ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application for	)	
Establishment of a Reasonable Arrangement	)	Case No. 10-0723
Between Eramet Marietta, Inc. and	)	
Columbus Southern Power Company.	)	On Appeal from the Public Utilities
	)	Commission of Ohio
	)	Case No. 09-516-EL-AEC

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I. INTRODUCTION

This appeal of Columbus Southern Power Company ("CSP" or "Company") focuses on its dissatisfaction with the solution adopted by the Public Utilities Commission of Ohio ("PUCO" or "Commission") in approving a "reasonable arrangement" between the Company and one of its mercantile customers. The mercantile customer is Eramet Marietta Inc. ("Eramet"). The solution adopted by the Commission was intended to assist Eramet, via an electricity discount, in obtaining corporate approval to make further capital investments in its Marietta facilities while providing fair compensation to CSP for the discount to Eramet. (CSP Appx. 32-33).

The Commission determined that in order to ensure that Eramet would make capital improvements at its Marietta facility, it was necessary to grant Eramet a discount on the power bill it would otherwise pay. The discount through 2011 is a reduced price that varies from the otherwise applicable tariff rate. From 2012 through 2018 the discount is reflected as a percentage off the tariff rate, with the discount declining each year. (CSP Appx. 34-35).

The electricity discount for Eramet approved by the Commission is being subsidized by all of the remaining customers of the Company, including residential customers.[1] This direct consumer subsidy ensures that the Company is receiving 100% of the revenues for services it provides to Eramet, just as if Eramet had otherwise paid CSP's non-discounted standard tariff rates.

[1] CSP filed to collect 100% of the 2009 discounts from its customers for its reasonable arrangements, including Eramet, in PUCO Case No. 09-1095-EL-EDR. Additionally, within the context of that case CSP applied to set the 2010 economic development rider ("EDR") to collect 100% of the 2010 reasonable arrangement discounts from customers. The PUCO approved CSP's request. See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates,* Case No. 09-1095-EL-EDR, Finding and Order (Jan. 7, 2010). (OCC Appx. 71). EDR rates of 10.52701 percent for CSP and 8.33091 percent are in effect currently and are being collected from the Company's customers, compensating CSP for 100% of the discounts granted to Eramet.

Importantly however, the Commission precluded CSP from retaining revenues over and above 100% of the Eramet discount. The PUCO found that "provider of last resort" ("POLR") revenues collected from Eramet should offset customers' subsidy of the Eramet discount. CSP's POLR charge, approved as a part of the Company's standard service offer,[2] is a bypassable charge[3] intended to compensate for the risk that a customer may switch (shop) to a non-CSP provider of generation when the market price of generation is below CSP's tariff rate. The Commission found that since Eramet had committed to a ten-year exclusive contract with CSP, Eramet had given up its right to switch to a competitor. (CSP Appx. 35-37, 53-54). Thus there would be no risk to CSP that Eramet would switch to a competitor. (CSP Appx. 35-37, 53-54). Accordingly, the Commission determined that rather than compensate CSP for a non-existent risk and POLR services it would not need to provide, the Commission would instead require Eramet to pay the POLR charge and credit the other CSP customers for those POLR revenues.[4] Thus, CSP's remaining customers' subsidy of the Eramet discount is diminished by receiving credits for POLR revenues paid by Eramet. CSP in turn was denied the right to collect windfall revenues for POLR services that it would not need to provide. Nonetheless CSP is currently receiving 100% of the revenues for services it provides to Eramet. The Commission's solution

[2] See (CSP Appx. 131-133).

[3] In the Order issued by the Commission modifying and approving the Companies' electric security plan ("ESP"), the Commission ruled that the POLR rider shall be avoidable for those customers who shop and agree to return at a market price and pay the market price of power incurred by the Company to serve the returning customers. (CSP Appx. 133). The Company had requested that the rider be non-bypassable.

[4] The costs of the Eramet discount are collected through CSP's economic development rider, which is a non-bypassable rider that applies to all customers, including reasonable arrangement customers.

recognized that the ability of CSP's customers to fund the Eramet rate discount is not unlimited.[5] The Commission's ruling limited the subsidy borne by CSP's other customers to 100% of the discounted Eramet rates. This result holds CSP harmless, and protects customers from paying windfall revenues to CSP for POLR services CSP does not have to provide. Allowing CSP to retain POLR revenues from Eramet, when it does not provide POLR service to Eramet, would have been an unreasonable result, the Commission concluded. On the other hand, reducing customers' subsidy of the Eramet discount by crediting customers for POLR revenues collected from Eramet was reasonable. It was so ordered by the PUCO. (CSP Appx. 133).

The POLR revenues credited to CSP customers to reduce their subsidy of the discount for the Eramet contract are expected to be approximately $1.65 million per year, starting in 2010. The credit is to apply only through the end of the Companies' current electric security plan ("ESP"), December 31, 2011. (CSP Appx. 37).

The discounting of CSP's rates for Eramet, even with the POLR revenue offset, still comes at a hefty price to the remaining CSP customers. The discounted electric rates will cost the CSP customers millions of dollars per year. Over three years, the discounted rates subsidized by CSP customers for this one reasonable arrangement could reach $30 million.[6] Thus, crediting other customers for the POLR charges paid by Eramet lessens this subsidy over the next two years by approximately $3.3 million.

[5] (CSP Supp. 43).

[6] See Testimony of OCC Witness Ibrahim. (CSP Supp. 153).

However, if CSP prevails in this appeal, CSP will be able to pocket moneys collected from Eramet for a POLR risk that it does not bear and POLR services it does not supply. CSP will be recouping from customers 100% of the revenues from the discount, plus more.

CSP's objective in this appeal is to obtain these windfall revenues collected from a customer who cannot shop. Hence, CSP challenges the PUCO's authority, under R.C. 4905.31, to offset the POLR revenues associated with the reasonable arrangement. CSP argues that the POLR revenues equate to "revenue foregone" referenced in R.C. 4905.31(E) under a utility's job retention program. (CSP Brief at 13). According to CSP, the PUCO has no authority to deny the Company "revenue foregone" under a reasonable arrangement. CSP also alleges that the ten-year exclusive contract with Eramet violates the state's policy facilitating competition and encouraging customer choice. (CSP Brief at 29-36). The Company disputes the Commission's finding that there is no risk of Eramet shopping, erroneously averring that it is against the manifest weight of the evidence. Finally, the Company contests the Commission's authority to require it to enter into an "involuntary" contract that "causes harm to CSP's financial interests."[7] (CSP Brief at 43-49).

The questions presented by this appeal are as follows:

1) Under Ohio law, a mercantile customer may obtain discounted electric rates to further economic development, by establishing or entering into a reasonable arrangement with a utility. The reasonable arrangement must be filed with and approved by the PUCO. Does the PUCO have authority to determine the amount of the discount that is to be funded by the utility's other customers?

2) Under S.B. 221, the General Assembly has established numerous state policies including policies related to electric generation competition, customer choice, and economic development. Does the PUCO run afoul of these policies by approving a customer-proposed ten-year exclusive contract with a utility for the purpose of retaining Ohio jobs?

[7] OCC does not address this final claim in their Merit Brief. OCC chose to focus its brief on the remaining issues. This should not be interpreted as acquiescence to CSP's position on this issue.

3) The PUCO approved rates for customers under standard service offer tariffs. Under these tariffs, customers are charged for imposing a risk for the utility standing as a default provider of generation service. Does CSP's default service provider charge (POLR) in its standard service offer tariff necessarily apply to a customer who takes exclusive service from the utility under a reasonable arrangement contract?

4) The PUCO has continuing jurisdiction over reasonable arrangements between a utility and a mercantile customer. Any modifications or changes to a reasonable arrangement requires notice and an opportunity to be heard. Do such procedures create a risk that a mercantile customer will be permitted to shop during a utility's three-year electric security plan ("ESP")?

II. STATEMENT OF FACTS AND CASE

On June 19, 2009, Eramet filed an application ("Application") in PUCO Case No. 09-516-EL-AEC, to establish a reasonable arrangement with CSP for electric service to its manganese alloy-producing facility in Marietta, Ohio. The purpose of the application was to permit Eramet to secure a reliable supply of electricity with a reasonable, predictable price over a term that would allow it to invest approximately $40 million to upgrade its Marietta facility. CSP did not join Eramet in filing the application, but did move to intervene on July 1, 2009. (CSP Supp. at 1). In addition to CSP, OCC and the Ohio Energy Group ("OEG") intervened in the case and filed timely comments regarding Eramet's application. (CSP Supp. 203).

A hearing on the matter commenced on August 4, 2009, and concluded on August 14, 2009. At the hearing, witnesses testified on behalf of Eramet, CSP, OCC, and the PUCO Staff ("Staff"). During the course of the hearing, on August 5, 2009, Eramet and the Staff filed a Joint Stipulation and Recommendation ("Stipulation"), proposing to resolve issues and concerns related to Eramet's Application. The Commission approved the Stipulation, with modifications, in its October 15, 2009 Opinion and Order ("Order"). (CSP Appx. 31).

On November 13, 2009, CSP filed an application for rehearing pursuant to R.C. 4903.10, alleging that the Order was unreasonable and unlawful based on eight assignments of error. (CSP Appx. 67). On November 23, 2009, OCC and Ohio Energy Group ("OEG") jointly filed a memorandum contra CSP's application for rehearing. (R. 43).

In its first assignment of error, CSP argued that the Commission's finding that Eramet cannot shop through 2011 (when CSP's ESP expires) is contrary to the record evidence and public policy, as codified in Ohio law. (CSP Appx. 69). CSP alleged in its second assignment of error that evaluating whether Eramet can shop under the contract based on only three years of the ten-year term is unreasonable and unlawful. (CSP Appx. 69). In its third assignment of error, CSP contended that evaluating whether Eramet can shop under the three-year period during which CSP's current provider of last resort ("POLR") charge has been authorized is unreasonable and unlawful. (CSP Appx. 69).

As an initial matter, the Commission found that its decision of whether Eramet can shop over the next three years is reasonable and appropriate. (CSP Appx. 53). The Commission found that CSP's argument disregards the circumstances surrounding the arrangement. (CSP Appx. 53). CSP has been authorized to assess POLR charges to its standard service offer ("SSO") customers only through December 31, 2011. The Commission focused on this period because it has not determined whether the POLR risk will exist beyond 2011. (CSP Appx. 53-54). Nor is it known whether the Company will apply for POLR as part of its future generation rates. Accordingly, the Commission denied CSP's second and third assignments of error. (CSP Appx. at 53-54). The Commission based its determination that Eramet cannot shop, in part, on the fact that Eramet specifically chose CSP as its exclusive electric service provider for its reasonable arrangement. In addition, the Commission relied on the testimony of Eramet witness Bjorklund, who stated, "Eramet will not need to shop." (CSP Appx. at 54).

In its fourth assignment of error, CSP argued that the finding that there is not a risk that Eramet will be permitted, to shop and then return to CSP is unreasonable and unlawful. (CSP Appx. 69). CSP cited the Commission's continuing jurisdiction over the reasonable arrangement as one source of that risk. (CSP Appx. 75-76). In CSP's view if the Commission has jurisdiction to modify the contract, this creates a risk that Eramet can shop. Nonetheless, the Commission found that its jurisdiction over the matter does not create a risk of shopping that necessitates a POLR charge. It denied CSP's fourth assignment of error. (CSP Appx. at 56).

In its fifth and sixth assignments of error, CSP argued that the Commission's decision requiring it to credit any POLR revenues paid by Eramet to CSP's customers is unreasonable and unlawful. (CSP Appx. 69). The Commission responded that CSP had raised no new arguments, reiterated its analysis in its Order, and concluded that it had the discretion to determine whether CSP was entitled to collect the entire 100% discount plus POLR. (CSP Appx. at 56). In rejecting each of CSP's rehearing arguments, the Commission relied on its recent decision in the *Ormet Case,*[8] noted that CSP will incur no costs for providing POLR service, and held that CSP should credit any POLR charges paid by Eramet to CSP's economic development rider to reduce the revenues recovered from other customers. (CSP Appx. at 56-57).

In its seventh and eighth assignments of error, CSP argued that requiring it to enter into a contract with Eramet that conforms to the Commission's Order reduces CSP's revenues and is

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[8] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* PUCO Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009), affirmed in relevant part by the PUCO's Entry on Rehearing issued Sept. 15, 2009.

unreasonable and unlawful. (CSP Appx. 69). The Commission rejected CSP's arguments, stating, "[I]f the General Assembly had intended on retaining the requirement that an electric utility agree to a proposed reasonable arrangement, 'there would have been no need * * * to amend Section 4905.31, Revised Code, to authorize the filing of an application by a mercantile customer." (CSP Appx. at 59-60).

In response to the Commission's Entry on Rehearing, CSP filed its Notice of Appeal on April 26, 2010. (CSP Appx. 26). OCC moved to intervene as an Appellee in this case. Its intervention was granted on July 22, 2010.

III. STANDARD OF REVIEW

R.C. 4903.13 (CSP Appx. 1) governs this Court's review of PUCO Orders. It provides in pertinent part: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable***." The Court has interpreted this standard as one turning upon whether the issue presents a question of law or a question of fact.

As to questions of fact, the Court has held that it will not reverse the PUCO unless the PUCO's findings are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.[9] This standard should be applied to CSP's Proposition of Law No. III. CSP's Proposition of Law

[9] *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, ¶ 8 of the syllabus, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N.E.2d 778.

No. III avers that the PUCO's finding that there is no risk of Eramet shopping is against the "manifest weight of the record." (CSP Brief at 36-42).

Questions of law, such as those raised by CSP's Propositions of Law Nos. I, II, and IV are held to a different standard of review. Legal issues are subject to more intensive examination than questions of fact—such issues are subject to complete and independent review.[10] But this does not prevent the Court from acknowledging and utilizing the specialized expertise of the PUCO in interpreting the law.[11] Reliance on the PUCO's expertise is particularly appropriate where there are highly specialized issues and its expertise would be of assistance[12] in discerning the presumed intent of the General Assembly.

With these standards of review in mind, the Court must consider and resolve the errors alleged by CSP.

IV. ARGUMENT

Under Ohio law, a mercantile customer may obtain discounted electric rates in order to retain jobs, by establishing or entering into a reasonable arrangement with a utility. The reasonable arrangement must be filed with and approved by the PUCO. Does the PUCO have authority to determine the amount of the discount that is to be funded by the utility's other customers? YES.

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[10] *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 678 N.E.2d 922.

[11] See *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

[12] See *Consumers Counsel v. Pub. Util. Comm.*,117 Ohio St.3d 289, 2008-Ohio-860, 883 N.E.2d 1025, ¶28 (where the Court deferred to the PUCO's expertise in deciding the most effective means of implementing the legislature's intent in H.B. 218).

PROPOSITION OF LAW 1:

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.[13]

When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this Court to apply the rules of statutory interpretation.[14] The Court has adhered to this standard for over one hundred years, as noted by Justice Pfeifer.[15] This standard acknowledges the duty of courts is to expound upon the law, not to create law. Otherwise the courts encroach upon the power of the General Assembly to enact laws, and thereby threaten the balance of powers created under the Ohio Constitution.[16] Thus, when the Court has been called upon to give effect to an act of the General Assembly, a standard of judicial restraint has developed where the wording of the law is clear and unambiguous.[17] This

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[13] *Sears v. Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413, syllabus ¶4. See also *State of Ohio v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus: "Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written."

[14] *State of Ohio v. Muncie* (2001), 91 Ohio St.3d 440, 447, 746 N.E.2d 1092, 1098 (citing *Symmes Twp. Bd. Of Trustees v. Smyth* (2000), 87 Ohio St.3d 549, 553, 721 N.E.2d 1057, 1061).

[15] *State of Ohio v. Kreischer,* 109 Ohio St.3d at 395, 848 N.E.2d at ¶14 (citations omitted).

[16] See Section 1, Article II, Ohio Constitution, vesting the legislative power in the Ohio General Assembly, and Section 1, Article IV, Ohio Constitution, vesting the judicial power in the courts. (OCC Appx. 9, 10).

[17] *Proctor, Dir. v. Kardassilaris et al.*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶22.

Court has ruled that a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation.[18] R.C. 4905.31 is such a statute.

A. R.C. 4905.31 Is Plain And Unambiguous, And Clearly Establishes The PUCO's Authority To Approve, Change, Alter, Or Modify All Reasonable Arrangements Proposed By A Utility Or A Mercantile Customer.

R.C. 4905.31,[19] pre-S.B. 221 and post-S.B. 221, is simple in many respects. It accomplishes three objectives. First, it designates entities and customers who "are not prohibited from" filing for, establishing, or entering into a "reasonable arrangement." Second, it defines "reasonable arrangements" that are not prohibited from being filed for, established, or entered into. Third, it institutes a process for implementing the arrangements.

The statute, as amended, provides that both public utilities and mercantile customers, or groups of mercantile customers are not prohibited from seeking to establish or enter into a reasonable arrangement. This is conveyed by the following words: "Chapters 4901., 4903., 4905., 4907., 4921., 4923., 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

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[18] Id., citing *Bernardini v. Bd. Of Ed. For the Conneaut Area City School Dist.* (1979), 58 Ohio St.2d 1, 6, 12 O.O.3d 1, 387 N.E.2d 1222, 1224. See also *Crowl v. DeLuca* (1972), 29 Ohio St.2d 53, 58-59, 58 O.O.2d 107, 278 N.E.2d 352, 356; *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, syllabus ¶2.

[19] R.C. 4905.31 (CSP Appx. 1) was enacted in 1953, and underwent its most significant revisions recently under S.B. 221. Notably the revisions did not displace the process for implementing a reasonable arrangement. Nor did S.B. 221 change the PUCO's authority over reasonable arrangements. Instead, the revisions extend the opportunities created for reasonable arrangements to mercantile customers or groups of mercantile customers and expand the categories of reasonable arrangements to include a number of diverse applications including economic development and job retention. See (OCC Appx. 11, which shows the "redline" version of the S.B. 221, including amendments to R.C. 4905.31).

prohibit *a mercantile customer* of an electric distribution utility****or group of those customers* from establishing a reasonable arrangement with that utility***."[20]

After defining this category of applicants, the statute then lists a series of allowable arrangements identified as subsections (A)-(E).[21] These are the reasonable arrangements that either the utility or the mercantile customers are not prohibited from seeking.

Next the statute delineates a two-step process for implementing the arrangements. The statute identifies the first step as either filing a schedule or establishing or entering into a reasonable arrangement. The words of the statute convey that a utility is not prohibited from "filing a schedule" or "establishing or entering into" a reasonable arrangement. A mercantile customer or a group of mercantile customers are not prohibited from "establishing a reasonable arrangement."

Once the schedule is filed or the arrangement is established or entered into, the second step must be followed: the schedule or arrangement must be filed with and approved by the commission "pursuant to an application" submitted by the public utility or mercantile customer. The statute provides "[n]o 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 customers***." The statute directs the public utility to conform its schedule of rates, tolls, and charges, to such arrangements. The statute concludes with a further mandate that "every such schedule or reasonable arrangement shall be under the

[20] (CSP Appx. 1) (emphasis added).

[21] Germane to this appeal is the category "E" which identifies as an allowable arrangement "(E) Any other financial device that may be practicable or advantageous to the parties interested. In 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***." (CSP Appx. 1).

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

The words of the statute that convey the PUCO's authority over reasonable arrangements are plain. There is no ambiguity. The Commission has ultimate authority to approve, regulate, and supervise reasonable arrangements. In the exercise of such authority, the Commission may consider and rule upon whether "costs incurred" by a public utility in conjunction with any economic development and job retention program, including the "revenues foregone," by a public utility, should be permitted to be collected from the utility's customers.

The statutory process for implementing reasonable arrangements is also quite clear. The utility or mercantile customer files for, enters into, or establishes the arrangement. The arrangement can fall under one of the categories listed as subsection (A) through (E). The utility or mercantile customer files an application seeking approval of the schedule or arrangement at the PUCO. The Commission considers it, and changes, alters, or modifies the arrangement or schedule. The utility adjusts its schedules to reflect whatever the Commission orders.

This statutory process was followed in the PUCO proceeding below. Eramet sought to establish a reasonable arrangement with CSP. It filed an application with the Commission proposing its reasonable arrangement. The Commission considered the application. The Commission ordered modifications to the proposed reasonable arrangement. One of the modifications was to require CSP to credit customers for POLR revenues paid by Eramet to CSP. This modification reduced the subsidy paid to CSP by other customers to fund the discount to Eramet. CSP was held harmless, and is receiving 100% of the revenues for services provided to Eramet, as if Eramet had been billed under standard service offer schedules without the discount. Under the PUCO's ruling, CSP is not however, collecting millions of POLR-related dollars from a customer for a risk not imposed or for services not provided under the reasonable arrangement. Instead the POLR charges offset some of customers' subsidy payments to CSP. Eramet filed a revised and executed power agreement on October 28, 2009. (R.39).

B. Subsection (E) Of R.C. 4905.31 Pertains To A Reasonable Arrangement That May Be Sought By An Applicant. It Does Not Restrict The PUCO's Authority.

CSP claims that R.C. 4905.31 does not permit the Commission to approve a reasonable arrangement and simultaneously disallow a portion of the costs incurred, including the resulting "revenue forgone." (CSP Brief at 13). The only path to this conclusion is through tortured statutory interpretation. It is this type of forced and subtle construction that the Court has wisely eschewed on numerous occasions.[22]

The Company begins its journey by zeroing in on the language of subsection (E), oblivious to the other sections of the statute. The Company identifies the Eramet arrangement as a qualifying financial device that "may" "recover costs incurred in conjunction with any economic development and job retention," including "revenue foregone." The Company then professes that "may" is intended by the General Assembly to pertain to categories of "financial devices" and not to "costs incurred" including "revenue foregone." (CSP Brief at 14). Rather, CSP posits that the General Assembly provided for permissive reasonable arrangements to include mandatory recovery of "costs incurred," including "revenue foregone." (CSP Brief at 16).

CSP then notes that the General Assembly attached no qualifying or modifying language within subsection (E) and thus, the Commission does not have discretion to deny recovery of revenue foregone. (CSP Brief at 16). In other words, the Commission may allow a financial

[22] See *Slingluff et al. v. Weaver et al.*, 66 Ohio St. 627, 64 N.E. 576 (citation omitted).

device to recover costs incurred for economic development or job retention, but may not deny recovery of "costs incurred," including "revenue foregone" as a result of the reasonable arrangement.

The Company bolsters its theory by grasping onto the doctrine of "expression unius est exclusion alterius." According to the Company, if the General Assembly wanted to give the Commission "offset" authority – allowing it to reduce the recovery of "revenue foregone" - it would have expressly done so. (CSP Brief at 17-18). Because the General Assembly did not, the Court should interpret that to mean that the General Assembly intended no offset.

The Company's forced interpretation of this specific section of R.C. 4905.31 must fail. The Company seeks to import doubt into the statute as to its meaning and then resorts to grammatical arguments related to the placement of the verb "may" to remove the doubt it created. The doubt fashioned by the Company is based on speculation. This Court has recognized that where the statute is clear and explicit, to import doubt as to its meaning and then attempt to resolve the doubt by supposition based on phraseology or punctuation is improper.[23]

When the statute is clear and explicit as it is here, the maxim of expressio unius est exclusio has no place. This maxim is not a rule of law. It is a rule of construction "used as a tool to cut through ambiguities to lay bare the intendment of a provision."[24] It is only an aid in ascertaining the meaning of law and must yield whenever a contrary intent is apparent.

The meaning of the law, however is clear and needs no interpretation. R.C. 4905.31 only defines the series of allowable arrangements that the applicants (utility or mercantile customer) are not prohibited from filing, establishing, or entering into. Thus, "may" merely defines what

[23] Id. at 628-629, 64 N.E. 576.

[24] *The State ex. rel. Jackman et al. v. Court of Common Pleas of Cuyahoga County et al.* (1967), 9 Ohio St.2d 156, 164, citing *State ex rel. Curtis v. DeCorps, Dir. Of Pub. Serv.* (1938), 134 Ohio St. 295, 12 O.O. 96, 16 N.E.2d 459.

the applicants are not prohibited from seeking. Subsection (E), one of the five categories of reasonable arrangements, presents the opportunity to seek a reasonable arrangement for economic development that includes "costs incurred" and "revenue foregone" as a result of such economic development. It does not in any way define the Commission's authority over the arrangements.

Rather the Commission's authority over the reasonable arrangements is established later on in the statute, where the statute plainly states that the schedule or arrangement must be approved by the Commission: "No such schedule or arrangement is lawful unless it is filed with and approved by the commission, pursuant to an application***." Lest there be doubt as to the authority of the Commission, all doubt is resolved in the final passage of the statute: "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."

The Commission's supervision and regulation over reasonable arrangements is further defined under the Ohio Administrative Code through enabling rules pertaining to the statute. Under those rules when a unique arrangement[25] is requested by a mercantile customer, the mercantile customer has the burden of showing the arrangement is "reasonable" and does not violate R.C. 4905.33 (OCC Appx. 5) and R.C. 4905.35 (OCC Appx. 6).[26] Further, the mercantile customer must show that the arrangement furthers the policy of the State of Ohio

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[25] A "unique arrangement" is a subset of reasonable arrangements under R.C.4905.31 that does not constitute an economic development arrangement (Ohio Adm. Code 4901:1-38-03) or an energy efficiency arrangement (Ohio Admin. Code 4901:1-38-04). (CSP Appx. 23).

[26] See Ohio Admin. Code 4901:1-38-05(B)(3). (CSP Appx. 24).

embodied in R.C. 4928.02.[27] The Commission itself has succinctly described its role in reasonable arrangements as one which requires it to determine whether or not the arrangement is in the "public interest." (CSP Appx. 141).

