

ORIGINAL

**IN THE
SUPREME COURT OF OHIO**

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

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

Steven T. Nourse, (Reg. No. 0046705)
Counsel of Record
Matthew J. Satterwhite
(Reg. No. 0071972)

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

**Counsel for Appellant, Columbus
Southern Power Company**

Richard Cordray
Ohio Attorney General

William L. Wright
(Reg. No. 0018010)
Section Chief

Thomas W. McNamee (Reg. No. 0017352)
Counsel of Record

Thomas G. Lindgren (Reg. No. 0039210)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th floor
Columbus, Ohio 43215-3739
Telephone: (614) 466-4396
Facsimile: (614) 644-8764
thomas.lindgren@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

**Counsel for the Appellee,
Public Utilities Commission of Ohio**

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

Maureen R. Grady, (Reg. No. 0020847)
Counsel of Record
Micheal Idzkowski (Reg. No. 0062839)

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

**Counsel for Intervening Appellee, Office
of the Ohio Consumers' Counsel**

Lisa G. McAlister (Reg. No. 0075043)
Counsel of Record
Thomas L. Froehle (Reg. No. 0061830)

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

**Counsel for Intervening Appellee,
Eramet Marietta, Inc.**

Samuel C. Randazzo (Reg. No. 0016386)
Counsel of Record
Joseph M. Clark (Reg. No. 0080711)

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

**Counsel for Intervening Appellee,
Industrial Energy Users-Ohio**

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES..... iii

INTRODUCTION..... 1

STATEMENT OF THE FACTS AND CASE..... 2

Proposition of Law No. I:

A consumer may unilaterally apply to the Commission for approval of a reasonable arrangement with its electric utility and the agreement of the electric utility is not required. Ohio Rev. Code § 4905.31 (West 2010), Appendix at 1-2. 4

 A. History 4

 B. R.C. 4905.31 authorizes reasonable arrangements..... 8

 C. The utility does not have a veto..... 9

 D. Summary..... 11

Proposition of Law No. II:

There is no requirement that revenues not collected from the customer involved in a reasonable arrangement be collected from other ratepayers. Ohio Rev. Code Ann. § 4905.31 (West 2010), Appendix at 1-2. 11

 A. Appellant is fully compensated. 14

 B. Offsets..... 15

 C. Eramet will not shop before the end of the current rate plan. 16

 D. Rates after the end of the current plan are unknown..... 19

 E. A reasonable arrangement by definition is different than standard rates. 21

 F. Summary..... 23

CONCLUSION..... 27

TABLE OF CONTENTS (cont'd)

	Page
PROOF OF SERVICE	30
APPENDIX	PAGE
Ohio Rev. Code Ann § 4905.31(West 2010)	1
Ohio Rev. Code Ann § 4905.32 (West 2010).....	2
Ohio Rev. Code Ann § 4905.33 (West 2010).....	2
Ohio Rev. Code Ann § 4928.02 (West 2010).....	2
Ohio Rev. Code Ann § 4928.141 (West 2010).....	4
Ohio Rev. Code Ann § 4928.142 (West 2010).....	4
Ohio Rev. Code Ann § 4928.143 (West 2010).....	8
102 Laws of Ohio 549, Section 18, codified as Section 614-17 Ohio General Code (1911).....	14

TABLE OF AUTHORITIES

Page(s)

Cases

<i>City of Canton v. Pub. Util. Comm'n</i> , 63 Ohio St. 2d 76 (1980).....	8
<i>Dayton Power and Light v. Pub. Util. Comm'n</i> , 4 Ohio St. 3d 91 (1983).....	13
<i>Elyria Foundry v. Pub. Util. Comm'n</i> , 114 Ohio St. 3d 305 (2007).....	24
<i>Ohio Edison v. Pub. Util. Comm'n</i> , 63 Ohio St. 3d 555 (1983)	13
<i>Toledo Edison v. Pub. Util. Comm'n</i> , 12 Ohio St. 3d 143 (1984)	13

Statutes

102 Laws of Ohio 549, Section 19, codified as Section 614-17 Ohio General Code (1911)	5
Ohi Rev. Code Ann. § 4928.141 (West 2010)	26
Ohio Rev. Code Ann. § 4905.31 (West 2010)	<i>passim</i>
Ohio Rev. Code Ann. § 4905.32 (West 2010)	4
Ohio Rev. Code Ann. § 4905.33 (West 2010)	4
Ohio Rev. Code Ann. § 4928.142 (West 2010)	20
Ohio Rev. Code Ann. § 4928.143 (West 2010)	20
Ohio Rev. Code Ann. § 4928.02 (West 2010)	1, 10, 24, 25

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan, PUCO Case No. 08-917-EL-SSO (Opinion and Order) (March 18, 2009)..... passim

In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company, PUCO Case No. 09-516-EL-AEC (Entry on Rehearing) (March 24, 2010)..... 20, 24, 25

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

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INTRODUCTION

The Public Utilities Commission of Ohio (Commission) must facilitate the state's effectiveness in the global economy. Ohio Rev. Code Ann. § 4928.02(N) (West 2010), Appendix at 3-4. It has done so by providing a reduced electricity price for the Eramet Marietta, Inc. (Eramet), a large energy user in the energy intensive, internationally competitive ferromanganese business. A recent change in R.C. 4905.31 permits a customer to ask the Commission for special treatment under a "reasonable arrangement". Previously only a utility could make such a request. Eramet made such a filing and the Commission approved a reasonable arrangement for Eramet, lowering its electricity costs and hopefully allowing it to expand.

