advocates.

where the Companies obtain blocks of wholesale power, rather than full requirements service, places the risk of POLR supply on FirstEnergy. As a result, the cost of wholesale generation should be significantly reduced. However, OEG believes that FirstEnergy should be fully compensated for this risk through distribution rates, including an appropriate rate of return, set by the Commission (OEG Ex. 1 at 13-14; OEG Br. at 11).

The Consumer Advocates disagree with the slice-of-system approach proposed by the Companies. Rather, the Consumer Advocates believe that bidding by class is preferable to the slice-of-system approach, because bidding by classes offers the potential to tailor bidding according to the characteristics of the customer. The Consumer Advocates point out the large customers are served using meters that register demand; therefore, they state that these demand-metered customers should be combined and bid out together (Con. Adv. Br. at 8).

OPAE states that the Companies' proposed procurement plan, which calls for the acquisition of 100 percent of the SSO load for all customer classes at one point in time by means of one type of wholesale market contract, carries the risk of higher prices and more volatility compared to other options that were not identified or considered (OPAE Ex. 1 at 11). OPAE recommends that the Commission require FirstEnergy to explore a more actively managed portfolio of wholesale market products to assure the most reasonable and lowest prices possible for the SSO, taking into account the need for price stability. As explained by OPAE, a more managed portfolio and procurement planning process would require the evaluation of a variety of contract terms and types over a longer term planning period, of between five to fifteen years, thus allowing the SSO provider to integrate energy efficiency, renewable, and traditional generation supply options to achieve the long-term lowest cost for customers. OPAE also recommends that the portfolio use a minimum of spot market and short-term transactions, because OPAE believes that such an approach will make it impossible to offer budget payment plans due to the significant changes in SSO prices and the need to levelize the payment amount during the budget year. In addition, OPAE believes that the Commission should require FirstEnergy to identify its SSO loads by class and use the power of the aggregated residential class to get a better price on its behalf (OPAE Ex. 1 at 11-14 and 19-20). OPAE believes that SSO procurement planning and prices should reflect products and prices separately for residential and small commercial customers (OPAE Ex. 1 at 33).

The Companies disagree with the active portfolio approach proposed by OEG and OPAE. According to the Companies, since they do not own or operate generation facilities, they are not in a position to assess generation portfolios and associated risks; they believe the suppliers are in the best position to manage such risks (Co. Reply Br. at 9).

Furthermore, Staff submits that the MRO application may fail to meet the requirements of some of the Commission's rules issued in Case No. 08-777-EL-ORD.

Specifically, Staff points to the requirements pertaining to the CBP, corporate separation plans, and those rules requiring the provision for certain detailed customer load information. Therefore, the Staff submits that the Companies will need to bring their proposal into compliance with the Commission rules (Staff Exs. 1A at 3 and Ex. 2 at 2-3).

OPAE further argues that the Companies have failed to meet the threshold requirement that the MRO must demonstrate compliance with Section 4928.02, Revised Code. According to OPAE, among these critical policies are the requirements to: ensure the availability of reasonably priced retail electric service; ensure diversity of suppliers and encourage development of distributed and small generation facilities; encourage market access for cost-effective supply and DSM resources; protect customers against unreasonable sales practices, market deficiencies, and market power; provide incentives to technologies that can adapt to potential environmental mandates; and protect at-risk populations (OPAE Br. at 4).

In response to OPAE, FirstEnergy argues that the provisions of a policy statute do not prevail over specific statutory mandates. FirstEnergy claims that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies but simply reflects the policy goals and objectives of the state, as carried out by the Commission. FirstEnergy believes that, once the Commission finds that the requirements of Section 4928.142, Revised Code, have been met, any further analysis is redundant (Co. Reply Br. at 13-14).

The Commission does not agree with FirstEnergy. As a preliminary matter, we do not find that there is a conflict between the policy provisions of Section 4928.02, Revised Code, and the requirements for a CBP contained in Section 4928.142, Revised Code, such that one statute must prevail over the other. On the contrary, as we stated previously, the policy provisions of Section 4928.02, Revised Code, will guide the Commission in its implementation of the statutory requirements of Section 4928.142(A), Revised Code.

The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated." We have done so in rules governing MRO applications[4] and will do so through our implementation of Section 4928.142, Revised Code, in this case.

Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy

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4 *See* Case No. 08-777-EL-ORD.

provisions of Section 4928.02, Revised Code. *See Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met the statutory requirements of Section 4928.142(A), Revised Code, only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.

The Commission finds that the competitive solicitation proposed by FirstEnergy should not be approved as proposed. The Commission believes, in considering the record in this case, that FirstEnergy has not demonstrated that its proposal will result in an open, fair, and transparent competitive solicitation.

First, the Companies have not demonstrated that the reverse auction format that they have proposed is, in the universe of competitive bids, the superior format to result in the lowest and best possible prices for consumers (OEG Ex. 1 at 11-12). The record in this proceeding demonstrates that, at the time of the auction, there will be a significant concentration of generation available for bidding under the control of a single party, the Companies' affiliate, FES, and that the reverse auction format may allow a bidder holding a significant concentration of the generation to strategically withhold some of its generation to ensure a higher price (OEG Ex. 1 at 7-8, 9-11). Further, testimony in the record indicates that FES may have an undue advantage in the bidding process proposed by FirstEnergy (OPAE Ex. 1 at 10). Based upon the evidence in the record, the Commission is not persuaded that the reverse auction format, as proposed by the Companies, will protect customers from the potential of FES to exercise market power.

Moreover, as Staff points out, FirstEnergy has not adequately addressed questions regarding corporate separation in this application (Staff Ex. 1a at 3). FirstEnergy must demonstrate that it has a separation plan and policies in place that, within the context of its proposed MRO, would meet the requirements of Section 4928.17, Revised Code, and the Commission's newly adopted rules. Given the potential for FES to exercise market power, it is necessary for FirstEnergy to clearly demonstrate in the record that the functional separation between the Companies and their affiliate has effectively prevented FES and persons with a financial interest in FES' performance from improperly influencing the decision to use the reverse auction format or specific bidding requirements. Therefore, the Commission finds that the evidence in the record does not demonstrate how the auction process proposed by FirstEnergy would protect customers against market deficiencies and market power and would provide for an open, fair, and transparent competitive solicitation pursuant to Section 4928.142(A)(1), Revised Code.