The words of the statute and the enabling rules convey the PUCO's authority over reasonable arrangements. They are not ambiguous. R.C. 4905.31 makes it clear that no reasonable arrangement is lawful unless it has been filed with and approved by the Commission. The Commission may change, alter, or modify a reasonable arrangement.

Because the Commission may change, alter, or modify a reasonable arrangement, the PUCO can examine the "costs incurred" and the "revenue foregone" related to an economic development or job retention program. Accordingly, the PUCO can determine whether POLR risk is a "cost incurred" and whether it would amount to "revenue foregone" where the utility is not providing POLR services and is not subject to POLR risk.

The Commission determined that the POLR risk was not a "cost incurred" under the Eramet reasonable arrangement. (CSP Appx. 38-39; 56-57). Since the POLR charge compensates utilities for a risk that a customer will shop and then return, Eramet eliminated the POLR risk when it gave up its right to shop. Hence, for this reasonable arrangement customer there is no POLR "cost incurred" under R.C. 4905.31(E) which could in turn be recovered as "revenue foregone." In examining "revenue foregone," the PUCO rightly considered other factors (e.g., costs that a utility would avoid under the arrangement).[28] The avoided POLR

[27] Id. See (CSP Appx. 7).

[28] Indeed under Ohio Adm. Code 4901:1-38-08(A)(3) (OCC Appx. 8) cost savings to the electric utility, under certain arrangements, are to be an offset to the recovery of "delta revenues" or the "revenue foregone" as the statute refers to such revenues. "Delta revenues" is defined as "the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission." Ohio Admin. Code 4901:1-38-01(C). (OCC Appx. 7).

expense is essentially a cost savings to the Company—the Company is Eramet's only provider under the ten-year term of the agreement and there would be no "costs incurred" for POLR risk or POLR services for this customer. Thus, there should be no POLR revenues that would be foregone under the agreement; instead the POLR risk and POLR service would be avoided as a result of the agreement. They should be offset against the permissible "revenue foregone" that is collected from CSP customers, as the PUCO correctly determined.

Moreover the Commission has a responsibility to ultimately determine whether the proposed arrangement is reasonable and in the public interest. Part of such a determination focuses on the cost imposed on the utility's customers to subsidize the discounted rates. Whether the discount subsidized by other customers should be offset by POLR revenues is merely one factor the Commission can consider in reviewing a reasonable arrangement.

CSP's interpretation of R.C. 4905.31(E) - that the Commission has no choice but to permit the utility to recover "costs incurred" including "revenues foregone" - supersedes and renders superfluous Commission review of such costs and revenues. The Company's forced interpretation of R.C. 4905.31 seeks to needlessly restrict the Commission from carrying out its review. It should be rejected. CSP asks this Court to accept a construction of R.C. 4905.31 that limits the authority of the PUCO, inconsistent with R.C. 4905.31 and the statute's enabling rules. The Court should not accept such arguments.

Otherwise, there would appear to be no reason why the Court could not, as to any legislation, alter it to make it conform to the utility's idea as to what the act should have been. Such a ruling would substitute the will and judgment of the General Assembly with the will and judgment of the judiciary who have been selected to merely expound upon the law. The Appellants' claims of error based on a forced construction of R.C. 4905.31 should be rejected.

Under S.B. 221, the General Assembly has established numerous state policies including policies related to electric generation competition, customer choice, and economic development. Does the PUCO run afoul of these policies by approving a customer-proposed ten-year exclusive contract with a utility for the purpose of retaining Ohio jobs? NO.

PROPOSITION OF LAW 2:

R.C. Chapter 4928 does not prohibit a mercantile customer from establishing a reasonable arrangement providing for an electric distribution utility to be its exclusive supplier, subject to the Commission's approval. Nor does R.C. Chapter 4928 prohibit the Commission from approving a reasonable arrangement with such an exclusive supplier provision.

In its merit brief, CSP argues that the PUCO's adoption of an "involuntary" contract between it and Eramet is unlawful because it violates well-established policy of the state and the retail shopping provisions of S.B. 3 and S.B. 221. (CSP Brief at 28-34). According to CSP, approval of the exclusive supplier provision is contrary to the most basic and central premise of S.B. 3 and S.B. 221: the development of competitive electric generation markets for retail customers. (CSP Brief at 28). CSP directs the Court to the provisions contained in R.C. 4928.02 (C), (G), and (H) (CSP Appx. 7) as evidence of the policy. (CSP Brief at 29). CSP also makes reference to R.C. 4928.06 (CSP Appx. 8), claiming that the exclusive supplier provision could not survive scrutiny under the factors the Commission must consider when determining whether there is effective competition or reasonable alternatives for that service. (CSP Brief at 34). Additionally, CSP complains that the PUCO ruling is unreasonable because it unduly restricts retail competition and locks Eramet's load[29] out of the competitive market. (CSP Brief at 34-35). CSP alleges that "prohibiting shopping for such significant electric load is unquestionably a major constraint on the competitive generation market in Ohio." (CSP Brief at 35). CSP alleges as well that enforcing an exclusive supplier provision contradicts the public interest and should be declared unconscionable and unenforceable. (CSP Brief at 36).

A. R.C. 4905.31 Clearly Permits A Mercantile Customer To Establish A Reasonable Arrangement With An Electric Distribution Utility, Notwithstanding The Provisions Of R.C. 4928.02 And 4928.06.

Eramet applied to establish a reasonable arrangement with CSP. (OCC Supp. 1). Eramet chose to give up the right to shop for generation service in exchange for a long-term exclusive supplier agreement with CSP. Under the long-term contract with CSP, Eramet is provided with rates that are discounted from the otherwise applicable tariffs it would pay. Customers of CSP currently fund the entire discount granted Eramet, primarily in order to facilitate capital investment in Eramet's Marietta facilities, thereby assuring the continued operation of Eramet and retaining 200 Ohio jobs.

Eramet's application to establish a reasonable arrangement with CSP was specifically permitted under the revisions to R.C. 4905.31 that came with S.B. 221. S.B. 221 (OCC Appx. 11) expanded the scope of reasonable arrangements under R.C. 4905.31 to allow "mercantile customers" such as Eramet to unilaterally establish a reasonable arrangement, subject to the PUCO's approval. The General Assembly in R.C. 4928.01(A)(19) defined a mercantile

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[29] CSP alleges that Eramet's "substantial power requirement" is equal to supplying up to 58, 000 households and is "extremely significant and potentially harmful to the enhancement of retail electric competition in Ohio." (CSP Brief at 2, 32). CSP explains at page 35 of its brief how the 58,000 figure is derived and cites to the PUCO's website. These references equating Eramet's power requirements to 58,000 households are outside-the-record information that should be disregarded by the Court, as it is not part of the record in this case. See OCC Proposition of Law 5.

customer as meeting a minimum consumption -- more than 700,000 kWh per year. (CSP Appx. 1). The General Assembly did not put restrictions on the length of reasonable arrangements or the maximum consumption when revisions to Chapter 4928 and R.C. 4905.31 were made through S.B. 221.

The General Assembly not only expanded reasonable arrangements under S.B. 221, but also revised the introductory language of the statute. Specifically, the preamble to R.C. 4905.31 expands upon the chapters of the Revised Code that do not prohibit reasonable arrangements. Among the chapters listed as not prohibiting reasonable arrangements is Chapter 4928. This Chapter was specifically added when S.B. 221 was enacted. (OCC Appx. 11).

Thus, notwithstanding CSP's arguments to the contrary, R.C. 4928.02 and 4928.06 do not prohibit mercantile customers from establishing reasonable arrangements under R.C. 4905.31. The specific revised language of R.C. 4905.31 makes this abundantly clear.[30] CSP's arguments that the Commission violated Chapter 4928 of the Revised Code must fail as the plain language of the statute states that Chapter 4928 does not prohibit reasonable arrangements, including those approved by the PUCO which may contain exclusive supplier provisions.[31]

B. R.C. Chapter 4928 Does Not Prohibit The Public Utilities Commission From Approving A Reasonable Arrangement That Encompasses An Exclusive Supplier Provision.

Contrary to CSP's assertions, the Commission's approval of the Eramet reasonable arrangement is consistent with a number of the policies underlying S.B. 221. Although one of the objectives of S.B. 221 is to foster competition, CSP ignores the myriad of other policies

[30] See (OCC Appx. 113), where in the *Ormet* decision, the PUCO acknowledged that, given the revised statutory language, it could not find as a matter of law, that the proposed unique arrangement, which includes an exclusive supplier provision, violates R.C. 4928.02.

[31] See (CSP Appx. 1).

underlying S.B. 221—policies that are effectuated by the PUCO approving the modified reasonable arrangement with Eramet.

Under R.C. 4928.02, the policies of the state include: (A) ensuring the availability of "reasonably priced retail electric service;"(B) providing customers with "the supplier, price, terms, conditions, and quality options that they elect to meet their respective needs;" (E) "effective customer choice of retail electric service;"(G) developing and implementing flexible regulatory treatment; and (N) facilitating the state's effectiveness in the global economy. (CSP Appx. 7).

By approving the modified Eramet reasonable arrangement with the POLR offset, the Commission can, consistent with R.C. 4928.02(A), attempt to ensure that reasonably priced electric retail rates are available for both Eramet and the other customers of CSP who subsidize the discount. Under the reasonable arrangement the Commission has permitted Eramet to choose its supplier and the conditions of service that meet its needs, consistent with the policy directive of R.C. 4928.02(B) and (E). The Eramet reasonable arrangement is premised upon the concept of permitting flexible regulatory treatment—rates that vary from tariff, and are discounted at various levels throughout the term of the reasonable arrangement. This is the type of flexible regulatory treatment referred to under R.C. 4928.02(G). Finally, Eramet asserted (and the PUCO implicitly agreed) that the discounted electric rates were essential for funding its capital investment in the Marietta plant which was necessary to ensure its continued operation in southeastern Ohio. (R. 1 at 3). The Commission ultimately decided that approving the reasonable arrangement between Eramet and CSP facilitated the state's effectiveness in the global economy, consistent with R.C. 4928.02 (N). (CSP Appx. 32).

Thus, even if one were to accept CSP's unsubstantiated contention that the competitive market is theoretically injured by the Eramet contract, the Court should conclude that there are countervailing and competing policies within Chapter 4928. Those state policies will be fulfilled by upholding the PUCO's decision affirming that CSP is not entitled to retain POLR revenues for a customer (Eramet) that will not be switching to a supplier other than CSP. CSP's arguments should be rejected.

> *The PUCO approved rates for customers under standard service offer tariffs. Under these tariffs, customers are charged for imposing a risk for the utility standing as a default provider of generation service. Does CSP's default service provider charge (POLR) in its standard service offer tariff necessarily apply to a customer who takes exclusive service from the utility under a reasonable arrangement contract? NO.*

PROPOSITION OF LAW 3:
The Commission's decision to credit customers for POLR charges paid by Eramet to CSP was reasonable and consistent with the modified electric security plan approved for CSP.

A. The PUCO's Decision To Credit Customers For POLR Charges Was Reasonable.

The Eramet arrangement was submitted to the PUCO for approval. Under R.C. 4905.31, the PUCO may approve, change, alter, or modify such reasonable arrangements. The PUCO's decision in this respect is no different than any other decision of the PUCO. The decision must be lawful and reasonable, and result in charges for service that are just and reasonable.[32] It must be conveyed by findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based on the findings of fact.[33] That is precisely what happened here.

[32] See R.C. 4905.22, requiring charges for electric services rendered to be just and reasonable. (OCC Appx. 4).

[33] See R.C. 4903.09. (OCC Appx. 1).

The PUCO approved a modified reasonable arrangement between Eramet and CSP, which requires CSP to credit its customers for provider of last resort revenues received from Eramet. This credit helps defray the cost of the discounted rates that CSP customers are subsidizing. Otherwise CSP would be assured of windfall revenues for POLR services that are not being provided to Eramet. For 2009, the POLR offset will diminish the Eramet discount subsidized by CSP customers by approximately $2.24 million. (CSP Supp. at 179). Each year thereafter, at least through 2011, the POLR offset should be approximately $1.65 million per year assuming Eramet's operations remain consistent with its 2009 experience.

The Commission's Order was reasonable in this regard because it recognized that CSP will be the exclusive supplier to Eramet (CSP Appx. 37, 53-54) and thus, there is no risk that Eramet will shop for generation and then return to CSP. The Commission correctly concluded that if CSP were to retain POLR revenues from Eramet, it would be compensated for a service it would not be providing. (CSP Appx. 38, 39). The Commission declined to require customers to fund an additional subsidy to CSP for POLR. CSP instead was held harmless—it was permitted to seek authority to recoup 100% of the revenues for services it provided to Eramet, as if Eramet had been billed for such services under standard tariff rates. The Commission subsequently allowed CSP to collect for 2009 and 2010, 100% of the Eramet subsidy.[34] The Commission properly exercised its authority to modify the reasonable arrangement proposed by Eramet to limit the subsidy of the Eramet discount by providing for a POLR offset.

In the Commission's evaluation of the POLR risks associated with Eramet, the Commission recognized the significance of the Eramet agreement. That agreement establishes CSP as the exclusive supplier to Eramet over the next ten years. Eramet's agreement to stay with

[34] See (OCC Appx. 71).

CSP directly affects the POLR risks CSP will bear related to supplying power to it. The PUCO found there was no POLR risk posed by Eramet under the long-term agreement. Thus, with no POLR risk being imposed on CSP, credits were ordered for the POLR revenues collected from Eramet. These credits are used to lessen customers' subsidy of the Eramet discount.

CSP is correct in asserting that the PUCO's decision was patterned after another recent case involving another customer, Ormet Primary Aluminum Company ("Ormet"). In *Ormet,* the PUCO concluded that CSP was to be the exclusive provider of service over the period of the contract.[35] The Commission then concluded there is no risk that Ormet would shop for competitive generation and then return to AEP-Ohio's POLR service.[36] If AEP-Ohio were to retain the POLR charges, AEP would be compensated for a service it would not be providing,[37] reasoned the Commission. The Commission also distinguished its holding from the AEP ESP Order concluding that the ESP holding is inapplicable because it addressed standard service offer customers rather than reasonable arrangement customers.[38]

The *Ormet* ruling was a sound ruling, in this respect, and acknowledged the statutory distinction discussed supra, between standard service offer customers and reasonable arrangement customers.[39] Moreover, the Commission ruling implicitly recognizes that any POLR risk that would come from reasonable arrangement customers migrating—purchasing their generation from a competitive supplier when the price is lower than the reasonable

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[35] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* Case No. 09-119-EL-AEC, Opinion and Order at 13 (July 15, 2009). (OCC Appx. 84).

[36] Id.

[37] Id.

[38] Id.

[39] See discussion infra of *OCC v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 337-338.

arrangement price—is quite different from migration risks associated with SSO customers. When the reasonable arrangement customer migrates, the utility is left with power to sell, but that power is priced at below tariff rates, as a result of the utility's customers subsidizing the discount. Hence the risk of having to sell the power at a market rate, below existing tariff rates, and incurring a loss, is vastly reduced. Instead, the power could come back to tariff customers, and displace higher priced tariff power.

The *Ormet* holding is nonetheless being appealed by CSP and Ohio Power Company, an affiliate of CSP. It is currently before the court as Case No. 09-2060. That appeal should be dispositive of this case. There are no significant differences between *Ormet* and *Eramet* that warrant a conclusion that the POLR offset is inappropriate.

While there are differences in the delta revenue being collected and the method of collecting the delta revenues,[40] one constant theme persists - in both *Eramet* and *Ormet* - the utility will be compensated for a service it is not providing (POLR) if it receives POLR revenues from the reasonable arrangement customer. That is the real issue at hand. Customers, through the delta revenue funding, would be providing the utility with 100% plus more, including revenues for service it did not provide. This is not a sound regulatory practice. It would result in customers not only providing the subsidy they are now providing to Eramet for its electricity discount but also providing a subsidy to CSP – at a time when customers are seeing their electric rates increase at an alarming rate.

Customers do need to be protected from the impact of electric rate increases taking the form of reasonable arrangements. What matters to customers is that their overall rates, affected

[40] Ormet delta revenues are based on a discount that fluctuates with aluminum prices and the number of potlines operated. The Eramet delta revenues are tied to a fixed price comparable to the applicable tariffs. See (OCC Appx.89-94, 33-34).

cumulatively by each and every reasonable arrangement, reflect reasonably priced retail electric service. This means that the need to reduce customers' obligations in each reasonable arrangement case are equally compelling, if not more compelling as the reasonable arrangement discounts stack up. It is the cumulative impact of subsidizing economic development rates that threaten to thwart the state policy of ensuring that reasonably priced electric service is available to consumers.[41]

The Commission's decision here is also analogous to the treatment of shopping credits the Court affirmed in *Ohio Consumers' Counsel v. Pub. Util. Comm.*[42] In that appeal, the Commission had approved a proposal that aggregation customers[43] be able to avoid a portion of the rate stabilization charge if they committed to obtaining electric generation from another supplier. The rate stabilization charge was the means, under S.B. 3, for the utility to be compensated for its provider of last resort risk.[44] Although OCC and others challenged the credits as discriminatory, this Court affirmed the PUCO. This Court found that providing credits or offsets to the rate stabilization charge was reasonable, as provider of last resort risks are different for different customer groups.[45] The Court recognized that since the aggregation customers agreed to stay with the competitive provider and not return to the utility, the utility's POLR risks were greatly reduced.[46]

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[41] See R.C. 4928.02(A).

[42] *Ohio Consumers Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 328, 2006-Ohio-2110, 857 N.E.2d 1184, ¶21-27, reconsideration denied (2006), 109 Ohio St.3d 1509, 2006-Ohio-2998, 849 N.E.2d 1029.

[43] "Aggregation customers" refers to customers taking service under a qualifying aggregation program. See R.C. 4928.01(A)(13). (CSP Appx. 1).

[44] *Ohio Consumers Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d at 335, 847 N.E.2d at 1192.

[45] Id. at 337, 857 N.E.2d at 1193.

[46] Id.

Here, the Commission has made the determination that the POLR risk related to one customer, Eramet, is not like the POLR risks that other customers may impose on CSP. This is because Eramet, similar to the aggregation customers in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, chose to pursue an arrangement where there is no risk created that it will impose POLR costs on the utility. That option was a reasonable arrangement under which CSP will be the exclusive supplier of Eramet for the next ten years. The Commission then ordered credits to the economic development rider the other customers pay to subsidize the discounted Eramet rates. These credits are similar in concept to the credits permitted in *Ohio Consumers' Counsel v. Pub. Util. Comm.* The Commission's finding here is entirely consistent with the principles of *Ohio Consumers' Counsel v. Pub. Util. Comm.* and acknowledges that POLR risks of a utility vary greatly depending upon the unique circumstances of the customer and the nature of the service provided. The Commission's decision is reasonable and should be affirmed.

B. The PUCO's Decision Establishing Standard Service Offer Rates In The Electric Security Plan Proceeding Does Not Conflict With Permitting POLR Offsets Under Reasonable Arrangements.

The Company argues that the PUCO's decision to allow Eramet to "effectively bypass" CSP's "non-bypassable"[47] POLR charge conflicts with the PUCO's decision in the Company's ESP. (CSP Brief at 19-28). The Companies explain that the PUCO on rehearing rejected an Ohio Energy Group ("OEG") proposal that would have allowed *standard service offer* customers to avoid a POLR charge if they agreed not to shop during the ESP period. (CSP Brief at 23-25). The PUCO's Entry on Rehearing there upheld the "shopping rule" that customers would be required to pay a POLR charge *during the time they are served under SSO rates* even if they

[47] The Companies mischaracterize the POLR charge as "non-bypassable." The Commission specifically determined that the POLR charge was bypassable for customers who shop and agree to return at market price. See (CSP Appx. 133). Its ruling applied to standard service offer customers as well as customers in governmental aggregation programs. Id.

agreed not to shop during the ESP period. (CSP Brief at 24). The "exclusive supplier" provision of the Eramet reasonable arrangement is no different than the OEG proposal rejected by the Commission in the ESP Entry on Rehearing, claims the Company. Thus, the Company argues that to allow Eramet to "effectively bypass" the POLR charge is inconsistent with the Commission's ESP ruling.

The Company's arguments miss the mark because they fail to recognize that the Commission's ESP shopping rule pertains to a specific set of customers - SSO customers - who are different in many respects from reasonable arrangement customers. SSO customers are subject to rates set through standard service offerings approved by the PUCO in ESP proceedings, governed by R.C. 4928.143. (CSP Appx. 14). Standard service offerings essentially represent a generic approach to reasonable generation rates.[48]

In contrast, mercantile customers such as Eramet, who enter into or establish reasonable arrangements, are subject to rates set through an entirely different process—a process which recognizes the unique nature of each customer, or group of customers. Under R.C. 4905.31, service under a reasonable arrangement allows for unique prices, terms, and conditions as denoted by the flexible provisions of the statute permitting variable rates based on a number of scenarios.

[48] Yet even within its standard service offer, the Commission recognized that there are varying degrees of POLR risks imposed by standard service customers. Indeed the PUCO found that if standard service offer customers made specific commitments to mitigate POLR risks imposed on the utilities, they could avoid POLR charges. (CSP Appx. 133) For instance if customers agreed to pay market rates if they shopped and sought to return, then the PUCO found the POLR charges to such customers could be avoided. The Commission's Order here is consistent, not inconsistent with the ESP Order. Like the ESP order which recognized that customer commitments can reduce or eliminate a utility's POLR risk, the Commission here recognizes a reasonable arrangement customer's commitment not to shop over the term of a contract eliminates the POLR risk to the Company.

R.C. 4905.31 also establishes a discrete application process to be followed to obtain approval of reasonable arrangements. R.C. 4905.31 delineates a separate PUCO approval process for a proposed reasonable arrangement along with a discrete filing of the schedule of rates conforming to the approved reasonable arrangement. Not only are reasonable arrangements controlled by their own statute, they are judged by a separate set of standards that have been specifically developed and codified in the Ohio Administrative Code[49] as the enabling rules of R.C. 4905.31. Those standards are not the same standards that apply to SSO rates established in the Companies' ESP, pursuant to provisions of R.C. 4928.143.

The Commission was correct in determining that the POLR ESP ruling that was related to SSO customers was inapplicable to reasonable arrangement customers. The Court should affirm this decision. The Commission's ruling was a sound ruling, and acknowledged the statutory distinction between standard service offer customers and reasonable arrangement customers.[50] Moreover, the Commission's ruling implicitly recognizes that any POLR risk that would come from reasonable arrangement customers migrating—purchasing their generation from a competitive supplier when the price is lower than the reasonable arrangement price—is quite different from migration risks associated with SSO customers.

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[49] See Ohio Admin. Code 4901:1-38 et seq. (OCC Appx. 7, 8); (CSP Appx. 21-24).

[50] As the Ohio Supreme Court has noted, a utility's provider of last resort risks are different for different customer groups. *OCC v. Pub. Util. Comm.*, 109 Ohio St.3d at 328, 337-338 (upholding additional shopping credits against the POLR charge--collected via a rate stabilization charge--for residential aggregation groups and commercial and industrial customers who agree not to return to the utility's generation service during the rate plan and agree to pay market price if they return).

C. The Commission's Decision Does Not Undermine The Modified Electric Security Plan Approved By The PUCO.

The Company argues that the Commission's ruling undermines its modified ESP plan. (CSP Brief at 25-28). The Company alleges that the POLR charge approved in the ESP proceeding was based on approving a specific revenue requirement for POLR, and interfering with the revenue stream (by reducing the POLR revenues collected by the Company) is unreasonable and unlawful. (CSP Brief at 25). Additionally, the Company argues that the PUCO's order modifies the total ESP package that the PUCO found to be more favorable in the aggregate than the expected results of the market rate offer. Modifying the package violates the controlling statutory standard (R.C. 4928.143(C)(1)) (CSP Appx. 14) and the process establishing an ESP, especially where the PUCO precludes full recovery of ESP rates, the Company argues. (CSP Brief at 26).

The Company appears to misapprehend the interplay between the reasonable arrangements and its ESP. In the ESP, the Company proposed an economic development cost recovery rider to collect costs, incentives, and foregone revenues associated with new or expanding special arrangements for economic development and job retention.[51] This is the very rider that applies to the Eramet reasonable arrangement and permits the Company to fund the costs, incentives, and foregone revenues associated with the approved Eramet agreement. The Company proposed in the ESP that the rider be set at zero, based upon the fact that reasonable arrangements, as contemplated by R.C. 4905.31, had not been filed with and approved by the PUCO at the time that the ESP plan was filed.

[51] See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO et al., Testimony of Dave Rausch at 12, Company Ex. 1; see (CSP Appx. 140-141).

OCC advocated at that time for a PUCO ruling that reasonable arrangement costs be shared 50/50 between customers and the utility, based on past PUCO precedent.[52] The Company on the other hand urged the PUCO to reject OCC's recommendation, arguing that economic development and full recovery of foregone revenue is consistent with S.B. 221 and a significant feature of its ESP plan. The Commission, however, did not reject OCC's recommendation but concluded that OCC's concerns were "unfounded and unnecessary at this stage." Rather, the Commission concluded that it is "vested with the authority to review and determine whether or not economic development arrangements are in the public interest."[53]

This ESP ruling reinforced the case-by-case approach to economic development arrangements, which is consistent with prior Commission practice and the PUCO's enabling rules of R.C. 4905.31.[54] The PUCO also conveyed its intent to deal with OCC's concerns when approval of the economic development arrangements is being sought. Thus, the PUCO left open the door to arguments such as OCC's that there should be some sharing of the economic development costs.

Hence, "modifications" to the ESP, by virtue of economic development cases, were anticipated and entirely consistent with the Commission's ESP Order. CSP should not be heard to complain now that such modifications are not permitted. CSP would have the PUCO shift the balance of the ESP even further in favor of investors and against customers who are paying CSP millions of dollars in subsidies even with the current crediting of POLR revenues. This proposal is neither reasonable nor lawful. CSP's arguments should be rejected.