Unilaterally lowering a customer's electricity bill can impose costs and, although it was not obligated to do so, the Commission ordered that the costs associated with the reduced rates for Eramet be paid by other customers. This order makes Columbus Southern Power Company (Appellant, CSP, or the company) whole.

Appellant is not satisfied. Appellant wants to be more than whole. Appellant wants to be paid for a risk not born. It wants to be paid for a risk that Eramet will buy its power from another supplier. There is no such risk and nothing to be paid for. Appellant wants something for nothing. The Commission rightly said "no" and it should be affirmed.

STATEMENT OF THE FACTS AND CASE

On June 19, 2009, Eramet filed an application pursuant to R.C. 4905.31 seeking approval of a reasonable arrangement with CSP. Eramet is in the highly competitive ferromanganese business. It requires a long-term electricity supply with a predictable price to allow the investment of \$40 million, and perhaps much more, in the continuation and potential expansion of its operations. Eramet's parent is an international corporation with equivalent production facilities in other countries. Eramet's parent is able to make new investments in Eramet Marietta or in its other operations. Eramet Marietta believes that a favorably-priced, long-term electricity supply is necessary to attract the investment by the parent. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 2) (October 15, 2009), Appellant's Appendix at 32.

On August 5, 2009, a stipulation was submitted to the Commission recommending a resolution to the case under which Eramet would be served by CSP for ten years at a percentage discount from the otherwise applicable rates which discount was reduced each year of the term. In exchange, Eramet committed to purchase power from CSP and to make a \$40 million investment in its facilities. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Stipulation at 4-9) (August 5, 2009), Appellant Supplement at 72-77. Appellant was not a signatory to the Stipulation. Hearing was held on the application and the stipulation August 4 through the 14 with briefs and reply briefs.

Having reviewed the record, the Commission issued an opinion and order modifying and approving the proposed reasonable arrangement. This step will increase the likelihood that future investment and expansion will happen in Marietta, not in some other country. Because the rates paid by Eramet are reduced under the reasonable arrangement, the Commission unilaterally established a mechanism under which Appellant is insulated from any potential harm. Appellant then initiated this appeal.

Proposition of Law No. I:

A consumer may unilaterally apply to the Commission for approval of a reasonable arrangement with its electric utility and the agreement of the electric utility is not required. Ohio Rev. Code § 4905.31 (West 2010), Appendix at 1-2.

Revised Code Section 4905.31 is the mechanism by which a specific consumer may obtain service under different rates, terms or conditions than would otherwise be applicable through the regular rates chargeable to other consumers. It is the means through which an exception to the usual statutory limitations barring both special rates, under Revised Code Section 4905.33, and charging other than scheduled rates, under Revised Code Section 4905.32, can be obtained. The approval of the Commission must be obtained and the utility schedules must be filed. For ninety-seven years only the utility could ask the Commission to do this. In 2008 the General Assembly changed the statute to allow mercantile consumers, not just utilities, to ask for unique treatment. Although this is perfectly clear on the face of R.C. 4905.31, an historic discussion of the section follows for the sake of completeness.

A. History

What is now R.C. 4905.31 has very old roots. It appears in the original Utilities Act which first established utilities regulation in Ohio and created the Public Service Commission of Ohio (whose name was later changed to the Public Utilities Commission of Ohio). Its original form hardly changed over the years. As first adopted it provided:

Nothing in this act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its customers, consumers, or employee for the division or distribution of its surplus profits or providing for a sliding scale of charges or providing for a minimum charge for service to be rendered, unless such minimum charge is made or prohibited by the terms of the franchise, grant or ordinance under which such public utility is operated, a classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other financial device that may be practicable or advantageous to the parties interested. No such arrangement, sliding scale, minimum charge, classification or device shall be lawful unless the same shall be filed with and approved by the commission. Every such public utility is required to conform its schedule of rates, tolls and charges to such arrangement, sliding scale, classification or other device. Every such arrangement, sliding scale, minimum charge, classification or device shall be under the supervision and regulation of the commission, and subject to change, alteration or modification by the commission.

102 Laws of Ohio 549, Section 19, codified as Section 614-17 Ohio General Code (1911)

Appendix at 14. This language matches, with minor changes in format and phrasing, to the statute as it was immediately before 2008.

Prior to the passage of SB 221 in 2008, the introductory section of R.C. 4905.31 provided:

Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923 of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement with another public utility or with its customers, consumers, or employees providing for ...

Further, the law provided that:

No such arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the commission.

Having obtained the approval of the Commission:

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs.

Thus the statutory process before SB 3 was quite clear. The utility proposed an arrangement, the Commission considered it, and the utility filed schedules to reflect whatever the Commission ordered. This was the way that the section operated for decades. Then things changed.

SB 221 amended the introductory language of R.C. 4905.31 to allow mercantile customers to present proposed arrangements to the Commission for its consideration.

The changes are (with legislative notations maintained for clarity):

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

establishing a reasonable arrangement with that utility or another public utility electric light company, providing for...