In addition, SB 221 amended Section 4928.02, Revised Code, to specifically include the promotion of DSM, time-differentiated pricing, and implementation of AMI as policies of this state. As the Staff points out, the application does not address time-differentiated and dynamic retail pricing (Staff Ex. 2 at 3). Time-differentiated and dynamic retail pricing make the economic costs to the Companies of providing retail generation service transparent to consumers. However, FirstEnergy has not demonstrated how its application promotes any of these policies. In particular, the Commission believes that AMI and time-differentiated pricing have the potential to promote an open, fair, and transparent competitive solicitation by giving customers the information needed to control their electricity bills and make appropriate decisions regarding the purchase of power, and by providing a potential check on the abuse of market power. FirstEnergy has not adequately explained how its application advances the policies of the state and achieves an open, fair, and competitive solicitation in the absence of such provisions.

Additionally, there is no evidence in the record establishing how FirstEnergy's proposal is open to and encourages participation by distributed and small generation facilities, and cost-effective and DSM resources.

2. Clear product definition - Section 4928.142(A)(1)(b), Revised Code

According to the application, the product is designed to be a full requirements SSO supply which will be provided for a specified term by the winning bidders. Thus, the product includes all energy and capacity, resource adequacy requirements, i.e., capacity associated with planning reserve requirement, transmission service, and ancillary services (Co. Ex. 1 at 10; Co. Ex. 4 at 12).

IEU-Ohio believes that, as presently designed, the slice-of-system tranches do not provide a clear product definition. According to IEU-Ohio, the design proposed by the Companies requires the bidders to bid on a product and to assume the obligation to do whatever it takes to supply FirstEnergy's retail load. IEU-Ohio believes that this approach places all of the risk of the lack of product specificity on the bidder and will work to increase prices. IEU-Ohio points out that the Master SSO Supply Agreement that bidders are required to execute identifies the products that suppliers are expected to provide and requires the suppliers to adhere to rules established by MISO, which might be amended from time to time. According to IEU-Ohio, considering how MISO markets are in a significant state of flux, if prospective bidders are requested to bid on a full requirements tranche, subject to whatever requirements MISO might put in place, then the product can not be considered clearly defined. Another example of how the proposal does not reflect a clear product definition, according to IEU-Ohio, is the fact that potential bidders will be asked to bid on tranches defined as load-following, but the quantities of electricity they will be required to provide are largely undefined and unpredictable. While each tranche is nominally 100 MW, the actual amount of electricity a successful bidder will be required to provide will vary hour by hour (IEU Ex. 1 at 10-13).

The Commission finds that FirstEnergy has not demonstrated that the application filed in this case provides a clear product definition in accordance with the requirements of Section 4928.142(A)(1)(b), Revised Code. The Commission believes that the evidence in the record of this proceeding does not establish that the slice-of-system, load-following product proposed by the Companies, which includes all energy and capacity, resource adequacy requirements, transmission, and ancillary services, provides a clear product definition which will enable potential bidders to properly assess the risks of bidding. The Commission notes that the load-following product in the CBP will commit the winning bidders to a load which will vary over time (creating a "quantity" risk or "supply" risk) and that FirstEnergy will not be supplying forecasting data to the winning suppliers (Tr. I. at 87-88; IEU Ex. 1 at 10-13). Moreover, the Commission notes that FirstEnergy has not addressed in the record in this case the potential for future changes with respect to resource adequacy in the MISO planning reserve sharing group and how such changes would impact FirstEnergy's product definition (Tr. I at 84-85).

Testimony at the hearing indicates that a procurement process where the Companies obtain blocks of wholesale power, rather than full requirements service, may result in a significantly reduced cost of wholesale generation, including consideration of the fact that the Companies would need to be compensated for absorbing the quantity risk (OEG Ex. 1 at 13-14). The Companies have not demonstrated that their proposal is superior to making forward purchases of a clearly defined quantity and flowing through, via a reconciliation adjustment, the net result of any short-term power purchases and sales needed to match load. Thus, FirstEnergy has not demonstrated that it has proposed a sufficiently clear product definition to advance the state policy goal of ensuring the availability of adequate, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, such that it satisfies the requirements of Section 4928.142(A)(1)(b), Revised Code.

3. Standardized bid evaluation criteria - Section 4928.142(A)(1)(c), Revised Code

The Companies explain that the CBP manager will establish the starting price for the solicitation in a manner to foster bidder participation in the bidding process. The bidding concludes when the number of bids for the tranches equals the total number of tranches that are offered. The price at which the tranches are offered during the final round in the CBP will be the price paid to the winning bidders for the SSO supply (Co. Ex. 4 at 12).

The Companies explain that each winning bidder will be required to execute the Master SSO Supply Agreement. Pursuant to the Master SSO Supply Agreement, every SSO supplier must be a MISO load-serving entity. In addition the agreement obligates every SSO supplier to join the MISO planning reserve sharing group and to abide by the resource adequacy requirements of that group. This provision, according to the Companies, will ensure that there is sufficient generating capacity to reliably serve future load and comply with applicable capacity requirements and reliability standards (Co. Ex. 4 at 24).

The Companies explain that the rules of the descending clock format are pre-specified in a way that can be thoroughly replicated and verified. In addition, because bidders are prequalified, the Companies state that the evaluation of the submitted bids is on a price-only basis (Co. Ex. 3 at 11).

The Commission finds that there is not sufficient evidence in the record of this proceeding establishing that potential suppliers would be satisfactorily evaluated on their ability to provide adequate and reliable retail electric service as required by Section 4928.02(A), Revised Code. In fact, according to the testimony in the record, the bids would be evaluated only on price, and there would be no evaluation on such other factors (Co. Ex. 3 at 18).

4. Oversight by an independent third party - Section 4928.142(A)(1)(d), Revised Code

An independent third party will be retained for each solicitation as the CBP manager, in accordance with the application (Co. Ex. 4 at 13). The Companies indicate that the CBP manager will be responsible for ensuring that the CBP is designed to be an open, fair, and transparent competitive solicitation; the product definition is clear, and there is a standardized bid criteria, consistent with Section 4928.142, Revised Code (Co. Ex. 1 at 5-6; Co. Ex. 4 at 13).