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[52] See (CSP Appx. 140-141).

[53] Id.

[54] See Ohio Admin. Code 4901:1-38 et seq.

Moreover, although CSP seeks to emphasize that the Commission characterized the POLR revenue as a "revenue requirement," the Court should not be misled into assuming there is precision in setting POLR that is normally found in establishing revenue requirements. There is not. The POLR "revenue requirement" determined by the PUCO is simply a measure of the risk that CSP bears that its customers will migrate or leave the standard service offer. It was derived from a futures pricing model that assumed that the POLR costs equate to a series of options to buy power *and assumed no reasonable arrangements* under R.C. 4905.31.[55] The POLR charge approved in the ESP is nothing but an output of the model, affected by a series of inputs that estimate risk. The output of the model, *which assumed no reasonable arrangements*, is unrelated to the actual costs of migration and switching. Hence, relying on a "revenue requirement" that is not cost based, and arguing that it equates to a guarantee of specific revenues, is inconsistent with how the POLR "cost" was derived. The Company's arguments should fail here.

Even if CSP's arguments are considered on the merits, they fail. Should Eramet cancel the contract early in order to shop, Eramet would nonetheless have to obtain distribution services from CSP. Those distribution services would be subject to a POLR charge that is bypassable only under certain conditions.[56] Under those circumstances, the reasonable arrangement would have terminated and along with it the customers' subsidy of the discounted rates under the Eramet reasonable arrangement. In turn, any POLR revenues paid by Eramet, as a distribution only customer, would no longer be credited to CSP customers. CSP would actually be subject to POLR risk for Eramet, and thus would be providing POLR service to Eramet, justifying retention of POLR revenues collected from Eramet.

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[55] OCC and others have appealed this portion of the approved ESP in S.Ct. Case No. 09-2022. That case has been fully briefed and is awaiting the scheduling of oral arguments.

[56] See footnote 2.

In contrast, under the current reasonable arrangement, CSP is not providing POLR services, nor is it incurring POLR risk. Through other customers' direct customer subsidy of the Eramet discount the Company receives 100% of the revenues for services it provides to Eramet, just as if Eramet had otherwise paid non-discounted standard tariff rates. The Commission however, deemed it inappropriate for CSP to retain revenues over and above 100% of the discount for Eramet. It denied CSP the right to collect windfall revenues for POLR services not provided and POLR risk not incurred. The PUCO was correct in its ruling. The Court should affirm.

> *The PUCO has continuing jurisdiction over reasonable arrangements between a utility and a mercantile customer. Any modifications or changes to a reasonable arrangement require notice and an opportunity to be heard. Do such procedures create a risk that a mercantile customer will be permitted to shop during the three-year ESP period? NO.*

PROPOSITION OF LAW 4:

A finding and order by the Commission will not be disturbed unless it appears from the record that the finding and order are manifestly against the weight of the evidence and are so clearly unsupported by record as to show misapprehension or mistake or willful disregard of duty.[57]

In CSP's Proposition of Law No. III, CSP argues that the PUCO's finding that there is no risk of Eramet shopping during the term of the Company's ESP and returning to CSP SSO service "conflicts with [the] adopted contract and controlling statutes and is otherwise against the manifest weight of the record." (CSP Brief at 36). To support this proposition, CSP argues: "[t]here is a demonstrated risk that Eramet will shop during the contract term as a matter of law as well as operation of the contract adopted below[,]" and "[t]he Commission manifestly erred in making this key finding because it, in its own words, 'narrowly focused' on a small portion of

[57] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 71 O.O.2d 393, 330 N.E.2d 1, syllabus ¶8, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 302.

the contract term to determine if there is a shopping risk under the long-term contract." (CSP Brief at 37-42). As discussed below, both of these arguments pertain to findings of fact by the Commission which can only be reversed if shown to be against the manifest weight of the evidence and so unsupported by the record as to show misapprehension or mistake. CSP fails to bear the heavy burden of proving such error and so this Court should reject such arguments.

A. The Commission's Finding That There Is No Risk Of Eramet Shopping For Competitive Generation Service And Subsequently Returning To SSO Service Is Supported By The Manifest Weight Of The Evidence.

In arguing that the Commission's finding of "no risk" of Eramet shopping is against the weight of the evidence, CSP is arguing a finding of fact. This Court has consistently held that as to findings of fact, the Commission's Order will not be reversed or modified unless it appears that the Order is against the manifest weight of the evidence *and* shows misapprehension, mistake, or willful disregard of duty.[58] This standard of review has been interpreted to mean that the Court will not substitute its judgment for that of the Commission.[59] Additionally, the Court has opined that in its review that it will not reweigh evidence on factual questions when there is sufficient probative evidence in the record to enable it to conclude that the PUCO's opinion is not manifestly against the weight of the evidence.[60] Indeed this Court has opined that it will not reverse the PUCO based on conjecture.[61]

[58] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1, syllabus ¶8.

[59] *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578, 2004-Ohio-6896, 820 N.E.2d 921, ¶29, (citation omitted).

[60] *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*(1996), 76 Ohio St.3d 163,165, 666 N.E.2d 1372, 1375 (citation omitted).

[61] *Lima v. Pub. Util. Comm.* (1922), 106 Ohio St. 379, 1 Ohio Law Abs. 77, 140 N.E. 147.

In this regard, the Appellant bears the burden of proof of demonstrating that the PUCO's decision is against the manifest weight of the evidence and is clearly unsupported by the record.[62] This burden is difficult to sustain and this Court has consistently found it proper to defer to the PUCO in matters that require the PUCO's expertise and discretion.[63]

Contrary to the Company's assertions, the manifest weight of the evidence in this case supports the Commission's finding of "no risk" of shopping. Under the Joint Stipulation approved by the Commission (CSP Supp. at 95) Eramet commits to have CSP supply its full requirements, over the entire ten-year term of the agreement. The language that conveys this is as follows: "Unless otherwise agreed by CSP and Eramet, CSP shall supply and deliver to Eramet electric service having the same quality as service that CSP is obligated to provide to Eramet under CSP's GS-4 rate schedule and successors thereto. CSP shall supply and deliver electricity in such amount as may be sufficient to meet Eramet's full requirements and Eramet shall consume and purchase such delivered supply to the same extent as would otherwise be the case if Eramet were served by CSP under the otherwise applicable tariff and did not obtain supply from a competitive retail electric service supplier." (CSP Supp. at 72).

This language provides that CSP will be the exclusive supplier of service to Eramet. That service is to be the same quality as provided currently under CSP Schedule GS-4 and is to be sufficient to meet Eramet's "full requirements." Based on the evidence in the record in this case, the Commission found that Eramet knowingly decided it would not shop for electric service in exchange for securing a long-term power contract with CSP. (CSP Appx. at 37, 54). The

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[62] *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St. 3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶29, quoting *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St.3d 549, 555, 2000-Ohio-422, 423, 728 N.E.2d 371.

[63] See *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St.3d 177, 179-180, 749 N.E.2d 262.

Commission noted that Eramet witness Bjorklund testified that with the ten-year discounted power contract with CSP, Eramet will not need to shop. (CSP Appx. at 37). In addition, the Commission found that the Stipulation memorializes Eramet's decision not to shop. The PUCO acknowledged that access to and deployment of capital at Eramet's Marietta facility are predicated, in part, on Eramet's success at securing a reliable supply of electricity at a reasonable and predictable price. (CSP Appx. at 37). Shopping would not lead to predictability of price, and Eramet indicated it is willing to forego the right to shop. The long-term contract assumes no shopping, and nothing in the record contradicts this assumption. On rehearing, the Commission reiterated its conclusions that, based on the evidence in the record, "Eramet will not need to shop" and "should not be allowed to shop" for the term of CSP's current ESP. (CSP Appx. at 54).

In the proceeding below, CSP's witness, Mr. Baker failed to testify that the ten-year Eramet contract establishes the POLR risks that CSP now insists exist. Hence, there is no evidence in the record to support CSP's factual assertion that Eramet could shop during the ESP period, or that it would shop. Instead, the record establishes that Eramet made a decision not to shop and that there is no risk of Eramet shopping.

While ignoring the record, CSP can cite only to "the potential of Eramet shopping anytime during the full term of the contract." (CSP Brief at 40). CSP appears to believe that the contract must contain the magic words "exclusive" and "sole source" for it to be an exclusive service arrangement. CSP fails to acknowledge the exclusive provider relationship established under the stipulation, preferring to offer unsubstantiated claims that there is a shopping risk.

Moreover, what is conspicuously absent from the record, is any attempt by CSP to protect itself from the risk of Eramet shopping. If CSP believed that the contract presented a significant risk of shopping, CSP could have proposed that the Commission modify the terms of the contract to provide it protection. It did not.

CSP has thus failed to sustain the heavy burden of an appellant challenging a fact finding of the PUCO on appeal. CSP's Brief does not cite to any affirmative record evidence to show that the PUCO's finding was against the manifest weight of the evidence. In fact, the record evidence supports the opposite conclusion—that there is no risk of Eramet shopping during the ESP period. Additionally, CSP has not shown how the PUCO's finding shows misapprehension, mistake, or willful misapprehension of duty. Accordingly, the Court should affirm the PUCO's order in this respect.

B. The PUCO's Focus On Whether Eramet Can Shop During The Period Of The ESP Is Appropriate Because That Is The Period During Which CSP's POLR Rates Are In Effect. CSP Has Failed To Prove This Amounts To Misapprehension Or Mistake.

CSP asserts that regardless of the term of CSP's ESP or whether its next SSO contains an identical POLR charge, the period of time that is relevant to POLR risk is the term of the contract with Eramet, which extends to the end of 2018. (CSP Brief at 40). CSP contends that the Commission's approach of considering just the ESP period is speculative and assumes away CSP's POLR charge after the first 26 months. (CSP Brief at 41). This appears to be CSP's attempt to argue that the Commission's finding shows the misapprehension or mistake that is required to overturn the PUCO's factual determination that no POLR risk is present. CSP is wrong.

CSP's view contrasts sharply with the Commission's view that Eramet's ability to shop is only relevant in the context of CSP's existing POLR charge – something that may no longer be applicable to CSP after the current ESP. (CSP Appx. at 37). If a competitive market for supplying generation develops in the next two years, the PUCO may not approve a POLR charge in its next ESP case. Or the Commission may implement a "return at market price" option which greatly mitigates any POLR risk. Further, where a state agency such as the Commission employs its expertise involving highly specialized issues such as those involved in this case, this Court should find such administrative action to be within the Commission's "discretionary purview." Therefore, the Commission's decision to only assess Eramet's ability to shop during the ESP (vs. the entire ten year period) is reasonable and appropriate, not against the manifest weight of the evidence, and not an error by the Commission. Accordingly, CSP's assertion that the Commission erred by focusing on the ESP period in its determination of "no risk" should be rejected.

C. CSP Has Not Demonstrated A Risk That Eramet Will Shop During The Contract And Return To SSO Service. Thus It Has Failed To Show That The Commission's Finding Of Risk Is Manifestly Against The Weight Of The Evidence.

CSP argues that there is a demonstrated risk that Eramet will shop and return to SSO service based on the Commission's jurisdiction regarding the reasonable arrangement under statute and the terms of the contract. (CSP Brief at 37). This is an attempt by CSP to transform an issue of fact - is there a risk of Eramet shopping - into an issue of law. It should be rejected.

The statutory jurisdiction of the Commission, under R.C. 4905.31(E), provides that a schedule or reasonable arrangement approved by the Commission is "subject to change, alteration or modification by the commission." (CSP Appx. at 2). The contract itself also acknowledges this fact when it declares that the Commission has continuing jurisdiction over the arrangement and may modify or terminate the agreement for good cause. (CSP Supp. at 63-64.) CSP further argues that the Commission's Order adopting Eramet's proposal provides that the Commission could modify or terminate the arrangement in the event that Eramet fails to satisfy its commitments under the contract, or if reasonable progress toward those commitments has not occurred, or for other good cause. (CSP Brief at 38-39) (CSP Appx. at 42).

1. The Commission's jurisdiction does not establish a risk that Eramet will shop and return to SSO service.

None of the sources of Commission jurisdiction over the contract produce the risk that Eramet will shop and return to SSO service in this case. Indeed, the Commission in its Opinion and Order noted that any modification to the reasonable arrangement would take place "only after notice and an opportunity to be heard for any party affected by such modification, which would also require our approval." (CSP Appx. at 37). Thus, CSP would, as an affected party, have the opportunity to be heard on the modifications, and could object to such modification or termination. The Commission would be held to the standards prescribed in the statute, as well as the enabling rules, and general rules with respect to PUCO orders—standards which are not lightly met and do not permit arbitrary termination or modification of a reasonable arrangement that would result in Eramet shopping. In addition, if the PUCO were to terminate the reasonable arrangement, the PUCO could impose termination provisions on Eramet that protect CSP in the event that CSP would have to serve Eramet at SSO rates, e.g., a condition that Eramet be charged the higher of market rates or SSO tariffs upon termination of the reasonable arrangement.

In fact, the Commission has contemplated such a scenario in CSP's ESP case for standard service offer customers. The Commission stated: "[a]s noted by several intervenors and Staff, the risk of returning customers may be mitigated, not eliminated, by requiring customers that switch to an alternative supplier (either through a governmental aggregation or individual CRES providers) to agree to return to market price, and pay market price, if they return to the electric utility after taking service from a CRES provider, or for the remaining period of the ESP term or until the customer switches to another alternative supplier. In exchange for this commitment, those customers shall avoid paying the POLR charge." (CSP Appx. at 133).

Further, as a practical matter, the risk that Eramet will shop as a result of a Commission action is minimal. For instance, in the event that the Commission determines to amend or modify the reasonable arrangement because Eramet has not lived up to its commitments, the PUCO would likely increase the rates Eramet would pay under the reasonable arrangement. One would expect that, as well, the PUCO would look to impose additional conditions on Eramet that could protect CSP in the event that Eramet seeks to end the exclusive arrangement. Certainly, CSP could weigh in on the amendment or modification to protect its interests.

2. Since Eramet cannot unilaterally terminate the contract, the contract does not establish a risk that Eramet will shop and return to SSO service.

In its Proposition of Law No. III, CSP claims that specific contract provisions create risk that Eramet will shop because the provisions allow early termination of the contract by either party. The provisions CSP points to as establishing the risk that Eramet will shop are in Article 6 which states: "This Contract shall not be cancelled without the prior written consent of the Commission. Notwithstanding the foregoing, the parties agree that each of the following events shall individually constitute a breach of this Contract that allows the *Company* the right to cancel without liability to the Customer all or any part of this Contract and/or pursue any further remedies available at law or in equity: (1) the Commission determines the Customer fails to comply with the Section IV. (E) of the Stipulation and Recommendation as modified and approved by the Commission in Case No. 09-516-EL-AEC on October 15, 2009; or (2) Customer assigns this Contract or any part hereof without obtaining the proper consent as provided in paragraph two above; or (3) Customer becomes insolvent or makes a general assignment for the benefit of creditors or admits in writing its inability to pay debts as they mature or if a trustee or receiver of Customer or of any substantial part of Customer's assets is appointed by any court or proceedings instituted under any provisions of the Federal Bankruptcy Code or any state insolvency law by or against Customer are acquiesced in or are not dismissed within thirty (30) days or result in an adjudication in bankruptcy or insolvency." (CSP Supp. at 62).

Based on Article 6, CSP asserts, "Either party may terminate if there is a default by the other party." (CSP Brief at 38). CSP alleges that Article 6 provides several opportunities for Eramet to terminate the contract, if it desires. (CSP Brief at 38). CSP contends that the most obvious contract "off ramp" for Eramet relates to the commitments contained in Exhibit A to the contract. (CSP Brief at 38). Those commitments include capital investment in Eramet's current manufacturing operations of at least $20 million by 2011 and an additional $20 million by 2014. (CSP Brief at 38) (CSP Supp. at 76). Thus, CSP asserts that "it would be completely within Eramet's control to fail to meet one of these commitments" and easy for its management to justify. (CSP Brief at 39). CSP argues that this scenario demonstrates that the Commission's finding of "no risk" is against the manifest weight of the evidence.

The Court should reject this argument because CSP's assertion that *either* party may terminate the contract under Article 6 is false. Article 6 allows only "the Company [i.e., CSP] the right to cancel without liability to the Customer all or any part of this Contract and/or pursue any further remedies available at law or in equity," and only lists events that pertain to a default by "the Customer," i.e., Eramet. (CSP Supp. at 62). Should Eramet default, it cannot unilaterally terminate the contract. Neither would the contract automatically terminate. Rather, CSP would have the right to cancel "all or any part of the contract, and has several options as to which remedy, "in law or equity," to pursue. Thus, CSP's assertions are incorrect and its argument is unfounded. Further, Article 6 specifically provides, "[t]his Contract shall not be cancelled without the prior written consent of the Commission." Thus, CSP's assertion that the language in Article 6 "undercuts the Commission's conclusion that there is no risk that Eramet will shop" is baseless.

Even assuming that the language of the contract allows Eramet to terminate the contract, CSP's argument that there is a shopping risk ignores the prefatory language under the exclusive supply provision which begins with "*Unless otherwise agreed by CSP and Eramet.*" This phrase means that CSP will be the exclusive supplier of Eramet's full requirements, unless both CSP and Eramet agree otherwise, *and* get the Commission to approve it. Thus, even if Eramet wants to shop, it will nonetheless be held to CSP serving it as the exclusive supplier unless CSP relinquishes the right and the PUCO approves such action.

PROPOSITION OF LAW 5

A reviewing Court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.[64]

R.C. 4903.21 defines the "transcript" that the Commission must transmit to the Court, under S.Ct.Prac.R. 5.5, when served with a notice of appeal. (OCC Appx. 3) The transcript is limited to the "journal entries, the original papers or transcripts thereof, and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of***." The transcript submitted to the Clerk of the Supreme Court becomes the "record" of the PUCO proceeding, which the Court then utilizes in reviewing the appeal from the PUCO. Under

64 *State of Ohio v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, syllabus ¶1.

S.Ct.Prac.R. 5.5, the record on appeal relates back to the "transcript" defined under R.C. 4903.21. The transcript is thus confined to the evidence adduced at the PUCO hearing.

Yet, the Company in its merit brief seeks to present certain information to the Court that was not part of the record in the PUCO proceeding being appealed. It was not relied upon by the PUCO in reaching the decision the Company is appealing. Nor was the information part of the evidence adduced at the hearing.

Specifically, the Company introduces information on the impact on the competitive electric market of CSP exclusively serving Eramet. CSP alleges that Eramet's "substantial power requirement" is equal to supplying up to 58,000 households and is "extremely significant and potentially harmful to the enhancement of retail electric competition in Ohio." (CSP Brief at 2). CSP uses this information to substantiate its claim that "[p]rohibiting shopping for such significant electric load is a major constraint on the competitive generation market in Ohio for nearly ten years." (CSP Brief at 35). CSP also conveys to the Court other extra-record information when it claims that it was named in the top-ten list of utilities in economic development by Site Selection magazine. (CSP Brief at 4). This information is not in the record and is not relevant to the issues presented in this appeal.

Because all of this information was never part of the record in the proceeding on appeal, this Court should not consider it.[65] This Court has held that a reviewing court cannot add matter to the record before it which was not part of the trial court's proceedings, and then decide the

[65] Id.; *North v. Beightler*, 112 Ohio St.3d 122, 2006-Ohio-6515, ¶7, 858 N.E.2d 386,387; *Hardy v. McFaul*, 103 Ohio St.3d 408, 410, 2004 Ohio 5467, ¶9, 816 N.E.2d 248, 250.

appeal on the basis of the new matter.[66] In *State of Ohio v. Ishmail*[67] this Court was faced with reviewing a court of appeals decision that considered information (transcripts) that were not taken into account at the trial court level. The role of a reviewing court is to assess errors of the trial court and such a review "should be limited to what transpired in the trial court, as reflected by the record made in the proceedings"[68] this Court opined. The transcripts were not part of the trial court's record transmitted to the court of appeals. Thus, it was prejudicial error for the reviewing court to add the transcripts to the record before it and to render its decision based on those transcripts.[69]

The Court's reasoning in *State of Ohio v. Ishmail* is equally applicable here. Like the transcripts that were not part of the trial court's review, the information in CSP's merit brief was not part of the PUCO's review. The Court's review of the PUCO proceeding must be limited to that which transpired below, like this Court found in *State of Ohio v. Ishmail.*

Allowing the Companies to bootstrap into the appeal information that was not part of the record below is also contrary to the provisions of the Revised Code that clearly restrict the scope of the record. Moreover, Appellees who have not been able to challenge the information will be prejudiced if Appellants can use this information on brief to support their arguments. It should be struck from the Appellant's merit brief.

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[66] *State of Ohio v. Ishmail,* 54 Ohio St. 2d at 402, 377 N.E.2d at 500. Accord *State v. Coleman* (1999), 85 Ohio St.3d 129, 133, 707 N.E.2d 476, 483 (Court would not consider materials that were not evidence before the trial court and not in the record on appeal, finding that a reviewing court cannot add matter to the record before it that was not part of the trial court's proceedings).

[67] *State of Ohio v. Ishmail,* 54 Ohio St.2d at 402, 377 N.E.2d at 500.

[68] *State of Ohio v. Ishmail,* 54 Ohio St.2d at 406, 377 N.E.2d at 501.

[69] See *Swetland Co. v. Evatt* (1941), 139 Ohio St. 6, 16, 21 O.O. 511, 37 N.E.2d 601, 606, finding that "[i]t should need no citation of authority to convince that this court will not go outside of the record in consideration of facts in appealed causes."

V. CONCLUSION

Under R.C. 4905.31, the Commission has plenary authority over reasonable arrangements entered into between a mercantile customer and an electric distribution utility. The Commission may change, alter, or modify every reasonable arrangement. No reasonable arrangement is lawful unless it is approved by the Commission. As part of the Commission's duties under R.C. 4905.31, it must review the "costs incurred" and the "revenue foregone" in conjunction with a reasonable arrangement. It has the authority and duty to determine whether the arrangement is in the public interest, and if it is not, it must modify the arrangement accordingly.

The Commission in the proceeding below reviewed the Eramet arrangement and determined that a number of modifications were needed before the arrangement could be approved. Its approach presented a balanced solution between all of the interested parties—the customers (including residential customers) funding the discounted rates, the customer (Eramet) seeking discounted rates, and the utility providing service. Moreover, the PUCO's approach was tailored to encourage capital investment in Eramet's Marietta facility to retain 200 jobs in southeastern Ohio that Eramet alleged were in jeopardy without discounted electric rates.

The Commission's solution was to approve, with modifications, the reasonable arrangement whereby CSP was to become the exclusive supplier to Eramet for the next ten years. The PUCO permitted CSP to collect the discount from its other customers. CSP did so and received authority to collect 100% of the discount in the rates for services provided to Eramet. The PUCO, however, ordered the costs of the discount to be mitigated. Customers funding the discount were to be credited with provider of last resort revenues collected from Eramet. Indeed the Commission found that under the exclusive arrangement between Eramet and CSP, there was no risk that Eramet would shop, and thus no need to compensate CSP for a risk it would not incur and POLR services it would not be providing.

The Company has failed to show that the Commission's actions were unlawful. The Commission has full authority under R.C. 4905.31 to consider "costs incurred" and to offset "revenue foregone" by costs avoided by the utility. Here there will be no costs incurred for POLR services because Eramet cannot shop under the exclusive contract. Rather, there will be avoided costs for CSP, which may properly be offset against "revenue foregone." Additionally, the PUCO found that permitting the reasonable arrangement to go forward is consistent with numerous policy mandates of R.C. 4928.02, including customer choice, regulatory flexibility, and facilitating Ohio's competitiveness in the global economy.

CSP has failed as well to show that these Commission's actions were unreasonable. In seeking to overturn the Commission on factual findings, the Company bears a heavy burden. It has not sustained this burden. The Company has not shown that the Commission's Order shows misapprehension, mistake, or willful disregard of duty.

The Court should affirm the Commission's solution to sustain jobs in Ohio, which included the PUCO recognizing the resources of other customers to subsidize discounted rates are not unlimited. CSP has been held harmless—it is collecting 100% of the revenues for services provided to Eramet. But CSP wants more. It seeks to line its pockets, at customers' expense, with additional POLR revenues—revenues that it would have received if it had to provide POLR services and had to incur POLR risk under this reasonable arrangement. The PUCO ruled, however, that CSP did not have to provide POLR service and had no POLR risk under the ten-year arrangement.

CSP's quest to squeeze more revenues from its customers for service it is not providing should be denied. Accordingly, CSP's appeal should be rejected. This Court should affirm the PUCO's ruling and ensure that Ohio customers have the rate protections intended by the General Assembly—which include ensuring that reasonably priced retail electric service is available to consumers.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

In the Matter of the Application for	)	
Establishment of a Reasonable Arrangement	)	Case No. 10-0723
Between Eramet Marietta, Inc. and	)	
Columbus Southern Power Company	)	On Appeal from the Public Utilities
	)	Commission of Ohio
	)	Case No. 09-516-EL-AEC

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4903.09 Written opinions filed by commission in all contested cases.

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

Effective Date: 10-26-1953

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

4903.21 Transcript.

Upon service or waiver of the notice of appeal as provided in section 4903.13 of the Revised Code, the public utilities commission shall forthwith transmit to the clerk of the supreme court, a transcript of the journal entries, the original papers or transcripts thereof, and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which documents shall be filed in said court.

Effective Date: 10-01-1953

4905.22 Service and facilities required - unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

Effective Date: 10-01-1953

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.