Ohio Rev. Code Ann. § 4905.31 (West 2010), Appendix at 1-2. Thus, it is apparent that the General Assembly meant to give the mercantile customers the same ability that the utility formerly had under R.C. 4905.31, the unilateral ability to make an application¹ for the Commission's consideration.

Appellant argues that the phrase "reasonable arrangement with that utility" requires the agreement of both sides. It does not. Filings under this section have always been unilateral. Appellant's own filings with the Commission have always been unilateral.² Under the pre-SB 221 version of R.C. 4905.31 only the utility could file and it filed unilaterally. SB 221 changed this so that customers could file as well. An examination of the statute makes this clear. It provides:

No such schedule or arrangement is lawful unless it is filed with and approved by the commission **pursuant to an application that is submitted by the public utility or the mercantile customer** or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.

Ohio Rev. Code Ann. § 4905.31 (West 2010) (emphasis added), Appendix at 1-2. If the General Assembly had meant that there had to be agreement between the utility and the

¹ It is recognized that the Commission directs the creation of a contract to memorialize the reasonable arrangement after approval. The point here is that there need be no *a priori* agreement.

² See, PUCO case Nos.01-1473-EL-AEC, 07-860-EL-AEC, 00-858-EL-AEC, and 00-855-EL-AEC.

customer, it would have required a joint application. It didn't. In fact it did the contrary. The statute quite clearly refers to the application being filed by either "...the public utility or the mercantile customer...."

Appellant's sister company Ohio Power Company³ even used the pre-SB 221 version of the statute to try to cancel contracts without the approval of the counter-parties. See, *City of Canton v. Pub. Util. Comm'n*, 63 Ohio St. 2d 76, 77 (1980), for a discussion of PUCO Case No. 75-161-EL-SLF where this occurred. This application was strongly opposed by the counter-parties to the contracts and was not done with their approval. While the request was denied by the Commission, it was for a failure of proof not because of any lack of authority to proceed. Clearly agreement is not required. It was not required of the utility before the 2008 amendment and the 2008 amendment put the mercantile customer in the utility's position. Therefore the mercantile customer is not required to obtain agreement before filing with the Commission under R.C. 4905.31.

B. R.C. 4905.31 authorizes reasonable arrangements.

Appellant's error arises from confusing "reasonable arrangement" with "contract". Appellant believes that this section deals only with contracts, specifically bilateral contracts. It says that you cannot have a bilateral contract without agreement of the signatories. Whether or not Appellant is right about contracts, the section does not deal with *contracts*. In fact, the term is not used in the statute. The statute deals with reasonable

³ Both Columbus Southern Power Company and Ohio Power Company are wholly owned affiliates of American Electric Power.

arrangements, a much broader term. The use of the term is not accidental. While a contract is one sort of arrangement, there are many arrangements that are not contracts. Although the section has generally been applied in situations where a bilateral contract was proposed, there is no such limitation in it. There is no basis on which to believe that a “reasonable arrangement” requires mutual assent. Indeed, agreement is meaningless because reasonable arrangements are subject to “...change, alteration, or modification by the Commission” at any time which means the Commission could order a different arrangement than had been agreed.

A much better way to think of the “reasonable arrangement” under R.C. 4905.31 is, not that it is a contract, but rather that it is a tariff applicable to only one customer. Reasonable arrangements have to be approved by the Commission, included within the other tariffs of the utility, and are subject to continuing oversight and unilateral alteration by the Commission. All of these are features of a tariff not a bilateral contract.⁴

C. The utility does not have a veto.

The statute provides that an applicant may propose “any other financial device that may be practicable or advantageous to the parties interested.” Ohio Rev. Code § 4905.31(E) (West 2010), Appendix at 1-2. Appellant would read this provision to mean that the proposal must be advantageous to *it*. This is merely another way to argue

⁴ Reasonable arrangements are normally memorialized, as was done in the case below, in a form denominated as a contract. This is done as an expedient. There is no such legal requirement.

that the utility's consent to a reasonable arrangement must be obtained but this has already been shown to be incorrect. Further the language of the statute says nothing of the sort. It refers not to the customer, not to the utility, but rather to "the parties interested." This phrasing is not accidental. The parties interested in these arrangements are quite broad. Certainly in an economic development sense everyone in Ohio has an interest in these arrangements. The Commission is directed by the General Assembly to "facilitate the state's effectiveness in the global economy." Ohio Rev. Code § 4928.02(N) (West 2010), Appendix at 2-4. That is the driving force behind allowing these arrangements at all. The other customers who may have to pay for the cost of the arrangement have an interest. That is why Ohio Consumers' Counsel and Ohio Energy Group were granted intervention in the case below. No one has a veto. The discretion is left to the Commission to determine what should be approved.

Under the statute a reasonable arrangement is not even required to be "advantageous". The requirement is that the reasonable arrangement be "practicable or advantageous". Either will do. Thus even if Appellant were correct and the reasonable arrangement was not advantageous to Appellant⁵, it would matter not one whit. The reasonable arrangement is certainly practicable. It is functioning today.

⁵ As Appellant is being fully paid for providing its service, the Commission would certainly view the reasonable arrangement as advantageous. While it would certainly be *more* advantageous to Appellant to be paid the POLR charges as well, for who would not want to be paid for work not done and risks not taken, full payment must be an advantage.

