ORIGINAL

IN THE SUPREME COURT OF OHIO

Columbus Southern Power Company	:	**Case No. 10-723**
	:	
Appellant,	:	
	:	**Appeal from Public**
v.	:	**Utilities Commission of Ohio**
	:	
The Public Utilities Commission of Ohio,	:	**Public Utilities**
	:	**Commission of Ohio**
Appellee.	:	**Case No. 09-516-EL-AEC**

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INTRODUCTION

Although the underlying facts involved with the case are complex, the outcome of the appeal turns squarely on the law. The approved standard service offer (SSO) rates of Columbus Southern Power Company (CSP) include a *non-bypassable* Provider of Last Resort (POLR) charge. The POLR charge was approved to cover two types of risk related to customers shopping for generation service since CSP stands ready as the default service provider: (1) the risk of allowing a customer to remain with the SSO when market prices are higher than the SSO, and (2) the risk of customers leaving the SSO when market prices are favorable and subsequently returning to the SSO when market prices exceed SSO rates. The Commission provided as part of approving CSP's SSO that shopping customers would pay the POLR charge when receiving SSO service as well as during the time they are receiving generation service from a competitive supplier, unless a shopping customer promises to pay a market price if that customer subsequently returns to the SSO. Approval of a POLR charges is common to all of the electric utilities in Ohio, consistent with the statutory POLR obligation imposed upon all electric utilities. Yet the decision below exposes CSP to uncompensated POLR risk based on an unsupportable conclusion that CSP faced no risk that the involved customer, Eramet Marietta, Inc. (Eramet), would shop for generation service from another supplier during the term of the contract.

Contemporaneous with finalizing CSP's ESP through the rehearing process, the Commission considered an application filed by Eramet for approval of a discounted rate for electric service. In deciding the *Eramet Case*[1] below, the Commission granted a substantial discount to Eramet and approved a nearly ten-year term for the contract. Over CSP's objection, the Commission claims that Eramet wanted CSP to be the "exclusive supplier" for the entire term of the contract. Against the manifest weight of the record, the Commission found that there was "no risk" that Eramet would shop during the contract term and held that CSP would not be permitted to recover the otherwise applicable POLR charge in connection with the contract. Thus, even though the Commission had recently approved CSP's non-bypassable POLR charge, it contemporaneously decided in the case below to order CSP to enter into a service agreement without fully compensating CSP the revenue foregone as a result of the discounted economic development rate. In reaching this decision, the Commission unlawfully concluded that it has full discretion to decide whether to allow recovery of revenue foregone.

The Commission's decision to render CSP the exclusive supplier also conflicts with the central tenets of Ohio electric restructuring laws and should be reversed and remanded. The extended term of the compulsory agreement is nearly equal to the decade that the State of Ohio has steadfastly maintained customer choice for electricity supply. Serving Eramet's substantial power requirement is roughly the equivalent of supplying power to up to 58,000 households and it is extremely significant and potentially harmful to the enhancement of retail electric competition in Ohio that the Commission

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

inexplicably decided to pull Eramet's load out of the competitive market for such a substantial period of time.

Neither the Commission's conclusion that it can unilaterally order a utility to "agree" to an objectionable service contract, nor the Commission's harmful conclusion that it has plenary discretion to require a utility to absorb the costs associated with any discount it approves, are legally sustainable. There is no basis in the controlling statute, R.C. 4905.31, to support the Commission's interpretation. And it makes little sense to require the utility to involuntarily absorb the costs of an economic development venture, given that the approved discount is not related to avoided costs in providing service and given that the anticipated economic benefits are expected to accrue primarily to Ohio's economy.

Under the Commission's view that it has unbridled discretion to approve economic development discounts and simultaneously disallow recovery of the associated revenue foregone, there is no limit to the potential financial harm that is yet to befall CSP and other utilities if the Court does not reverse this decision. This dispute is no academic matter – the Commission's decision directly inflicts millions of dollars of harm to CSP annually, adding to an even larger adverse impact based on a similar recent decision and potentially additional future decisions for other large industrial customers. Indeed, the Commission's decision below was patterned after another recent case wherein it similarly awarded another customer, Ormet Primary Aluminum Company (Ormet), a substantial discount as part of a ten-year contract.[2]

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[2] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC ("*Ormet Case*").

CSP and Ohio Power Company (its affiliated electric distribution utility) have appealed the *Ormet Case* through Case No. 2009-2060 and that case awaits oral argument. As a related matter, CSP and Ohio Power Company have appealed the Commission's decision in the *Economic Development Rider Case*, a proceeding initiated by CSP and Ohio Power Company to recover the foregone revenue associated with both the Ormet and Eramet special arrangements, through Case No. 2010-722[3] which is currently being briefed.

In short, CSP is committed to economic development and has continuously demonstrated this commitment in the communities it serves. CSP collaboratively works with existing customers to provide needed electrical infrastructure in an effort to retain existing jobs and investment. For example, in September 2008, AEP (CSP's parent company) was named in the top 10 list of utilities in economic development by Site Selection magazine, a national publication of corporate real estate strategy and area economic development.[4] While CSP supports economic development in many ways and has consistently worked with the Commission and the State of Ohio to promote economic development opportunities, it must challenge as unreasonable and unlawful the Commission's decision which inflicts financial harm on the serving utility as a method of promoting economic development. When approving economic development arrangements that are perceived to benefit the State of Ohio, the Commission must permit

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[3] (*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates*, Case No. 09-1095-EL-RDR ("*EDR Case*")

[4] http://www.siteselection.com/portal/

the affected utility recovery of the full discount granted, in accordance with R.C. 4905.31.

STATEMENT OF FACTS AND OF THE CASE

A. Overview of the Legislative Restructuring of the Electric Industry

Am. Sub. S.B. No. 3, 1999 Ohio SB 3, effective October 5, 1999 (SB 3), restructured regulation of electric utilities and introduced retail customer choice for electric generation service, largely deregulating generation service in Ohio. Am. Sub. S.B. No. 221, 2007 Ohio SB 221, effective July 31, 2008 (SB 221), modified the method for setting standard service offer (SSO) rates for electric service and created new requirements for alternative energy, energy efficiency and peak demand reductions. Thus, through the enactment of SB 3 by the General Assembly (and retained by SB 221), customers were given the statutory right to shop for generation service on their own or as part of an aggregated group.

Of equal importance to this case, SB 3 granted customers the right to not shop and avoid market-based rates by taking service under the SSO of their electric distribution utility (EDU). Ohio Rev. Code Ann. 4928.141 (2010), Ap. at 10.[5] As a related but distinct matter, customers can also return to the EDU's SSO if they shopped for generation service and subsequently decided to return or if their competitive service provider defaulted on its obligation to serve. Ohio Rev. Code Ann. 4928.14 (2010), Ap. at 10. Despite significant changes made to the regulatory framework established by SB 3 back in 1999, the enactment of SB 221 in 2008 retained the same "customer choice"

[5] References to Appellant's Appendix are designated as "Ap."

components as the cornerstone of the continuing structure for deregulation of electric service in Ohio.

A corollary to these customer rights is the EDU's obligation to be the Provider of Last Resort (POLR), a requirement imposed on EDUs by multiple statutory provisions. R.C. 4928.141(A) imposes on an EDU the requirement to provide consumers within its certified service territory "a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Ohio Rev. Code Ann. 4928.141(A) (2010), Ap. at 11. When coupled with the right to choose a retail generation supplier, availability of the SSO to any customer means that a customer can freely leave the EDU when market price is lower than the stabilized SSO rate and can just as easily return when the market price rises above the SSO rate. Given the volatile nature of market prices for electricity, there exists a potential for "churn" or migration of customers on and off SSO service. Another POLR obligation is based on R.C. 4928.14, which provides that customers of a defaulting competitive provider return to the EDU's SSO until the customers choose an alternative supplier. Ohio Rev. Code Ann. 4928.14 (2010), Ap. at 10. EDUs must stand ready to serve in these situations and fulfill their statutory POLR obligation.

Another significant amendment within SB 221 that is pertinent to this case involves reasonable arrangements, also known as "special contracts," whereby a customer typically receives service at a discounted rate based on furthering economic development purposes within the State of Ohio or other unique circumstances. R.C.

4905.31 was amended to allow a "mercantile customer"[6] to petition the Commission for approval of a reasonable arrangement with an EDU. Previously (and continuing for non-electric public utilities), only a public utility could petition the Commission for approval of a reasonable arrangement. When creating this novel provision for mercantile customers, the General Assembly simultaneously decided to permit a financial device "to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program." Ohio Rev. Code Ann. 4905.31(E) (2010), Ap. at 1 (emphasis added).