Effective Date: 01-01-2001

4905.35 Prohibiting discrimination.

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

(B)(1) A natural gas company that is a public utility shall offer its regulated services or goods to all similarly situated consumers, including persons with which it is affiliated or which it controls, under comparable terms and conditions.

(2) A natural gas company that is a public utility and that offers to a consumer a bundled service that includes both regulated and unregulated services or goods shall offer, on an unbundled basis, to that same consumer the regulated services or goods that would have been part of the bundled service. Those regulated services or goods shall be of the same quality as or better quality than, and shall be offered at the same price as or a better price than and under the same terms and conditions as or better terms and conditions than, they would have been had they been part of the company's bundled service.

(3) No natural gas company that is a public utility shall condition or limit the availability of any regulated services or goods, or condition the availability of a discounted rate or improved quality, price, term, or condition for any regulated services or goods, on the basis of the identity of the supplier of any other services or goods or on the purchase of any unregulated services or goods from the company.

Effective Date: 09-17-1996

4901:1-38-01 Definitions.

(A) "Affidavit" means a written declaration made under oath before a notary public or other authorized officer.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Delta revenue" means the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission.

(D) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.

(E) "Energy efficiency production facilities" means any customer that manufactures or assembles products that promote the more efficient use of energy (i.e., increase the ratio of energy end use services (i.e., heat, light, and drive power) derived from a device or process to energy inputs necessary to derive such end use services as compared with other devices or processes that are commonly installed to derive the same energy use services); or, any customer that manufactures, assembles or distributes products that are used in the production of clean, renewable energy.

(F) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(G) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 or 4928.141 of the Revised Code, or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by the electric utility.

(H) "Staff" means the staff of the commission or its authorized representative.

Effective: 04/02/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04, 4905.06

Rule Amplifies: 4905.31, 4928.02

4901:1-38-08 Revenue recovery.

(A) Each electric utility that is serving customers pursuant to approved reasonable arrangements, may apply for a rider for the recovery of certain costs associated with its delta revenue for serving those customers pursuant to reasonable arrangements in accordance with the following:

(1) The approval of the request for revenue recovery, including the level of such recovery, shall be at the commission's discretion.

(2) The electric utility may request recovery of direct incremental administrative costs related to the programs as part of the rider. Such cost recovery shall be subject to audit, review, and approval by the commission.

(3) For reasonable arrangements in which incentives are given based upon cost savings to the electric utility (including, but not limited to, nonfirm arrangements, on/off peak pricing, seasonal rates, time-of -day rates, real-time-pricing rates), the cost savings shall be an offset to the recovery of the delta revenues.

(4) The amount of the revenue recovery rider shall be spread to all customers in proportion to the current revenue distribution between and among classes, subject to change, alteration, or modification by the commission. The electric utility shall file the projected impact of the proposed rider on all customers, by customer class.

(5) The rider shall be updated and reconciled, by application to the commission, semiannually. All data submitted in support of the rider update is subject to commission review and audit.

(B) If it appears to the commission that the proposals in the application may be unjust and unreasonable, the commission shall set the matter for hearing.

(1) At such hearing, the burden of proof to show that the revenue recovery rider proposal in the application is just and reasonable shall be upon the electric utility.

(2) The revenue recovery rider shall be subject to change, alteration, or modification by the commission.

(3) The staff shall have access to all customer and electric utility information related to service provided pursuant to the reasonable arrangements that created the delta revenue triggering the electric utility's application to recover the costs associated with said delta revenue.

(C) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

Effective: 04/02/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4905.04, 4905.06

Rule Amplifies: 4905.31, 4928.02

The Ohio Constitution

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§ 2.01 In whom power vested

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The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

(As amended Nov. 3, 1953; 125 v 1095.)

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§ 4.01 In whom power vested
[View Article Table of Contents]

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

(Amended 7-7, 1968; Nov. 6, 1973; SJR No.30.)

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(127th General Assembly)
(Amended Substitute Senate Bill Number 221)

AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 be amended and sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051 of the Revised Code be enacted to read as follows:

Sec. 9.835. (A) As used in this section:

(1) "Energy price risk management contract" means a contract that

mitigates for the term of the contract the price volatility of energy sources, including, but not limited to, natural gas, gasoline, oil, and diesel fuel, and that is a budgetary and financial tool only and not a contract for the procurement of an energy source.

(2) "Political subdivision" means a county, city, village, township, park district, or school district.

(3) "State entity" means the general assembly, the supreme court, the court of claims, the office of an elected state officer, or a department, bureau, board, office, commission, agency, institution, or other instrumentality of this state established by the constitution or laws of this state for the exercise of any function of state government, but excludes a political subdivision, an institution of higher education, the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, or the city of Cincinnati retirement system.

(4) "State official" means the elected or appointed official, or that person's designee, charged with the management of a state entity.

(B) If it determines that doing so is in the best interest of the state entity or the political subdivision, and subject to, respectively, state or local appropriation to pay amounts due, a state official or the legislative or other governing authority of a political subdivision may enter into an energy price risk management contract. Money received pursuant to such a contract entered into by a state official shall be deposited to the credit of the general revenue fund of this state, and, unless otherwise provided by ordinance or resolution enacted or adopted by the legislative authority of the political subdivision authorizing any such contract, money received under the contract shall be deposited to the credit of the general fund of the political subdivision.

Sec. 3318.112. (A) As used in this section, "solar ready" means capable of accommodating the eventual installation of roof top, solar photovoltaic energy equipment.

(B) The Ohio school facilities commission shall adopt rules prescribing standards for solar ready equipment in school buildings under their jurisdiction. The rules shall include, but not be limited to, standards regarding roof space limitations, shading and obstruction, building orientation, roof loading capacity, and electric systems.

(C) A school district may seek, and the commission may grant for good cause shown, a waiver from part or all of the standards prescribed under division (B) of this section.

Sec. 4905.31. ~~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 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 ~~either of the following:~~

~~(1) Stipulated~~ stipulated variations in cost as provided in the schedule or arrangement~~;~~

~~(2) Any emissions fee levied upon an electric light company under Substitute Senate Bill No. 359 of the 119th general assembly as provided in the schedule. The public utilities commission shall permit an electric light company to recover the emissions fee pursuant to such a variable rate schedule.~~

~~(3) Any emissions fee levied upon an electric light company under division (C) or (D) of section 3745.11 of the Revised Code as provided in the schedule. The public utilities commission shall permit an electric light company to recover any such emission fee pursuant to such a variable rate schedule.~~

~~(4) Any schedule of variable rates filed under division (B) of this section shall provide for the recovery of any such emissions fee by applying a uniform percentage increase to the base rate charged each customer of the electric light company for service during the period that the variable rate is in effect.~~

(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. ~~No~~ 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~~, sliding scale, minimum charge, classification, variable rate, or device~~ 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. ~~The commission shall review the cost data or factors upon which a variable rate schedule filed under division (B)(2) or (3) of this section is based and shall adjust the base rates of the electric light company or order the company to refund any charges that it has collected under the variable rate schedule that the commission finds to have resulted from errors or erroneous reporting. After recovery of all of the emissions fees upon which a variable rate authorized under division (B)(2) or (3) of this section is based, collection of the variable rate shall end and the variable rate schedule shall be terminated.~~

Every such schedule or reasonable arrangement~~, sliding scale, minimum charge, classification, variable rate, or device~~ shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

Sec. 4928.01. (A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating

reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code ~~as amended by Sub. S.B. No. 3 of the 123rd general assembly~~.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces ~~or to the extent it~~, sells that electricity for resale ~~electricity it so produces~~, or obtains electricity from a generating facility it hosts on its premises.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

~~(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.~~

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile ~~commercial~~ customer" means a commercial or

industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users~~. Such energy includes~~, including, but ~~is~~ not limited to, ~~wind power; geothermal energy; solar thermal energy; and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric generation, landfill gas, or hydroelectric generation~~ advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been

charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

~~(28) "Small electric generation facility" means an electric generation plant and associated facilities designed for, or capable of, operation at a capacity of less than two megawatts.~~

~~(29)~~(28) "Starting date of competitive retail electric service" means January 1, 2001~~, except as provided in division (C) of this section~~.

~~(30)~~(29) "Customer-generator" means a user of a net metering system.

~~(31)~~(30) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

~~(32)~~(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

~~(33)~~(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to ~~retail electric service providers~~ another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously, primarily to meet the energy needs of the customer's facilities;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model

(WARM).

(g) Demand-side management and any energy efficiency improvement.

(35) "Renewable energy resource" means solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. "Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy. As used in division (A)(35) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(a) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(b) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(c) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromus fish.

(d) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(e) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(f) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(g) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(h) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

~~(C) Prior to January 1, 2001, and after application by an electric utility, notice, and an opportunity to be heard, the public utilities commission may issue an order delaying the January 1, 2001, starting date of competitive retail electric service for the electric utility for a specified number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2001.~~

Sec. 4928.02. It is the policy of this state to do the following throughout this state ~~beginning on the starting date of competitive retail electric service~~:

(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;

~~(G)~~(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;

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

~~(I)~~(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.

Sec. 4928.05. (A)(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except ~~section~~ sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent

transmission operator, or similar organization approved by the federal energy regulatory commission.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

Sec. 4928.09. (A)(1) No person shall operate in this state as an electric utility, an electric services company, ~~or~~ a billing and collection agent, or a regional transmission organization approved by the federal energy regulatory commission and having the responsibility for maintaining reliability in all or part of this state on and after the starting date of competitive retail electric service unless that person first does both of the following:

(a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;

(b) Designates an agent authorized to receive that service of process in this state, by filing with the commission a document designating that agent.

(2) No person shall continue to operate as such an electric utility, electric services company, ~~or~~ billing and collection agent, or regional transmission organization described in division (A)(1) of this section unless that person continues to consent to such jurisdiction and service of process in this state and continues to designate an agent as provided under this division, by refiling in accordance with division (A)(4) of this section the appropriate documents filed under division (A)(1) of this section or, as

applicable, the appropriate amended documents filed under division (A)(3) of this section. Such refiling shall occur during the month of December of every fourth year after the initial filing of a document under division (A)(1) of this section.

(3) If the address of the person filing a document under division (A)(1) or (2) of this section changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person shall file an amended document containing the new information.

(4) The consent and designation required by divisions (A)(1) to (3) of this section shall be in writing, on forms prescribed by the public utilities commission. The original of each such document or amended document shall be legible and shall be filed with the commission, with a copy filed with the office of the consumers' counsel and with the attorney general's office.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into this state pursuant to such summons, subpoena, or other form of process.

(C) Divisions (A) and (B) of this section do not apply to any of the following:

(1) A corporation incorporated under the laws of this state that has appointed a statutory agent pursuant to section 1701.07 or 1702.06 of the Revised Code;

(2) A foreign corporation licensed to transact business in this state that has appointed a designated agent pursuant to section 1703.041 of the Revised Code;

(3) Any other person that is a resident of this state or that files consent to service of process and designates a statutory agent pursuant to other laws of this state.

Sec. 4928.14. ~~(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.~~

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

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

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

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

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

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

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

Sec. 4928.141. (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.

Sec. 4928.142. (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 the effective date of this section, 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 and not less 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.

Sec. 4928.143. (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.

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

Sec. 4928.145. During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

Sec. 4928.146. Nothing in sections 4928.141 to 4928.145 of the Revised Code precludes or prohibits an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Sec. 4928.151. The public utilities commission shall adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities, so that, on and after the effective date of the initial rules so adopted, all such utilities apply the same policies and charges to those customers. Initial rules shall be adopted not later than six months after the effective date of this section. The rules shall address the just and reasonable allocation to and utility recovery from the requesting customer or other customers of the utility of all costs of any such line extension and any requisite substation or related facility, including, but not limited to, the costs of necessary technical studies, operations and maintenance costs, and capital costs, including a return on capital costs.

Sec. 4928.17. (A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations ~~on affiliate practices solely for the purpose of maintaining a separation of~~ the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) ~~Notwithstanding section 4905.20, 4905.21, 4905.46, or 4905.48 of the Revised Code, an~~ No electric distribution utility ~~may divest itself of~~ shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval~~, subject to the provisions of Title XLIX of the Revised Code relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset~~.

Sec. 4928.20. (A) The legislative authority of a municipal corporation may adopt an ordinance, or the board of township trustees of a township or the board of county commissioners of a county may adopt a resolution, under which, on or after the starting date of competitive retail electric service, it may aggregate in accordance with this section the retail electrical loads located, respectively, within the municipal corporation, township, or unincorporated area of the county and, for that purpose, may enter into service agreements to facilitate for those loads the sale and purchase of electricity. The legislative authority or board also may exercise such authority jointly with any other such legislative authority or board. For customers that are not mercantile ~~commercial~~ customers, an ordinance or resolution under this division shall specify whether the aggregation will occur only with the prior, affirmative consent of each person owning, occupying, controlling, or using an electric load center proposed to be aggregated or will occur automatically for all such persons pursuant to the opt-out requirements of division (D) of this section. The aggregation of mercantile ~~commercial~~ customers shall occur only with the prior, affirmative consent of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated. Nothing in this division, however, authorizes the aggregation of the retail electric loads of an electric load center, as defined in section 4933.81 of the Revised Code, that is located in the certified territory of a nonprofit electric supplier under sections 4933.81 to 4933.90 of the Revised Code or an electric load center served by transmission or distribution facilities of a municipal electric utility.

(B) If an ordinance or resolution adopted under division (A) of this section specifies that aggregation of customers that are not mercantile ~~commercial~~ customers will occur automatically as described in that division, the ordinance or resolution shall direct the board of elections to submit the question of the authority to aggregate to the electors of the respective municipal corporation, township, or unincorporated area of a county at a special election on the day of the next primary or general election in the municipal corporation, township, or county. The legislative authority or board shall certify a copy of the ordinance or resolution to the board of elections not less than seventy-five days before the day of the special election. No ordinance or resolution adopted under division (A) of this section that provides for an election under this division shall take effect unless approved by a majority of the electors voting upon the ordinance or resolution at the election held pursuant to this division.

(C) Upon the applicable requisite authority under divisions (A) and (B) of this section, the legislative authority or board shall develop a plan of operation and governance for the aggregation program so authorized. Before adopting a plan under this division, the legislative authority or board shall hold at least two public hearings on the plan. Before the first hearing, the legislative authority or board shall publish notice of the hearings once a ~~week for two consecutive weeks in a newspaper of general circulation in the~~ jurisdiction. The notice shall summarize the plan and state the date, time, and location of each hearing.

(D) No legislative authority or board, pursuant to an ordinance or resolution under divisions (A) and (B) of this section that provides for automatic aggregation of customers that are not mercantile ~~commercial~~ customers as described in division (A) of this section, shall aggregate the electrical load of any electric load center located within its jurisdiction unless it in advance clearly discloses to the person owning, occupying, controlling, or using the load center that the person will be enrolled automatically in the aggregation program and will remain so enrolled unless the person affirmatively elects by a stated procedure not to be so enrolled. The disclosure shall state prominently the rates, charges, and other terms and conditions of enrollment. The stated procedure shall allow any person enrolled in the aggregation program the opportunity to opt out of the program every ~~two~~ three years, without paying a switching fee. Any such person that opts out before the commencement of the aggregation program pursuant to the stated procedure shall default to the standard service offer provided under ~~division (A) of~~ section 4928.14 or division (D) of section 4928.35 of the Revised Code until the person chooses an alternative supplier.

(E)(1) With respect to a governmental aggregation for a municipal corporation that is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.41 of the Revised Code.

(2) With respect to a governmental aggregation for a township or the unincorporated area of a county, which aggregation is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.40 of the Revised Code, except that:

(a) The petitions shall be filed, respectively, with the township fiscal officer or the board of county commissioners, who shall perform those duties imposed under those sections upon the city auditor or village clerk.

(b) The petitions shall contain the signatures of not less than ten per cent of the total number of electors in, respectively, the township or the unincorporated area of the county who voted for the office of governor at the preceding general election for that office in that area.

(F) A governmental aggregator under division (A) of this section is not a public utility engaging in the wholesale purchase and resale of electricity, and provision of the aggregated service is not a wholesale utility transaction. A governmental aggregator shall be subject to supervision and regulation by the public utilities commission only to the extent of any competitive retail electric service it provides and commission authority under this chapter.

(G) This section does not apply in the case of a municipal corporation that supplies such aggregated service to electric load centers to which its municipal electric utility also supplies a noncompetitive retail electric service through transmission or distribution facilities the utility singly or jointly owns or operates.

(H) A governmental aggregator shall not include in its aggregation the accounts of any of the following:

(1) A customer that has opted out of the aggregation;

(2) A customer in contract with a certified ~~competitive~~ electric services company ~~retail electric services provider~~;

(3) A customer that has a special contract with an electric distribution utility;

(4) A customer that is not located within the governmental aggregator's governmental boundaries;

(5) Subject to division (C) of section 4928.21 of the Revised Code, a customer who appears on the "do not aggregate" list maintained under that section.

(I) Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that the governmental aggregation's customers as an aggregated group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this section shall result in less than full recovery by an electric distribution utility of any surcharge authorized under section 4928.144 of the Revised Code.

(J) On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(e) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer. Such market price shall include, but not be limited to, capacity and energy charges; all charges associated with the provision of that power supply through the regional transmission organization, including, but not limited to, transmission, ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the commission. The period of time during which the market price and alternative energy resource amount shall be so assessed on the consumer shall be from the time the consumer so returns to the electric distribution utility until the expiration of the electric security plan. However, if that period of time is expected to be more than two years, the commission may reduce the time period to a period of not less than two years.

(K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charge that relates to a cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

Sec. 4928.24. The public utilities commission shall employ a federal energy advocate to monitor the activities of the federal energy regulatory commission and other federal agencies and to advocate on behalf of the interests of retail electric service consumers in this state. The attorney general shall represent the advocate before the federal energy regulatory commission and other federal agencies. Among other duties assigned to the advocate by the commission, the advocate shall examine the value of the participation of this state's electric utilities in regional transmission organizations and submit a report to the public utilities commission on whether continued participation of those utilities is in the interest of those consumers.

Sec. 4928.31. (A) Not later than ninety days after the effective date of this section, an electric utility supplying retail electric service in this state on that date shall file with the public utilities commission a plan for the utility's provision of retail electric service in this state during the market development period. This transition plan shall be in such form as the commission shall prescribe by rule adopted under division (A) of section

4928.06 of the Revised Code and shall include all of the following:

(1) A rate unbundling plan that specifies, consistent with divisions (A)(1) to (7) of section 4928.34 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, the unbundles components for electric generation, transmission, and distribution service and such other unbundled service components as the commission requires, to be charged by the utility beginning on the starting date of competitive retail electric service and that includes information the commission requires to fix and determine those components;

(2) A corporate separation plan consistent with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(3) Such plan or plans as the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(4) An employee assistance plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter;

(5) A consumer education plan consistent with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

A transition plan under this section may include tariff terms and conditions to address reasonable requirements for changing suppliers, length of commitment by a customer for service, and such other matters as are necessary to accommodate electric restructuring. Additionally, a transition plan under this section may include an application for the opportunity to receive transition revenues as authorized under sections 4928.31 to 4928.40 of the Revised Code, which application shall be consistent with those sections and any rules adopted by the commission under division (A) of section ~~4928.06 of the Revised Code. The transition plan also may include a~~ plan for the independent operation of the utility's transmission facilities consistent with section 4928.12 of the Revised Code, division (A)(13) of section 4928.34 of the Revised Code, and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

The commission may reject and require refiling, in whole or in part, of any substantially inadequate transition plan.

(B) The electric utility shall provide public notice of its filing under division (A) of this section, in a form and manner that the commission shall prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code. However, the adoption of rules regarding the public notice under this division, regarding the form of the transition plan under division (A) of this section, and regarding procedures for expedited discovery under division (A) of section 4928.32 of the Revised Code are not subject to division (D) of section 111.15 of the Revised Code.

Sec. 4928.34. (A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been

adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the ~~123RD~~ 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the

effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with section 4928.12 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been

adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code.

In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

Sec. 4928.35. (A) Upon approval of its transition plan under sections 4928.31 to 4928.40 of the Revised Code, an electric utility shall file in accordance with section 4905.30 of the Revised Code schedules containing the unbundled rate components set in the approved plan in accordance with section 4928.34 of the Revised Code. The schedules shall be in effect for the duration of the utility's market development period, shall be subject to the cap specified in division (A)(6) of section 4928.34 of the Revised Code, and shall not be adjusted during that period by the public utilities commission except as otherwise authorized by division (B) of this section or as otherwise authorized by federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility.

(B) Efforts shall be made to reach agreements with electric utilities in matters of litigation regarding property valuation issues. Irrespective of those efforts, the unbundled components for an electric utility's retail electric generation service and distribution service, as provided in division (A) of this section, are not subject to adjustment for the utility's market development period, except that the commission shall order an equitable reduction in those components for all customer classes to reflect any refund a utility receives as a result of the resolution of utility personal property tax valuation litigation that is resolved on or after the effective date of this section and not later than December 31, 2005. Immediately upon the issuance of that order, the electric utility shall file revised rate schedules under section 4909.18 of the Revised Code to effect the order.

(C) The schedule under division (A) of this section containing the unbundled distribution components shall provide that electric distribution service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule also shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(D) During the market development period, 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 priced in accordance with the schedule containing the utility's unbundled generation service component. Immediately upon approval of its transition plan, the utility shall file the standard service offer with the commission under section 4909.18 of the Revised Code, during the market development period. The failure of a supplier to deliver retail electric generation service shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under this division until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to deliver such service if any of the conditions specified in ~~divisions (B)(1) to (4) of~~ section 4928.14 of the Revised Code is met.

(E) An amendment of a corporate separation plan contained in a transition plan approved by the commission under section 4928.33 of the Revised Code shall be filed and approved as a corporate separation plan pursuant to section 4928.17 of the Revised Code.

(F) Any change to an electric utility's opportunity to receive transition revenues under a transition plan approved in accordance with section 4928.33 of the Revised Code shall be authorized only as provided in sections 4928.31 to 4928.40 of the Revised Code.

(G) The commission, by order, shall require each electric utility whose approved transition plan did not include an independent transmission plan as described in division (A)(13) of section 4928.34 of the Revised Code to be a member of, and transfer control of transmission facilities it owns or controls in this state to, one or more qualifying transmission entities, as described in division (B) of section 4928.12 of the Revised Code, that are planned to be operational on and after December 31, 2003. However, the commission may extend that date if, for reasons beyond the control of the utility, a qualifying transmission entity is not planned to be operational on that date. The commission's order may specify an earlier date on which the transmission entity or entities are planned to be operational if the commission considers it necessary to carry out the policy specified in section 4928.02 of the Revised Code or to encourage effective competition in retail electric service in this state.

Upon the issuance of the order, each such utility shall file with the commission a plan for such independent operation of the utility's transmission facilities consistent with this division. The commission may reject and require refiling of any substantially inadequate plan submitted under this division.

After reasonable notice and opportunity for hearing, the commission shall approve the plan upon a finding that the plan will result in the utility's compliance with the order, this division, and any rules adopted under division (A) of section 4928.06 of the Revised Code. The approved independent transmission plan shall be deemed a part of the utility's transition plan for purposes of sections 4928.31 to 4928.40 of the Revised Code.

Sec. 4928.61. (A) There is hereby established in the state treasury the advanced energy fund, into which shall be deposited all advanced energy revenues remitted to the director of development under division (B) of this section, for the exclusive purposes of funding the advanced energy program created under section 4928.62 of the Revised Code and paying the program's administrative costs. Interest on the fund shall be credited to the fund.

(B) Advanced energy revenues shall include all of the following:

(1) Revenues remitted to the director after collection by each electric distribution utility in this state of a temporary rider on retail electric distribution service rates as such rates are determined by the public utilities commission pursuant to this chapter. The rider shall be a uniform amount statewide, determined by the director of development, after consultation with the public benefits advisory board created by section 4928.58 of the Revised Code. The amount shall be determined by dividing an aggregate revenue target for a given year as determined by the director, after consultation with the advisory board, by the number of customers of electric distribution utilities in this state in the prior year. Such aggregate revenue target shall not exceed more than fifteen million dollars in any year through 2005 and shall not exceed more than five million dollars in any year after 2005. The rider shall be imposed beginning on the effective date of the amendment of this section by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, and shall terminate at the end of ten years following the

starting date of competitive retail electric service or until the advanced energy fund, including interest, reaches one hundred million dollars, whichever is first.

(2) Revenues from payments, repayments, and collections under the advanced energy program and from program income;

(3) Revenues remitted to the director after collection by a municipal electric utility or electric cooperative in this state upon the utility's or cooperative's decision to participate in the advanced energy fund;

(4) Revenues from renewable energy compliance payments as provided under division (C)(2) of section 4928.64 of the Revised Code;

(5) Revenue from forfeitures under division (C) of section 4928.66 of the Revised Code;

(6) Interest earnings on the advanced energy fund.

(C)(1) Each electric distribution utility in this state shall remit to the director on a quarterly basis the revenues described in divisions (B)(1) and (2) of this section. Such remittances shall occur within thirty days after the end of each calendar quarter.

(2) Each participating electric cooperative and participating municipal electric utility shall remit to the director on a quarterly basis the revenues described in division (B)(3) of this section. Such remittances shall occur within thirty days after the end of each calendar quarter. For the purpose of division (B)(3) of this section, the participation of an electric cooperative or municipal electric utility in the energy efficiency revolving loan program as it existed immediately prior to the effective date of the amendment of this section by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, does not constitute a decision to participate in the advanced energy fund under this section as so amended.

(3) All remittances under divisions (C)(1) and (2) of this section shall continue only until the end of ten years following the starting date of competitive retail electric service or until the advanced energy fund, including interest, reaches one hundred million dollars, whichever is first.