D. Summary

The plain reading of R.C. 4905.31 as it exists currently shows that a customer can unilaterally apply for a reasonable arrangement. The agreement of the utility is not required. Just as the utility's agreement to a tariff which would apply to a class of customers is not needed, its agreement is not needed for a tariff which applies to one customer. It is for the Commission to determine whether the customer's proposal should be approved, modified, or rejected. That is what happened in the case below. A customer proposed, the Commission considered, but then modified, the proposal. This is what the statute contemplates. This is what happened. The Commission should be affirmed.

Proposition of Law No. II:

There is no requirement that revenues not collected from the customer involved in a reasonable arrangement be collected from other ratepayers. Ohio Rev. Code Ann. § 4905.31 (West 2010), Appendix at 1-2.

An economic development arrangement, like the one approved in the case below, typically includes a reduction in the rate charged to the customer involved below the rate level which would otherwise have applied to that customer. That is the point of the transaction, to allow the continuation or, as in this case, support the development, of the customer's business through lower rates for electricity. The question then arises, what, if anything, is to be done about the rates not charged? Despite Appellant's arguments to the contrary, R.C. 4905.31 does not *require* the Commission to do anything regarding the

portion of the otherwise applicable rates which would not be charged. The statute is clear. In the list of things that the Commission can approve, the section lists:

Any other financial device that may be practicable 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 a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program**; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate.

Ohio Rev. Code Ann. § 4905.31(E) (West 2010) (emphasis added), Appendix at 1-2. Thus it is perfectly clear that the Commission can, as part of its order under R.C. 4905.31 approving a reasonable arrangement, create a mechanism to collect costs of that reasonable arrangement including revenue foregone.⁶ The point of the discussion here is that there is no obligation under R.C. 4905.31 that the Commission do anything regarding the rates not collected from the customer served under the reasonable arrangement. The authorization in subsection (E) is permissive. It says “may include”, not “must include”. Thus it would have been statutorily valid for the Commission to have approved a reasonable arrangement for Eramet without having made any provision allowing Appellant to

⁶ In fact, of course, the Commission did exactly this in the case below. It provided a mechanism under which Appellant will recover all of its costs under this reasonable arrangement. The crux of the dispute in this case is that Appellant and the Commission measure this cost differently.

collect any amount from other customers to pay Appellant for lowering the rates for Eramet.

Appellant mistakenly believes that it is entitled to receive specific amounts from all customers, reasoning that money it doesn't get from one customer it must get from another. This is not now, and never was, the law. As discussed above, R.C. 4905.31 requires no adjustment at all. The reason for this is that the protection for the utility is global, not customer-specific. There has never been a requirement that the utility be paid any particular amount from any specific customer.

What the utility is entitled to is the overall opportunity to earn a reasonable return on its investment used in providing the service to customers. This has been discussed by the Court in many cases. *Dayton Power and Light v. Pub. Util. Comm'n*, 4 Ohio St. 3d 91 (1983); *Ohio Edison v. Pub. Util. Comm'n*, 63 Ohio St. 3d 555 (1983); *Toledo Edison v. Pub. Util. Comm'n*, 12 Ohio St. 3d 143 (1984). Appellant has not argued, and could not argue, that this Constitutional test has not been met. Indeed Appellant has not even argued it is not earning a reasonable return on its regulated operations.

Because neither R.C. 4905.31 nor the Constitutional ban on confiscation requires that the utility receive any specific amount on behalf of Eramet, Appellant has no legal basis on which to complain about the Commission order.

A. Appellant is fully compensated.

Despite the lack of a legal requirement that it do so, the Commission did approve a mechanism which allows Appellant to fully recover the costs of the reasonable arrangement with Eramet. The entire differential between what Eramet pays Appellant and what the rate that would otherwise have been applicable to a customer of the size of Eramet but for the reasonable arrangement will be collected from other customers, except the relatively small POLR component of the rate.

The reason for the exception is that the POLR component of the rate which would otherwise have been charged to a customer with the usage of Eramet is not a **cost** of providing service to Eramet.⁷ R.C. 4905.31(E) only allows a mechanism to recover **costs** of the reasonable arrangements.

The POLR component of Appellant's rates exists to compensate for the possibility that a standard service customer will leave the standard service and buy power from another supplier, termed "migration risk". *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, PUCO Case No. 08-917-EL-SSO (Opinion and Order at 38-40) (March 18, 2009), Appellant's Appendix at 131-3. Eramet, as a matter of fact, is not on Appellant's standard service offer. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 9) (October 15, 2009), Appellant's Appendix at 39. Not

⁷ Indeed, it is not a *cost* at all.

being on the standard service offer, Eramet can not leave the Appellant's standard service offer to buy power from another supplier. Eramet cannot even leave the reasonable arrangement to buy power from another supplier, it has given up this ability. *Id* at 8-9, Appellant's Appendix at 38-39. As it is impossibility for Eramet to leave to shop elsewhere, it cannot return from that shopping. As a factual matter, Appellant will, as regards its service to Eramet, not bear the risk for which the POLR charge was established. *Id*. The POLR charge in the existing rates is imposed to compensate for the risks that a customer will leave the utility's standard service to shop elsewhere. Eramet, however: (1) does not now receive standard offer service; (2) will not leave standard offer service; and (3) will not purchase electricity from another supplier during the period of the current rate plan. There is, therefore, no POLR risk. In the absence of a POLR risk, there is nothing to compensate Appellant for. That is what the Commission's order recognizes and it should be affirmed.