OEG argues that the MRO must be overseen by an independent third party that should be chosen by the Commission and not FirstEnergy (OEG Ex. 1 at 19). Kroger emphasizes that the Companies' proposal should be modified to make it clear that the CBP manager is accountable to the Commission, as required by statute (Kroger Ex. 1 at 4).

The Companies have retained the Brattle Group as the CBP manager (Co. Ex. 1 at 5). IEU-Ohio states that, contrary to FirstEnergy's assertions in the application, it is evident that the Brattle Group had no involvement in designing what prospective bidders would bid on. In fact, IEU-Ohio believes that FirstEnergy exclusively designed what suppliers would bid on and then turned the reigns over to the Brattle Group to administer the bidding process. IEU-Ohio opines that, had the CBP been designed by an independent third party, other structures for the bidding process, such as a mix of fixed block and load-following requirements, would have been considered (IEU Ex. 1 at 8-9).

With regard to FirstEnergy's selection of the Brattle Group as the independent third party that will design the solicitation and administer the bidding of the MRO, OEG notes that FirstEnergy currently employs two principals of the Brattle Group as expert witnesses in its ESP proceeding. Moreover, the Brattle Group has presented testimony on behalf of the Companies in four prior cases before the Commission and in five separate proceedings before the Pennsylvania Public Utilities Commission on behalf of FirstEnergy affiliates. OEG claims that a consulting group whose principals have been and are currently employed by FirstEnergy cannot be considered an "independent third party," because there is an inherent conflict of interest when a consultant is asked to act on behalf of his employer in one proceeding and act independently from his employer in a related, contemporaneous proceeding (OEG Ex. 1 at 17).

The Commission finds that the application submitted by FirstEnergy does not meet the statutory requirement for oversight by an independent third party. FirstEnergy's application provides for a critical and central role to be played by the CBP manager. The CBP manager will be responsible for ensuring that the CBP is designed to be open, fair, and transparent, that the product definition is clear, and that there are standardized bid evaluation criteria (Co. Ex. 1 at 5-6; Co. Ex. 4 at 13). Further, the CBP manager is responsible for all communications with potential bidders and for overseeing the website which will contain essential information for the bidding process (Co. Ex. 3 at 5, 7-9). Accordingly, the CBP manager must be clearly seen as independent by any and all potential bidders.

The Commission notes that Section 4928.142(A)(1)(d), Revised Code, requires that the CBP manager be an "independent third party." It is not sufficient that the CBP manager simply be a third party as FirstEnergy claims; the CBP manager must be "independent" as well. Although the Commission does not intend to impugn the integrity or reputation of the CBP manager retained by FirstEnergy, the Commission finds that the CBP manager retained by FirstEnergy has an appearance of a conflict of interest in this case.

The record demonstrates that the CBP manager was not selected through a transparent process or in consultation with Staff or any other interested parties. Instead, the CBP manager was selected at the sole discretion of the Companies through a closed selection process (Tr. I at 119-120, 137). Moreover, principals of the CBP manager have testified for the Companies or its affiliates on several occasions in the past, including the FirstEnergy distribution rate case presently pending before the Commission. More importantly, principals for the CBP manager testified for the statutory alternative to the MRO in FirstEnergy's ESP proceeding (Tr. I at 60-61). The Commission believes that such testimony, in support of the statutory alternative to the CBP in which the CBP manager is intended to play the central role, creates an appearance of a conflict of interest, particularly in light of the fact that the CBP manager was not selected through an open, transparent process, or in collaboration with other interested parties.

5. Evaluation of submitted bids - Section 4928.142(A)(1)(e), Revised Code

In the application, the Companies explain that, at the conclusion of each solicitation, the CBP manager will submit a report to the Commission which will include the information and data necessary for the Commission to determine whether the statutory criteria has been met, along with recommendations regarding the least-cost winning bidders (Co. Ex. 4 at 15). The Companies offer that the report will answer the question posed in Section 4928.142(C), Revised Code, regarding whether there were at least four bidders, whether each product in the solicitation was oversubscribed, and whether at least 25 percent of the volume was bid on by entities other than the utility (Co. Ex. 3 at 14). Constellation agrees that the CBP proposed by the Companies provides appropriate Commission evaluation, preapproval, and oversight prior to the CBP prices becoming retail rates (Const. Ex. 1 at 19).

The Consumer Advocates do not believe that the Companies' proposal that the final prices achieved by the CBP will be filed with the Commission, immediately after close of the initial CBP and within 30 days for subsequent CBPs, provides sufficient time for public review and comment (OCC Ex. 1 at 7-8). Furthermore, the Consumer Advocates note that the Companies' proposal provides for little or no Commission oversight, which constitutes a serious flaw in the MRO that must be corrected (Con. Adv. Br. at 6). In addition, the Consumer Advocates recommend that the Commission establish an appropriate review period that includes the opportunity for stakeholders to comment on the CBP and propose improvements to the Companies' procurement and pricing procedures (OCC Ex. 1 at 8; Con. Adv. Br. at 6)

The Commission finds that the application filed by FirstEnergy meets the statutory criterion regarding evaluation of proposed bids. The Consumer Advocates believe that the proposal does not provide an adequate opportunity for public review and comment. However, Section 4928.142(C), Revised Code, plainly does not provide for such an opportunity, as it provides the Commission with only three days to reject the results of a CBP.

The Consumer Advocates also recommend that the Commission establish a review period which includes an opportunity to comment on the CBP after the fact, including comments regarding the manner in which future CBPs should be conducted. The Commission notes that Section 4928.02(I), Revised Code, provides, *inter alia,* that it is the policy of this state to ensure that retail customers are protected against market deficiencies and market power. We believe that the proposed opportunity for review and comment by stakeholders would advance this state policy.

B. Criteria for eligibility for market rate offer plan - Section 4928.142(B), Revised Code

Section 4928.142(B) requires that an MRO application detail the electric utilities' proposed compliance with the CBP requirements and the Commission's rules. In addition, this provision requires that the utility demonstrate all of the following: membership in a regional transmission organization (RTO); the RTO has a market-monitor function; and there is a published source of information that identifies pricing.