B. CSP's Electric Security Plan Case

Under SB 221, electric utilities can either seek approval of an Electric Security Plan (ESP) or a Market Rate Offer (MRO) to establish an SSO rate plan. Ohio Rev. Code Ann. 4928.141 (2010), Ap. At 10. While an ESP may be considered more of a hybrid pricing plan, combining elements of traditional regulation and market-based deregulation, the MRO is ultimately designed, after a possible transition period, to fully achieve permanent market-based pricing for the utility. In particular, a utility's decision to opt for an MRO is permanent under R.C. 4928.142(F). Ohio Rev. Code Ann. 4928.143 (2010), Ap. At 14. In approving the special arrangement in the decision below, the Commission denied full recovery of revenues foregone as a result of the special arrangement, by excluding recovery of the otherwise applicable POLR charges

[6] A "mercantile customer" as defined in R.C. 4928.01 (A)(19), is a commercial or industrial customer that consumes more than 700,000 kWh of electricity per year, for nonresidential use, or is part of a national account involving multiple facilities in one or more states. Ohio Rev. Code Ann. 4928.01(A)(19) (2010), Ap. at 2.

authorized by the Commission as part of CSP's ESP. Understanding CSP's approved POLR charge is central to this case. CSP filed an ESP proposal on the same date that SB 221 became effective, July 31, 2008.[7] As part of its ESP application, CSP proposed a non-bypassable POLR rider to collect an annual revenue requirement reflecting the costs of fulfilling the POLR obligation. (*ESP Case*, Opinion and Order at 38 (internal citations omitted), Ap. at 131.)

In considering the proposal, the Commission recognized that CSP's proposed POLR charge would cover two distinct risks: "the cost of allowing a customer to remain with the Companies, or to switch to a [competitive] provider and then return to the Companies' SSO after shopping" and noted that CSP "utilized the Black-Sholes Model to calculate their cost of fulfilling the POLR obligation, comparing customers' rights to 'a series of options on power.'" (*ESP Case*, Opinion and Order at 38-39, Ap. at 131-132.) (internal citations omitted). The Commission also recognized its Staff's position that there are "two risks involved: one risk is the risk of customers returning to the SSO and the other risk is that the customers leave and take service from a [competitive] provider (migration risk). Staff witness Cahaan testified that the risk associated with customers returning to the SSO could be avoided by requiring the customer to return at a market price..." (*ESP Case*, Opinion and Order at 39, Ap. at 132) (internal citations omitted). As between the two risks, the Commission noted that CSP's testimony indicated "the migration risk equals approximately 90 percent of the Companies' POLR costs pursuant to the Black-Scholes model." (*Id.*)

[7] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-SSO ("*ESP Case*") (March 18, 2009 Opinion and Order), Ap. at 94.

The Commission decided to grant and modify CSP's proposed POLR charge as part of its decision in the *ESP Case*:

> Therefore, based on the record before us, we conclude that the Companies' proposed ESP should be modified such that the POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith, including the migration risk. The Commission accepts the Companies' witness' quantification of that risk to equal 90 percent of the estimated POLR costs, and thus, finds that the POLR rider shall be established to collect a POLR revenue requirement of $97.4 million for CSP and $54.8 million for OP.

(*ESP Case*, Opinion and Order at 40, Ap. at 133) (internal citations omitted). Thus, regarding the migration risk (*i.e.*, that customers could leave the standard service offer when market prices drop below the SSO rate during the period of the ESP), the Commission agreed that 90% of the requested POLR revenue requirement proposed should be allowed to compensate CSP for that risk. Regarding the second part of the risk (*i.e.*, a customer shopping and then returning to the SSO rate when the market price goes back up), the Commission permitted shopping customers to bypass the POLR charge if they agree to pay a market price if they end up returning to SSO service later; otherwise, those shopping customers would continue to pay the POLR charge during the time they received generation service from a competitive service provider. (*ESP Case*, Opinion and Order at 40, Ap. at 133.)

C. The Proceeding Below

Shortly after the commencement of CSP's ESP, on June 19, 2009, Eramet filed an application under R.C. 4905.31 for approval of a reasonable arrangement with CSP. (*Eramet Case*, October 15, 2009 Opinion and Order at 1, Ap. at 31.) CSP did not join Eramet in filing the application, but did move to intervene on July 1, 2009. (*Eramet Case*, July 1, 2009 Motion of CSP to Intervene, Supp. at 1.) CSP's motion to intervene advocated approval of the proposed arrangement only if CSP would be permitted full recovery of revenues foregone as a result of the discount from tariff rates. (*Id.* at 2-3, Supp. at 2-3.) Eramet did not propose a contractual provision for CSP to be the exclusive supplier of competitive generation service to Eramet during the term of the proposed arrangement. Nonetheless, the Commission found that "Eramet knowingly decided that it would not shop for electric service in exchange for securing a long-term power contract with CSP." (*Eramet Case*, Opinion and Order at 7, Ap. at 37.) Accordingly, the Commission ordered that CSP must "credit any POLR charges paid by Eramet to its economic development rider in order to reduce the amount of delta revenues recovered from other ratepayers." (*Id.* at 9, Ap. at 39.) [8]

CSP filed an application for rehearing, requesting that the Commission reconsider its adoption of the compulsory agreement generally and "exclusive supplier" aspect of the agreement specifically – not only to uphold State policy and statutory mandates regarding customer choice but also to preserve the Commission's decision to adopt a non-bypassable POLR charge in the *ESP Case* and enable CSP to fully recover "revenues foregone" as a result of the Eramet arrangement consistent with R.C. 4905.31. (*Eramet Case*, CSP November 13, 2009 Application for Rehearing, Ap. at 67.) The Commission rejected CSP's rehearing arguments and found that R.C. 4905.31 enabled it to order CSP to execute the "agreement" without CSP's consent. (*Eramet Case*, March 24, 2010 Entry on Rehearing, at 6, Ap. at 57.) With respect to CSP being the exclusive supplier during the term of the arrangement, the Commission again found that Eramet has chosen to take

[8] On August 5, 2009 the Commission Staff and Eramet filed a stipulation dealing with elements of the application. The issues included in the Stipulation are separate and distinct from the issues now on appeal.

service from CSP and expressed a desire not to shop. (*Id.* at 3-4, Ap. at 54-55.) On that basis, the Commission again found that, under R.C. 4905.31, "the recovery of delta revenues is a matter for the Commission's discretion" and reinforced its decision to require a POLR charge offset to CSP's recovery of foregone revenues associated with the arrangement. (*Id.* at 5, Ap. at 56.) In rejecting each CSP's rehearing arguments raised below, the Commission relied heavily on its recent decision in the *Ormet Case*. (*Id.* at 5-7, Ap. at 56-58.) CSP timely filed a Notice of Appeal with this Court.

STANDARD OF REVIEW

This Court has "complete and independent power of review as to all questions of law" in appeals from the commission. *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St. 3d 466, 469. *See also Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St. 3d 362, 365. Pursuant to R.C. 4903.13, a Commission order will be reversed, vacated, or modified by this court when, upon consideration of the record, the court finds the order to be unlawful or unreasonable. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009), 121 Ohio St. 3d 362, 365. *See also Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530.[9] In order to reverse or modify a Commission decision as to questions of fact, the Court must find that the record does not contain sufficient probative evidence or find that the Commission's decision was manifestly against the weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571 *quoting AT&T Communications of Ohio,*

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[9] For sake of clarification the stipulation reached in this record did not deal with the issues in this appeal, and therefore the test to determine the reasonableness of stipulations is not an appropriate standard to apply in this appeal.

Inc. v. Pub. Util. Comm. (2000), 88 Ohio St. 3d 549, 555. The appellant bears the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* Furthermore, the Court will not reverse a Commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order. *Myers v. Pub. Util. Comm.,* (1992), 64 Ohio St.3d 299, 302.

ARGUMENT

PROPOSITION OF LAW NO. I:

> **The Commission erred as a matter of law in concluding that "the recovery of delta revenues is a matter for the Commission's discretion" under R.C. 4905.31.**

The Commission made its position on recovery of delta revenues perfectly clear on rehearing by stating as follows:

> Despite CSP's arguments, the plain language of Section 4905.31, Revised Code, does not require the Commission to approve the full recovery of all delta revenue resulting from a reasonable arrangement. Section 4905.31, Revised Code, states that a reasonable arrangement "*may include* a device to recover *costs incurred* in conjunction with any economic development and job retention program . . . including recovery of revenue foregone." Much as we determined in [the *Ormet Case*], we find that the use of "may" in this section indicates that approval of the recovery of delta revenues is discretionary, not mandatory. (Ormet, Entry on Rehearing at 10-11). If the General Assembly had intended to require the recovery of delta revenues, it would have used "shall" or "must" rather than "may." * * * Thus, the Commission finds that, according to the plain language of the statute, as well as our prior decisions, the recovery of delta revenues is a matter for the Commission's discretion.

(*Eramet Case*, Opinion and Order at 8 (emphasis original), Ap. at 38.) While the Commission's position is perfectly clear, it is unreasonable and unlawful.