B. Offsets

Appellant argues that what the Commission has ordered is an offset of the lost revenue and when the General Assembly meant to allow offsets of revenue recoveries, it did so explicitly. R.C. 4905.31 includes no language authorizing an offset, so, in Appellant's view, the Commission could not refuse to allow the collection of the POLR charge.

Appellant's reading of R.C. 4905.31 cannot be supported. As noted previously, the section does not require lost revenues be recovered at all. To read the section as "lost

revenues need not be recovered but, if they are, they must be recovered regardless of any change in circumstance” makes no sense. Recovery of anything under the section is dependent on that item being a “cost”. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 8-9) (October 15, 2009), Appellant’s Appendix at 38-9. If other customers are going to have to pay for something, that something must be real. It must be a cost. As discussed extensively below, there are no POLR costs associated with Eramet as a result of the reasonable arrangement. There is, therefore, nothing for the other customers to pay for, no cost to be collected. If this is an offset, it is permitted by the statute.

C. Eramet will not shop before the end of the current rate plan.

There can be no uncertainty. Eramet will not buy electricity from a supplier other than the Appellant for at least the period of time that Appellant’s current rate plan exists, that is, until December 31, 2011. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 7-8) (October 15, 2009), Appellant’s Appendix at 37-38. That is the Commission’s order. The POLR charge that is a part of the current rate plan compensates Appellant for the risk that a standard service customer will leave the standard service and buy electricity from another supplier. *In the Matter of the Application of Columbus Southern Power Company for Approval of an*

Electric Security Plan, PUCO Case No. 08-917-EL-SSO (Opinion and Order at 38-40) (March 18, 2009), Appellant's Appendix at 131-3. Because Eramet cannot leave Appellant's service, that is, it must buy from Appellant, Eramet cannot return to the standard service offer. The risk, for which the POLR charge was intended to compensate, does not exist as regards Eramet. Applying the charge as regards Eramet would have been, therefore, improper and the Commission did not apply the charge. Appellant's arguments to the contrary notwithstanding, the conclusion is correct and inescapable.

Appellant argues that the Commission could change the terms of the reasonable arrangement in the future, which could result in termination and shopping. There will be no change in this reasonable arrangement during the period of time that the current ESP plan is in effect. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 7) (October 15, 2009), Appellant's Appendix at 37. So, even if Appellant were correct (and it is not), no change to the reasonable arrangement is possible during the period when the POLR charge is in effect. Even if there were some change in the future beyond the period of time during which the POLR charge exists, no change would occur until there had been notice, an opportunity for hearing, a new Commission order, and a new possibility of appeal by any party that is disgruntled by that new Commission decision.

Appellant describes several scenarios in which the reasonable arrangement might terminate before its full term has run. Eramet could default, that is, simply not pay its

bill. This risk has, of course, nothing to do with the appropriateness of the POLR charge. If Eramet breached the contract as a tactic, an action for damages would exist. If Eramet breached because it failed as a business enterprise, there would be no consumption for which to bill. Neither possibility is relevant to the question at hand. Appellant notes that Eramet could breach the terms by assigning the contract without authorization. This is entirely artificial. Since assignment without agreement is a violation of the arrangement, no sensible entity would ever be the counter-party. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Contract at 2, ¶ 2) Appellant Supplement at 61. Why would any entity enter such an agreement whose only possible outcome is to embroil it in litigation?

Finally the Appellant notes that Eramet could violate the capital investment commitments included in the arrangement. Failing to make a required investment is not shopping for another supplier and thus it has no bearing on the POLR risk. As noted by the Commission, this sort of failure by Eramet would invoke the Commission's ongoing oversight of the arrangement. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 12) (October 15, 2009), Appellant's Appendix at 42. Such oversight is necessary to assure that the interests of all those interested, including the interests of the Appellant, are protected. If a fundamental pre-

mise of the arrangement is breached, the Commission will act to rectify the situation. This is a strength of the Commission order.

None of these scenarios has any bearing on appropriateness of the POLR charge. As has been noted several times before, the POLR charge is to compensate Appellant for the risk that a customer will buy electricity from another supplier. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, PUCO Case No. 08-917-EL-SSO (Opinion and Order at 38-40) (March 18, 2009), Appellant's Appendix at 131-3. The risks Appellant identifies are not risks that Eramet will buy from another supplier. There is no such risk.

D. Rates after the end of the current plan are unknown.

While the term of the reasonable arrangement approved below is ten years, the Commission only determined the recovery of the difference between the amount paid by Eramet under the reasonable arrangement and the standard service offer for the period that the current standard service offer will exist, that is, until December 31, 2011. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 7) (October 15, 2009), Appellant's Supplement at 37. The reason that the Commission only looked to the first three years of the current plan is quite obvious. Those are the only data that exist.