1. Membership in regional transmission organization - Section 4928.142(B)(1), Revised Code

Section 4928.142(B)(1), Revised Code, requires that an applicant filing an MRO application must demonstrate that the electric utility or its transmission service affiliate belongs to at least one RTO approved by FERC. According to the Companies, their transmission affiliate, American Transmission System, Inc. (ATSI), is a member of the Midwest Independent Transmission System, Operator (MISO), which is an RTO that has been approved by FERC. On September 1, 2003, ATSI transferred functional control of its transmission facilities to MISO (Co. Ex. 1 at 2-3; Co. Ex. 4 at 7).

No party disputed the fact that FirstEnergy and its transmission affiliate belong to MISO or that MISO is an RTO approved by FERC. Therefore, the Commission finds that the Companies have fulfilled the requirements of Section 4928.143(B)(1), Revised Code.

2. Market-monitor function - Section 4928.142(B)(2), Revised Code

Section 4928.142(B)(2), Revised Code, requires that the RTO has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric utility's conduct. The Companies submit, and Constellation agrees, that MISO has an independent market-monitor function and the requisite abilities required by this section of the code (Co. Ex. 1 at 3; Co. Ex. 4 at 7; Const. Ex. 1 at 11).

Staff believes that the MRO does not meet the requirements pertaining to market monitoring and that the application is vague and ambiguous in delineating which entity, the market-monitor unit or MISO, is responsible for mitigating market power. Staff submits that Section 4928.142(B), Revised Code, contemplates that the market-monitor function will encompass both the authority to identify and act to mitigate market power; therefore, Staff maintains that the market-monitor function must be performed by a market-monitor unit, rather than MISO, which may be reluctant to police its own members (Staff Br. at 10-11).

OPAE believes that there are serious questions regarding MISO's ability to mitigate market power or the Companies' market conduct. OPAE points out that the Companies' witness Warvell could cite no instances where MISO has acted to mitigate market power, nor could he point to any evidence that such authority had been used with respect to ATSI (OPAE Br. at 3). IEU-Ohio states that, despite FERC's acceptance of MISO's market monitoring and mitigation measures, the structure of MISO's mitigation measures do not attempt to detect and mitigate marker power, at least in the traditional sense. Rather, IEU-Ohio believes that MISO's mitigation measures are structured to create safe harbors of behavior that might otherwise be viewed as an exercise of market power (IEU Ex. 1 at 18 and 21).

The Commission notes that, after the deadline for briefs in this proceeding, FERC issued a decision regarding the function of the market monitor.[5] There is no testimony in the record of this proceeding regarding the impact of this recent FERC decision on the ability of the market monitor to take actions to identify and mitigate market power or the electric utility's conduct. Because the record in this proceeding demonstrates that the precise duties of the market monitor are in flux, we find that FirstEnergy has not demonstrated that the RTO market monitor has the ability to take actions to identify and mitigate market power or the Companies' conduct.

3. Published source of pricing information - Section 4928.142(B)(3), Revised Code

Section 4928.142(B)(3), Revised Code, requires that an MRO application demonstrate that a published source of information is available publicly or through subscription that identifies pricing information for traded electricity. According to the Companies, published information is available through a combination of such sources at the Intercontinental Exchange (ICE), New York Mercantile Exchange (NYMEX), ICAP, and Platts (Co. Ex. 1 at 4; Co. Ex. 4 at 8). Constellation agrees that these publications satisfy the statutory requirement (Const. Ex. 1 at 12).

OPAE submits that the Companies failed to show that the publications they cited represent pricing for the volume of capacity and energy necessary to meet the load of the Companies. Therefore, OPAE asserts that the publications cited are not adequate to meet the need to establish a transparent price to provide SSO service going forward, as required by statute (OPAE Br. at 4). IEU-Ohio agrees that the sources cited by the Companies are not adequate to meet the statutory requirement and that actual transactional forward pricing data, as opposed to broker quotes, must be available (IEU Ex. 1 at 15).

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[5] This decision was the subject of a motion filed by Constellation to supplement its reply brief. We find that it would be prejudicial to the other parties in this proceeding to grant Constellation's motion, as the other parties have had no opportunity to rebut Constellation's interpretation of the decision, given the accelerated schedule of this proceeding. Therefore, the motion will be denied.

The Commission finds that the record in this proceeding does not demonstrate that published sources of information are publically available or available through subscription that identify pricing information for traded electricity, in accordance with the requirements of Section 4928.142(B)(3), Revised Code. The testimony in the record does not support a finding that pricing information is available from a single source which represents actual transactions for both peak and off-peak power and that such pricing information includes specific information regarding the quantities of electricity traded in such transactions for the period specified in the statute (Tr. I at 88-89; IEU Ex. 1a at 15). Based upon the record in this proceeding, we cannot find that the requisite pricing information is consistently and reliably available.

C. Rate design

With regard to the generation rate design proposed in the MRO application, the Companies have proposed tariffs that are based solely on per kilowatt hour (kWh) charges, as opposed to the existing tariffs which include demand charges and a declining block structure. The Companies state that this change in rate design will remove disincentives for energy efficiency measures because the declining block rates will be eliminated. Furthermore, the applicants propose that seasonal pricing, which will be fixed and based on the seasonality characteristics observable in historical locational marginal prices, be applicable to all SSO generation charges. The Companies believe that seasonal pricing, which will apply to all residential and general service tariffs, will send more appropriate price signals to customers, thereby encouraging customers to reduce usage during higher priced summer periods (Co. Ex. 4 at 5-6 and 19).

Nucor states that the elimination of FirstEnergy's current rate design will result in significant rate increases for customers. Despite these increases, Nucor states that the Companies have done nothing to mitigate the rate shock to customers (Nucor Ex. 1 at 7-9). OmniSource agrees with Nucor that customers' options, such as time-of-day pricing, interruptible and economic development rates, and incentives for customers related to energy use and efficiency, must be required as part of the MRO (OmniSource Br. at 2; Nucor Ex. 1 at 7). Likewise, Kroger comments that the Companies' proposed rate design fails to account for time-of-use differences between customer classes in allocating generation costs. According to Kroger, this deficiency will result in cross-subsidization because there will be no recognition in the rates of the fact that some customer classes have a higher portion of usage in lower-cost, off-peak periods that other customer classes (Kroger Ex. 1 at 5).

