

**IN THE
SUPREME COURT OF OHIO**

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| Industrial Energy Users-Ohio |) | Case No. 10-1533 |
| |) | |
| Appellant, |) | |
| |) | Appeal from the Public Utilities |
| v. |) | Commission of Ohio, <i>In the Matter of the</i> |
| |) | <i>Application of Columbus Southern Power</i> |
| The Public Utilities Commission of |) | <i>for Approval of its Program Portfolio Plan</i> |
| Ohio |) | <i>and Request for Expedited Consideration,</i> |
| |) | Case No. 09-1089-EL-POR |
| Appellee. |) | |

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

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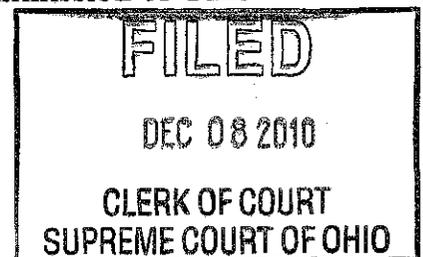
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MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

As one of the many state policies the Public Utilities Commission of Ohio (“Commission”) is responsible for ensuring, the Commission is charged with facilitating the state’s effectiveness in the global economy. Ohio Rev. Code Ann. § 4928.02 (N) (West 2010), App. at 2. In tandem with its responsibilities, the Commission enjoys broad authority in the conduct of its business. *Weiss v. Pub. Util. Comm’n*, 90 Ohio St. 3d 15, 734 N.E.2d 775 (2000) citing *Duff v. Pub. Util. Comm’n*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 275 (1978). In this appeal, Industrial Energy Users-Ohio (“IEU”) challenges Commission policy pronouncements and asks this Court to reweigh evidence and reject factual findings made by the Commission. These are improper requests in the context of an appeal of a Commission order. It is the Commission’s duty to determine its own

policy and it has broad authority to do so. *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004). Accordingly, IEU's policy arguments should be rejected.

IEU challenges the Commission's (1) approval of a lost distribution revenue recovery mechanism; (2) consideration of rate impacts; (3) approval of a peak demand reduction proposal; and (4) elimination of a benchmark comparison method for mercantile agreements. Each of IEU's challenges are either expressly permitted by statute or are policy decisions supported by properly examined record evidence. IEU would have this Court substitute its judgment for that of the Commission. This is improper. The Commission acted reasonably in accord with the evidence and thoroughly explained the manner by which it came to its decisions. This is what the law requires. The Commission should be affirmed.

STATEMENT OF THE FACTS AND CASE

Amended Substitute Senate Bill 221 ("SB 221") was signed into law on May 1, 2008. SB 221 revised the law in Ohio relating to the regulation of electric distribution utilities' ("EDU") Standard Service Offer ("SSO"). The SSO price for Columbus Southern Power (CSP) is currently set forth in its electric security plan ("ESP"), which was approved by the Commission. *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 Nos. 08-917-EL-SSO, *et al.* (Opinion and Order at 22) (March 18, 2009)

(hereinafter "*CSP ESP Proceeding*"), Appellant's App. at 182. SB 221 also created mandatory energy efficiency, peak demand reduction, and alternative energy portfolio requirements. R.C. 4928.66 requires EDUs to implement energy efficiency and peak demand reduction ("EE/PDR") programs to meet certain mandates established in SB 221. Under SB 221's energy efficiency requirements, EDUs must achieve annual reductions in kilowatt hour ("kWh") sales that ultimately culminate in cumulative energy efficiency achievements in excess of 22 percent by 2025. Ohio Rev. Code Ann. § 4928.66 (West 2010), Appendix at 1. SB 221, additionally, requires EDUs to implement programs designed to achieve peak demand reductions of 1 percent in 2009 and additional peak demand reductions of .75 percent each year thereafter through 2018.