It is impossible to know today what Appellant's rates will be on January 1, 2012 or how, if at all, POLR charges will be reflected in them. At that time, the current rate plan will have ended by its own terms. What will replace it is not known. It could be a second electric security plan approved by the Commission under R.C. 4928.143(C)(1). It could be a modified version of the current plan if there is a rejection of the Commission's order approving a second electric security plan under 4928.143(C)(2). It could be a blended rate consisting of an auction result in part and changes to the current electric security plan in part under R.C. 4928.142(D). There is simply no way to know today.

Because the structure of those future rates cannot be known today, it is impossible to know which, if any, of the unknown and unknowable charges should be paid by other customers. As this Court is well aware from the variety of appeals that it has seen from the rate plans approved by the Commission in the past, these sorts of structures are very complicated and individual for the specific utilities. It can't even be known if there would be a POLR charge to be discussed. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Entry on Rehearing at 2-3) (March 24, 2010), Appellant's Supplement at 53-4. The POLR charge at issue in this case will assuredly be gone at that time. *Id.* The regulatory treatment of the differential between what Eramet pays in the future and whatever some future standard service offer might be, if there is a differential, must wait until that difference can be defined. Indeed, it may be

possible that the entirety of the differential would be recoverable from other customers, eliminating Appellant's concern.⁸

This does not place the Appellant in a "catch-22" position. It does not need to wait ten years for a determination to be made. As part of the next rate plan (however it is established) or in a separate proceeding, it will be necessary to determine the future treatment of whatever differential might exist under that future plan. This controversy must wait until the Commission makes actual determinations based on the situation as it exists when the current plan ends. There is no practical alternative.

E. A reasonable arrangement by definition is different than standard rates.

Appellant argues that the Commission's order approving the Eramet reasonable arrangement violates the Commission order which established the standard service offer. Rates for customers other than Eramet are set under the standard service offer. That an order establishing a reasonable arrangement is different than the otherwise applicable rates is not surprising. That is the point of the arrangement.

Appellant claims that in establishing the standard service offer which is included in the Appellant's current rate plan, the Commission identified specific amounts of "revenue requirement" sought to be recovered through the POLR charge also established in that order. Appellant reasons that because the POLR charge will not be collected for the

⁸ This potential might well create an appeal from another party of course, but at least there would be a real controversy to discuss.

Eramet load, the revenue requirement set in the standard service offer order will not be collected. Appellant sees this as a conflict which must be resolved in its favor. Appellant is wrong.

The amount to be collected through the POLR charge did not arise arbitrarily. It was the result of an analysis of the overall risk of customers going to another supplier, the migration risk. This risk was represented by a specific amount of money, which the Commission termed the revenue requirement associated with the POLR. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, PUCO Case No. 08-917-EL-SSO (Opinion and Order at 38-40) (March 18, 2009), Appellant's Appendix at 131-3. This amount was then spread across the body of customers so that each customer would pay an amount reflecting its proportionate share of the risk.

This is where the Appellant's confusion arises. It is entitled not to a specific amount of money but rather to be compensated for a specific amount of risk. The Commission order establishing the POLR charge was based on an analysis of all customers. The order approving the reasonable arrangement changed the factual situation. Because of the Commission order, the migration risk associated with Eramet dropped to zero. As has been said many times, Eramet cannot buy electricity from another supplier. It can not migrate. The amount of total risk to which Appellant is exposed has changed as a result of the order approving the reasonable arrangement. Migration risk no longer exists. The POLR charge is explicitly created to recompense Appellant for this risk and, as a result of

the order below, it no longer exists as regards Eramet. That is why there is no conflict as regards the POLR charge between the order which established the POLR charge and the order approving the reasonable arrangement. In the first order, the Commission intended to recompense the Appellant for its migration risk. As a result of the second order, the total amount of migration risk faced by the Appellant has been reduced, and the Appellant is still fully recompensed for the reduced level of risk borne. Adjusting a decision for a change in circumstance is appropriate and that is what the Commission did.

F. Summary

R.C. 4905.31 does not require any recovery of monetary differentials between reasonable arrangements approved under that section and any other rate treatment. Although it was not required to do so, the Commission did authorize the differential between the amounts paid by Eramet and the rates which would have been charged to a customer of Eramet's size should be collected from other customers, with one exception. The POLR charge which would be paid by other customers should not be recovered. This POLR charge was created to repay Appellant for a specified risk which, as a result of the reasonable arrangement, simply no longer exists as regards Eramet. Appellant is fully compensated for this new, lower level of risk and has no basis on which to object.

It is the policy of this state to do the following throughout this state: ... (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs; (C) ensure the

diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers....

Ohio Rev. Code § 4928.02(B), (C) (West 2010), Appendix at 2. The General Assembly has been very clear in its directives to the Commission regarding electric restructuring. It has provided an extensive list of its policy requirements in Revised Code Section 4928.02. These policy directives are mandatory. *Elyria Foundry v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305 (2007). The policy directives of concern here are the second and third on the list, specifically:

It is the policy of this state to do the following throughout this state : ... (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs; (C) ensure the diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers...

Ohio Rev. Code Ann. § 4928.02(B), (C) (West 2010), Appendix at 2. Fulfilling this obligation was the Commission's duty in the case below and the Commission did so.