(D) Any moneys collected in rates for non-low-income customer energy efficiency programs, as of October 5, 1999, and not contributed to the energy efficiency revolving loan fund authorized under this section prior to the effective date of its amendment by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, shall be used to continue to fund cost-effective, residential energy efficiency programs, be contributed into the universal service fund as a supplement to that required under section 4928.53 of the Revised Code, or be returned to ratepayers in the form of a rate reduction at the option of the affected electric distribution utility.

Sec. 4928.621. (A) Any Edison technology center in this state is eligible to apply for and receive assistance pursuant to section 4928.62 of the Revised Code for the purposes of creating an advanced energy manufacturing center in this state that will provide for the exchange of information and expertise regarding advanced energy, assisting with the design of advanced energy projects, developing workforce training programs for such projects, and encouraging investment in advanced energy manufacturing technologies for advanced energy products and investment in sustainable manufacturing operations that create high-paying jobs in this state.

(B) Any university or group of universities in this state that conducts research on any advanced energy resource or any not-for-profit corporation formed to address issues affecting the price and availability of electricity and having members that are small businesses may apply for and receive assistance pursuant to section 4928.62 of the Revised Code for the purpose of encouraging research in this state that is directed at innovation in or the refinement of those resources or for the purpose of educational outreach regarding those resources and, to that end, shall use that assistance to establish such a program of research or education outreach. Any such educational outreach shall be directed at an increase in, innovation regarding, or refinement of access by or of application or understanding of businesses and consumers in this state regarding, advanced energy resources.

(C) Any independent group located in this state the express objective of which is to educate small businesses in this state regarding renewable energy resources and energy efficiency programs, or any small business located in this state electing to utilize an advanced energy project or participate in an energy efficiency program, is eligible to apply for and receive assistance pursuant to section 4928.62 of the Revised Code.

(D) Nothing in this section shall be construed as limiting the eligibility of any qualifying entity to apply for or receive assistance pursuant to section 4928.62 of the Revised Code.

Sec. 4928.64. (A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; or a mercantile customer-sited advance energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division

(B)(2)(b) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

(1) Half may be generated from advanced energy resources;

(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

By end of year	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the

utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.

(4)(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the

commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing the compliance of electric distribution utilities and electric services companies with division (B) of this section and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

Sec. 4928.65. An electric distribution utility or electric services company may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity, including, but not limited to, a mercantile customer or an owner or operator of a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state, for the purpose of complying with the renewable energy and solar energy resource requirements of division (B)(2) of section 4928.64 of the Revised Code. The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources. The rules also shall provide for this state a system of registering renewable energy credits by specifying which of any generally available registries shall be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits shall allow a hydroelectric generating facility to be eligible for obtaining renewable energy credits and shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.

Sec. 4928.66. (A)(1)(a) Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.

(b) Beginning in 2009, an electric distribution utility shall implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018. In 2018, the standing committees in the house of representatives and the senate primarily dealing with energy issues shall make recommendations to the general assembly regarding future peak demand reduction targets.

(2) For the purposes of divisions (A)(1)(a) and (b) of this section:

(a) The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

(b) The commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.

(c) Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors. Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs. If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline. The baseline also shall be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

(d) Programs implemented by a utility may include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.

(e) No programs or improvements described in division (A)(2)(d) of this section shall conflict with any statewide building code adopted by the board of building standards.

(B) In accordance with rules it shall adopt, the public utilities commission shall produce and docket at the commission an annual report containing the results of its verification of the annual levels of energy efficiency and of peak demand reductions achieved by each electric distribution utility pursuant to division (A) of this section. A copy of the report shall be provided to the consumers' counsel.

(C) If the commission determines, after notice and opportunity for hearing and based upon its report under division (B) of this section, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement of division (A) of this section, the commission shall assess a forfeiture on the utility as provided under sections

4905.55 to 4905.60 and 4905.64 of the Revised Code, either in the amount, per day per undercompliance or noncompliance, relative to the period of the report, equal to that prescribed for noncompliances under section 4905.54 of the Revised Code, or in an amount equal to the then existing market value of one renewable energy credit per megawatt hour of undercompliance or noncompliance. Revenue from any forfeiture assessed under this division shall be deposited to the credit of the advanced energy fund created under section 4928.61 of the Revised Code.

(D) The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism under this division. Such an application shall not be considered an application to increase rates and may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs. The commission by order may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

(E) The commission additionally shall adopt rules that require an electric distribution utility to provide a customer upon request with two years' consumption data in an accessible form.

Sec. 4928.67. (A)(1) ~~Beginning on the starting date of competitive retail electric service, a retail electric service provider in this state~~ Except as provided in division (A)(2) of this section, an electric utility shall develop a standard contract or tariff providing for net ~~energy~~ metering.

~~Any time that the total rated generating capacity used by customer-generators is less than one per cent of the provider's aggregate customer peak demand in this state, the provider shall make this contract or tariff available to customer-generators, upon request and on a first-come, first-served basis. The~~

That contract or tariff shall be identical in rate structure, all retail rate components, and any monthly charges~~,~~ to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.

(2) An electric utility shall also develop a separate standard contract or tariff providing for net metering for a hospital, as defined in section 3701.01 of the Revised Code, that is also a customer-generator, subject to all of the following:

(a) No limitation, including that in divisions (A)(31)(a) and (d) of section 4928.01 of the Revised Code, shall apply regarding the availability of the contract or tariff to such hospital customer-generators.

(b) The contract or tariff shall be based both upon the rate structure, rate components, and any charges to which the hospital would otherwise be assigned if the hospital were not a customer-generator and upon the market value of the customer-generated electricity at the time it is generated.

(c) The contract or tariff shall allow the hospital customer-generator to operate its electric generating facilities individually or collectively without any wattage limitation on size.

~~(2)~~(B)(1) Net metering under this section shall be accomplished using a single meter capable of registering the flow of electricity in each direction. If its existing electrical meter is not capable of measuring the flow of electricity in two directions, the customer-generator shall be responsible for all expenses involved in purchasing and installing a meter that is capable of measuring electricity flow in two directions.

~~(3) Such an~~ (2) The electric ~~service provider~~ utility, at its own expense and with the written consent of the customer-generator, may install one or more additional meters to monitor the flow of electricity in each direction.

~~(B)~~(3) Consistent with the other provisions of this section, the measurement of net electricity supplied or generated shall be calculated in the following manner:

~~(1)~~(a) The electric ~~service provider~~ utility shall measure the net electricity produced or consumed during the billing period, in accordance with normal metering practices.

~~(2)~~(b) If the electricity supplied by the electric ~~service provider~~ utility exceeds the electricity generated by the customer-generator and fed back to the ~~electric service provider~~ utility during the billing period, the customer-generator shall be billed for the net electricity supplied by the ~~electric service provider~~ utility, in accordance with normal metering practices. If electricity is provided to the ~~electric service provider~~ utility, the ~~credits for that electricity shall appear in the next billing cycle.~~

~~(C)(1)~~(4) A net metering system used by a customer-generator shall meet all applicable safety and performance standards established by the national electrical code, the institute of electrical and electronics engineers, and underwriters laboratories.

~~(2)~~(C) The public utilities commission shall adopt rules relating to additional control and testing requirements for customer-generators ~~which~~ that the commission determines are necessary to protect public and worker safety and system reliability.

(D) An electric ~~service provider~~ utility shall not require a customer-generator whose net metering system meets the standards and requirements provided for in divisions (B)(4) and (C)~~(1) and (D)~~ of this section to do any of the following:

(1) Comply with additional safety or performance standards;

(2) Perform or pay for additional tests;

(3) Purchase additional liability insurance.

Sec. 4928.68. To the extent permitted by federal law, the public utilities commission shall adopt rules establishing greenhouse gas emission reporting requirements, including participation in the climate registry, and carbon dioxide control planning requirements for each electric generating facility that is located in this state, is owned or operated by a public utility that is subject to the commission's jurisdiction, and emits greenhouse gases, including facilities in operation on the effective date of this section.

Sec. 4928.69. Notwithstanding any provision of Chapter 4928. of the Revised Code and except as otherwise provided in an agreement filed with and approved by the public utilities commission under section 4905.31 of the Revised Code, an electric distribution utility shall not charge any person that is a customer of a municipal electric utility that is in existence on or before January 1, 2008, any surcharge, service termination charge, exit fee, or transition charge.

Sec. 4929.01. As used in this chapter:

(A) "Alternative rate plan" means a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges, under which rates and charges may be established for a commodity sales service or ancillary service that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; ~~or~~ provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges; or establish revenue decoupling mechanisms. Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.

(B) "Ancillary service" means a service that is ancillary to the receipt or delivery of natural gas to consumers, including, but not limited to, storage, pooling, balancing, and transmission.

(C) "Commodity sales service" means the sale of natural gas to consumers, exclusive of any distribution or ancillary service.

(D) "Comparable service" means any regulated service or goods whose availability, quality, price, terms, and conditions are the same as or better than those of the services or goods that the natural gas company provides to a person with which it is affiliated or which it controls, or, as to any consumer, that the natural gas company offers to that consumer as part of a bundled service that includes both regulated and exempt services or goods.

(E) "Consumer" means any person or association of persons purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas, including industrial consumers, commercial consumers, and residential consumers, but not including natural gas companies.

(F) "Distribution service" means the delivery of natural gas to a consumer at the consumer's facilities, by and through the instrumentalities and facilities of a natural gas company, regardless of the party having title to the natural gas.

(G) "Natural gas company" means a natural gas company, as defined in section 4905.03 of the Revised Code, that is a public utility as defined in section 4905.02 of the Revised Code and excludes a retail natural gas supplier.

(H) "Person," except as provided in division (N) of this section, has the same meaning as in section 1.59 of the Revised Code, and includes this state and any political subdivision, agency, or other instrumentality of this state and includes the United States and any agency or other instrumentality of the United States.

(I) "Billing or collection agent" means a fully independent agent, not affiliated with or otherwise controlled by a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent that the agent is under contract with such supplier or aggregator solely to provide billing and collection for competitive retail natural gas service on behalf of the supplier or aggregator.

(J) "Competitive retail natural gas service" means any retail natural gas service that may be competitively offered to consumers in this state as a result of revised schedules approved under division (C) of section 4929.29 of the Revised Code, a rule or order adopted or issued by the public utilities commission under Chapter 4905. of the Revised Code, or an exemption granted by the commission under sections 4929.04 to 4929.08 of the

Revised Code.

(K) "Governmental aggregator" means either of the following:

(1) A legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting exclusively under section 4929.26 or 4929.27 of the Revised Code as an aggregator for the provision of competitive retail natural gas service;

(2) A municipal corporation acting exclusively under Section 4 of Article XVIII, Ohio Constitution, as an aggregator for the provision of competitive retail natural gas service.

(L)(1) "Mercantile customer" means a customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside of this state. "Mercantile customer" excludes a customer for which a declaration under division (L)(2) of this section is in effect pursuant to that division.

(2) A not-for-profit customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside this state may file a declaration under division (L)(2) of this section with the public utilities commission. The declaration shall take effect upon the date of filing, and by virtue of the declaration, the customer is not a mercantile customer for the purposes of this section and sections 4929.20 to 4929.29 of the Revised Code or the purposes of a governmental natural gas aggregation or arrangement or other contract entered into after the declaration's effective date for the supply or arranging of the supply of natural gas to the customer to a location within this state. The customer may file a rescission of the declaration with the commission at any time. The rescission shall not affect any governmental natural gas aggregation or arrangement or other contract entered into by the customer prior to the date of the filing of the rescission and shall have effect only with respect to any subsequent such aggregation or arrangement or other contract. The commission shall prescribe rules under section 4929.10 of the Revised Code specifying the form of the declaration or a rescission and procedures by which a declaration or rescission may be filed.

(M) "Retail natural gas service" means commodity sales service, ancillary service, natural gas aggregation service, natural gas marketing service, or natural gas brokerage service.

(N) "Retail natural gas supplier" means any person, as defined in section

1.59 of the Revised Code, that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of a competitive retail natural gas service to consumers in this state that are not mercantile customers. "Retail natural gas supplier" includes a marketer, broker, or aggregator, but excludes a natural gas company, a governmental aggregator as defined in division (K)(1) or (2) of this section, an entity described in division (B) or (C) of section 4905.02 of the Revised Code, or a billing or collection agent, and excludes a producer or gatherer of gas to the extent such producer or gatherer is not a natural gas company under section 4905.03 of the Revised Code.

(O) "Revenue decoupling mechanism" means a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.

Sec. 4929.02. (A) It is the policy of this state to, throughout this state:

(1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

(2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;

(4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;

(5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;

(6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;

(7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;

(8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated

natural gas services and goods;

(9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;

(10) Facilitate the state's competitiveness in the global economy;

(11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in ~~carrying out~~ exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

Sec. 4929.051. An alternative rate plan filed by a natural gas company under section 4929.05 of the Revised Code and proposing a revenue decoupling mechanism may be an application not for an increase in rates if the rates, joint rates, tolls, classifications, charges, or rentals are based upon the billing determinants and revenue requirement authorized by the public utilities commission in the company's most recent rate case proceeding and the plan also establishes, continues, or expands an energy efficiency or energy conservation program.

SECTION 2. That existing sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 and sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code are hereby repealed.

SECTION 3. Nothing in this act affects the legal validity or the force and effect of an electric distribution utility's rate plan, as defined in section 4928.01 of the Revised Code as amended by this act, or the plan's terms and conditions, including any provisions regarding cost recovery.

SECTION 4. Section 4929.051 of the Revised Code, as enacted by this act, shall not be applied in favor of a claim or finding that an application described in that section but submitted to the Public Utilities Commission prior to the act's effective date is an application to increase rates.

SECTION 5. The Governor's Energy Advisor periodically shall submit a written report to the General Assembly pursuant to section 101.68 of the Revised Code and report in person to and as requested by the standing committees of the House of Representatives and the Senate that have primary responsibility for energy efficiency and conservation issues regarding initiatives undertaken by the Advisor and state government pursuant to numbered paragraphs 3 and 4 of Executive Order 2007-02S, "Coordinating Ohio Energy Policy and State Energy Utilization. The first written report shall be submitted not later than sixty days after the effective date of this act.

Am. Sub. S. B. No. 221 127th G.A.

Joe A. Husted

Speaker ___________________ of the House of Representatives.

Bill Harris

President ___________________ of the Senate.

Passed April 23, 2008

Approved May 1, 2008

Ted Strickland

Governor.

Am. Sub. S. B. No. 221 127th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Mark C. Flanders

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 1st day of May, A. D. 20 08.

Jennifer Brunner

Secretary of State.

File No. 69 Effective Date 7/31/08

File #69

(127th General Assembly)
(Amended Substitute Senate Bill Number 221)

AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Introduced by

Senator Schuler
(By Request)

Cosponsors: Senators Jacobson, Harris, Fedor, Boccieri, Miller, R., Morano, Mumper, Niehaus, Padgett, Roberts, Wilson, Spada
Representatives Hagan, J., Blessing, Jones, Uecker, Budish, Chandler, Domenick, Evans, Flowers, McGregor, J., Yuko

eff 7/31/08

Passed by the Senate,

October 31, 2007

Passed by the House of Representatives.

Concurred in House amendments April 23, 2008

April 22, 2008

Filed in the office of the Secretary of State at Columbus, Ohio, on the

1st *day of* May, *A. D. 20*08

Secretary of State.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Their Economic Development Cost Recovery Rider Rates.	Case No. 09-1095-EL-RDR

FINDING AND ORDER

The Commission finds:

(1) On November 13, 2009, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (collectively, AEP-Ohio) filed an application (Application) to adjust their respective economic development cost rider (EDR) rates to collect estimated deferred delta revenues and carrying costs associated with a unique arrangement with Ormet Primary Aluminum Corporation (Ormet), which was approved in *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009) and Entry on Rehearing (September 15, 2009) (09-119), and a reasonable arrangement with Eramet Marietta, Inc. (Eramet), which was approved in *In the Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company*, Case No. 09-516-EL-AEC, Opinion and Order (October 15, 2009) (09-516).

(2) In its Application, AEP-Ohio proposes that its EDR rates, to be applied to its customers' distribution charges, should be set at 13.18314 percent for CSP and 9.37456 percent for OP, effective with bills rendered in the first billing cycle of January 2010. Recognizing, however, the Commission's requirement in 09-119, as well as 09-516, that AEP-Ohio credit any POLR charges paid by Ormet or Eramet as offsets to its EDR rates, AEP-Ohio alternatively proposes EDR rates of 10.52701 percent for CSP and 8.33091 for OP, which include POLR credits. AEP-Ohio's Application also proposes to set EDR rates on a levelized basis, to recover over 12 months the projected under-recoveries associated with the Eramet contract, beginning from the effective date of the contract through December 31, 2010, and

the Ormet unique arrangement, from its effective date through December 31, 2010. AEP-Ohio contends that it is proposing the levelized approach to EDR rates so that customers will avoid experiencing the large swings in EDR rates every six months that would otherwise be attributable to the pricing structure of the Ormet unique arrangement.

(3) On November 19, 2009, the Ohio Energy Group (OEG) filed a motion to intervene, asserting that it has a real and substantial interest in the proceeding, and that the Commission's disposition of the proceeding may impair or impede OEG's ability to protect that interest.

(4) On November 25, 2009, Ormet filed a motion to intervene, asserting that it has an interest in the instant proceeding, as it is a party to one of the unique arrangements at issue, and this proceeding has the potential of affecting that arrangement. With its motion to intervene, Ormet also filed a motion to permit Clifton A. Vince, Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand, counsel for Ormet, to practice before the Commission pro hac vice in this proceeding.

(5) On November 25, 2009, the Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene and, as more fully explained below, a motion to set the matter for hearing. In its motion to intervene, IEU-Ohio asserts that AEP-Ohio's Application may result in increases to the rates charged to IEU-Ohio members for electric service, and impact the quality of service that IEU-Ohio members receive from AEP-Ohio.

(6) On November 30, 2009, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene, arguing that it is the advocate for the residential utility customers of AEP-Ohio who may be affected by the EDR rates proposed by AEP-Ohio, and that its interest is different than that of any other party to the proceeding.

(7) The Commission finds that OEG, Ormet, IEU-Ohio, and OCC have set forth reasonable grounds for intervention. Accordingly, their motions to intervene should be granted. Additionally, the Commission finds that Ormet's motion for admission pro hac vice, requesting that Clifton A. Vince,

Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand be permitted to practice before the Commission in this matter, is reasonable and should be granted.

(8) In support of its motion to set the matter for hearing, IEU-Ohio cites Rule 4901:1-38-08, Ohio Administrative Code (O.A.C.), which states that if it appears to the Commission that the proposals in the Application may be unjust and unreasonable, the Commission must set the matter for hearing. IEU-Ohio argues that the following issues make AEP-Ohio's Application appear to be unjust and unreasonable:

(a) When Ormet sought to return to service from AEP, AEP argued that since it had not planned to provide service to Ormet, it was losing the opportunity to sell its generation at market-based rates, and that it should be compensated for its lost opportunity costs. However, in this Application, AEP has proposed to calculate the delta revenue associated with providing service to Ormet as the difference between the price Ormet pays under the Commission approved reasonable arrangement and the otherwise applicable tariff rate, rather than basing delta revenues on its current lost opportunity costs. AEP's flip flop in position is a heads I win, tails you lose proposition for AEP's other customers. AEP has failed to demonstrate why any change in the methodology to calculate delta revenue associated with the Ormet contract is warranted.

(b) Section 4905.31(E), Revised Code, specifically states that the public utility may recover costs incurred in conjunction with any economic development and job retention program. Both Ormet and Eramet filed "unique arrangements" and not "economic development arrangements" under the Commission's rules. Thus, AEP has failed to demonstrate it is appropriate to recover delta revenue associated with these reasonable arrangements, particularly under the rider it proposes to use.

(c) In calculating the carrying costs, AEP proposes to use the weighted average costs of each company's respective long-term debt. AEP has failed to demonstrate why any carrying charges should not be based on short-term debt, given that the recovery period is not greater than twelve months.

(d) AEP's application is also procedurally deficient. Rule 4901:1-38-08, O.A.C., requires utilities seeking recovery of reasonable arrangement delta revenue to file the projected impact of the proposed rider on all customers, by customer class, which AEP did not do.

IEU-Ohio Motion to Set Matter for Hearing at 4-5.

(9) On December 3, 2009, Ormet filed comments on AEP-Ohio's Application, asserting that AEP-Ohio must produce further information before the Commission can make a decision regarding its Application with respect to calendar year 2010. Ormet explains that under the Commission-approved unique arrangement in 09-119, the delta revenues AEP-Ohio is entitled to collect are based upon the difference between the tariff rates for Ormet and the rate resulting from the unique arrangement. Ormet contends that AEP-Ohio has offered no explanation or justification for the proposed 2010 tariff rate, that the rate assumed in the Application has not been submitted to the Commission for approval, and that it appears to be higher than the rate increase permitted in *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO; and *In the Matter of the Application of Ohio Power Company for Approval of an Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, Opinion and Order (March 18, 2009); Entry Nunc Pro Tunc (March 30, 2009); First Entry on Rehearing (July 23, 2009);

Finding and Order (July 29, 2009); Second Entry on Rehearing (November 4, 2009) (ESP proceedings). Accordingly, Ormet requests that the Commission set the matter for hearing, or, in the alternative, explain the basis for AEP-Ohio's proposed 2010 tariff rate prior to approving the Application.

(10) OCC and OEG also filed comments on December 3, 2009, in which they argue that AEP-Ohio failed to support its applications with the appropriate information, that any provider of last resort (POLR) charges paid to AEP-Ohio under its contracts with Ormet and Eramet should be credited to the economic development rider (EDR), and that AEP-Ohio unreasonably requests to accrue carrying costs on any under-recovery of delta revenues caused by levelized rates, but failed to request a mechanism for protecting customers from an accrual of carrying costs on over-recovery. In their comments, OCC and OEG also posit that AEP-Ohio's EDR should be audited every six months to verify that AEP-Ohio, Ormet, and Eramet have met and maintained compliance with Commission-ordered conditions. OCC and OEG advocate for Commission rejection of AEP-Ohio's Application, or in the alternative, a determination that the Application may be unjust and unreasonable, and that a hearing is necessary.

(11) On December 9, 2009, AEP-Ohio replied and submitted supplemental information, which provided the projected impact of the proposed EDR rider on all CSP and OP customers, by customer class.

(12) Commission Staff (Staff) reviewed AEP-Ohio's application and supplemental information, and issued its recommendation on December 10, 2009. Staff recommended that the Commission approve AEP-Ohio's Application, using the proposed EDR rates that include POLR credits, as filed on December 9, 2010. Staff noted that it is Staff's understanding that AEP-Ohio is requesting to accrue carrying costs on any under-recovery of delta revenues caused by the levelized EDR rates. In connection with this request, Staff recommended that the Commission require a symmetrical credit to carrying costs in the event of over-recovery caused by the levelized rate structure.

(13) On December 11, 2009, IEU-Ohio filed a motion to consolidate Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, 09-1906-EL-ATA, 09-1095-EL-FAC, and 09-1095-EL-UNC, arguing that the interconnected nature of the proposals addressed by the cases demands that the Commission resolve the cases by means of one proceeding. IEU-Ohio also contends that, although AEP-Ohio implicitly argues otherwise, adjustments to AEP-Ohio's EDR riders are not exempt from the limitations imposed on rate increases in the ESP proceedings.

(14) On December 14, 2009, AEP-Ohio filed a memorandum contra IEU-Ohio's motion to consolidate, stating that cost increases associated with new government mandates, such as AEP-Ohio's delta revenue costs, are not included under the rate increase limitations set forth in the ESP.

(15) On December 15, 2009, IEU-Ohio filed a reply to AEP-Ohio's memorandum contra, contending that the Commission did not adopt, in the ESP proceedings, AEP-Ohio's argument that cost increases associated with new government mandates fall outside the rate increase limitations.

(16) On December 22, 2009, Ormet also filed a reply to AEP-Ohio's memorandum contra, arguing that the EDR should be subject to the Commission-mandated limitations on AEP-Ohio's rate increases.

(17) As an initial matter, IEU-Ohio contends that AEP-Ohio has failed to demonstrate that it is appropriate for it to recover delta revenue associated with the Ormet unique arrangement and the Eramet reasonable arrangement. In support of its argument, IEU-Ohio cites Section 4905.31(E), Revised Code, which provides that a public utility electric light company may recover costs incurred in conjunction with any economic development and job retention program. IEU-Ohio contends that because Ormet's unique arrangement and Eramet's reasonable arrangement were not filed specifically as economic development arrangements under the Commission's rules, it is inappropriate for AEP-Ohio to recover delta revenue associated with the respective arrangements.

(18) Despite IEU-Ohio's argument, the Commission finds that AEP-Ohio is authorized to recover delta revenue related to the Ormet unique arrangement and the Eramet reasonable arrangement. Section 4905.31, Revised Code, permits recovery of foregone revenue by the electric utility incurred in conjunction with economic development and job retention programs. Both the Ormet unique arrangement and the Eramet reasonable arrangement advance, as underlying goals, either economic growth or job retention. Chapter 4901:1-38, O.A.C., titled "Arrangements," implements Section 4905.31, Revised Code. Chapter 4901:1-38, O.A.C., encompasses all types of arrangements, including economic development arrangements, energy efficiency arrangements, and unique arrangements. Rule 4901:1-38-02, O.A.C., details that the purpose of Chapter 4901:1-38, O.A.C., in part, is to facilitate Ohio's effectiveness in the global economy, to promote job growth and retention in the state, and to ensure the availability of reasonably priced electric service. Each of these factors was a goal of the Ormet and Eramet arrangements. Further, Rule 4901:1-38-08, O.A.C., which permits revenue recovery pertaining to agreements, provides that "each electric utility that is serving customers pursuant to approved reasonable arrangements may apply for a rider for the recovery of certain costs associated with its delta revenue for serving those customers pursuant to reasonable arrangements[.]" The rule provides an opportunity to seek recovery of delta revenues resulting from arrangements. It does not limit the recovery of revenue to a narrow type of arrangement, as IEU-Ohio suggests. Moreover, 09-119 and 09-516 specifically contemplated such filings by AEP-Ohio, seeking recovery of the approved revenue foregone as a result of arrangements. See 09-119 Opinion and Order at 6-10; 09-516 Opinion and Order at 8, 9.