The Commission's interpretation employs a strained interpretation that reads the phrase "may include" out of context and conflicts with the plain meaning of the complete sentence when read as a whole. Though the Commission has authority to approve or disapprove proposals under R.C. 4905.31, the statute does not permit the Commission to approve a proposed arrangement and simultaneously disallow a portion of the resulting foregone revenue (also known as "delta revenues," referring to the difference between the discounted rate and the otherwise applicable tariff rate). The Commission below did, in fact, approve an arrangement and proceeded to offset CSP's recovery of delta revenues associated with the compulsory arrangement relative to the otherwise applicable POLR charge that would be paid by Eramet. Not only is the Commission's interpretation flawed based on the plain language of R.C. 4905.31, it also conflicts with the Commission's own rules, CSP's ESP recently adopted by the Commission and SB 221's new regimen for establishing electricity rates. Having "complete and independent power of review as to all questions of law" in appeals from the commission, the Court should reverse the Commission's flawed interpretation of the controlling statute. *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St. 3d 466, 469.

A. R.C. 4905.31 does not authorize the Commission to impose an involuntary contract on a utility and then deny full recovery of the resulting revenue foregone under the compulsory arrangement.

R.C. 4905.31 provides, in pertinent part, for Commission approval of financial devices as follows:

> (E) Any other financial device that may be practical or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include [1] *a device to recover costs incurred in conjunction with any economic development and job retention program of*

> *the utility within its certified territory, including recovery of revenue foregone as a result of any such program*; [2] any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; [3] any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and [4] compliance with any government mandate.

Ohio Rev. Code Ann. 4905.31 (2010), Ap. at 1 (emphasis and bracketed numbering supplied). While the bracketed numbering above was added for convenience in discussing the four listed items, it is evident from the precise language and punctuation used by the General Assembly in this new sentence that it intended to create four new permissible categories of special arrangements involving electric utilities. It is also evident that the General Assembly wanted to specify these categories simultaneously with its creation of the novel opportunity for mercantile customers to petition the Commission.

Understanding that the new sentence creates four categories is necessary to properly interpret the sentence. The Commission's erroneous interpretation glosses over the fact that the new sentence creates four items and interprets the phrase "may include" out of context as if the entire first part of the sentence only applied to the first category. Upon cursory examination, it is evident that the introductory language in the sentence preceding the list applies to all of the four items and the entire sentence must be examined and understood before reaching any conclusions about the General Assembly's use of the phrase "may include" in the introductory part of the sentence.

Under R.C. 1.42, the General Assembly has expressed that, when interpreting any provision in the Revised Code, words and phrases shall be read in context and construed according to the rules of grammar and common usage. Ohio Rev. Code Ann. 1.42

(2010), Ap. at 1. The context and grammatical structure of the sentence used by the General Assembly in R.C. 4905.31(E), including the use of semicolons to separately list the four items, is that a financial device "may include" 1; 2; 3 and 4. Contrary to the Commission's interpretation, the phrase "may include" in the first part of the sentence is in prelude to listing the four permitted items and the phrase does not modify the language internally used to describe any of the individual items 1; 2; 3; and 4.

As a practical matter, any given financial device that is proposed will likely include only one of the four items listed as being permissible (though it could include multiple items and would rarely, if ever, include all four categories of items). The applicant – whether it is a utility or a mercantile customer – gets to choose which type of item(s) to include in its proposal. Hence, the phrase "may include" is plainly designed to permit (but not require) the applicant to include any one or more of the permissible items in its proposal. This case involves the Commission approving a contract under the first option and, as such, it must apply to entirety of the provision.

By contrast to this obvious grammatical structure and context, the Commission's decision misapprehends the phrase "may include" as modifying the far-removed phrase "including recovery of revenue foregone." Thus, the Commission's interpretation improperly joins the distant phrases together to awkwardly interpret that language as saying that a financial device "may include … including recovery of revenue foregone." In addition to the fact that this strained reading makes no grammatical sense, it inappropriately grafts the introductory phrase "may include" onto the internal language describing item one in the list of four items.

The language describing the first item in the list describes "a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program." This description produces a complete thought and needs no further interpretation in order to be clear. The General Assembly provided that a permissible item to be included in a financial device under R.C. 4905.31 is a device to recover costs of an economic development program, including foregone revenue (delta revenue). There is no "may" in the phrase "including revenue foregone" within the first option in the list of four. The Commission's flawed interpretation emasculates the General Assembly's manifest intention to permit recovery of economic development costs "including revenue foregone."

Not only does the Commission's primary interpretation effectively rewrite the statute, the Commission's secondary argument is equally flawed in stating that the General Assembly would have used "shall" or "must" rather than "may" if it had intended to require recovery of delta revenues. (*Eramet Case*, Opinion and Order at 8, Ap. at 38.) If the General Assembly had used the phrase "shall include" instead of "may include" in this instance, then the sentence would have been rendered useless as a list of permissible alternatives. Under the secondary argument used in the Commission's entry on rehearing, the sentence structure would be that a financial device "shall include" 1; 2; 3 and 4. In other words, all of the four categories would have to be included in a financial device in order to be permissible under R.C. 4905.31. That approach makes no sense and further exposes the fallacy of the Commission's interpretation. Thus, the phrase "may include" cannot reasonably be interpreted to limit the recovery of revenue foregone. Accordingly, CSP submits that, because the General Assembly provided that recovery of economic development costs, including revenue foregone, is permissible without attaching any qualifying or modifying language within that listed item, the Commission's conclusion that is has full discretion to grant or deny recovery of revenue foregone is unlawful and must be reversed.

Further, application of the legislative cannon *expressio unius est exclusio alterius* confirms that the Commission cannot reasonably read this statutory language as creating the authority to offset the recovery of revenues foregone by an actual or perceived avoidance of an expense by the electric utility. CSP's position that the Commission cannot require a utility to enter into an agreement and then refuse to allow recovery of the resulting foregone revenue is further bolstered by the fact that the General Assembly has expressly provided for comparable offsets elsewhere within SB 221 – when it actually intended to do so. For instance, the General Assembly provided in R.C. 4928.143 (B) (2) (c) that:

> Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

Ohio Rev. Code Ann. 4928.143(B)(2)(c) (2010), Ap. at 15.

Another example of an explicit offset provision is found in R.C. 4928.142 (D), also enacted as part of SB 221, where the General Assembly provided that:

> In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission *shall include the benefits that may become available to the electric distribution utility* as a result of or in connection with the costs included in the adjustment... The *commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is*

> *significantly in excess* of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate.

Ohio Rev. Code Ann. 4928.142(D) (2010), Ap. at 13 (emphasis added).

These provisions demonstrate that in some instances the General Assembly chose to have the Commission offset revenue recovery by cost savings or other considerations such as impact on return on equity. In those instances, the Commission was given explicit authority to make such an offset. The absence of such authorization in R.C. 4905.31(E) is particularly telling in light of the presence of such authorization in other provisions in the same piece of legislation. The legislative canon *expressio unius est exclusio alterius* applies, meaning the inclusion of one thing implies exclusion of the other. *See Crawford-Cole v. Lucas Co. Dept. of Jobs & Family Services*, (2009), 121 Ohio St.3d 560, 566. The inclusion of authority to make a rate offset in certain statutes, but not in the amendment to R.C. 4905.31 – enacted as part of the same legislation – compels a finding that R.C. 4905.31 does not provide the Commission with inherent authority to make a rate offset to the statutorily permitted recovery of revenues foregone.

Finally as to whether the second sentence in R.C. 4905.31(E) should be interpreted to grant the Commission unlimited discretion to disallow recovery of foregone revenues when imposing a compulsory economic development agreement, CSP submits that such an interpretation would also violate the first sentence in R.C. 4905.31(E). This is true because a reduction in recovery of revenue foregone would necessarily be harmful to the utility's interests, and such an arrangement would not be "advantageous" to both parties to the contract as is required by the first sentence in R.C.

4905.31(E). This deliberate language also confirms CSP's reading of R.C. 4905.31(E) and undermines the Commission's strained interpretation.

The ultimate problem with the Commission's interpretation is that it leads to the conclusion that the Commission could disallow recovery of all revenues foregone under a contract filed unilaterally by a mercantile customer and imposed on the utility by the Commission. The true test of the merits of the Commission's "full discretion" interpretation is whether it stands the test of reasonableness in the context of other possible outcomes. Moreover, the Commission's interpretation could be broadly applied to any customer who agrees not to shop and, case by case, erode CSP's authorized POLR revenue without offsetting compensation. In any case, requiring a utility to enter into a contract, and then denying recovery of the revenues foregone under that contract cannot be permitted under R.C. 4905.31. While the Commission has substantial discretion under R.C. 4905.31 to adopt or reject a proposal for a reasonable arrangement, it cannot adopt a compulsory agreement and simultaneously deny recovery of revenues foregone. For all of these reasons, the Commission's interpretation of R.C. 4905.31 should be reversed and remanded.

B. The decision below, denying CSP recovery of POLR charges that Eramet would pay without the compulsory agreement, conflicts with the Commission's contemporaneously-adopted Electric Security Plan for CSP and undermines SB 221's new regimen for establishing electricity rates.