There is no need to guess the supplier, price, terms, conditions, and quality options the consumer in this case, Eramet, has elected to meet its needs. Eramet has told us. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Entry on Rehearing at 3) (March 24, 2010), Appellant's Appendix at 54. Indeed that is the purpose of the application in the case below. One of the terms sought was that

the complementary obligations of AEP to supply and Eramet to purchase would continue for 10 years. *Id.* Eramet will not shop for another supplier during the period of the arrangement. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 7) (October 15, 2009), Appellant's Appendix at 37. This is Eramet's unilateral choice. *Id.* Approving this is giving the consumer exactly what it wants as to the supplier and the terms of service. This complies quite literally with the statutory policy.

Appellant argues that this violates some state policy in favor of competition. In Appellant's view "competition" apparently means buying power from someone other than the utility. This is entirely wrong-headed.

The policy of the state is not directed to forcing customers away from utility service. The policy is to provide consumers with choices, and the tools needed to exercise those choices, not to dictate how those choices will be exercised. In addition to Revised Code Sections 4928.02(B) and (C) already discussed, the Commission is to help to provide consumers with information about the transmission and distribution systems to promote effective consumer choice. Ohio Rev. Code § 4928.02(E) (West 2010), Appendix at 3. The Commission is to assure openness of the distribution system so that consumers have the choice of providing their own generation. Ohio Rev. Code Ann. § 4928.02(F) (West 2010), Appendix at 3. The entire thrust of the policy directives is toward letting the consumer choose.

Many of the choices available for consumers come from new participants, the competitive retail electric service suppliers. Additionally two choices for consumers are created by statute, specifically the standard service offer⁹ pursuant to Revised Code Section 4928.141 and the new reasonable arrangement pursuant to Revised Code Section 4905.31. This consumer, Eramet, has made its choice. *In the Matter of the Application of Eramet Marietta, Inc. for Approval of a Reasonable Arrangement with Columbus Southern Power Company*, PUCO Case No. 09-516-EL-AEC (Opinion and Order at 7) (October 15, 2009), Appellant's Appendix at 37. This is in keeping with the policy of the state.

It might be argued that Eramet should be denied its unilateral choice because its choice not to buy from another supplier harms the competitive environment in Ohio. There is no evidence in the record to support this.

Appellant argues that the term of Eramet's choice of service, ten years, is too long. That such an arrangement ties up too large an amount of electricity demand for too long. There is simply no basis for these objections. Any binding arrangement ties up electricity demand for its term. That is the function of the arrangement. That this consumer believes it needs supply assurance for a long period is hardly surprising given the extremely energy intensive nature of the ferromanganese industry. The Commission

⁹ The standard service offer itself can be provisioned in two ways, either an electric security plan, or a market rate offer but the distinction is not important for the current discussion.

found that there is no evidence in this record to indicate that tying Eramet's demand to the Appellant will have any effect on other customers.

Because allowing the consumer to have its choice does not harm other consumers and clearly advances the literal words of the express policy of the state by making the consumer's choice of supply and supplier effective and providing the consumer with the terms and conditions it elected, the Commission's order is reasonable and should be affirmed.

CONCLUSION

The General Assembly meant to broaden the options available to electric customers by allowing large industrial users to petition the Commission to establish arrangements for electric service unique to that customer. The General Assembly did this by amending R.C. 4905.31, which previously had only allowed the utility to make filings, to permit a customer to seek this sort of relief from the Commission unilaterally. Appellant argues that the change in the law changed nothing, but its arguments do not reflect the words of the amendment. In the case below, a large customer Eramet made this sort of filing.

Eramet asked the Commission to approve a long-term arrangement under which Eramet would exclusively buy power from Appellant for ten years. The Commission did approve a ten-year agreement but ordered a different pricing mechanism for the power sold. Although it did not have to do so, the Commission ordered that the amounts not chargeable to Eramet would be recovered from other customers except for the POLR

charge because, by virtue of the reasonable arrangement, there is no longer a POLR risk associated with Eramet.

Appellant argues that the POLR charge should also be paid by other customers. Its arguments are unavailing. Its statutory reading is incorrect. The order does not conflict with either statute or prior orders of the Commission. The statute only allows other customers to pay for the costs associated with reasonable arrangements and there is no POLR cost associated with the Eramet reasonable arrangement. Customers cannot be forced to pay something for nothing.

Finally Appellant argues that a customer cannot waive its ability to buy electricity from someone other than the utility. The law is entirely to the contrary. The Commission is to facilitate consumers in obtaining electricity from whom they want and under terms that they want. That is exactly what the Commission did.

Having fulfilled its obligations under the law, the Commission's orders should be affirmed.

Respectfully submitted,

Richard Cordray
Attorney General of Ohio

William L. Wright,
Section Chief



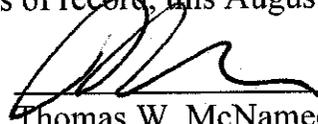
Thomas McNamee
Counsel of Record

Thomas G. Lindgren
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th floor
Columbus, Ohio 43215-3739
Telephone: (614) 466-4396
Facsimile: (614) 644-8764
thomas.mcnamee@puc.state.oh.us
thomas.lindgren@puc.state.oh.us

Counsel for the Appellee,
Public Utilities Commission of Ohio

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Appellee, submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid upon the following parties of record, this August 25, 2010.