The Consumer Advocates maintain that the MRO should be modified regarding interruptible service in order to reduce the procurement costs for customers served by the Companies. According to the Consumer Advocates, a well-designed load response program could provide benefits as part of the MRO process by reducing the demand that bidders would have to meet. Under the Consumer Advocates' proposal, credits for interruptible customers, once an effective interruptible program is developed, should be paid by all customers who are combined with the interruptible customers for bidding purposes (Con. Adv. Br. at 5).

OCC disagrees with the Companies' proposal to eliminate demand components in non-residential retail generation rates. OCC believes that the elimination of historic demand charges from all non-residential generation tariffs will encourage an inefficient demand for, and use of, generation resources. According to OCC, this weakness in the rate design of the retail generation rates will be recognized by bidders in the CBP and will result in higher bids. OCC does not believe that the seasonality factor proposed by the Companies provides enough control over the growth in demand; thus, OCC recommends that the demand components be reintroduced before any bidding takes place. OCC recommends that, in future auctions, mandatory real-time pricing for large customers, rather than demand charges, should be considered as a preferred pricing mechanism (OCC Ex. 1 at 5-7). The Consumer Advocates believe that the Commission should encourage advanced metering infrastructure to attain this goal (Con. Adv. Br. at 5).

The Companies disagree with OCC's proposal to maintain demand components for non-residential customers, stating that introducing demand charges means that higher-than-average load factor customer could pay lower-than-average SSO generation charges, and conversely lower-than-average load factor customers could pay higher-than-average charges. The result, according to the Companies, is that the lower-than-average customers would have an incentive to shop in comparison to the higher-than-average customers. Therefore, the Companies argue that the level of shopping would be influenced by rate design, rather than cost. The Companies also believe this would lead to under-recovery of costs by the Companies and higher reconciliation costs for customers (Co. Ex. 9 at 5).

In response to the intervenors' overall criticisms of the rate design, the Companies maintain that inclusion in the retail rates of cost components, e.g., demand, time-of-day, or interruptible components, other than seasonal and voltage-based cost difference, would be arbitrary and could not be designed to match the costs incurred by the Companies. FirstEnergy maintains that there is no reasonable way to quantify demand, time-of-day, or interruptible components for all winning bidders in the aggregate and no way to know whether suppliers have included such components in their bids. In addition, the Companies note that, if the retail rate for a certain class of customers is reduced as a result of the suggested modifications by the intervenors, such a reduction would have to be made up by increasing the retail rate for other classes of customers (Co. Ex. 9 at 4-5). Finally, the Companies point out that the arguments raised by the intervenors regarding the rate design are more of an attack on SB 221 and not the Companies' proposal. The Companies emphasize that their proposal is for an SSO and, if customers believe that they can get a better rate based on their particular circumstances, they are free to obtain those rates in the competitive market (Co. Br. at 4-5).

FirstEnergy argues that there is nothing in Section 4928.142, Revised Code, which requires the use of time-of-day rates or interruptible rates in market rate offers. However, there also is nothing in Section 4928.142, Revised Code, which diminishes the Commission's existing authority over rate design or duty to ensure the availability of reasonably priced electric service. Section 4928.142, Revised Code, simply provides a new mechanism for the determination of the amount of generation rates and expressly authorizes the Commission to prescribe retail rates; it does not speak to how such rates are designed or allocated among customers.

The Commission notes that the policy of the state, as codified in Section 4928.02, Revised Code, requires the Commission to ensure the availability of unbundled and comparable retail electric service that provides customers with the supplier, term, price, conditions, and quality options they elect to meet their respective needs. Further, SB 221 amended Section 4928.02, Revised Code, to specifically include the promotion of time-differentiated pricing as a policy goal of this state. FirstEnergy has not demonstrated how its proposed rate design advances these policy goals. In fact, the record clearly indicates that FirstEnergy could have proposed a rate design which would advance these goals. The Commission agrees with Kroger that time-of-day rates would recognize that some customers have a higher proportion of usage in lower-cost, off-peak periods (Kroger Ex. 1 at 5). Likewise, the record demonstrates that interruptible rates can be used to reduce generation and transmission capacity needs (Nucor Ex. 1 at 11). Moreover, the Commission notes that FirstEnergy has not demonstrated that time-of-day rates or interruptible rates are impractical or cannot be implemented as part of a competitive bidding process (Tr. I at 159; Tr. V at 21). In fact, the record in this proceeding demonstrates that FirstEnergy included both time-of-day rates and interruptible rates in its prior request, in Case No. 07-796-EL-ATA, for a competitive bidding process (Nucor Ex. 1 at 5, 10). Therefore, because the Commission finds that FirstEnergy has not demonstrated that its proposed rate design advances the state policies enumerated in Section 4928.02, Revised Code, the proposed rate design should not be adopted and approved by the Commission.

D. <u>Riders</u>

The Companies propose a non-bypassable cost recovery true-up reconciliation mechanism (Rider CRT) which will be applied quarterly to the retail price in order to account for the differences between the SSO generation service revenues and the SSO supply costs during the prior quarter (Co. Ex. 4 at 19-20; Co. Ex. 2 at 5-6). In addition, the Companies propose that Rider CRT be used to recover certain incremental expenses associated with the implementation of the CBP. As explained in the application, these incremental charges include: the CBP expenses permitted by Section 4928.142(C), Revised Code, that are not recovered through the tranche fees paid by the SSO suppliers (including fees and expenses associated with the independent third party and any consultant hired by the Commission); actual uncollectible expense amounts related to the provision of SSO generation service; and the delta revenues for special contracts both those remaining after December 31, 2008, and those approved by the Commission after January 1, 2009, i.e., for economic development and energy efficiency schedules, governmental special contracts, or unique arrangements (Co. Ex. 4 at 19-21, Ex. 3 at 4). Specifically, full recovery of the total SSO revenue requirements will be ensured through the application of two separate Rider CRT charges (Rider CRT1 and Rider CRT2). Rider CRT1, which will be recovered from all customers of the Companies, will reconcile aggregate SSO revenue requirements for the Companies with the associated SSO generation revenues. Rider CRT2, which will be recovered only from CEI customers, will include the revenue variance associated with CEI's special contract customers remaining after December 31, 2008 (Co. Ex. 4, Ex. C at 3). The Companies propose that the avoidable generation charges will be equal to the customer's SSO generation charge (Co. Ex. 2 at 9).