In addition to lacking a basis in R.C. 4905.31, affirming the Commission's interpretation of R.C. 4905.31(E) would also conflict with the ESP rates recently adopted by the Commission for CSP and undermine other provisions within R.C. Chapter 4928.

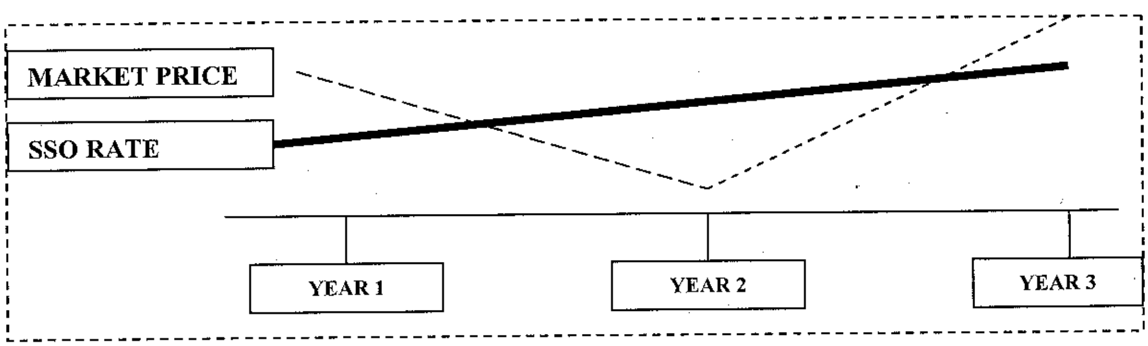
The Commission in the *ESP Case* specifically rejected arguments that CSP's non-bypassable POLR charges can be avoided if a customer agrees not to shop. Moreover, the interpretation adopted by the Commission below also conflicts with SB 221's new pricing regimen for electric service. The Commission's decision forces CSP to forego the approved POLR charge for Eramet even though CSP's statutory POLR obligations continue.

1. Background regarding CSP's approved POLR charge

As discussed above, regarding the first part of the migration risk (that customers could leave the utility when market prices drop below the SSO rate during the period of the ESP) the Commission acknowledged that risk and agreed that 90% of the requested POLR revenue requirement should be allowed to compensate CSP for that risk. (*ESP Case*, Opinion and Order at 39, 40 (internal citations omitted), Ap. at 132,133.) Regarding the second part of the migration risk (a shopping customer subsequently returning to the SSO rate when the market price goes back up), the Commission's decision in the *ESP Case* separately acknowledged that risk and permitted shopping customers to only bypass the POLR charge if they agree to pay a market price when/if they subsequently return to SSO service; otherwise, shopping customers would continue to pay the POLR charge during the time they received service by a competitive service provider. (*Id.* at 40, Ap. at 133.)

CSP's approved POLR charge is based on the interrelationship between the cost to the Companies of providing this service and the value to the customers of having the "optionality" provided by SB 221. In financial terms the customers' rights are equivalent to a series of financial options on electricity. Economically rational customers will exercise their rights to change providers when the economic benefits are apparent and accrue to those customers. On the other side of the transaction, however, the Companies bear the difference between market and ESP prices as a loss and collecting the approved POLR charge enables CSP to stand ready to discharge its POLR obligations.

The value of the customers' right to switch under S.B. 221 comes from the *option* customers are given to switch suppliers, while still having the safety net of the ESP rate to come back to, *if* electricity prices move in a way that makes switching back to the Companies an economically attractive choice or if their supplier defaults. The value of that option exists at the beginning of the ESP term, independent of the actual outcomes that eventually materialize in the future. The Companies committed at the outset of the term of their ESP, based on current circumstances and uncertainties, to provide an SSO price for the full three-year term and undertake the attendant POLR risk. The diagram below illustrates this relationship through a hypothetical example:



Under this hypothetical, customers may stay on (or return to) the regulated SSO rate in years 1 and 3, while they would likely shop in the market during year 2. At the outset of CSP's three-year ESP, nobody (including CSP) could predict with certainty where the free market price (dotted line) would go during the subsequent three years. There are a myriad of factors that affect the market price of electricity, causing it to be volatile over any given period of time. Yet, CSP's obligation to support the SSO price during the entire ESP term was firmly established on the first day of the ESP. The migration risk, for which the Commission authorized CSP's POLR charge, is illustrated in year 2 when customers could leave the SSO to pursue more favorable market prices. The amount collected through the POLR charge allows CSP to "hedge" against such market changes and ride out those fluctuations.

The POLR risk exists because customers can switch, not based on whether they exercise their right to switch. An option gives one a right to do something, and one pays for the right to do it. The value and legitimacy of the option is not dependent upon whether it is exercised. Like purchasing casualty or fire insurance covering one's home, it is common to pay for insurance coverage and the event being insured against never occurs. Nonetheless, the insurance company stands ready to cover damages arising from a fire or casualty and is obligated to do so. Similarly, because CSP's POLR obligation is statutory and will not be eliminated during the term of the contract, the approved POLR charge should be collected.

2. The Commission's decision in the *Eramet Case* conflicts with its contemporaneous decision in the *ESP Case*, the SSO pricing regimen under SB 221 and the language of the contract approved below.

By allowing Eramet to effectively bypass CSP's otherwise applicable non-bypassable POLR charge, the decision below conflicts with the Commission's decision in the *ESP Case*. On rehearing in the *ESP Case*, the Commission considered and rejected the following argument made by the Ohio Energy Group (OEG):

> OEG states that the Commission properly found that the POLR rider should be avoidable for those customers who shop and agree to return at a market price; however, OEG believes that the Commission did not go far enough. *OEG requests that the Commission grant rehearing to allow the POLR rider to be avoidable by those customers who agree not to shop during the ESP through a legally binding commitment.*

(*ESP Case*, July 23, 2009 Entry on Rehearing, at 25, Ap. at 195) (emphasis added). The Commission denied OEG's rehearing and reaffirmed its decision without modification, finding that the parties had not raised any new issues for consideration. (*Id.* at 26.) Yet, the decision below was based on the very same theory the Commission explicitly rejected in the proceeding that approved the POLR charge.

In the *ESP Case*, OEG witness Baron proposed that customers make an election to waive their right to shop during the ESP in exchange for bypassing the POLR charge. (*Eramet Case*, CSP Ex. 2, Direct Testimony of Stephen J. Baron, at 11-12, Supp. at 19-20.)[10] Mr. Baron recognized that AEP Ohio incurred the POLR risk upon commencement of the ESP and that the POLR risks are incurred prior to actual shopping. During cross examination in the *ESP Case*, Mr. Baron admitted that "In order for the concept to have some effect, customers would have to opt in or opt out or basically agree to these waiver provisions prior to the start of the ESP." (*Eramet Case*, CSP Ex. 3, *ESP Case* Tr. II, at 147, Supp. at 46.)[11] During questioning, Mr. Baron acknowledged that once the ESP becomes effective "the company at that point does incur some — begin to incur some risk." (*Id.* at 149). Thus, Mr. Baron explained that under OEG's proposal the concept was for customers to make the waiver prior to the beginning of the ESP period, in recognition that the risk begins for CSP as soon as the ESP is effective. (*Id.* at 150). Consequently, it necessarily follows that months into the ESP period customers cannot begin to make commitments not to shop and avoid the POLR charge (as is being advocated in the current case).

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[10] References to Appellant's Supplement are designated as "Supp."

[11] The Commission took administrative notice of Mr. Baron's testimony from the *ESP Case* during the hearing below. (*Eramet Case*, Tr. III at 409, Supp. at 47,48.)

Based on the extensive development of OEG's proposals in the record and the Commission's explicit consideration of those proposals in its orders in the *ESP Case*, the Commission declined to allow customers to avoid the POLR charge by agreeing that CSP would be the customer's exclusive provider. On the contrary, after considering these arguments in the *ESP Case*, the Commission adopted a *non-bypassable* POLR charge reflecting 90 percent of the estimated POLR costs presented by the Companies and found that only customers who actually switch to a competitive supplier – and agreed at the time they decided to shop that, if they returned it would be at a market price – would avoid the POLR charge during the time they are served by a competitive provider. (*ESP Case*, Opinion and Order at 40, Ap. at 133.) The narrow exception for customers who promise to return at market has no application to this case. In other words, regardless of whether a customer promised not to shop during the ESP term, all customers would pay the POLR charge for the entire time they are served under CSP's SSO and would avoid POLR charges only during the period served by a competitive provider only if they agreed at the time they decided to shop that they would pay a market price if they return to generation service from CSP. That basic shopping rule was established as an integral part of CSP's approved ESP and it was supposed to control such matters during the three-year ESP term. The Commission explicitly wrestled this same issue to the ground in the *ESP Case* and only allowed the POLR charge to be bypassed under narrow circumstances – rejecting OEG's broader proposal to avoid POLR charges any time a customer promised not to shop.