(19) In its Application, AEP-Ohio proposes to recover expected unrecovered costs based on the estimated delta revenues created by the Ormet and Eramet arrangements during 2010. The estimated delta revenues AEP-Ohio sets forth in its Application are calculated as the difference between the proposed 2010 tariff rates and the Commission-approved prices under the Ormet unique arrangement and the Eramet reasonable arrangement. IEU-Ohio argues that AEP-Ohio has

not demonstrated why its proposed change in the method of calculating delta revenue is warranted.

(20) Rule 4901-38-01(C), O.A.C., which defines delta revenue, states that "[d]elta revenue" means the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the [C]ommission." The method by which AEP-Ohio proposes to calculate delta revenue in this Application directly follows the definition set forth in the rule, as well as the Commission's orders in 09-119 and 09-516. The Commission believes this is the proper method for calculating delta revenue, and that AEP-Ohio is warranted in its use of this method.

(21) In its comments, Ormet expresses concern that AEP-Ohio's proposed 2010 tariff rate has not been submitted to the Commission for approval. Likewise, OCC and OEG express concern over assumptions they allege AEP-Ohio has made in its delta revenue calculations. Moreover, Ormet expresses concerns that the proposed 2010 tariff rate AEP-Ohio used in its Application appears to be higher than the rate increase permitted under the ESP proceedings, which is 6 percent for CSP and 7 percent for OP for 2010. Since filing its Application in this case, AEP-Ohio filed an application to modify its standard service offer rates in Case No. 09-1906-EL-ATA. The proposed 2010 tariff rate AEP-Ohio used to calculate delta revenue for purposes of its EDR rates is the same rate submitted to the Commission for approval in Case No. 09-1906-EL-ATA in 2010. On December 10, 2010, Staff filed its review and recommendation in Case No. 09-1906-EL-ATA, indicating that it finds that the rates proposed in the applications provide for increases no greater than those authorized by the Commission in the ESP proceedings. In accordance with this review and our decision issued simultaneously with this order in Case Nos. 09-872-EL-FAC, 09-873-EL-FAC, and 09-1906-EL-ATA, the Commission finds that the parties' arguments that the proposed 2010 tariff rates utilized by AEP-Ohio in its delta revenue calculations are unjustified is without merit.

(22) IEU-Ohio, OCC, and OEG have also expressed concerns that AEP-Ohio's Application is procedurally deficient, in that it initially did not file the projected impact of the EDR rider on all

customers, by customer class. As noted above, however, on December 9, 2009, AEP-Ohio filed supplemental information that provided the projected impact of the EDR rider. With this information in the docket, it appears that the Application provides a clear picture for the Commission's evaluation of the EDR rates proposed.

(23) In its Application, AEP-Ohio proposes to recover the 2009 deferred unrecovered costs, or delta revenues, resulting from the Ormet and Eramet reasonable arrangements, as well as the carrying costs at the weighted average cost of CSP's and OP's respective long-term debt. AEP-Ohio's estimated recovery for 2009 is based on the following: estimates provided by Ormet of its production level and associated MWh of consumption for the period beginning with the effective date of the unique arrangement through the end of 2009; and a projection for Eramet's electricity consumption from the effective date of its contract, pursuant to the reasonable arrangement, through the end of 2009. AEP-Ohio also proposes to continue accruing carrying costs on the combined Ormet and Eramet balance of unrecovered deferred costs until the deferral and related carrying costs are fully recovered.

(24) IEU-Ohio asserts, in its motion to set the matter for hearing, that AEP-Ohio has failed to demonstrate why any carrying charges should not be based on the average cost of each company's short-term debt. However, under the semiannual reconciliation process prescribed for EDR rates under Rule 4901:1-38-08, O.A.C., the use of each company's average cost of long-term debt is a more appropriate mechanism for calculating carrying charges than short-term debt, and, therefore, should be utilized.

(25) The Commission finds AEP-Ohio's proposal to recover the 2009 deferred unrecovered costs resulting from the Ormet and Eramet arrangements, as well as the carrying costs at the weighted average cost of CSP's and OP's respective long-term debt, which are 5.73 percent for CSP, and 5.71 percent for OP, to be reasonable. The Commission additionally finds that, on a going-forward basis, AEP-Ohio shall utilize the interest rates from its latest-approved filing for the calculation of carrying costs.

(26) As noted above, IEU-Ohio and Ormet contend that the EDR should be subject to the Commission-mandated limitations on AEP-Ohio's rate increases. AEP-Ohio contends that because the cost increases associated with the EDR constitute government mandates, they are not included in the rate increase limitations imposed in the ESP. IEU-Ohio contends that the Commission did not adopt AEP-Ohio's new government mandate exception to its rate increase limitations. IEU-Ohio also argues that the Commission specifically listed those mechanisms that are exempt from the applicable rate increase limitations in the ESP first entry on rehearing, and the EDR was not among those listed.

(27) While the Commission enumerated a few of the riders and other mechanisms that are exempt from the ESP rate increase limitations in the first entry on rehearing, the list was not, as IEU-Ohio suggests, exhaustive. Although the rider was named and established in the ESP, we believe that the statute, as well as our rules, permit recovery of the delta revenues created by reasonable arrangements. As explained in 09-119 and 09-516 and herein, the reasonable arrangements approved further the policy of this state, and are consistent with Sections 4905.31 and 4928.02, Revised Code, and Chapter 4901:1-38, O.A.C. Accordingly, we find that the EDR is not subject to the limitations on AEP-Ohio's rate increases set forth in the ESP. Finding otherwise would result in considerable deferrals being created, including carrying costs, which would be passed on to customers.

(28) Although we find that the EDR is not subject to the limitations on rate increases set forth in the ESP, we are not persuaded by, and decline to adopt, AEP-Ohio's argument that the cost increases associated with the EDR constitute government mandates. As IEU-Ohio notes in its memorandum contra, to interpret any Commission order pertaining to rates with which an electric utility does not agree as a new government mandate, not subject to rate increase limitations, overextends the meaning of the phrase.

(29) The Commission finds that AEP-Ohio's proposal to utilize EDR rates of 10.52701 percent for CSP and 8.33091 percent for OP, which include POLR credits, is reasonable. Likewise, the

Commission finds that the levelized approach proposed by AEP-Ohio for the collection of EDR costs is a just and reasonable means of collection, as it will operate to avoid the extreme swings in EDR costs linked to the structure of the Ormet unique arrangement.

(30) As detailed by AEP-Ohio in its Application, the structure of the Ormet contract frontloads Ormet's price discount over the first eight months of each year. Based upon its use of the levelized rate approach to temper swings in EDR costs for its customers, AEP-Ohio anticipates the under-recovery of EDR costs during the first eight months of each year. In light of this situation, AEP-Ohio proposes to accrue carrying costs, at the weighted average costs of CSP's and OP's respective long-term debt, caused by the levelized rates. OCC and OEG object that while AEP-Ohio requests to accrue carrying costs on the under-recovery of delta revenues due to levelized rates, it does not request a symmetrical mechanism for protecting consumers in the event of the over-recovery of delta revenues. Staff agrees with the position of OCC and OEG on the issue.

(31) The Commission finds that AEP-Ohio's request to accrue carrying costs on the under-recovery of delta revenues due to levelized rates is reasonable and should be permitted. However, to the extent that OCC, OEG, and Staff assert that in the event of over-recovery of delta revenues, customers should be afforded symmetrical treatment to that afforded to AEP-Ohio in the event of an under-recovery, we find their argument persuasive. Therefore, if the over-recovery of delta revenues occurs, AEP-Ohio shall credit customers with the value of the equivalent carrying costs, calculated according to the weighted average costs of long term debt, 5.73 percent for CSP, and 5.71 percent for OP.

(32) As noted above, Rule 4901-38-08, O.A.C., prescribes that the EDR shall be updated and reconciled semiannually. Additionally, all data submitted in support of any rider update is subject to Commission review and audit. Pursuant to this provision, as well as Staff's recommendation, the Commission finds that the EDR should be updated and reconciled, by application to the Commission, semiannually. By this process, the estimated delta revenues will be trued to actual delta

revenues, and any over- or under-recovery will be reconciled. The semiannual adjustments to the EDR rates of CSP and OP will be effective with the first billing cycle of April and October in each year. AEP-Ohio is cautioned, therefore, to submit its applications in a timely fashion, such that the Commission will have sufficient time to review the filings and perform due diligence with regard to its review of the proposed rates.

(33) Upon review of the extensive pleadings and comments filed by numerous parties, the Commission finds that AEP-Ohio's Application to adjust its EDR rates, as supplemented on December 9, 2009, and as modified herein, does not appear to be unjust or unreasonable, and should be approved as modified herein. Therefore, the Commission finds that it is unnecessary to hold a hearing in this matter, and, thus, the requests for hearing advanced by several parties should be denied. The Commission additionally authorizes AEP-Ohio to implement its adjusted EDR rates of 10.52701 percent for CSP and 8.33091 percent for OP, effective with bills rendered in the first billing cycle of January 2010.

(34) Finally, the Commission finds that the case herein, which was originally docketed as Case No. 09-1095-EL-UNC, is more appropriately docketed with the new RDR case code, as it specifically addresses economic development riders. Accordingly, now and hereafter, Case No. 09-1095-EL-UNC should be designated as Case No. 09-1095-EL-RDR.

It is, therefore,

ORDERED, That the motions of OEG, Ormet, IEU-Ohio, and OCC to intervene be granted. It is, further,

ORDERED, That Ormet's motion to admit Clifton A. Vince, Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand to practice pro hac vice before the Commission in this proceeding be granted. It is, further,

ORDERED, That AEP-Ohio's Application to adjust its EDR rates, as supplemented on December 9, 2009, be approved as modified herein. It is, further,

ORDERED, That AEP-Ohio implement its adjusted EDR rates of 10.52701 percent for CSP and 8.33091 percent for OP, effective with bills rendered in the first billing cycle of January 2010. It is, further, ORDERED, That the requests for a hearing be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

RLH:ct

Entered in the Journal

JAN 0 7 2010

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

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

APPEARANCES:

Sonnenschein Nath & Rosenthal LLP, by Clifton A. Vince, Douglas G. Bonner, Daniel D. Barnowski, and Emma F. Hand, 1301 K Street NW, Suite 600 East Tower, Washington, D.C. 20005, on behalf of Ormet Primary Aluminum Corporation.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Thomas Lindgren and Thomas McNamee, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Marvin I. Resnik and Steven T. Nourse, American Electric Power Service Corporation, 1 Riverside Plaza, 29th Floor, Columbus, Ohio 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Gregory J. Poulos, and Maureen R. Grady, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential consumers of Columbus Southern Power Company and Ohio Power Company.

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

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

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

OPINION:

I. History of the Proceeding

On February 17, 2009, Ormet Primary Aluminum Corporation (Ormet) filed an application pursuant to Section 4905.31, Revised Code, to establish a unique arrangement with the Ohio Power Company and Columbus Southern Power Company (AEP-Ohio) for electric service to its aluminum-producing facility located in Hannibal, Ohio. In its application, Ormet requests that the Commission establish a unique arrangement for electric service with AEP-Ohio that links the price of electricity for its facility for calendar years 2010 through 2018 with the price of aluminum as reported on the London Metal Exchange (LME). Ormet filed an amended application on April 10, 2009, to reflect the possible curtailment of the equivalent of at least two of its six potlines.

On March 9, 2009, Industrial Energy Users-Ohio (IEU-Ohio) filed comments regarding Ormet's application. Further on April 28, 2009, Ohio Energy Group (OEG) and Kroger Company (Kroger) each filed comments regarding Ormet's amended application.

Motions to intervene were filed by AEP-Ohio, IEU-Ohio, OEG, Kroger, and the Ohio Consumers' Counsel (OCC). Those motions were granted by the attorney examiner.

Based upon the comments, the attorney examiner set this matter for hearing. The hearing in this matter commenced on April 30, 2009, and concluded on June 17, 2009. At the hearing, Ormet presented four witnesses, OCC presented three witnesses, and Staff presented one witness. Briefs were filed on July 1, 2009, by Ormet, AEP-Ohio, OCC and OEG, IEU-Ohio, Kroger, and Staff.

II. Discussion and Conclusions

In support of the unique arrangement, Ormet argues that the benefits to the region of keeping Ormet in operation will more than offset the delta revenue paid by other ratepayers. Ormet claims that the undisputed expert testimony in the record of this proceeding demonstrates that, at full operations, Ormet provides $195 million of benefits to the regional economy (Ormet Ex. 5 at 1).

Ormet also contends that the proposed unique arrangement furthers the policy of the State of Ohio as codified in Section 4928.02, Revised Code. Ormet claims that the unique arrangement is designed to meet the specific needs of Ormet with respect to the price, terms, conditions, and quality options of electric service as specified by Section 4928.02(B), Revised Code. Further, Ormet claims that the unique arrangement will help Ohio compete in the global economy pursuant to Section 4928.02(N), Revised Code. Ormet contends that it competes in a global market and needs affordable energy in order to compete.

Ormet further contends that it has provided the information needed by the Commission to approve the unique arrangement. Ormet notes that it has provided an affidavit from its chief executive officer verifying the information provided in the application and that it has also provided verifiable data in support of the application.

OCC and OEG claim that Ormet's economic analysis of its impact on the region is flawed because it fails to factor in the negative economic impact on the rest of the state from raising electric rates to pay for the delta revenues (Tr. I at 263, 265). OCC and OEG assert that there will be a clear negative economic impact to requiring all other AEP-Ohio ratepayers to pay increased rates to pay for the delta revenues under the proposed unique arrangement.

IEU-Ohio notes that the Commission may approve a proposed unique arrangement if it is shown to be just and reasonable and that it furthers the policy of this state. However, IEU-Ohio argues that Ormet's application should not be approved. IEU-Ohio claims that there are no clear or reliable indications of how the proposed unique arrangement will produce sufficient beneficial outcomes to make the transfer of revenue responsibility just and reasonable. IEU-Ohio alleges that there are many unanswered questions regarding the proposed unique arrangement, including questions related to the future price of aluminum, the treatment of delta revenue, pending litigation between Ormet and its alumina supplier, Ormet's ability to negotiate a new tolling contract, the sale of significant assets currently owned by Ormet, and the minimum cash requirement associated with labor costs for 2010 and beyond.

The Commission finds that Ormet's application for a unique arrangement should be approved subject to a number of modifications set forth below. The evidence in the record of this proceeding demonstrates that Ormet provides significant economic benefits to the region. Specifically, the evidence demonstrates that Ormet provides $195 million in total employee compensation and benefits to the regional economy (Ormet Ex. 5 at 1). The evidence also indicates that Ormet is a key employer for the region (Ormet Ex. 5 at 3-4) and that Ormet's operations are responsible, indirectly, for the creation of an additional 2,400 jobs in the region (Tr. 1 at 262-263). Further, the record shows that Ormet's operations generate over $6.7 million in tax revenue each year (Tr. 1 at 271). Finally, although OCC and OEG, as well as Staff, claim that the increased rates paid by ratepayers will have a negative economic effect on the state's economy, no party presented evidence in the record which quantified this negative effect (TR. 1 at 264-265).

The Commission notes that, although the proposed unique arrangement covers the period between January 1, 2009 and December 31, 2018, the specific terms and conditions of the unique arrangement are distinctly different for calendar year 2009 than for the remaining years of the unique arrangement. Therefore, the Commission will address the terms related to calendar year 2009 separately.

A. Terms of the Unique Arrangement for Calendar Year 2009

Under the terms of the amended application, for the balance of calendar year 2009, Ormet will pay AEP-Ohio the lesser of the applicable AEP-Ohio tariff rate or \$38.00 per MWh. If Ormet reduced its production by the equivalent of at least two potlines, Ormet's rate would be reduced to the lesser of the applicable AEP-Ohio tariff rate or \$34.00 per MWh. Ormet requests that the rate for 2009 going forward be set at a level that, taking into account the rate that Ormet has been paying to date, would result in an average rate of \$38.00 per MWh for the portion of the year that Ormet was above the four potline operating level and an average rate of \$34.00 per MWh for the portion of the year that Ormet was operating at four potlines or less.

OCC and OEG argue that, while Ormet's proposed unique arrangement for 2009 is reasonable in most respects, the provisions calling for retroactive recovery of discounted rates should be rejected. OCC and OEG note that the proposed unique arrangement requests the Commission make the unique arrangement retroactive to January 1, 2009. OCC and OEG allege that this would result in Ormet receiving discounted rates for electricity that were different from the rates which were approved and in effect at the time the service was delivered. OCC and OEG argue that this would constitute retroactive ratemaking which is prohibited. *Lucas County v. Public Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349. Further, OCC and OEG contend that Ormet should be required to pay AEP-Ohio's economic development rider. OCC and OEG note that this rider is unavoidable and that Ormet should pay this rider just like all other customers.

Finally, OCC and OEG claim that the proposed unique arrangement for 2009 is unreasonable and unlawful because it provides compensation to AEP-Ohio for its POLR responsibilities when Ormet cannot shop under the contract. OCC and OEG claim that, because AEP-Ohio will not incur any risk that Ormet would leave and come back to system and seek service when the market makes it more economical, AEP-Ohio should not assess a POLR charge on Ormet, and ratepayers should not pay any discount which compensates AEP-Ohio for a non-existent POLR risk for this consumer.

AEP-Ohio argues that the Commission should not reopen its prior approval of the temporary amendment to the 2007-2008 contract between Ormet and AEP-Ohio. This temporary amendment was approved by the Commission effective January 1, 2009. AEP contends that, if the Commission approves the proposed unique arrangement, the unique arrangement should be effective on a prospective basis only because an earlier effective date would violate the terms of the temporary amendment.

Staff notes that Ormet's rate for 2009, the first year of the agreement, would be fixed at either $38 per MWh or $34 per MWh, depending on the number of potlines in operation (OCC Ex. 3 at 6-7). Although Staff had previously recommended that the Commission bifurcate this proceeding and address calendar year 2009 separately, Staff recommends Commission approval of the terms for the first year of the unique arrangement.

The Commission finds that the terms of the unique arrangement for 2009 should be approved subject to the following modifications. With respect to price, the Commission orders AEP-Ohio to bill Ormet, for the balance of 2009, at a rate which, for all of calendar year 2009, averages $38.00 per MWh for the periods when Ormet was in full operation (i.e., six potlines), $35.00 per MWh for the periods when Ormet curtailed production to 4.6 potlines, and $34.00 per MWh for the periods when Ormet curtailed production to 4 potlines. This rate will ensure that Ormet will receive the benefits of the rates proposed for calendar year 2009 in its amended application without bifurcating the proceeding as originally proposed by Staff. Further, this rate is contingent upon Ormet maintaining employment levels at 900 employees for calendar year 2009 pursuant to Ormet's representations in the record of this proceeding (Ormet Ex. 11A at 5-6; Tr. III at 425).

However, with respect to the delta revenue for 2009, the Commission believes further proceedings are necessary regarding the recovery of delta revenues by AEP-Ohio for calendar year 2009. Therefore, the Commission authorizes AEP-Ohio to defer the delta revenues created by the unique arrangement for the remainder of calendar year 2009, and the Commission directs AEP-Ohio to file an application to recover the appropriate amounts of the deferrals authorized by the Commission in Case No. 08-1338-EL-AAM and the delta revenues for calendar year 2009.

The approved unique arrangement shall be effective for services rendered following the filing in this docket of an executed power agreement which conforms to the modifications ordered by the Commission in this Opinion and Order. Although the power agreement shall be effective for services rendered after the filing of an executed power agreement, the Commission retains the right, upon review of the executed power agreement, to order further revisions to the power agreement in order to ensure that the power agreement conforms to the modifications of the proposed unique arrangement ordered by the Commission in this Opinion and Order.

B. Terms of the Unique Arrangement for Calendar Years 2010 through 2018

For calendar years 2010 through 2018, the rate Ormet will pay under the proposed unique arrangement will be determined based upon schedules filed each year with the Commission. Each schedule would include an "indexed rate" and a "target price." The indexed rate would be the rate that Ormet could pay to produce the minimum cash flow necessary to sustain operations and pay its required legacy costs depending upon the LME price of aluminum. The target price will be the projected average price of aluminum for the calendar year as reported on the LME at which Ormet would be able to pay the AEP-Ohio tariff rate and still maintain the minimum cash flow necessary to maintain its operations and pay its required legacy costs. Under the proposed unique arrangement, the Commission may require an independent third-party review of each year's schedule at Ormet's expense.

When the LME price of aluminum is less than or equal to the target price, Ormet will pay the indexed rate. When the LME price of aluminum is greater than the target price, but not more than $300 per tonne above the target price, Ormet will pay 102 percent of the AEP-Ohio tariff rate. When the LME price is greater than $300 per tonne than the target price, Ormet will pay 105 percent of the AEP-Ohio tariff rate. At the end of each year, there will be a true-up to reconcile the projected LME prices for the year with the actual LME prices.

With respect to the terms of the unique arrangement for calendar years 2010 through 2018, intervenors in this proceeding and Staff have raised a number of specific arguments related to: (1) the proposed discount and delta revenue recovery; (2) potential delta revenue credits; (3) POLR charges; (4) deposit and advance payment requirements; and (5) the need for future review of the proposed unique arrangement. Although the Commission will approve the proposed unique arrangement, the Commission will order a number of modifications to the unique arrangement in order to address the issues raised by intervenors and Staff.

1) Proposed Discount and Delta Revenue Recovery

IEU-Ohio argues that the unique arrangement, if approved, would impose an excessive burden on other customers of AEP-Ohio. IEU-Ohio claims that, under the pricing formula contained in the proposed unique arrangement and assuming an AEP-Ohio tariff rate of $44.24 per MWh, Ormet would need to sell aluminum at $2,843 per tonne to avoid creating delta revenues; however, if Ormet sold aluminum in 2010 at $1,602 per tonne, which was the LME forward price as of April 29, 2009, delta revenues would amount to $283 million (OEG Ex. 1; OEG Ex. 6).

Likewise, OCC and OEG claim that the proposed unique arrangement is unreasonable because it fails to limit the delta revenues that ratepayers could be asked to pay. OCC and OEG note that any LME price less than $2,200 per tonne will result in Ormet being paid, in the form of a credit on its bill, to use electricity (Tr. I at 153; Tr. II at 297). As of May 1, 2009, the LME futures price for July 2010 was $1,602 per tonne (Tr. I at 150-155). OCC and OEG claim that, if the futures price for July 2010 accurately reflects the actual LME price for July 2010, Ormet will be paid $77.1 million to use power in 2010 (Tr. I at 153). OCC and OEG contend that there is no basis in law for the proposed unique arrangement and that Ormet has failed to provide any credible legal justification for requiring ratepayers to pay cash to a company beyond discounting rates to zero dollars. Therefore, OCC and OEG conclude that the proposed unique arrangement would not be reasonable without an appropriate floor for the rate Ormet will pay.

OCC and OEG note that, although the total impact of wages on the states of Ohio, West Virginia and Pennsylvania, if Ormet were to close, would be $195 million per year (Ormet Ex. 8 at 4), half of the employees and retirees identified in the amended application reside in Pennsylvania and West Virginia (Ormet Ex. 5 at 5), and a substantial amount of the tax revenues received from Ormet goes to West Virginia (Ormet Ex. 5 at 11-12). Thus, OCC and OEG conclude that Ormet's economic study should be discounted by 42 percent before it can be considered a relevant study on the Ohio economic impact of a potential closing by Ormet. OCC and OEG note that Staff recommended in the hearing that the amount of the rate discount be limited to $54 million per year and that the discount be phased out over the term of the contract (Staff Ex 2 at 3). However, OCC and OEG maintain that the limit should not exceed $32 million, the amount of wages of the Ohio workers at the Ormet plant.

Kroger argues that, when considering a proposed unique arrangement, the Commission must balance all costs of the proposed arrangement with the benefits of assuming those costs. Further, Kroger contends that, in order to avoid exposing ratepayers to unreasonable and unlimited risk, any unique arrangement approved by the Commission in this proceeding should include reasonable protections for AEP-Ohio ratepayers. Kroger believes that the reasonable protections should include a definitive limit on the cost that ratepayers are required to pay, by either limiting the discount Ormet receives to a certain percentage below AEP-Ohio's tariff rates or placing a dollar limit on the amount of delta revenues AEP-Ohio may recover annually from the unique arrangement.

AEP-Ohio believes that the amount of any discount to be provided to Ormet is a matter for the Commission's judgment. However, AEP-Ohio claims that, under Section 4905.31(E), Revised Code, AEP-Ohio must be provided full recovery of all delta revenues under the unique arrangement because the statute specifies that all costs of an economic development program or job retention program are recoverable by an electric utility, including all "revenue forgone."

Ormet claims that the potential harm predicted by the intervenors in this proceeding is speculative and based upon an unlikely worst case scenario. Ormet contends that the delta revenue calculations by OCC and OEG are based upon the erroneous assumption that current LME forward prices are reliable predictors of future LME prices and that future LME prices are likely to stay below $1,941 per tonne (OCC Ex. 3 at 11-12). However, Ormet contends that a more reliable projection predicts that aluminum prices will be near $2,000 per tonne by the end of 2009 (Ormet Ex. 9 at 1; Tr. I at 173-174). Ormet also claims that there are several additional factors that will lower its costs, and the need for rate discounts, over time; these factors include deleveraging through the proceeds raised by asset sales and internally-generated cash (Ormet Ex. 7 at 2), and reductions in Ormet's pension contributions beginning in 2013 (Tr. III at 434-436).