Thomas W. McNamee
Assistant Attorney General

Parties of Record:

Janine L. Migden-Ostrander
Maureen R. Grady
Micheal Idzkowski
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

Lisa G. McAlister
Thomas Froehle
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215

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

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

APPENDIX

APPENDIX

TABLE OF CONTENTS

	Page
Ohio Rev. Code Ann § 4905.31(West 2010)	1
Ohio Rev. Code Ann § 4905.32 (West 2010)	2
Ohio Rev. Code Ann § 4905.33 (West 2010)	2
Ohio Rev. Code Ann § 4928.02 (West 2010)	2
Ohio Rev. Code Ann § 4928.141 (West 2010)	4
Ohio Rev. Code Ann § 4928.142 (West 2010)	4
Ohio Rev. Code Ann § 4928.143 (West 2010)	8
102 Laws of Ohio 549, Section 18, codified as Section 614-17 Ohio General Code (1911)	14

4905.31 Reasonable arrangements allowed - variable rate.

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

- (A) The division or distribution of its surplus profits;
- (B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement.
- (C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;
- (D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;
- (E) Any other financial device that may be practicable or advantageous to the parties interested. In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate. No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet. Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs. Every such schedule or reasonable arrangement shall be under the supervision and

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

4905.32 Schedule rate collected.

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

4905.33 Rebates, special rates, and free service prohibited.

(A) No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions.

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

4928.02 State policy.

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

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

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

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

- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;
- (L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;
- (M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;
- (N) Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution

infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

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

4928.142 Standard generation service offer price - competitive bidding.

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

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

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

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

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

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

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

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

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

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

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

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

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

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in

year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

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

(2) Its prudently incurred purchased power costs;

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

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without

compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

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

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

4928.143 Application for approval of electric security plan - testing.

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

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

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

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

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

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

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals,

including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

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

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

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

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

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

(C)(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application

filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

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

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

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

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year

thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

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

contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

Reasonable charges provided.
Section 614-25.

charge for such service is prohibited and declared to be unlawful.

Section 15. Every public utility shall furnish and provide with respect to its business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just and reasonable, and not more than allowed by law or by order of the commission. Every unjust or unreasonable charge made or demanded for any service, or in connection therewith, or in excess of that allowed by law or by order of the commission, is prohibited and declared to be unlawful.

Section 614-14.
Unjust, special rates, for service, etc., prohibited.

Section 16. No public utility shall directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person, firm, or corporation, a greater or less compensation for any services rendered, or to be rendered, except as provided in this act, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under the same, or substantially the same circumstances and conditions. Nor shall free service or service for less than actual cost be furnished for the purpose of destroying competition, and such free service and every such charge is prohibited and declared unlawful.

Section 614-15.
Unjust advantage.

Section 17. No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 614-16.
Printed schedules of rates must be filed.

Section 18. Every public utility shall print and file with the commission, within ninety days after this act takes effect, schedules, showing all rates, joint rates, rentals, tolls, classifications and charges for service of each and every kind by it rendered or furnished, which were in effect at the time this act takes effect and the length of time the same has been in force, and all rules and regulations in any manner affecting the same. Such schedules shall be plainly printed and kept open to public inspection. The commission shall have power to prescribe the form of every such schedule, and may, from time to time, prescribe, by order, changes in the form thereof. The commission may establish rules and regulations for keeping such schedule open to public inspection, and may, from time to time, modify the same. A copy of such schedules or so much thereof as the commission shall deem necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission may order.

Section 614-17.
Reasonable arrangements at work.

Section 19. Nothing in this act shall be taken to prohibit a public utility from entering into any reasonable arrangement with its customers, consumers or employes for the division or distribution of its surplus profits or providing for a sliding scale of charges or providing for a

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minimum charge for service to be rendered, unless such minimum charge is made or prohibited by the terms of the franchise, grant or ordinance under which such public utility is operated, a classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration, or providing any other financial device that may be practicable or advantageous to the parties interested. No such arrangement, sliding scale, minimum charge, classification or device shall be lawful unless the same shall be filed with and approved by the commission. Every such public utility is required to conform its schedules of rates, tolls and charges to such arrangement, sliding scale, classification or other device. Every such arrangement, sliding scale, minimum charge, classification or device shall be under the supervision and regulation of the commission, and subject to change, alteration or modification by the commission.

Approval.

Section 614-18.

SECTION 20. No public utility shall charge, demand, exact, receive or collect a different rate, rental, toll or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any public utility refund or remit directly or indirectly, any rate, rental, toll or charge so specified, or any part thereof, nor extend to any person, firm or corporation, any rule, regulation, privilege or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms and corporations under like circumstances for the like, or substantially similar, service.

Schedule rate collected.

Refund or rebate not allowed.

Section 614-19.

SECTION 21. The furnishing by any public utility of any product or service, at the rates, and upon the terms and conditions provided for in any existing contract, executed prior to the passage of this act, shall not be construed as constituting a discrimination, or undue or unreasonable preference, or advantage within the meaning specified.

Prior contract.

Provided, however, that when any such contract or contracts are or become terminable by notice, the commission shall have power, in its discretion, to direct by order, that such contract or contracts shall be terminated as and when directed by such order.

Section 614-20.

SECTION 22. Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental, in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days

Change of rates 30 days' notice.