The Commission's Entry on Rehearing in the *ESP Case* affirmatively and unequivocally stated that "the Commission carefully considered all of the arguments, testimony, and evidence in the proceeding and determined that the Companies should be compensated for the cost of carrying the risk associated with being the POLR provider, including the migration risk." (*ESP Case*, Entry on Rehearing at 26, Ap. at 196.) The *ESP Case* rehearing decision was issued on July 23, 2009 – less than ninety days before the Commission issued its initial decision in the case below on October 15, 2009. Though the two decisions were issued contemporaneously, the result reached in the decision below squarely conflicts with the Commission's own decision in the *ESP Case* to reject OEG's proposal to avoid the POLR charge by promising not to shop. The OEG's proposal rejected by the Commission in the *ESP Case* is not substantively different than the "exclusive supplier" provision adopted by the Commission below.

In the *ESP Case*, the Commission plainly stated that "[t]he POLR charge was proposed to collect a POLR *revenue requirement* of $108.2 million for CSP and $60.9 million for OP." (*ESP Case*, Opinion and Order at 38, Ap. at 131) (emphasis added). Similarly, when deciding to grant 90% of the POLR proposed rate, the Commission ordered that "the POLR rider shall be established to collect a POLR *revenue requirement* of $97.4 million for CSP and $54.8 million for OP." (*Id.* at 40, Ap. at 133) (emphasis added). This demonstrates that the Commission's intention in the *ESP Case* was to increase CSP's revenue requirements and create firm revenues to support the POLR duty a non-bypassable revenue stream as part of the overall ESP decision – not just create a charge that can simply be avoided by a promise not to shop (or, as in the case below, the mere equivocal suggestion that in one employee of the customer's personal opinion, there would likely not be a need to shop). It is unreasonable and unlawful for the Commission to contemporaneously issue an order in another case that directly undermines that result.

Moreover, under the controlling statute, CSP's ESP, approved by the Commission, necessarily reflects a *total package* that the Commission held to be more favorable, in the aggregate, than the expected results under an MRO. The orders in the *ESP Case* were issued pursuant to R.C. 4928.143. As referenced above, an electric utility can establish its SSO rates either by establishing a Market Rate Offer under R.C. 4928.142 or an Electric Security Plan under R.C. 4928.143. Regarding approval of an ESP, the General Assembly provided that the Commission shall approve an ESP if it is more favorable, *in the aggregate*, than the expected results of an MRO for that utility. Ohio Rev. Code Ann. 4928.143(C)(1) (2010), Ap. at 16. In deciding CSP's *ESP Case*, the Commission repeatedly found that the ESP (including the non-bypassable POLR charge) met this standard. (*ESP Case*, Opinion and Order at 72, Ap. at 165; Entry on Rehearing at 51, Ap. at 221.) Contemporaneously modifying that carefully-balanced package of terms and conditions in the case below violates that controlling statutory standard and process for establishing an ESP, especially where the Commission does so in a manner that precludes full recovery of the ESP rates.

The overall package and balancing of interests reached in the *ESP Case* is undermined by the decision below and, as the Commission extends its precedent to other customers, a much larger group of customers (possibly all mercantile customers) could eventually avoid paying the POLR charge simply by agreeing to make their electric utility their exclusive supplier. Not only would the potential for competition in Ohio become more and more significantly impaired, but such a result would also exponentially undermine the explicit findings within the Commission's orders in the *ESP Case*.

When examined in the larger context of the SSO pricing provisions of SB 221, it becomes even more evident that the decision below to disallow full recovery of revenues foregone as a result of a compulsory economic development contract is unlawful. As discussed above, an electric utility can establish its SSO pricing either through an MRO adopted under R.C. 4928.142 or an ESP adopted under R.C. 4928.143. When the Commission imposes an involuntary economic development contract on a utility without making the utility whole for revenue foregone *vis-à-vis* its approved SSO rates (*i.e.*, full delta revenue recovery), it undermines the approved SSO pricing established under SB 221 – whether that rate plan is an ESP or an MRO.

Consider an example where the MRO utility has achieved fully market-based SSO rates under R.C. 4928.142 and is entitled to collect market rates for electricity from all of its SSO customers. If the customer leaves the SSO, the utility would sell the power in the wholesale market or to another retail customer outside its service territory, collecting a unregulated market price for doing so. It would plainly undermine such a market-based pricing regimen for the Commission to force the utility to serve a mercantile customer at a lower price in order to promote the State of Ohio's economic development goals – without making the utility whole by allowing recovery of revenues foregone. By requiring the utility to serve the customer at a price below market, the Commission would directly undermine the statutory pricing scheme. In addition to harming the utility, the Commission would also undermine competition by subsidizing electric service to the customer and distorting the market's price for serving the customer. Though it may be more obvious when considering a similar example involving an MRO utility, the same problem – from the perspective of R.C. 4905.31 – is present for an ESP.

Just as the market prices determine an MRO utility's SSO rates, the approved ESP determines CSP's SSO rates during the term of the rate plan. The Commission's decision to require CSP to enter into a contract with Eramet without permitting recovery of revenues foregone violates both the statutory SSO scheme generally and CSP's approved ESP specifically.

In sum, the applicable law supports recovery of all revenues foregone under the Eramet contract. There is no statutory authority for the Commission to offset these revenues foregone by an amount of expense reductions, whether actual or not. The revenues foregone equal the difference between what Eramet would pay under the Companies' applicable rate schedules and what it would pay under the unique arrangement rate – no more and no less. If the Commission wanted to approve the full discount requested by Eramet based on perceived benefits to the State of Ohio, it simply needed to permit full recovery of revenues foregone to CSP. Whereas, if the Commission wanted to reduce the impact of the unique arrangement on other ratepayers' bills, the proper course of action would have been to reduce further the amount of the maximum discount to which Eramet would be entitled. Since it approved the discount as being beneficial and ordered CSP to enter into an arrangement with Eramet, the Commission was required to permit full recovery of revenues foregone.

PROPOSITION OF LAW NO. II:

The Commission unlawfully adopted a contract requiring that one of CSP's largest customers to forego its statutory right to shop for competitive generation service for nearly a decade, by wrongly characterizing the exclusive supplier component as being Eramet's choice and by adopting the requirement in violation of the fundamental retail shopping provisions of SB 3 and SB 221.

The Commission below found that Eramet decided that it would not shop for electric service during the 110-month term of the arrangement and, thus, CSP would be the exclusive supplier to Eramet's substantial electric load for nearly an entire decade. (*Eramet Case*, Opinion and Order at 7, Ap. at 37; Entry on Rehearing at 3-4. Ap. at 54-55.)

This finding is flawed in several respects, most notably that the exclusive supplier characterization is not supported by Eramet's testimony in the record, is found nowhere in the actual service contract adopted below, and incorporates an unlawful policy that conflicts with the fundamental tenets of Ohio's electric restructuring law. Accordingly, the exclusive supplier characterization of the contract should be reversed and vacated.

A. Eramet did not waive its right to shop and neither the Order nor the adopted contract provides that CSP is the exclusive supplier during the term of the contract.

As an initial matter, the Commission's finding that Eramet chose CSP as its exclusive supplier was based on testimony by an Eramet official, Mr. Bjorklund, who stated his vague "personal view" that, with the 110-month discounted power contract with CSP, Eramet would not "need to shop." (*Eramet Case*, Tr. I at 104, Supp. at 51.) The Commission "boot straps" that vague personal view into Eramet's "decision not to shop" that the Commission viewed as being further confirmed through Eramet's stated intention "to secure a reliable supply of electricity pursuant to terms and conditions that will provide it with a reasonable and predictable price over a permissible term." (*Eramet Case*, Opinion and Order at 7, Ap. at 37.)

When Mr. Bjorklund was asked about retaining flexibility to purchase from the market when prices were lower than the contract, he indicated two separate times that he would prefer another witness answer such questions. (*Eramet Case*, Tr. I at 104-105, Supp. at 51-52.) He also restated his vague, personal view as being that "it shouldn't be necessary to talk about switching." (*Id.*) He also declined to agree that Eramet would be content not to switch if market prices were lower than the contract price. (*Id.*) It would have been easy for Mr. Bjorklund to testify that Eramet would not have the right to shop throughout the term of the contract if that were what Eramet was agreeing to. But he did not say that. Rather, his statements amount to nothing more than a current belief that Eramet will not need to shop during that time. Thus, the Commission's pivotal finding that Eramet chose CSP as its exclusive supplier during the long-term contract is simply not supported by Eramet's testimony.

Also contrary to the gloss that Eramet expressed a desire to make CSP its exclusive supplier, the Commission itself found that:

> The Stipulation does not speak to delta revenue recovery or any offsets. Additionally, neither Eramet nor Staff have advanced any specific argument regarding the POLR adjustment question.

(*Eramet Case*, Opinion and Order at 7, Ap. at 37.) If the Stipulation did not speak to delta revenue and neither Eramet nor Staff took a position regarding the POLR adjustment question, then the Stipulation could not have intended to address whether Eramet had forfeited its right to shop as a term of the Stipulation.