OPAE believes that Rider CRT is not justified and that the "costs" it contains are not costs incurred by the Companies; therefore, OPAE urges that Rider CRT be rejected (OPAE Br. at 9-10). Staff, Constellation, and Dominion argue that all of the generation-related charges should be avoidable by shopping customers (Staff Ex. 3 at 3; Const. Ex. 1 at 23; Dom. Br. at 5). Furthermore, Dominion points out that the CBP pertains to wholesale competition, not retail competition; thus, Dominion argues that these costs should be recovered through the price paid by the SSO generation supply customers and not shopping customers (Dom. Br. at 5-6). OEG argues that, if the Companies' MRO is approved and they are allowed to outsource all POLR responsibility and risk to third parties for supplying the non-shopping load, then the Companies will not incur any POLR costs because all POLR costs will be reflected in the retail mark-up or the FERC-regulated market generation rates. Therefore, OEG insists that consumers who elect to shop should not have to pay the Companies any POLR charges (OEG Ex. 1 at 20).

As pointed out by the Consumer Advocates, the Companies must allow net-meterers on their systems and must credit net-meterers with the excess generation they contribute to the systems; therefore, any bundling of non-generation charges with generation charges must be addressed in crediting net-meterers for their contribution to the system. The Consumer Advocates submit that, either the Companies must create a means to take the transmission charges out of the bids or they must credit net-meterers with the full service bundle. Accordingly, the Consumer Advocates recommend that the Companies apply a reconciliation adjustment to the credits given net-meterers for their contributions to the distribution system. (Con. Adv. Br. at 13).

OEG agrees that, with the exception of the delta revenues, the generation-related charges contained in the CRT should be avoidable. Specifically, with regard to the delta revenues, OEG believes that these revenues can be non-bypassable; however, OEG believes that it is critical that the Commission formally approve in a separate docket each transaction that results in delta revenues in order to avoid the possibility of undue discrimination (OEG Ex. 1 at 21). Staff advocates that the delta revenues should be removed from Rider CRT and that recovery for delta revenues should be placed in a separate rider. In addition, Staff states that the Companies should be required to apply to recover any delta revenues in accordance with the Commission rules (Staff Ex. 3 at 3).

OCC and Cleveland disagree with the Companies' proposal pertaining to the handling of lost revenues resulting from special contracts through Rider CTR (OCC Ex. 1 at 9; Cleve. Ex. A at 7). Cleveland states that, as proposed by the Companies, Rider CRT allows them to recover 100 percent of non-quantified, unidentified, and uncontrolled delta revenues and costs related to alternative energy resources without any review by the Commission or interested parties (Cleve. Ex. A at 7). The Consumer Advocates maintain that the Companies have failed to establish a market-based SSO for CEI's special contracts customers. The Consumer Advocates state that FirstEnergy and not the customers should be responsible for the delta revenues (Con. Adv. Br. at 8-9). OCC points out that, prior to this filing, FirstEnergy's shareholders contributed to the recovery of delta revenues. Therefore, OCC advocates that the Commission should not allow any more that 50 percent of the delta revenues to be recovered from customers who do not have special contracts (OCC Ex. 1 at 10). Similarly, Kroger's witness Higgins believes that the recovery of delta revenues is inconsistent with the adoption of an MRO and that any costs of special deals made by the Companies should be absorbed by FirstEnergy and not subsidized by the customers (Kroger Ex. 1 at 6).

The Companies insist that Rider CRT is consistent with the statute which allows the Companies to recover generation-related costs through a reconciliation mechanism, Rider CRT. The Companies point out that most of the parties do not appear to dispute that certain items included in Rider CRT, i.e., the cost of recovering revenue variance, conducting the CBP, uncollectible expense, and delta revenues, should be recoverable; the dispute is whether shopping customers should also pay these charges (Co. Br. at 4-5). The Companies disagree with the proposal that all of the generation-related charges in Rider CRT should be avoidable. Specifically, with regard to Staff's proposals that the difference between purchase power expenses and retail generation revenue, as well as the fines and damages related to the auction, should be bypassable. The Companies argue that, if customers are allowed to shop and avoid such charges, there would be a shrinking pool of customers from which to recover such cost. Thus, the Companies state that they would bear the risk of not recovering all of the costs of procuring generation. In response to the proposal that uncollectible costs in Rider CRT should be avoidable, the Companies state that, if the proposal is adopted, customers taking service from third-party suppliers would avoid sharing in the cost of the state policy provision which protects at-risk population (Co. Ex. 9 at 9-11).

FirstEnergy states that Rider CRT keeps the Companies revenue neutral. On rebuttal, the Companies state that they are entitled to recover their full costs of power supply procured in the MRO process and, if they do not recover such costs for the customer that has an approved reasonable arrangement, then such delta revenue should be recoverable from all customers. The Companies submit that, if they are not allowed to recover the delta revenues, they would be denied the opportunity to earn a reasonable rate of return (Co. Ex. 9 at 6-8).

The Commission finds that Rider CRT should not include recovery of delta revenue for the CEI special contracts which were extended beyond December 31, 2008, in the RCP case, Case No. 05-1125-EL-ATA. There is no evidence in the record that this provision was including recovery of delta revenue after December 31, 2008 (Tr. V at 35-42). In fact, FirstEnergy's witness Ridmann testified that there was no provision in the stipulation approved by the Commission in the RCP case for recovery of delta revenues after December 31, 2008 (Tr. V at 39). Further, there is no provision in Section 4928.142, Revised Code, which permits the recovery of delta revenue for contracts entered into prior to the implementation of the MRO.

Moreover, the Commission agrees with Staff witness Fortney that the delta revenue recovery for future special or unique arrangements should be made by a separate rider. Further, once delta revenue recovery is removed from Rider CRT, all remaining aspects of Rider CRT relate to generation (Staff Ex. 3 at 3). Thus, the Commission finds that Rider CRT should be avoidable for customers who shop.