Staff argues that any unique arrangement approved by the Commission should contain a floor and a ceiling. The Staff believes that a price floor, below which a customer's payments cannot go, reflects the need to maintain the customer's incentive to operate efficiently and effectively. Staff maintains that a maximum reduction of 25 percent from the tariff rate is the appropriate balance, keeping the customer focused on efficiency but providing temporary assistance as well (Staff Ex. 2). This floor would result in a maximum rate discount of $54 million.

In addition, Staff argues that there should be a ceiling on the amount of delta revenue to be recovered from other ratepayers. Staff notes that the benefits of unique arrangements to other ratepayers are limited and that the ability of other ratepayers to pay for delta revenues is likewise limited. Staff believes that the primary benefit of the unique arrangement is the potential preservation of jobs in Ohio; thus, Staff argues that the cap on annual delta revenue recovery should be set initially at $54 million, which is the amount of Ormet's payroll. In addition, Staff recommends that the amount of any discount be reduced by 11 percent of the initial discount each year during the term of the unique arrangement.

Ormet argues that the $54 million cap proposed by Staff is insufficient. Although Ormet believes that the aluminum market will rebound, Ormet claims that this market is highly volatile and that any cap must address this volatility (Ormet Ex. 6 at 6-7). Ormet maintains that the $54 million cap proposed by Staff is inadequate given the volatility of the aluminum market. Ormet claims that, if the discount in any given year is not sufficient to keep Ormet in business, then the entire contract will fail and Ormet will likely need to curtail production at its Hannibal facility.

Moreover, Ormet contends that Staff's proposed cap is unreasonable and speculative. Ormet believes that Staff's proposed cap fails to consider what Ormet needs to operate or to balance the costs of discounts against Ormet's benefits to this state. Ormet also claims that Staff has provided no support for its position that a maximum reduction of 25 percent from the tariff rate is appropriate. Further, Ormet contends that Staff has not demonstrated that its proposed $54 million cap would enable Ormet to remain in business for the years 2010 through 2019.

The Commission agrees with Staff's position that, generally, unique arrangements must contain a floor, a minimum amount that the party seeking a unique arrangement should be required to pay, and a ceiling, a maximum amount of delta revenue which the ratepayers should be expected to pay. Ormet represents that it does not oppose the application of a cap or floor to its contract (Ormet Brief at 21).

With respect to a floor, Ormet proposes a number of different methods for establishing a floor, with a range of $93 million to $114 million as the maximum discount from tariff rates. This range includes the variable costs of production of the electricity consumed by Ormet, which testimony indicates would be approximately $90 million (Tr. I at 235; Staff Ex. 2A, Tr. IV. at 478-479, 491-492). On the other hand, Staff has proposed a floor in which Ormet would receive a maximum discount from tariff rates of $54 million. OCC and OEG propose a floor of $32 million, based upon the total wages paid to Ormet's employees who reside in this state.

Based upon the record in this case, the Commission finds that Ormet's rate should be determined as proposed in the unique arrangement, but with a floor, or maximum discount from tariff rates. Although the Commission does not agree with Staff's recommendation on the amount of the floor, this floor should be implemented in the manner proposed by Staff at the hearing (Staff Ex. 2). Moreover, the Commission is not persuaded by the arguments presented by OCC and OEG that the Commission should consider only the Ohio portions of the regional economy. All of the jobs which would be retained under the proposed unique arrangement are located in this state irrespective of where the employees reside. Further, neither OCC nor OEG presented any economic analysis regarding how much of the indirect benefits of Ormet's continuing to remain in operation advantage the residents of this state as opposed to other states.

Therefore, the Commission will modify the proposed unique arrangement to set the maximum rate discount at $60 million for calendar years 2010 and 2011. The Commission has based the floor upon the variable costs of production of the electricity consumed by Ormet at full capacity, which the testimony at hearing indicates would be approximately $90 million. However, testimony in the record also indicates that, at the time of the hearing, Ormet was in the process of curtailing production to 4 potlines (Tr. 1 at 70-71). This curtailment of operations should reduce Ormet's demand for electricity by approximately one-third; therefore, the Commission has reduced the estimate of the variable costs of production of the electricity of $90 million by one-third to $60 million. The Commission finds that this is an appropriate floor or maximum discount for Ormet. This floor will be subject to two adjustments: a flexible phase down and a reduction in the discount due to reductions in employment, both of which will be discussed below.

With respect to the ceiling, or the maximum amount ratepayers should be expected to pay in any given year, the Commission agrees with Staff and the intervenors that the ability of ratepayers to fund the recovery of delta revenues is not unlimited. Ormet contends that the Staff has not offered proof for its recommendation of what ratepayers can afford to pay. However, Ormet, not Staff nor the intervenors, has the burden of proof in this proceeding, and it is Ormet that has failed to present evidence contravening the Staff's expert testimony, which was based upon substantial experience in relevant utility matters in this state (Staff Ex. 1 at 1; Tr. II at 336-338; Tr. IV at 505). Therefore, the Commission will adopt Staff's recommendation of $54 million as the maximum amount of delta revenue which ratepayers should be expected to pay in a given year.

However, this will result in a potential differential of up to $6 million per year between the $60 million maximum discount from tariff rates for Ormet and the $54 million maximum in delta revenues which ratepayers can be expected to pay. AEP-Ohio will be authorized to defer this differential, with carrying costs equal to AEP-Ohio's long term cost of debt, during the term of the unique arrangement. During this time, all delta revenue credits attributable to above-tariff payments by Ormet, to be calculated as discussed below, will be first applied to reduce or eliminate the deferral and carrying charges before being applied to AEP-Ohio's economic development rider. At the end of the term of the unique arrangement, AEP-Ohio will be permitted to recover any remaining deferred amounts, including carrying charges, through its economic development rider.

With respect to the adjustments to the floor, or maximum rate discount, the Commission agrees with Staff's recommendation that the unique arrangement be modified to phase down the discount over time. Ormet represents that there are several additional factors that will lower its costs, and in turn the need for rate discounts, over time; these factors include deleveraging through the proceeds raised by asset sales and internally-generated cash (Ormet Ex. 7 at 2) and reductions in Ormet's pension contributions beginning in 2013 (Tr. III at 434-436, 457-458). Therefore, although the $60 million floor will be in effect for calendar years 2010 and 2011, the Commission finds that, for calendar year 2012, the floor should be reduced to $54 million; for calendar years 2013 through 2018, the remaining six years of the contract, the floor should be reduced each year by $10 million, until it phases out completely for calendar year 2018.

The Commission also acknowledges that the aluminum market is subject to a great deal of volatility and that the unique arrangement should address that volatility.

Therefore, for calendar year 2013 through 2018, Ormet may elect to use, in the current year, any unused portion of the floor from a previous year (or years). Ormet shall apply this election by providing written notice to AEP-Ohio and by filing such notice in this docket. For example, if, due to LME prices in 2014, Ormet only uses a discount of $28.75 million, leaving $6 million of the 2014 discount unused, Ormet may elect to increase the floor in calendar year 2015 (or 2016 through 2018) by the $6 million unused discount. In no event will an adjusted floor be permitted to exceed $54 million in any year between 2013 and 2018. This should assist Ormet in weathering any short-term swings in the LME market while ensuring that the floor, or maximum rate discount, phases out over the duration of the unique arrangement.

Second, the Commission notes that the primary purpose of the unique arrangement is to retain jobs rather than to boost worldwide aluminum production or to enrich Ormet's investors. Any rate discounts provided to Ormet must be directly related to Ormet maintaining certain levels of employment. The record in this case demonstrates Ormet cannot continue to employ 900 employees beyond 2009 with curtailed production (Tr. III at 425). Therefore, under the unique arrangement, Ormet will be required to maintain an employment level of full-time employees of 650. Ormet will be required to provide a monthly report to Staff and AEP-Ohio detailing its employment levels. The floor will be reduced each month by $10 million for every 50 employees below 650 full-time employees that were employed by Ormet for the previous month. This reduction will be in addition to any planned phase down of the floor discussed above.

2) Potential Delta Revenue Credits

Kroger argues that the unique arrangement must provide for a greater share in the benefits for AEP-Ohio ratepayers in the event that aluminum prices rise above the target price. Kroger claims that ratepayers are being asked to bear the risk of declining aluminum prices and, therefore, should receive a reasonable return in the event that aluminum prices rebound. Kroger does not believe that a potential five percent gain is sufficient to compensate ratepayers for these risks.

OCC and OEG also allege that, under the proposed unique arrangement, AEP-Ohio's ratepayers bear great risks related to the price of aluminum while receiving little benefit if the price of aluminum rises. OCC and OEG cite to the testimony of OCC witness Ibrahim that the proposed unique arrangement lacks symmetry regarding the risks and benefits born by AEP-Ohio's customers (OCC Ex. 3 at 14-15). OCC and OEG claim that, if aluminum prices double from the price when Dr. Ibrahim filed his testimony, the possible benefit to AEP-Ohio's ratepayers would only be $3.6 million to $8.9 million (OCC Ex. 3 at 15). On the other hand, if the futures price for July 2010 accurately reflects the actual LME price for July 2010, Ormet will be paid $77.1 million to use power in 2010 and ratepayers would be responsible for delta revenues of $281.1 million. OCC and OEG contend that this asymmetry is extremely disadvantageous to AEP-Ohio's ratepayers because these ratepayers will bear huge risks for delta revenues while the benefits are extremely unlikely and minimal compared to the risks. Consequently, OCC and OEG recommend that a reasonable symmetry would require Ormet to pay a rate that exceeds the tariff rate by $0.049 per MWh times 50 percent for each $1 per tonne when the actual LME price exceeds the target price. AEP-Ohio would receive delta revenue credits for the amount that Ormet pays in excess of tariff rates with a maximum delta revenue credit cap of $16.35 million per year.

Ormet contends that the proposed unique arrangement is designed to assure that Ormet is not unreasonably benefitted at the expense of AEP-Ohio's ratepayers. Ormet notes that the unique arrangement is designed to impose the minimum burden on ratepayers by providing for the minimum cash flow necessary to keep its Hannibal facility in operation and pay its required legacy costs; the unique proposed arrangement does not guarantee that Ormet will earn a profit or a particular rate of return. Further, Ormet notes that it has voluntarily offered to pay above-tariff rates when the LME price of aluminum is greater than the target price.

The Commission finds that the unique arrangement, as filed, contains insufficient potential benefits to ratepayers in relation to the risks which Ormet proposes the ratepayers bear. Further, the Commission notes that the record indicates that Ormet will be able to substantially reduce its pension fund obligations beginning in the future (Tr. III at 434-436). However, the Commission finds that this can be addressed by increasing the amounts that Ormet will pay when LME prices exceed the LME target price. Therefore, beginning in 2012, if the LME price is greater than the LME target price, but not more than $300 above the LME target price, Ormet will pay 104 percent of the AEP-Ohio tariff rate rather than 102 percent of the AEP-Ohio tariff rate. Assuming full operations at Ormet's facility, this will increase the Ormet's potential contribution to delta revenue credits to approximately $8.74 million per year from $4.37 million. Further, if the LME price is greater than $300 above the LME target price, Ormet will pay 108 percent of the AEP-Ohio tariff rate rather than 105 percent of the AEP-Ohio tariff rate. This will increase Ormet's potential contribution to delta revenue credits to approximately $17.48 million per year from $10.91 million.

The Commission finds that any amounts paid by Ormet in excess of AEP-Ohio's tariff rates should be considered as delta revenue credits. AEP-Ohio is directed to apply the delta revenue credits first to any deferred amounts, including carrying charges, of delta revenues. Any remaining delta revenue credits should be applied to AEP-Ohio's economic development rider.

3) POLR Charges

OCC and OEG claim that the proposed unique arrangement is unreasonable and unlawful because it compensates AEP-Ohio for POLR charges when Ormet cannot shop under the unique arrangement. Under terms of the proposed unique arrangement, AEP-Ohio would be the exclusive supplier to Ormet's Hannibal facility (Ormet Ex. 8, Attachment A at 8-9; Tr. I at 37; Tr. IV at 484). OCC and OEG reason that, since there is no risk that Ormet will shop generation service while the contract is in effect, there is no risk to AEP-Ohio that it will be called to serve as Ormet's provider-of-last-resort; therefore, a POLR charge should not be assessed upon Ormet, and the other ratepayers should not pay delta revenues for POLR charges.

Kroger also contends that POLR charges should be excluded from the amount of delta revenues recovered by AEP-Ohio. Kroger reasons that, because Ormet will be contractually obligated to receive electricity from AEP-Ohio under the proposed unique arrangement, there is no risk to AEP-Ohio that Ormet will purchase electricity from an alternative electric service supplier. Kroger claims that, under the proposed unique arrangement, AEP-Ohio would still receive compensation for being the POLR supplier without incurring POLR costs. Further, Kroger believes that AEP-Ohio should be required to share the cost of any discount to Ormet since AEP-Ohio benefits financially from continued Ormet operations.

AEP-Ohio argues that the POLR charges authorized in its electric security plan should not be reduced. AEP-Ohio notes that the policy of the State is to promote competitive generation markets and customer choice. Section 4928.02, Revised Code. AEP-Ohio believes that any Commission order keeping Ormet's load out of the competitive markets for ten years would conflict with that policy. Further, AEP-Ohio contends that the Commission has already determined, in its electric security plan proceeding, that a customer should not be able to give up its statutory right to obtain service from a competitive supplier in exchange for avoiding the POLR charge. Instead, the only opportunity for a customer to avoid the POLR charge is to switch to a competitive supplier and agree to pay market rates for generation upon any return to the electric utility. *In re Columbus Sothern Power Co. and Ohio Power Co.*, Case No. 08-917-EL-SSO et al., Opinion and Order (March 18, 2009) at 40.

The Commission finds that, under the terms of the unique arrangement, AEP-Ohio will be the exclusive supplier to Ormet (Tr. I at 37-38; Tr. IV at 484). Therefore, there is no risk that Ormet will shop for competitive generation and then return to AEP-Ohio's POLR service. If AEP-Ohio were to retain these charges, AEP-Ohio would be compensated for a service it would not be providing. Moreover, our decision in the AEP-Ohio electric security plan is inapplicable to this case because that holding addressed customers receiving service under AEP-Ohio's standard service offer rather than a customer receiving service under a unique arrangement specifically approved by the Commission. Therefore, the Commission finds that the unique arrangement should be modified such that any POLR charges paid by Ormet are used to reduce the AEP-Ohio's ratepayers' obligations under the unique arrangement. During the term of the unique arrangement, AEP-Ohio shall credit any POLR charges paid by Ormet to its economic development rider in order to reduce the impact of the unique arrangement on other ratepayers' bills.

4) Deposit and Advance Payment Provisions

IEU-Ohio observes that the proposed unique arrangement would shift all risk of a potential default by Ormet to AEP-Ohio's customers by relieving Ormet of its current obligation to provide a security deposit as long as AEP-Ohio is permitted to treat any defaulted amounts as delta revenue to be recovered from its customers (Ormet Ex. 8, Attachment A at 14). IEU-Ohio argues that there is no real offset to the costs as a result of shifting the default risks to the other ratepayers and that this is part of the excessive burden placed upon AEP-Ohio's ratepayers under the proposed unique arrangement.

Ormet claims that all it is seeking with respect to deposit and advance payment terms is a return to standard tariff terms (Tr. I at 124, 227). Ormet believes that these terms will benefit AEP-Ohio's other ratepayers. Ormet notes that the calculation of the rate that Ormet can afford to pay is based on the assumption that the cash deposit currently held by AEP-Ohio will be returned to Ormet, thereby increasing its cash flow. If this deposit is not returned, it will result in increasing the magnitude of the discount required and in increasing the delta revenues to be collected from ratepayers. Thus, Ormet claims that, if the deposit is returned, the certainty of lower delta revenues would offset any potential risk of default.

AEP-Oho argues that the provisions in the proposed unique arrangement regarding waiver of deposit and advanced payment should not be modified. AEP avers that any modification would jeopardize the ability of AEP-Ohio to recover any unpaid amounts.

The Commission finds that the provisions related to deposit and advance payments should not be modified. The record clearly demonstrates that these provisions are an essential element of the proposed unique arrangement (Ormet Ex. 11A at 3, 4). Further, the record also demonstrates that Ormet has curtailed its operations, which will result in less ratepayer exposure to the risk of default by Ormet.

5) Future Review of the Proposed Unique Arrangement

In addition, IEU-Ohio claims that the proposed unique arrangement would prohibit the Commission and other stakeholders from seeking to modify the unique arrangement, except in very limited circumstances, while allowing Ormet to request modifications that would further benefit Ormet. Likewise, OCC and OEG claim that the proposed unique arrangement would unlawfully limit the Commission's jurisdiction to review and modify the agreement. Kroger also states that the Commission must have the ability to periodically review and, if necessary, modify the unique arrangement. Further, Kroger claims that ten years is an unreasonable amount of time to expose ratepayers to the risk and cost of a unique arrangement; thus there must be a reasonable time limit on the unique arrangement. Staff agrees that there should be some limit upon the length of the unique agreement. Thus, Staff believes that there should be periodic reviews of whether the unique agreements should continue.

The Commission believes that the provisions contained in the proposed unique arrangement for future review will be adequate to safeguard ratepayers from undue risks if supplemented by an additional, independent provision. The Commission notes that Ormet has repeatedly, throughout this proceeding, represented to the Commission its belief that, in the long-term, LME prices will recover sufficiently for Ormet to profitably operate. Ormet has disparaged the use of futures prices by OCC and OEG to predict future LME prices and has argued instead that the Commission should rely instead upon an analyst report which predicts a future rise in LME prices (Ormet Ex. 9 at 14).

Therefore, the Commission will modify the unique arrangement to provide an additional, independent, termination provision in the event that long-term LME prices do not recover as Ormet predicts. The Commission, above, has determined that, for calendar years 2010 and 2011, AEP should be permitted to defer for future recovery the differential between the floor, or maximum discount, of $60 million and the ceiling of $54 million. The Commission will modify the proposed unique arrangement to allow the Commission to terminate, by order, the unique arrangement if Ormet does not begin to reduce the amount of the accumulated deferrals, and carrying charges, through the payment of above-tariff rates, pursuant to the terms of the unique arrangement, by April 1, 2012. The Commission specifically notes that the crediting of POLR charges by AEP in the form of delta revenue credits shall not constitute the payment of above-tariff rates by Ormet for purposes of this termination provision. Unless otherwise ordered by the Commission, such termination shall be effective immediately upon issuance of a Commission order terminating the unique arrangement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On February 17, 2009, Ormet filed an application pursuant to Section 4905.31, Revised Code, to establish a unique arrangement with AEP-Ohio for electric service to its aluminum-producing facility located in Hannibal, Ohio.

(2) Ormet filed an amended application on April 10, 2009.

(3) Comments regarding Ormet's application and amended application were filed by IEU-Ohio, OEG, and Kroger.

(4) Based upon the comments, the attorney examiner set this matter for hearing before the Commission.

(5) The hearing in this matter commenced on April 30, 2009, and concluded on June 17, 2009.

(6) The amended application is reasonable and should be approved as modified by the Commission.

ORDER:

It is, therefore,

ORDERED, That the amended application for a unique arrangement filed by Ormet be approved as modified by the Commission. It is, further,

ORDERED, That Ormet and AEP-Ohio file an executed power agreement in this docket that conforms to the modifications ordered by the Commission. It is, further,

ORDERED, That the approved unique arrangement shall be effective for services rendered following the filing in this docket of an executed power agreement. It is, further,

ORDERED, That AEP-Ohio be authorized to defer delta revenues for the remainder of calendar year 2009 and for calendar years 2010 and 2011, to the extent set forth in this Opinion and Order. It is, further, ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP:ct

Entered in the Journal
JUL 15 2009

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

(1) On February 17, 2009, Ormet Primary Aluminum Corporation (Ormet) filed an application to establish a unique arrangement with the Ohio Power Company and Columbus Southern Power Company (AEP-Ohio) for electric service to its aluminum-producing facility located in Hannibal, Ohio. Ormet is requesting that the Commission establish a unique arrangement for electric service with AEP-Ohio that links the price of electricity for its facility with the price of aluminum as reported on the London Metal Exchange. Ormet filed an amended application on April 10, 2009, to reflect the possible curtailment of the equivalent of at least two of its six potlines.

(2) On July 15, 2009, the Commission issued its Opinion and Order, approving the amended application as modified by the Commission.

(3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(4) On August 14, 2009, Industrial Energy Users-Ohio (IEU-Ohio) filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

(a) The Commission should grant rehearing to clarify the rate that will apply to Ormet during 2009.

(b) The Commission's failure to include a provision to terminate the reasonable arrangement automatically if Ormet fails to maintain operations is unreasonable.

(c) The Commission's failure to require Ormet to maintain deposit and advance payment provisions is unreasonable.

(5) Moreover, the Ohio Consumers Counsel and the Ohio Energy Group (OCC and OEG) filed an application for rehearing on August 14, 2009, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

(a) The Commission erred in failing to specify and ensure how AEP-Ohio will apply the credit for the full amount of provider of last resort (POLR) charges that will reduce what customers will have to pay for Ormet's unique arrangement.

(b) The Commission erred by failing to specify that AEP-Ohio and Ormet shall not be permitted to reduce the delta revenue credit, for example by negotiating a discount for the POLR charge, that is intended by the Commission to reduce what customers will have to pay for Ormet's unique arrangement.

(6) Further, on August 14, 2009, AEP-Ohio filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

(a) The Commission's conclusion that, during the ten-year term of this unique arrangement, there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP-Ohio is unreasonable and conflicts with the Commission's orders in AEP-Ohio's electric security plan cases, *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 08-917-EL-SSO, et al.

(b) Even assuming there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP-Ohio, requiring that POLR charges paid by Ormet must be credited by AEP-

Ohio to its economic development rider is unlawful. Section 4905.31(E), Revised Code, does not permit the Commission to offset the amount of revenue forgone by alleged or real expense reductions. Further, the Commission's authority under Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929., Revised Code, is not available to the Commission to prohibit AEP-Ohio from recovering all revenues forgone as a result of the unique arrangement.

(c) The Opinion and Order commits a customer to refrain from acquiring its generation service from a competitive retail electric service provider in violation of the clearly stated public policy of this State. Contract provisions that are contrary to the public interest are unenforceable.

(d) The Commission ordered AEP-Ohio and Ormet to execute and file a power agreement conforming to the Commission's Opinion and Order even though AEP-Ohio did not agree with all the terms of the modified reasonable arrangement. There is no "reasonable arrangement with" AEP-Ohio under Section 4905.31, Revised Code.

(e) Eliminating the existing requirement for AEP-Ohio to retain a deposit from Ormet and no longer requiring Ormet to make payments in advance to AEP-Ohio is unreasonable in light of the increased possibility of Ormet terminating production, either indefinitely or permanently, along with the related inability to make timely payments for electric services or Ormet's decision not to make such payments.

(7) On August 24, 2009, IEU-Ohio, and Ormet each filed memoranda contra AEP-Ohio's application for rehearing. OCC and OEG also filed a joint memorandum contra AEP-Ohio's application for rehearing on August 24, 2009. Further, on August 24, 2009, AEP-Ohio filed a memorandum contra the application for rehearing filed by OCC and OEG.

(8) In its first assignment of error, IEU-Ohio requests that the Commission clarify the rate for electric service which Ormet will pay in 2009. IEU-Ohio notes that, after the Commission issued its Opinion and Order in this proceeding, Ormet issued a notice of layoff and closure pursuant to the Federal Worker Adjustment and Retraining Notification Act (WARN). IEU-Ohio also cites to a recent press release issued by Ormet regarding a decision in its arbitration proceeding with its alumina supplier. IEU-Ohio claims that, because the 2009 rates approved by the Commission in the Opinion and Order were expressly contingent upon Ormet maintaining at least 900 employees at its Hannibal facility, these developments require the Commission to clarify the rates that Ormet should pay in 2009.

In its memorandum contra, Ormet claims that it issued its initial WARN notices in order to preserve all of its available options in light of the arbitration decision and the Commission's Opinion and Order in this proceeding. Further, Ormet represents that it has issued a supplemental WARN notice stating its intention to shutdown two of its six potlines and reduce its workforce by 100 employees and that it has issued a subsequent press release regarding its intention to operate four of its six potlines through the balance of 2009. With respect to its 2009 rate under the unique arrangement, Ormet argues that, if it is not able to maintain an employment level of 900 employees, it will not be entitled to the 2009 rate set forth in the Opinion and Order; and AEP-Ohio will charge Ormet the default rate set forth in the power agreement, which is an average of $38.00 per MWh for 2009 until such time as Ormet resumes employment of 900 employees.

As a preliminary matter, the Commission notes that none of the WARN notices and press releases cited by both IEU-Ohio and Ormet have been admitted into the evidentiary record in this proceeding. Further, no witnesses have testified regarding the nature or the implications of the WARN notices. Therefore, the WARN notices and press releases will not be considered by the Commission in this Entry on Rehearing. The Opinion and Order provided that, if Ormet maintained an employment level of 900 employees for calendar year 2009, AEP-Ohio would bill Ormet, for the balance of 2009, at a rate which averages $38.00 per MWh for the periods when Ormet was in full production (i.e., six potlines), $35.00 per MWh for the periods when Ormet curtailed production to 4.6 potlines, and $34.00 per MWh for the periods when Ormet curtailed production to 4 potlines. Further, the Commission ordered Ormet to provide AEP-Ohio and Staff with monthly reports detailing its employment levels. The Commission agrees with Ormet that, to the extent that Ormet fails to maintain the required employment level in 2009, AEP-Ohio should charge Ormet $38.00 per MWh, which is the default rate in the power agreement, irrespective of Ormet's production levels. Moreover, the Commission will clarify that the termination provision contained in Section 2.03 of the proposed power agreement shall not apply for 2009 billing periods (Ormet Ex. 8, Attachment A at 9). Although the Commission does not believe that any further clarification is necessary, we will direct Staff to review Ormet's monthly billing records for 2009 and the submitted monthly employment reports to ensure that Ormet was billed in accordance with the unique arrangement. Rehearing on this assignment of error should be denied.