As to the Commission's secondary observation regarding procurement of reliable service, Eramet's desire for a reliable supply of electricity pursuant to terms and conditions that provide a reasonable and predictable price over a permissible term is not something that can be satisfied only by CSP. Those traits – terms and conditions that provide a reasonable and predictable price over a permissible term – are the epitome of what a competitive generation service provider would offer to large customers such as Eramet. There simply is no meaning in the words upon which the Commission relies to suggest that Eramet was expressing its intent to forfeit or retain the right to shop for nearly 10 years.

Consequently, the Commission is left with the phrase chosen by Eramet's president, Mr. Bjorlund -- he did not see a need for Eramet to shop. These are carefully chosen words by the individual responsible for running Eramet -- words which have the effect of keeping open Eramet's options, not shutting them off. The Commission's conclusion that under the Stipulation Eramet cannot shop is not only unsupported by the record, it is contrary to the record. In short, Eramet's application and testimony simply do not support the Commission's findings that the contract conveys an exclusive supplier status on CSP or otherwise establish that Eramet is prohibited from shopping for electricity during the 110-month contract.

It is also compelling there is no provision in Eramet's application or the ultimate contract adopted by the Commission that specifies CSP as the exclusive supplier or requires Eramet to forego its right to shop for competitive generation service during the term of the contract. Thus, regardless of how Eramet witness Bjorkland's testimony is characterized, the ultimate proof (or lack thereof) should in the contract. It is also telling that neither the Opinion and Order or the Entry on Rehearing directly declares or orders that Eramet cannot shop during the 110-month contract term, even though this is the primary matter of importance in this case. The exclusive supplier issue is the *conditio sine qua non* that drives the entire POLR offset and foregone revenue dispute involved in this appeal; if there was no exclusive supplier component of the agreement, this appeal would not have been filed. Yet, while the orders below conclude that Eramet indicated it would not need to shop during the term of the contract, neither the orders nor the contract directly addresses whether Eramet is permitted to shop during the long-term contract.

B. To the extent the contract is deemed to convey "exclusive supplier" status on CSP during the term of the contract, it is unlawful and unreasonable.

In any case, the Commission's characterization of the contract as involving an exclusive supplier component is contrary to the most basic and central premise of SB 3 and SB 221: development of competitive electric generation markets for retail customers in Ohio. As discussed below, the effect of the Commission's decision is to pull from the competitive market for nearly a decade an electric load equivalent to up to 58,000 households – larger than the electric load of entire cities within Ohio. The dispute in this case stems from the Commission's adoption of this exclusive supplier provision and the Court should resolve this case by reversing or vacating the unlawful ruling.

SB 3 provided for restructuring Ohio's electric utility industry in order to achieve retail competition with respect to the generation component of electric service. *Indus. Energy Users-Ohio v. Pub. Util. Comm.* (2008), 117 Ohio St. 3d 486, 487. *See also Ohio*

Consumers' Counsel v. Pub. Util. Comm. (2007), 114 Ohio St. 3d 340; *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305; *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, 301; *Constellation NewEnergy, Inc. v. Pub. Util. Comm.* (2004), 104 Ohio St. 3d 530. This Court has repeatedly recognized that the enactment of SB 3 by the General Assembly signaled customer choice for the State of Ohio and adopted "a comprehensive statutory scheme to facilitate and encourage competition in Ohio's retail electric market." *FirstEnergy Corp. v. Pub. Util. Comm.* (2002), 96 Ohio St.3d 371.

SB 3, together with amendments made in SB 221, set forth the State's continuing policy to ensure diversity of electricity supplies and suppliers,[12] to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment,[13] and to ensure effective competition in the provision of retail electric service.[14] Even more explicit than the policy statements in R.C. 4928.02, SB 3 directly establishes a right to shop for generation and other competitive retail electric services:

> *Beginning on the starting date of competitive retail electric service, retail electric generation*, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are *competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.*

Ohio Rev. Code Ann. 4928.03 (2010), Ap. at 8. This provision was retained through the enactment of SB 221 and, thus, has been in effect for a decade. Rather than defending and upholding the right to shop, the Commission's decision below unduly restricts retail

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[12] Ohio Rev. Code Ann. 4928.02 (C) (2010), Ap. at 7.
[13] Ohio Rev. Code Ann. 4928.02 (G) (2010), Ap. at 7.
[14] Ohio Rev. Code Ann. 4928.02 (H) (2010), Ap. at 7.

competition and locks Eramet's large electric load out of the competitive market for a decade.

In addition, the General Assembly enacted R.C. 4928.06 entitled "Commission to ensure competitive retail electric service" – originally as part of SB 3 and retained by SB 221. Ohio Rev. Code Ann. 4928.06 (2010), Ap. at 8. Through the enactment of this provision, the General Assembly directly provided multiple directives to the Commission concerning retail choice and empowered the Commission to address and resolve any decline or loss of effective competition. Among other things, the Commission is to consider specific factors in determining whether effective competition exists:

> (1) The number and size of alternative providers of that service;
>
> (2) The extent to which the service is available from alternative suppliers in the relevant market;
>
> (3) The ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;
>
> (4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services.

Ohio Rev. Code Ann. 4928.06(D) (2010), Ap. at 9. The exclusive supplier provision adopted below cannot survive scrutiny under any serious application of these factors. From the General Assembly's unequivocal policy pronouncements to the structure and fundamental purpose of R.C. Chapter 4928, it is clear that a contract by which CSP's largest customer pulls its power requirements from the market stifles the development of a competitive retail electric generation market.

Though Eramet is a single customer, the significance of the Commission's error becomes even more evident when one considers the significance of Eramet's electric load. The involuntary contract ordered by the Commission requires CSP to supply Eramet with 38,000 to 58,000 megawatts (MWh) of electricity per month. (*Eramet Case*, Contract for Electric Service, Exhibit A at Article IV.D, Supp. at 73-74.) According to the Commission's website, a typical Ohio household consumes, on average, approximately 800 kWh per month.[15] Thus, a conservative estimate for each household is to use 1,000 kWh (1 MWh) per month to calculate the equivalence of Eramet's load to that of a number of residential homes. This approach means that Eramet's electric load is roughly equal to the load of up to 58,000 residential homes – larger than the electric load of entire cities within Ohio. Prohibiting shopping for such significant electric load is a major constraint on the competitive generation market in Ohio for nearly ten years.

The enforceability of an exclusive supplier provision is also legally suspect, given that it contradicts the public interest, as expressed in Ohio's policy adopted in SB 3 and SB 221. The Commission's adoption of a contractual provision, which is contrary to public policy and casts uncertainty over the enforceability of the contract, surely must be declared unreasonable and unlawful. It is well-established that where there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefited by the contractual provision. 8 Williston on Contracts (4th Ed. 1998) 43, Section 18:7.

This Court has declared contracts unconscionable and void where the contract purports to violate important public policies, including policies articulated by the General Assembly in statutes. *See e.g. Taylor Building Corp. of America v. Benfield* (2008), 117

[15] http://www.puco.ohio.gov/PUCO/Consumer/Information.cfm?id=8076

Ohio St.3d 352. An "exclusive supplier" provision that contradicts the public interest as expressed in Ohio's policy adopted in SB 3 and SB 221 should be considered void as against public policy and unenforceable. There should be no question that the Commission's adoption of this offensive provision has caused substantial harm to CSP, as required for this Court to reverse. *Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353.

As demonstrated, the Commission's adoption of the exclusive supplier provision is contrary to the retail choice provisions in SB 3 and SB 221, conflicts with the public policy goals explicitly articulated by the General Assembly, and has significant potential to inhibit retail competition in Ohio. The harmful impact on CSP of this unlawful provision is presently substantial and potentially far-reaching. Consequently, this Court should reverse or vacate the Commission's adoption of the exclusive supplier provision as being unreasonable and unlawful.

PROPOSITION OF LAW NO. III:

The Commission's key finding, that there is no risk of Eramet shopping for competitive generation service and subsequently returning to SSO service, conflicts with adopted contract and controlling statutes and is otherwise against the manifest weight of the record.

Even if the Court does not determine as a matter of law that the "shopping elimination" component of the compulsory contract ordered below by the Commission is void and unenforceable as a matter of law, the Court should reverse the Commission's conclusion that "there is no risk that Eramet will shop for a competitive supplier during CSP's current approved ESP." (*Eramet Case*, Opinion and Order at 8, Ap. at 38.) As explained below, the Court should reverse the Commission's finding of "no risk" against the manifest weight of the evidence, because: (A) there is a demonstrated risk that Eramet will shop during the contract term as a matter of law as well as operation of the contract adopted below, and (B) the Commission manifestly erred in making this key finding because it, in its own words, "narrowly focused" on a small portion of the contract term to determine if there is a shopping risk under the long-term contract. The Commission's conclusions in this regard should be reversed as they conflict with controlling law and are otherwise against the manifest weight of the record. *Monongahela Power Co. v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 571.