The Companies propose four other riders. Two of the proposed riders only apply to CEI customers. The regulatory transition charge rider (Rider RTC) will apply to CEI customers only through December 31, 2010, in accordance with the Companies' RCP (Co. Ex. 4 at 21). The Companies submit that SB 221 allows for the continuation of this transition cost recovery as provided for in the current RCP. Rider RTC will begin January 1, 2009, and will be updated around May 1, 2009, to account for the reductions called for in the RCP. The second rider applicable to CEI customers from January 1, 2009, through April 30, 2009, is the distribution service rider (Rider DSI). As explained by the Companies, Rider DSI is necessary to provide for application of distribution charges to CEI for the designated period, since the distribution rates for CEI customers do change under the Companies' proposal in *In the Matter of the Application of FirstEnergy for Authority to Increase Rates for Distribution Service,* Case No. 07-551-EL-AIR, until May 1, 2009 (Co. Ex. 2 at 7-8; Co. Ex. 4 at 22).

The proposed grandfathered contracts rider (Rider GRC) is applicable only to certain customer facilities under a special contract entered into pursuant to Section 4905.31, Revised Code, and entered into prior to January 1, 2001. Finally, the Companies propose a deferred transmission cost recovery rider (Rider DTC). According to the Companies, Rider DTC is necessary to recover certain deferred incremental transmission and ancillary service-related costs, as well as the recovery of such deferrals, in accordance with the Commission's decision in Case Nos. 04-1931-EL-AAM and 04-1932-EL-ATA. The Companies explain that recovery of these deferrals began January 1, 2006, and, under Rider DTC, will continue from January 1, 2009, through December 31, 2010 (Co. Ex. 2 at 7-8; Co. Ex. 4 at 22).

The Commission notes that no party opposed FirstEnergy's proposals concerning Rider RTC, Rider DSI, Rider GRC, and DTC. However, it is unnecessary for the Commission to reach a decision on these riders in light of the fact that the Commission is not approving FirstEnergy's application at this time.

E. Renewable energy, energy efficiency, and peak demand reduction requirements

Sections 4928.64 and 4928.66, Revised Code, set forth requirements that electric utilities must comply with regarding alternative energy portfolios, energy efficiency, and peak demand reduction. In their application, the Companies propose that any requirements for meeting renewable energy requirements will be achieved through a separate request for proposal during 2009 so that all such requirements will be met by the end of 2009. According to the instant application, the renewable energy resources will be in the form of renewable energy credits and the cost will be passed on to customers. The Companies intend on pursuing their plans for meeting the targets pertaining to load reductions and energy efficiency through programs that are separate from this application. According to the Companies, no specific requirements related to advanced energy or advanced energy technologies are applicable during the time period contemplated by the initial CBP under this application (Co. Ex. 4 at 29).

It is the understanding of IEU-Ohio that customer-sited capabilities must be set forth by the Companies in their MRO proposal in order to meet the alternative energy resource, energy efficiency, and peak demand reduction portfolio requirements in SB 221. IEU-Ohio points out that FirstEnergy did include provisions dealing with customer-sited capabilities in its ESP case, which was filed contemporaneously with this case (IEU Ex. 1 at 6-7). OPAE agrees and recommends that FirstEnergy consider an integrated procurement plan whereby the impact of various cost-effective demand side management programs are considered as substitutes for some portion of the traditional generation supply contracts (OPAE Ex. 1 at 34-35). In addition, Nucor notes that interruptible rates, which are not proposed in the MRO application, are critical to meet the broad demand response policy objectives of SB 221, as well as the peak demand reduction targets in the statute; therefore, Nucor avers that the Commission should require that customers be allowed to take service under interruptible rate options (Nucor Ex. 1 at 12).

The record in this case demonstrates that FirstEnergy has not included in its application a proposal for compliance with the renewable energy requirements in Section 4928.64, Revised Code (Tr. I at 81). The Commission finds that the Companies' application for an MRO cannot be approved in the absence of a proposal for compliance with the renewable energy requirements of Section 4928.64, Revised Code. The Commission notes that Section 4928.142, Revised Code, which allows electric utilities to apply for MROs, and Section 4928.64, Revised Code, which provides renewable energy requirements for electric utilities, were enacted together as part of SB 221. Reading these provisions together, it is clear that the General Assembly intended for the Commission to consider the utility's proposal for addressing the renewable energy requirement in the context of considering the utility's application for an MRO.

In addition, the Commission notes that Section 4928.02, Revised Code, states that it is the policy of this state to protect at-risk populations in considering the implementation of new advanced energy or renewable energy resources. By attempting to sever the Commission's consideration of its MRO from the consideration of its proposal for compliance with the statutory renewable energy resource requirements, FirstEnergy's application has the potential to frustrate, rather than advance, this policy goal of the state.

Moreover, by failing to include the proposal to meet the renewable energy requirements as part of its application for an MRO, FirstEnergy precludes the possibility that generation based upon renewable energy could be part of the winning bidder's portfolio in the CBP. Instead, FirstEnergy assumes that the only means of meeting the renewable energy requirement will be through the purchase of renewable energy credits, with the cost of such credits being passed through to consumers.

Likewise, the Commission finds that FirstEnergy's application for an MRO cannot be approved in the absence of a proposal by the Companies for compliance with the energy efficiency and peak demand reduction requirements of Section 4928.66, Revised Code. The Commission further notes that SB 221 amended the policies of the state, codified in Section 4928.02, Revised Code, to specifically enumerate DSM, time-differentiated pricing, and implementation of AMI as policies which should be promoted by the Commission. These provisions were all enacted as part of SB 221, and it is clear that the General Assembly intended for the Commission to consider an electric utility's plan for compliance with the energy efficiency and peak demand reduction requirements in conjunction with the consideration of its application for an MRO.

F. <u>Other issues</u>

The Companies have also developed contingency plans in the event one or more of the winning bidders repudiate the Master SSO Supply Agreement prior to the beginning of the delivery period, or if one or more SSO supplier defaults during the delivery period (Co. Ex. 1 at 14-15; Co. Ex. 4 at 26). Constellation supports the contingency plans proposed in the MRO (Const. Ex. 1 at 4). IEU-Ohio notes that, in the event of these types of defaults, measures should be taken to offset the costs being passed on to retail customers (IEU Ex. 1 at 22). The Consumer Advocates believe that increased oversight by the Commission should be applied to circumstances where a winning bidder fails to provide service and the Companies should not have unfettered discretion to determine how they will acquire replacement tranches (Con. Adv. Br. at 11). Constellation also recommends several changes to the propose SSO Master Supply Agreement (Const. Ex. 1 at 29).