(9) In its second assignment of error, IEU-Ohio claims that the Commission's failure to include a provision to terminate the reasonable arrangement automatically if Ormet fails to maintain operations is unreasonable. IEU-Ohio notes that, because the unique arrangement is for a ten-year period, once AEP-Ohio and Ormet file an executed power agreement, it is possible that Ormet may cease operations and, at some point in the future, resume operations and attempt to claim it is entitled to receive electric service pursuant to the contract for the balance of the term. Therefore, IEU-Ohio contends that the termination provisions of the unique arrangement, as modified by the Commission in the Opinion and Order, do not sufficiently protect ratepayers from undue risks.

Rehearing on this assignment of error should be denied. The Commission finds that the provisions of the unique arrangement, as modified by the Commission, adequately protect ratepayers in the event that Ormet ceases operations. The power agreement introduced into the record of this proceeding provides that the power agreement shall terminate 24 months after any shutdown, unless Ormet begins ramping up production (Ormet Ex. 8, Attachment A at 10). Further, in the Opinion and Order, the Commission modified the unique arrangement such that Ormet is required to maintain an employment level of 650 full-time employees. In the event that Ormet does not maintain this employment level, the maximum rate discount, or floor, would be reduced by $10 million for every 50 employees below 650 full-time employees that were employed for the previous month. This modification ensures that the maximum rate discount funded by ratepayers is directly linked to continued employment at the Hannibal facility. Therefore, we find that the provisions of the power agreement, as modified, provide sufficient protection to ratepayers from any risk of curtailment of production or shutdown of the Hannibal facility by Ormet.

(10) In its third assignment of error, IEU-Oho contends that the Commission's failure to require Ormet to maintain deposit and advance payment provisions is unreasonable. Likewise, in its fifth assignment of error, AEP-Ohio claims that the Commission's failure to maintain the existing requirements for a deposit and advance payments from Ormet is unreasonable.

IEU-Ohio argues that ratepayer exposure to the risk of default by Ormet has increased due to the issuance of the WARN notice, discussed above, by Ormet. Similarly, AEP-Ohio argues that it may be unreasonable to release Ormet from the requirement that it provide a deposit and advance payments due to Ormet's recent issuance of the WARN notice.

Ormet claims that the absence of deposit and advance payment provisions actually benefits ratepayers. Ormet notes that the annual calculation of the rate that Ormet can afford to pay is currently based upon the assumption that the cash deposit currently held by AEP-Ohio will be returned to Ormet, thereby increasing its cash flow (Tr. I at 19-21, 22-23). However, Ormet contends that, if it is required to keep a deposit with AEP-Ohio and to continue paying in advance for power, then its cash flow will be reduced and the magnitude of the discount required by Ormet to continue in operation would increase.

The Commission finds that IEU-Ohio and AEP-Ohio have not raised any new arguments, based upon evidence in the record in this proceeding, in support of their assignments of error. IEU-Ohio's argument relies solely on the issuance by Ormet of the WARN notice, an event which the Commission has already determined was not part of the evidentiary record in this proceeding and will not be considered on rehearing. The evidence in the record in this case demonstrates that payment provisions contained in the power agreement, as proposed by Ormet, reflect the same terms available to customers receiving service under AEP-Ohio's standard service offer (Tr. I at 124, 227). Moreover, the record demonstrates that such terms are necessary for Ormet to continue operations under the unique arrangement (Ormet Ex. 6 at 7, Ormet Ex. 11A at 3, 4). Rehearing on this assignment of error is denied.

(11) In support of its first assignment of error, AEP-Ohio argues that there is a risk that, during the ten-year term of the unique arrangement, Ormet will be permitted to shop for competitive generation and then return to AEP-Ohio. AEP-Ohio argues that the Commission's authority over the unique arrangement is continuous and that, as circumstances change, the Commission can order a modification of the unique arrangement. AEP-Ohio specifically notes that the Commission modified the proposed unique arrangement to provide provisions related to employment levels and the requirement that any accumulated deferrals be reduced through payment of above-tariff rates no later than April 2012. Further, AEP-Ohio notes that Ormet has not just shopped for competitive generation in the past but has also sought and been granted permission to switch to another electric supplier's certified territory. *See Ormet Primary Aluminum Corporation et al., v. South Central Power Co. and Columbus Southern Power Co.*, Case No. 05-1057-EL-CSS. Therefore, based upon the Commission's continuing jurisdiction over the special arrangement and upon its experience with this customer, AEP-Ohio argues that the Commission should reverse its conclusion that there is no risk of Ormet shopping and then returning to POLR service.

In their joint memorandum contra AEP-Ohio's application for rehearing, OCC and OEG argue that the Commission's conclusion that there is no risk of Ormet shopping and returning to AEP-Ohio during the ten-year term of the unique arrangement was reasonable and consistent with the Commission's order in AEP-Ohio's ESP case. OCC and OEG claim that the record established that Ormet made the decision that it would not shop and that the Opinion and Order simply ratifies Ormet's decision to make AEP-Ohio its exclusive electric supplier for the next ten years. Further, OCC and OEG dispute AEP-Ohio's assertion that the Commission's ability to modify the arrangement at any time provides an opportunity for Ormet to shop for a different supplier.

The Commission finds that rehearing on this assignment of error should be granted in order to clarify that the relevant period when Ormet cannot shop is the duration of AEP-Ohio's current approved electric security plan (ESP). It is not necessary to reach the question of whether Ormet can shop beyond the duration of the current ESP because no determination has been made whether future standard services offers will include a comparable POLR charge. Under the terms of the unique arrangement as approved by the Commission, AEP-Ohio will be the exclusive supplier to Ormet for ten years, commencing January 1, 2009 (Tr. I at 37-38; Tr. IV at 484). Accordingly, in the Opinion and Order the Commission determined that AEP-Ohio would not be subject to POLR risk (i.e., the risk that Ormet may shop and subsequently seek to return to AEP-Ohio's standard service offer) and, therefore, that AEP-Ohio should not be compensated for bearing this risk. Although AEP-Ohio argues that there is a risk of Ormet shopping and then returning to AEP-Ohio's standard service offer because the unique arrangement remains under the Commission continuing jurisdiction, the Commission notes that any modification to the unique arrangement would take place only after notice and an opportunity for hearing for any party affected by such modification, including AEP-Ohio.

Moreover, the unique arrangement provides that the Commission may modify the unique arrangement only after January 1, 2016, unless the cumulative net discount under the unique arrangement exceeds 50 percent of the amount that Ormet would have been required to pay under AEP-Ohio's applicable tariff rates (Ormet Ex. 8, Attachment A at 9). Although the Commission modified the unique arrangement to provide an additional independent termination provision, this termination provision, by its terms, cannot be effective before April 1, 2012. However, AEP's electric security plan, and its authority to assess POLR charges to its standard service offer customers, expires on December 31, 2011. Therefore, under the terms of the unique arraignment as modified by the Commission, there is no risk that Ormet will shop and return to

AEP-Ohio's standard service offer during its current electric security plan.

With respect to AEP-Ohio's argument there is a risk of Ormet shopping based upon AEP-Ohio's experience with this customer, specifically the repeated transfer of Ormet's Hannibal facilities pursuant to Section 4933.83, Revised Code, the Commission notes that both the initial transfer and the return of Ormet's Hannibal facilities were approved with AEP-Ohio's consent and that AEP-Ohio was fully compensated for the return of Ormet to its service territory. *Ormet Primary Aluminum Corporation*, Case No. 05-1057-EL-CSS, Supplemental Opinion and Order (November 8, 2006) at 2, 4, 5-6, 8, 10. This experience, therefore, has no bearing upon whether there is any risk of Ormet shopping for a competitive retail electric supplier.

(12) In support of its second assignment of error, AEP-Ohio argues that the Commission lacks authority to preclude AEP-Ohio from recovering all revenue foregone as a result of the unique arrangement and that the failure to permit AEP-Ohio to recover all revenue foregone conflicts with AEP-Ohio's approved electric security plan. AEP-Ohio contends that the plain language of Section 4905.31, Revised Code, provides the Commission with no statutory authority to offset the recovery of the revenue foregone by any expense the Commission believes will not be incurred by the electric utility due to the unique arrangement. AEP-Ohio claims that any such reduction in the recovery of revenue foregone would not be "advantageous" to both parties to the contract, as required by Section 4905.31, Revised Code. AEP-Ohio claims that, in other contexts, the General Assembly provided explicit offset authority to the Commission and that the absence of such explicit authority is particularly telling in light of the presence of explicit offset authority in other provisions amended by Am. Sub. Bill 221. AEP-Ohio also contends that the Opinion and Order is contrary to the Commission's order approving AEP-Ohio's ESP. AEP alleges that the Commission determined in the ESP proceeding that all customers would pay the POLR charge for the entire time they are served under AEP-Ohio's standard service offer and that customers would avoid POLR charges during the period they are actually served by a CRES provider if they agreed to return at a market price. Further, AEP-Ohio contends that the Commission cannot distinguish its decision in

the ESP proceeding from this case because the same POLR risk that formed the basis for the POLR charge adopted in the ESP proceeding is present with Ormet.

OCC and OEG argue that Section 4905.31, Revised Code, does not preclude the Commission from requiring that the POLR charge for Ormet be credited to the economic development rider. OCC and OEG contend that Section 4905.31, Revised Code, allows for reasonable arrangements which are either "practicable" or "advantageous" to the "parties interested." Thus, according to OCC and OEG, the reasonable arrangement can be either practicable *or* advantageous; but it need not be both. Further, OCC and OEG argue that the plain meaning of the term "parties interested" goes beyond just the parties to the contract and includes other ratepayers, who have a distinct interest in how the agreement will affect the rates they must pay. Finally, OCC and OEG claim that the POLR provisions of AEP-Ohio's ESP do not apply to Ormet, which is not receiving service under AEP-Ohio's standard service offer.

The Commission finds that rehearing on this assignment of error should be denied. Contrary to AEP-Ohio's analysis, the plain language of Section 4905.31, Revised Code, does not require the Commission to approve the full recovery of all delta revenue resulting from the unique arrangement. Section 4905.31, Revised Code, states that a unique arrangement "*may include* a device to recover *costs incurred* in conjunction with any economic development and job retention program . . . including recovery of revenue foregone." The Commission finds that the use by the General Assembly of "may" in this context authorizes, but does not require, the recovery of delta revenues. If the General Assembly had intended to require the recovery of delta revenues, the General Assembly would have used "shall" or "must" rather than "may." Moreover, Section 4905.31, Revised Code, states that "[e]very . . . reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." This provision provides the Commission with broad statutory authority to change, alter, or modify proposed unique arrangements and includes no exception to that authority with respect to the recovery of delta revenues. Thus, the Commission finds that, according to the plain language of the statute, the recovery of delta revenues is a matter for the Commission's discretion.

In addition, Section 4905.31, Revised Code, provides for the recovery of "costs incurred." In this Entry on Rehearing, the Commission has determined that there is no risk that Ormet will shop for a competitive supplier during AEP-Ohio's current approved ESP. Therefore, if there is no risk of Ormet shopping and returning to standard offer service during its ESP, AEP-Ohio will incur no costs for providing POLR service which can be recovered under Section 4905.31, Revised Code. Accordingly, the Commission determined in the Opinion and Order that AEP-Ohio should credit any POLR charges paid by Ormet to its economic development rider in order to reduce the recovery of delta revenues from other ratepayers.

Finally, the Commission finds that AEP-Ohio's reliance upon our orders approving its ESP to be misplaced. Under the unique arrangement, Ormet will *not* be receiving service under AEP-Ohio's standard service offer; instead, Ormet will be receiving service under a unique arrangement. Although AEP-Ohio posits that this is a distinction without a difference, the Commission notes that service under a unique arrangement is authorized by a different statute, Section 4905.31, Revised Code, than service under a standard service offer, Section 4928.141, Revised Code. By its very nature, service under a unique arrangement provides for service under different prices, terms, and conditions than service under a standard service offer. In fact, in this proceeding, AEP-Ohio, enumerating several factors that it believes distinguishes Ormet from customers who are on the standard service offer, has argued that Ormet should not receive standard service offer terms for security deposits and advance payments. The Commission agrees that Ormet is different from customers on the standard service offer, and one of those differences is that Ormet has committed to AEP-Ohio to be its exclusive supplier (Tr. I at 37-38; Tr. IV at 484). Therefore, since there is no risk that Ormet will shop during AEP-Ohio's ESP, Ormet does not present the same POLR risk as customers on the standard service offer as claimed by AEP-Ohio. Moreover, the Commission's decision that AEP-Ohio's ESP was more favorable in the aggregate than the expected results that would otherwise apply under Section 4928.142, Revised Code, does not imply that the electric utility's ESP is the only basis for setting rates. The rates established by a reasonable arrangement under Section 4905.31, Revised Code, will frequently differ from the rates established under an ESP.

(13) In its third assignment of error, AEP-Ohio argues that the Opinion and Order commits a customer to refrain from acquiring its generation service from a competitive retail electric service provider in violation of the clearly stated public policy of this state, as codified in Section 4928.02, Revised Code. Specifically, AEP-Ohio claims that the statute sets forth the state's policy to ensure diversity of electric supplies and suppliers, to recognize the continuing emergence of competitive electric markets through the development and implementation of flexible regulatory treatment, and to ensure effective competition in the provision of retail electric service. AEP-Ohio claims that it is clear from these policy pronouncements that a contract by which a customer states a commitment not to pursue competitive options for 10 years stifles the development of a competitive retail electric market. Therefore, AEP-Ohio concludes that the Commission should not approve this provision.

OCC and OEG argue that allowing a customer to choose AEP-Ohio as an exclusive provider does not violate any public policy of the state but, rather, furthers the policy of the state in facilitating reasonable rates and customer choice. OCC and OEG claim that competition is not the end-all purpose of Am. Sub. Senate Bill 221; rather, Am. Sub. Senate Bill 221 is intended to ensure "reasonably priced electric retail service" by providing customers with tools and opportunities to achieve such reasonably priced rates. OCC and OEG also claim that customer choice means that a customer, who agrees to contract provisions, including a long-term exclusive supplier provision, should not be second-guessed by AEP-Ohio.

The Commission finds that rehearing on this assignment of error should be denied. AEP-Ohio does not cite to any evidence in the record of this proceeding to support its claim that the exclusive supplier provision of the proposed unique arrangement violates state policy as codified in Section 4928.02, Revised Code. There is no testimony in the record that the exclusive supplier provision will adversely impact the diversity of electric suppliers and supplies. There is no evidence that the proposed unique arrangement fails to recognize the continuing emergence of competitive markets or adversely impacts the development and implementation of flexible regulatory treatment. There is no testimony cited by AEP-Ohio regarding the impact of the exclusive supplier provision upon competition in the provision of retail electric service. The exclusive supplier provision may, or may not, adversely affect competition in this state, but there is no evidence in the record to support that determination.

In the absence of evidence to support its assignment of error, AEP-Ohio argues that, as a matter of law, the unique arrangement violates Section 4928.02, Revised Code. However, Section 4905.31, Revised Code, states, in relevant part:

> 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 . . . [emphasis added].

Therefore, nothing in Chapter 4928, Revised Code, including the policy provisions of Section 4928.02, Revised Code, should be construed as prohibiting a reasonable arrangement for the supply of retail electric service. Accordingly, the Commission cannot find, as a matter of law, that the proposed unique arrangement, which includes an exclusive supplier provision violates Section 4928.02, Revised Code.

Further, AEP-Ohio's concern is misplaced in this case. This is not an instance in which the electric utility is seeking to become a customer's exclusive electric supplier as a condition of a unique arrangement. Rather, it is Ormet who is committing to AEP-Ohio to be its exclusive electric supplier. In a competitive retail market, a consumer has the right to choose to enter into a long-term forward contract for generation service.

(14) With respect to its fourth assignment of error, AEP-Ohio argues that a reasonable arrangement proposed by an electric utility's mercantile customer cannot be approved by the Commission under Section 4905.31, Revised Code, unless the electric utility agrees to be bound by the proposed reasonable arrangement. Although AEP-Ohio acknowledges that the term "arrangement" in the statute is ambiguous, AEP-Ohio claims that a fair and reasonable interpretation of the term, is "mutual agreement or understanding." Further, AEP-Ohio contends that the context of the statute confirms that "arrangement" should be interpreted as "mutual agreement" because the statute envisions that a reasonable arrangement submitted to the Commission is an arrangement already in existence which becomes lawful and immediately enforceable upon approval by the Commission.

In addition, AEP-Ohio contends that the amendment to Section 4905.31, Revised Code, contained in Am. Sub. Senate Bill 221, which allows mercantile customers to submit a reasonable arrangement to the Commission for approval, merely clarified that an electric utility may offer a general arrangement to all of its customers or to customers in a specific class and allow the individual customers to decide whether to actually "enter into" the offered arrangement. Moreover, AEP-Ohio posits that the amendment recognizes that a mercantile customer has the option of establishing a reasonable arrangement not only with its electric utility but also with some other public utility electric light company. AEP-Ohio claims that this language suggests mutual agreement because it would be strange for the Commission to force a CRES provider or an electric utility serving another territory to enter into an arrangement. Moreover, AEP-Ohio argues that the mercantile customer may apply for a proposed reasonable arrangement because the mercantile customer has a key role to play in persuading the Commission that the reasonable arrangement furthers its intended purpose.

Ormet responds that the Commission has already rejected the arguments raised by AEP-Ohio. Ormet notes that, in adopting the rules governing reasonable arrangements, the Commission specifically rejected a claim that a reasonable arrangement required the electric utility's agreement, holding that:

> FirstEnergy argues that the Commission should make it clear that such applications require the electric utility's consent before they can be approved by the Commission. We believe FirstEnergy's position is not consistent with Section 4905.31, Revised Code, as modified by [Am. Sub. Senate Bill 221]. This section provides that a mercantile customer may apply to the Commission to establish a reasonable arrangement with an electric utility. *Although such arrangement requires Commission approval, there is no requirement that the electric utility must consent to the arrangement before the Commission approves it.*
>
> *In the Matter of the Adoption of Rules for Reasonable Arrangements,* Case No. 08-777-EL-ORD, Entry on Rehearing (February 11, 2009) at 21 [emphasis added].

OCC and OEG also contend that the Commission may order AEP-Ohio and Ormet to enter into a reasonable arrangement without mutual agreement by the electric utility. OEG and OCC claim that AEP-Ohio's assumption that "establishing" a reasonable arrangement and "entering into a reasonable arrangement" mean the same thing violates the rule of statutory interpretation that the entire statute is intended to be effective. *See* Section 1.47(B), Revised Code. Instead, OCC and OEG argue that "establishing" a reasonable arrangement and "entering into a reasonable arrangement" are listed separately under Section 4905.31, Revised Code, and constitute two separate acts. Thus, OCC and OEG posit that "establishing a reasonable arrangement" can be completed through a filed design or plan *without mutual agreement* while "entering into a reasonable arrangement" specifically means to reach an agreement and cannot be completed without mutual consent. Moreover, OCC and OEG argue that AEP-Ohio's interpretation of "establishing a reasonable arrangement" within the context of Section 4905.31, Revised Code, is faulty. OCC and OEG claim that, in assuming that the arrangement becomes immediately enforceable upon approval, AEP-Ohio neglects to recognize the last paragraph of the statute, which states that "[e]very such . . . reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." OCC and OEG contend that this provision means that the "establishment of a reasonable arrangement" is not final until the Commission finds that the arrangement is reasonable and in the public interest.

Finally, OCC and OEG allege that AEP-Ohio's interpretation of Section 4905.31, Revised Code, fails to recognize that a major reason that the General Assembly amended Section 4905.31, Revised Code, was to encourage economic development contracts. OCC and OEG claim that the General Assembly wanted to ensure that mercantile customers have the opportunity to propose reasonable arrangements to the Commission even if the electric utility was unwilling to "enter into an agreement" with the mercantile customer. OCC and OEG argue that, irrespective of whether an arrangement is filed by the utility or a mercantile customer, an arrangement should be approved only if it is "reasonable," which OCC and OEG define as an arrangement which does not impose economic burdens on the customers paying any subsidies.

IEU-Ohio argues that AEP-Ohio seeks an absolute veto over authority delegated to the Commission by Section 4905.31, Revised Code, to enable a reasonable arrangement that is filed by a mercantile customer or group of such customers. IEU-Ohio claims that Am. Sub. Senate Bill 221 did not modify the requirement that the Commission review and approve any reasonable arrangement before it becomes lawful and effective; however, Am. Sub. Senate Bill 221 did explicitly expand the persons eligible to submit a reasonable arrangement for the Commission's consideration and approval. Moreover, IEU-Ohio notes that, despite expanding the scope of persons eligible to submit a proposed reasonable arrangement to the Commission, the General Assembly did not modify the requirement that, upon Commission approval of a reasonable arrangement, the electric utility is required to conform its schedule of rates, tolls, and charges to the arrangement. IEU-Ohio also notes that there is no new language requiring the agreement of the electric utility with the Commission-approved reasonable arrangement even though, in Am. Sub. Senate Bill 221, the General Assembly did provide such a provision where the Commission modifies a proposed ESP.

According to IEU-Ohio, the clear and plain language in Section 4905.31, Revised Code, states that: (1) an electric utility, a mercantile customer, or group of mercantile customers may submit a proposed reasonable arrangement to the Commission for the Commission's consideration and approval; (2) the proposed reasonable arrangement may become lawful and effective only upon Commission approval; and (3) the electric utility must then conform its rates to the Commission-approved reasonable arrangement.

The Commission notes that, although AEP-Ohio argues that a reasonable arrangement proposed by an electric utility's mercantile customer cannot be approved by the Commission unless the electric utility agrees to be bound by the proposed reasonable arrangement, the record in this case demonstrates that AEP-Ohio did not engage in negotiations with Ormet in order to reach such an agreement (Tr. I at 13, 15, 17). Thus, AEP-Ohio appears to believe that it can effectively veto reasonable arrangements simply by declining to negotiate with mercantile customers. However, AEP-Ohio ignores the language of Section 4905.31, Revised Code, as amended by Am. Sub. Senate Bill 221, which provides that a mercantile customer may submit an application for a reasonable arrangement to the Commission. Prior to the enactment of Am. Sub. Senate Bill 221, a reasonable arrangement required the electric utility's agreement because only the electric utility was authorized to file an application for a reasonable arrangement. In Am. Sub. Senate Bill 221, the General Assembly expressly authorized mercantile customers to file applications with the Commission for reasonable arrangements. If the General Assembly had intended on retaining the requirement that an electric utility agree to a proposed reasonable arrangement, there would have been no need for the General Assembly to amend Section 4905.31, Revised Code, to authorize the filing of an application by a mercantile customer.

Moreover, AEP-Ohio does not address the plain language of Section 4905.31, Revised Code, which provides that the proposed reasonable arrangement is subject to "change, alteration, or modification" by the Commission but does not provide for the opportunity for the electric utility to reject such modifications. If the General Assembly had intended to provide the electric utility with the opportunity to reject modifications by the Commission, the General Assembly would have expressly provided that opportunity as it did in a similar situation in Section 4928.143(C)(2)(a), Revised Code. Instead, the General Assembly enacted a statutory framework under which an electric utility or mercantile customer (or a group of mercantile customers) may file an application with the Commission for a proposed reasonable arrangement. The Commission may approve or change, alter, or modify the proposed reasonable arrangement. After the Commission has approved, or modified and approved, a reasonable arrangement, the electric utility must conform its rates to the reasonable arrangement. There is no provision in this statutory framework for an electric utility to reject the modifications ordered by the Commission. Accordingly, the Commission finds that rehearing on this assignment of error should be denied.

(15) In support of their two assignments of error, OCC and OEG contend that the Opinion and Order failed to address the mechanics of how POLR credits would be applied to AEP-Ohio's economic development rider. Specifically, OCC and OEG request that the Commission clarify the Opinion and Order to preclude AEP-Ohio and Ormet from negotiating a discount to the POLR charge as part of Ormet's discounted rate.

AEP-Ohio argues that OCC and OEG erroneously assume that the percentage discount to which Ormet might be entitled applies to all rate components except the POLR rider. AEP-Ohio, on the other hand, contends that all components of the tariff, including all riders, should be discounted by the percentage amount of the discount.

The Commission finds that rehearing should be granted in order to clarify the manner in which POLR charges paid by Ormet should be credited to the economic development rider. AEP-Ohio argues that the amount of the credit should be discounted by the same percentage of the maximum rate discount provided to Ormet. This interpretation is not consistent with the Opinion and Order in this case. The rate discount provided to Ormet has no impact whatsoever on the amount of the credit to be applied to the economic development rider. Instead, AEP-Ohio should credit the full amount of the POLR component of the tariff rate which would otherwise apply, on a per MWh basis.

It is, therefore,

ORDERED, That the application for rehearing filed by IEU-Ohio be denied and that the applications for rehearing filed by OCC and OEG and AEP-Ohio be granted, in part, and denied, in part. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP:ct

Entered in the Journal

SEP 15 2009

Reneé J. Jenkins
Secretary

CERTIFICATE OF SERVICE

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

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