A. There is a demonstrated risk that Eramet will shop during the contract term as a matter of law as well as operation of the contract adopted below.

The first major flaw in the Commission's "no risk" finding is that it conflicts with the Commission's statutory jurisdiction in this case and the actual terms of the contract adopted below. Under R.C. 4905.31(E), a schedule or reasonable arrangement approved by the Commission "shall be under the supervision and regulation of the commission, and is subject to change, alteration or modification by the commission." Ohio Rev. Code Ann. 4905.31(E) (2010), Ap. at 2. This is explicitly provided for in Article 11 of the approved contract provides that the Commission has continuing jurisdiction and may require modification or termination of the agreement for good cause. (*Eramet Case*, Contract for Electric Service at Article 11, Supp. at 63-64.) The Commission's authority over these matters is continuous in nature. Therefore, as circumstances change, the Commission can order a modification of the contract. As events continue to unfold it is understandable (and, more importantly, it is consistent with R.C. 4905.31) for the Commission to preserve its continuing jurisdiction regarding the contract terms it previously approved. But the Commission's finding that there is "no risk" of contract termination should be reversed because it ignores the continuing jurisdiction conferred by the General Assembly through this statutory provision.

There are also other provisions for early termination of the power agreement. Either party may terminate if there is a default by the other party. (*Eramet Case*, Contract for Electric Service at Article 6, Supp. at 62.) Examples provided in the contract include (i) failure to comply with the commitments contained in Exhibit A to the contract, (ii) an unauthorized assignment of the contract by Eramet, and (iii) the customer becomes insolvent or admits it cannot pay debts. (*Id.*) Each of these possibilities would facilitate Eramet's termination of the contract if it desired to achieve that outcome and pursue a lower market price for electricity during the next decade. This undercuts the Commission's conclusion that there is no risk that Eramet will shop and subsequently return to SSO service with CSP.

The most obvious contract "off ramp" for Eramet relates to the commitments contained in Exhibit A to the contract. Those commitments include capital investment in Eramet's current Ohio manufacturing operations of at least $20 million by 2011 and an additional $20 million by 2014 for a total investment over the combined periods of at least $40 million. (*Eramet Case*, Contract for Electric Service, Exhibit A at Section IV.E, Supp. at 76.)

The Commission explicitly clarified, in adopting Eramet's proposal that it could modify or terminate the arrangement in connection with the commitments:

> As set forth in the Stipulation, the Commission retains the ability to, at any time and after notice and an opportunity to be heard, consider and make modifications to Eramet's reasonable arrangement in the event that we determine that Eramet has not satisfied its commitments under the

> reasonable arrangement, that reasonable progress * * * has not occurred, or for good cause shown.

(Eramet Case, Opinion and Order at 12, Ap. at 42.)

Of course, it would be the completely within Eramet's control to fail meeting one of these commitments and would be easy for its management to justify if a lower market price for electricity were readily available. And Eramet could end up shopping for generation service if the contract were terminated on that basis or any other basis. The Commission should have recognized that scenario as presenting POLR risk for CSP. Failing to do so and finding "no risk" conflicts with R.C. 4905.31(E) and is against the manifest weight of the record.

B. The Commission manifestly erred in making this key finding because it, in its own words, "narrowly focused" on a small portion of the contract term to determine if there is a shopping risk under the long-term contract.

The second major evidentiary flaw in the Commission's "no risk" finding is that it failed to consider the majority of the contract's term. Rather, the Commission transparently narrowed the scope of its review to only the first part of the contract term. Specifically, for the period through the end of 2011, the Commission found that "CSP will not be subject to POLR risk (*i.e.*, the risk that Eramet may shop and subsequently seek to return to CSP's standard service offer) and, therefore, CSP should not be compensated for bearing this risk." (*Eramet Case*, Opinion and Order at 7, Ap. at 37.) See *Eramet Case*, Opinion and Order at 8, Ap. at 38 ("there is no risk that Eramet will shop for a competitive supplier during CSP's current approved ESP"). The Commission explained that it "narrowly focused upon the first 26 months of the contract, or the term of the current ESP, specifically because no determination has been made as to whether future SSOs will include POLR charges." (*Eramet Case,* Entry on Rehearing at 3, Ap. at 54.)

Following its revised approach adopted during the rehearing stage of the *Ormet Case*, the Commission's decision below found that "it is not necessary to reach the question of whether Eramet can shop 'beyond the duration of the current ESP because no determination has been made whether future standard service offers will include a comparable POLR charge.' " (*Id.* at 7, Ap. at 58.)

The Commission's attempt to analyze the effects of a 110-month contract by looking at only the first quarter[16] of the contract term is flawed. Whether Eramet might shop for generation service during the term of the contract requires an analysis of the full terms. The Commission's truncated analysis permitted the Commission to disregard the potential of Eramet shopping for generation service during the full term of its contract.

The decision below did not approve a 26-month contract for Eramet; the agreement was approved through the end of 2018. Regardless of the term of CSP's ESP or whether its next SSO contains an identical POLR charge, the term of the compulsory contract with Eramet is set to extend to the end of 2018. That is the period of time that is relevant to the inquiry concerning POLR risk when approving a contract. CSP will continue to bear the statutory POLR obligation throughout the term of the contract and the potential of Eramet shopping anytime during the full term imposes POLR risks on CSP – just as it does for all customers that are able to shop.

[16] For ease of reference, the initial 26-month period of the approximately 110-month contract that was considered by the Commission, or about 24% of the term, may be referred to herein as the "first 25%" of the term or the "first quarter" of the contract term.

In explaining why the Commission only considered the initial 25% of the contract term and did not consider the other 75% of the contract term, the Commission stated that it "would be *forced to speculate* in order to determine whether Eramet has the right to shop after the expiration of the current ESP." Ironically, this candid observation reveals that the Commission cannot determine what will happen after the ESP term during the remaining 75% of the contract term. Rather than make an assessment of the actual contract terms, the Commission simply "assumed away" CSP's POLR charge after the first 26 months – which involves making an affirmative assumption to change the status quo in the future (rather than presuming the *status quo*). Thus, it is the Commission's approach that is admittedly speculative and without any basis in the record. Regardless of the fact that it is not presently known whether CSP will have a similar POLR charge after 2011 (*i.e.*, as part of its next SSO rate plan), the Commission should have simply provided for full recovery of "revenues foregone" without tying its decision to a specific charge that may or may not be in effect for the entire term of the Eramet contract.

Under that more appropriate "delta revenue" approach, if there ends up being a POLR charge as part of the next SSO, there would be full recovery of delta revenues and, if the next rate does not include a POLR charge, there would still be full recovery of delta revenues – albeit at a lower level because the contract would not result in foregone POLR revenues. The Commission's approach of attempting to sidestep this key question does not change CSP's ever-present POLR obligation and does not change the legally-required outcome mandated by R.C. 4905.31(E) that CSP must be permitted to fully recover revenues foregone. CSP submits that it is patently unreasonable to adopt a 110-month contract and impose an offset to recovery of delta revenues based on a finding of "no risk" that is limited to the first 25% of that contract term.

Under the Commission's approach of narrowing the inquiry to only the first quarter of the contract term, CSP would need to wait until its next SSO rate plan for 2012 and beyond is established or wait until the remainder of the contract term transpires to actually determine whether the contract was ever terminated or whether Eramet shopped for generation service. In the future after those contingencies unfold, however, it will be too late for CSP to legally go back and challenge the decision below. Such a "Catch -22" approach is unreasonable and unlawful.

Ultimately, Eramet may find that at some point during the contract term market prices for electricity become cheaper than the prices being paid under the involuntary contract imposed upon CSP. CSP believes that the Commission would not hold Eramet to a higher price for electricity than would otherwise be available in the competitive market, especially since doing so would also reduce or eliminate the delta revenues that ultimately are collected from the other ratepayers. This would be especially true if Eramet's business interests or viability were in jeopardy. Alternatively, there are several plausible scenarios (as outlined above) where the Commission could either determine that Eramet has not fulfilled its obligations under the arrangement and terminate it for that reason or the Commission may exercise its continuing jurisdiction over the contract to amend or terminate it. Whether considered for the first 26 months or more appropriately for the full 110-month term of the compulsory contract, the POLR risk to CSP is real and the Commission erred in concluding that there is "no risk" of Eramet shopping during the next decade.

PROPOSITION OF LAW NO. IV:

There can be no "reasonable arrangement" with CSP under R.C. 4905.31 where the Commission orders an involuntary contract that causes harm to CSP's financial interests.

It is beyond dispute that the basic elements of a contract include, among other things, manifestation of mutual assent. *Kostelink v. Helper* (2002), 96 Ohio St. 3d 1, 3. The Commission's interpretation and application of R.C. 4928.31 (E) not only violates this principle, but is contrary to the terms of that statute as amended by SB 221.