In light of the fact that FirstEnergy's application is not being approved at this time for the reasons discussed above, the Commission finds that it is unnecessary to reach these additional issues. The Commission directs FirstEnergy, in the event it chooses to continue to pursue an MRO, to carefully consider the revisions to the Master SSO Supply Agreement proposed by the parties. In addition, the Commission notes that FirstEnergy has failed to meet the requirements of some of the Commission's rules issued in Case No. 08-777-EL-ORD. Therefore, if FirstEnergy pursues an MRO in the future it will be required to comply with the rules adopted by the Commission in Case No. 08-777-EL-ORD, once such rules become effective.

IV. CONCLUSION

Upon review of FirstEnergy's MRO application, taking in consideration the requirements established by SB 221, the Commission finds that the MRO application can not be approved as filed. In the event FirstEnergy decides to continue to pursue an MRO, FirstEnergy is directed to provide a sufficient demonstration to address the concerns we have noted herein.

FINDINGS OF FACT:

(1) On July 31, 2008, FirstEnergy filed an application for an MRO in accordance with Section 4928.142, Revised Code.

(2) On August 18, 2008, a technical conference was held regarding FirstEnergy's application and on August 25, 2008, a prehearing conference was held in this matter.

(3) On September 15, 2008, intervention was granted to: OEG; OCC; Kroger; OEC; IEU-Ohio; OPAE; Nucor; NOAC; Constellation; Dominion; OHA; Citizens' Coalition; NRDC;

Sierra Club; NEMA; Integrys; Direct Energy; City of Akron; OMA; FPL; Cleveland; NOPEC; OFBF; American Wind Association, Wind on Wires, and Ohio Advance Energy; Citizens; OmniSource; Material Sciences; OSC; COSE; Morgan Stanley Capital Group; and Commercial Group.

(4) The hearing commenced on September 16, 2008, and concluded on September 22, 2008.

(5) Briefs and reply briefs were filed on October 6, 2008, and October 14, 2008, respectively.

CONCLUSIONS OF LAW:

(1) The Companies are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) The Companies' application was filed pursuant to Section 4928.142, Revised Code, which authorizes the electric utilities to file an MRO as their SSO, whereby retail electric generation pricing will be based upon the results of a CBP.

(3) Paragraphs (A) and (B) of Section 4928.142, Revised Code, set forth the specific requirements that an electric utility must meet in order to demonstrate that the CBP and the MRO proposal comply with the statute.

(4) Section 4928.142(A)(1), Revised Code, requires that an MRO be determined through a CBP that provides for: an open, fair, and transparent competitive solicitation; a clear product definition; standardized bid evaluation criteria; oversight by an independent third party; and evaluation of submitted bids prior to selection of the least-cost bid winner or winners.

(5) Section 4928.142(B) requires that an MRO application detail the electric utilities' proposed compliance with the CBP requirements and the Commission's rules, and demonstrate: membership in an RTO; the RTO has a market-monitor function and the ability to take actions to identify and mitigate market power and the distribution utility market conduct; and that there is a published source of information that identifies pricing for on- and off-peak energy products that are contracts for delivery beginning at least two years in the future.

(6) Section 4928.142(B), Revised Code, provides that a utility may file its application for an MRO prior to the effective date of the Commission rules required under the statute; however, as the Commission determines necessary, the utility shall immediately conform its filing to the rules upon the rules taking effect.

(7) In keeping with Section 4928.142(A)(1)(a), Revised Code, the competitive solicitation proposed by FirstEnergy should not be approved.

(8) The application does not provide a clear product definition in accordance with the requirements of Section 4928.142((A)(1)(b), Revised Code.

(9) The application does not meet the statutory requirement for standardized bid evaluation found in Section 4928.142(A)(1)(c), Revised Code.

(10) The application does not meet the statutory requirement for oversight by an independent third party found in Section 4928.142(A)(1)(d), Revised Code.

(11) The application meets the statutory criterion regarding evaluation of proposed bids found in Section 4928.142(A)(1)(e), Revised Code.

(12) FirstEnergy has fulfilled the requirements of Section 4928.143(B)(1), Revised Code, requiring membership in an RTO.

(13) FirstEnergy has not demonstrated that the application meets the requirements of Section 4928.143(B)(2), Revised Code, pertaining to the market-monitor function.

(14) FirstEnergy has not demonstrated that a source of information is available for pricing of traded electricity, in accordance with the requirements of Section 4928.142(B)(3), Revised Code.

(15) The rate design included in the application cannot be approved because FirstEnergy has not demonstrated that the proposed rate design advances state policies.

(16) Rider CRT should not include recovery of delta revenue for the special contracts and all remaining aspects of Rider CRT relating to generation should be avoidable. The delta revenue recovery for future special or unique arrangements should be made by a separate rider.

(17) The application for an MRO cannot be approved in the absence of a proposal for compliance with the renewable energy requirements of Section 4928.64, Revised Code, and a proposal for compliance with the energy efficiency and peak demand reduction requirements of Section 4928.66, Revised Code.

(18) In the event FirstEnergy chooses to continue to pursue an MRO, it should consider the revisions to the Master SSO Supply Agreement proposed by the parties.

(19) If FirstEnergy continues to pursue an MRO, it will be required to comply with the rules adopted by the Commission in Case No. 08-777-EL-ORD, once such rules become effective.

ORDER:

It is, therefore,

ORDERED, That FirstEnergy's application for approval of its proposed MRO is not approved for the reasons set forth in this opinion and order and, in the event FirstEnergy elects to pursue an MRO, FirstEnergy is directed to provide a sufficient demonstration to address the specific concerns noted herein. It is, further,

ORDERED, That Constellation's motion to supplement its reply brief be denied. It is, further, ORDERED, That a copy of this opinion and order be served on 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

CMTP/GAP/vrm

Entered in the Journal

NOV 25 2008

Reneé J. Jenkins
Secretary

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief and Second Appendix of Appellant the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via First Class mail, postage prepaid this 25th day of March, 2010.

Maureen R. Grady
Assistant Consumers' Counsel

SERVICE LIST

Duane W. Luckey
Werner L. Margard III
Thomas G. Lindgren
John H. Jones
Assistant Attorneys General
180 East Broad Street, 6th FL.
Columbus, OH 43215-3793

Daniel R. Conway
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, OH 43215

Marvin I. Resnik
Kevin F. Duffy
Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215-2373

Samuel C. Randazzo
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215