Prior to the enactment of SB 221, R.C. 4905.31 allowed a "public utility" to file a schedule or enter into "any reasonable arrangement" with its customers, providing for certain enumerated outcomes, including variable rates and different classifications of service. The statute provided that no "such arrangement" is lawful until it was filed with and approved by the Commission. SB 221 amended R.C. 4905.31 in a number of ways. As relevant to this appeal, it now provides that a mercantile customer of an electric distribution utility is not prohibited "from establishing a reasonable arrangement with that utility..." Ohio Rev. Code Ann. 4905.31(E) (2000), Ap. at 1. Such a reasonable arrangement can be filed with the Commission by the mercantile customer. The Commission understands this language to permit a mercantile customer, with the Commission's approval, to impose the arrangement *on* the utility, despite the words of the statute which contemplate an arrangement *established with* the utility.

A. The common usage interpretation of the statute, as amended, supports CSP

These statutory changes, however, do not allow mercantile customers to establish an arrangement without the agreement of the electric distribution utility by unilaterally submitting a proposed arrangement for approval by the Commission. An analysis of the statute as modified shows there can be no arrangement approved by the Commission if the public utility to be bound by the arrangement does not agree to its terms.

As a general rule the words in a statute must be read in accordance with the common usage of the terms.[17] Therefore, the terms "establish" and "arrangement" should be given their ordinary meaning. The term "establish" is not ambiguous; it is commonly used as a synonym for "create, originate or bring into existence."[18] CSP believes that the term "arrangement" refers to a contract. Understanding "arrangement" to refer to a "contract" is consistent with the common reference of "arrangements" under R.C. 4905.31 as "special contracts."[19]

To the extent "arrangement" is ambiguous, it may mean either a "*mutual* agreement or understanding" or "a preliminary step or measure."[20] To ascertain which meaning of "arrangement" is intended in this instance, it is necessary to look at the context in which the words appear. The statute states that a "mercantile customer of an electric distribution utility" is not prohibited "from establishing a reasonable arrangement with that utility or another public utility electric light company." Since "establishing"

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[17] R.C. 1.42 provides: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Ohio Rev. Code Ann. 1.42 (2010), Ap. at 1. *See also Weiss v. Pub. Util. Comm.*, (2000), 90 Ohio St.3d 15, 17.

[18] Webster's Third New International Dictionary at 778; Black's Law Dictionary (8th ed.) at 568.

[19] *Columbus S. Power Co. v. Pub. Util. Comm* . (1993), 67 Ohio St. 3d 535, 539; 620 N.E. 2d 835, 840; *Canton v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 76, 77.

[20] Webster's, supra, at 120.

means "creating or bringing into existence," then any ambiguity of "arrangement" suggests that the statute means either that:

> a mercantile customer is not prohibited from creating or bringing into existence a reasonable [*mutual agreement or understanding i.e., a contract*] with its EDU or other public utility electric light company; or
>
> a mercantile customer is not prohibited from creating or bringing into existence a reasonable [*preliminary step or measure*] with its EDU or other public utility.

The former is a fair and reasonable interpretation of the statute; the latter is not.

In common usage one would not speak of creating a preliminary measure with another. "Creating" connotes that the object created has a sense of finality or permanence; it has come into existence. A preliminary step or measure lacks this quality of permanence and instead implies that something more needs to happen before the reasonable arrangement is brought before the Commission for its approval. On the other hand, one would speak of creating a mutual agreement or understanding with another, and in such instances permanence and finality are implied. Thus, a mercantile customer can work with a utility to mutually establish an arrangement but cannot independently do so. It also is significant that the statute provides that the mercantile customer may establish "a reasonable arrangement *with* [its EDU] or another public utility electric light company." The clear indication is that the customer is working cooperatively *with* the utility to jointly establish the arrangement.

B. The context of the statute supports CSP's position

The paragraph of the statute requiring Commission approval also confirms that the mutual agreement interpretation is the better reading of the statute. It states that "no such . . . arrangement is lawful unless it is filed with and approved by the commission."

The statute goes on to provide that the public utility "is required to conform its schedules of rates, tolls, and charges to such arrangement." The statute thus envisions that the arrangement submitted to the Commission is an arrangement already in existence (*i.e.*, established) which becomes lawful and immediately enforceable upon approval. As a matter of common usage and basic contract law, a preliminary step or measure lacks the requisite finality to become a lawful and enforceable arrangement upon approval by the Commission. Indeed it is difficult to imagine how the Commission could "approve" a mere preliminary measure or how a public utility could be "required to conform its schedules of rates, tolls and charges to [a preliminary measure]" that had not evolved into an agreement or understanding.

C. The Commission did not give effect to the entire amendment

Another equally important rule of statutory interpretation applicable here is that all portions of the statute must be given effect.[21] In order to read the SB 221 amendment as authorizing only mutually agreeable arrangements between a utility and one or more customers, there also has to be a reason why the General Assembly would have authorized the mercantile customer, as well as the utility, to establish an arrangement and to submit it to the Commission for approval. Such reasons exist.

Prior to the amendment, the statute authorized a public utility to enter into a special contract only with its own customers. A utility could not enter into a special contract with a party not already a customer nor could a customer enter into a special contract with a different utility operating outside the certified territory. SB 221 fills in

[21] R.C. 1.47(B) provides that in enacting statutes, it is presumed that the entire statute is intended to be effective. Ohio Rev. Code Ann. 1.47 (2010), Ap. at 1.

this gap for mercantile customers of EDUs, consistent with the overall goal of the act of fostering competition in the electric industry. The new language recognizes that a mercantile customer has the option of establishing a special contract not only with its EDU but also with some other public utility electric light company. This language also suggests mutual agreement – it would be strange for the Commission to force an EDU serving another its territory to enter into an arrangement with a customer in another EDU's service territory.

SB 221 also gives the mercantile customer and its EDU or another public utility electric light company the option of having the customer submit the application for approval of the mutual arrangement. There are obvious reasons for this change, too. Two likely reasons for proposing a special contract are to have the arrangement support economic development or to further energy efficiency. In both of these situations, the customer has the key role to play in persuading the Commission that the arrangement furthers the intended purpose. For example, to justify an economic development arrangement, the customer has to provide the documentation to establish, among other things, the number of jobs that will be created, the customer's financial viability and the secondary and tertiary benefits of the project. Ohio Admin. Code 4901:1-38-03(A) (2) (2010), Ap. at 21-22. In the case of an energy efficiency arrangement, the customer must describe its status in the community and how the arrangement furthers state policy and must submit verifiable information to establish that it meets the criteria for an energy efficiency arrangement. Ohio Admin. Code 4901:1-38-04(A) (1) and (2) (2010), Ap. at 23-24. The fact that in some instances the customer logically bears the burden of establishing the reasonableness of the arrangement is a good reason for allowing the customer, instead of the public utility, to submit the application for approval.

Another good reason for allowing the customer, in lieu of the public utility, to submit the arrangement to the Commission is that the utility may not want to actively support or bear the burden of persuasion regarding the amount of discount being requested by the mercantile customer, leaving that determination to the Commission. Such was the case in the case below for CSP with a very aggressive pricing proposal being advanced by Eramet. This consideration is applicable not only in reasonable arrangements for economic development and energy efficiency, but also for unique arrangements under Ohio Admin. Code 4901:1-38-05.

Finally, as noted earlier, R.C. 4905.31 (E) refers to the recovery of costs associated with the "development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code." Ohio Rev. Code Ann. 4905.31(2010), Ap. at 1. R.C. 4928.66 (2)(d) specifically provides for facilitating efforts by mercantile customers to offer their customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to their EDUs as part of a reasonable arrangement under R.C. 4905.31. Ohio Rev. Code Ann. 4928.66 (2010), Ap. at 19. The amendment to R.C. 4905.31 does not mean that the affected EDU has to accept the offer or must accept the offer if ordered to do so by the Commission. Similarly, the right of mercantile customers to file applications for the other types of reasonable arrangements set out in R.C. 4905.31 does not negate the right of the EDU to refrain from accepting the offer made in the filing.

Thus, R.C. 4905.31, as amended, is properly read, according to common usage, as continuing to allow only arrangements agreed to by the public utility and its customer(s), as opposed to opening the door to unilateral arrangements proposed by the customer and imposed on the public utility. In fact, this is the reading given to the statute by the Commission itself. In its September 17, 2008, Finding and Order adopting Ohio Admin. Code Chapter 4901:1-38, the Commission "determined that it is necessary to approve all reasonable arrangements *entered into between the utility and one or more of its customers.*" (emphasis added).[22]

CONCLUSION

For the foregoing reasons, CSP respectfully requests that this Court reverse and remand the Commission's decision below.

Respectfully submitted,

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[22] *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. 08-777-EL-ORD Finding and Order (Sept. 17, 2008) at 7.

PROOF OF SERVICE

I certify that Columbus Southern Power Company's Merit Brief was served by First-Class U.S. Mail upon counsel for all parties of record identified below this 27th day of July, 2010.

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