In implementing SB 221, the Commission promulgated rules requiring each EDU to file EE/PDR portfolio plans for Commission approval. Ohio Admin. Code § 4901:1-39-04 (West 2010), Appendix at 4. The portfolio plans describe each EDU's programs designed to meet the EE/PDR benchmarks over a three-year time frame. CSP's approved Portfolio Plan for 2010-2012 is the subject of this appeal. On November 12, 2009, CSP filed its Application for approval of a Portfolio Plan. *In the Matter of the Application of Columbus Southern Power Company for Approval of its Program Portfolio Plan and Request for Expedited Consideration*, Case Nos. 09-1089-EL-POR, *et al.* (Application and Request for Expedited Consideration, November 12, 2009) (hereinafter "*Portfolio Plan Case*"), Appellant's Supp. at 1. With its Application, CSP submitted a Stipulation

and Recommendation (“Stipulation”) entered into by numerous parties¹ in support of CSP’s Portfolio Plan. CSP’s Portfolio Plan included estimated expenditures in excess of \$161.9 million over a three-year period. CSP proposed to recover the expenditures through its EE/PDR Rider, which was previously created in its ESP proceeding.

An evidentiary hearing was conducted on February 25, 2010. Initial briefs were filed by CSP, IEU, and, jointly, the Office of the Ohio Consumers’ Counsel, the Ohio Environmental Council, the Sierra Club and the Natural Resources Defense Council. CSP and IEU filed Reply Briefs. After consulting the record and arguments of the Parties in their merit brief, the Commission issued its Opinion and Order approving the Stipulation, with modifications. On May 21, 2010, CSP filed tariffs to comply with the Commission’s Order.

On May 26, 2010, the Commission approved CSP’s tariffs, making the EE/PDR Riders effective commencing with CSP’s June 2010 billing cycle. On June 14, 2010, IEU filed its Application for Rehearing of the Commission’s May 13, 2010 Opinion and Order. On July 14, 2010, the Commission issued an Entry on Rehearing denying IEU’s Application for Rehearing. This appeal ensued.

¹ The Signatory Parties in this case were the Ohio Consumers' Counsel, the Ohio Manufacturers' Association, the Ohio Environmental Council, the Ohio Partners for Affordable Energy, the Sierra Club, the Natural Resources Defense Council, the Columbus Southern Power Company, the Ohio Power Company, the Ohio Energy Group, the Ohio Poverty Law Center, and the Ohio Hospital Association.

ARGUMENT

PROPOSITION OF LAW I:

The Commission has the discretion to authorize lost distribution revenue and properly exercised that discretion below. Ohio Rev. Code Ann. § 4928.66(D) (West 2010).

This Court has often afforded broad deference to the Commission's expertise in interpretation and application of statutes that deal with utility rate matters. *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St. 3d 451, 812 N.E.2d 955 (2004). R.C. 4928.66 provides statutory authority to support the Commission's approval of the Stipulation's distribution lost revenue mechanism. Furthermore, O.A.C. 4901:1-39-07(A) gives the Commission's discretion as to what is an appropriate lost distribution recovery mechanism. Additionally, the Commission recognized the diverse interests represented by the Signatory Parties, and that the Signatory Parties negotiated and bargained for the provisions of the Stipulation, including the lost distribution revenue mechanism, and found it to be reasonable.

IEU argues that the Stipulation's lost distribution revenue provision, adopted by the Commission, is unlawful and unreasonable. Appellant's Brief at 6. This argument is incorrect. First, R.C. 4928.66 provides statutory authority to support the Stipulation's distribution lost revenue mechanism. R.C. 4928.66(D) states that

[t]he 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.

Ohio Rev. Code Ann. § 4928.66(D) (West 2010), Appendix at 4, (Emphasis added). Revenue decoupling is a rate-making method that allows an EDU to adjust for under-recovery of certain costs. In other words, revenue decoupling is a method of recovering lost distribution revenue and, thus, is lawful and permitted under R.C. 4928.66.

Second, duly promulgated O.A.C. 4901:1-39-07(A) expresses the Commission's discretion to permit distribution lost revenue mechanisms in the context of adopting a program portfolio plan. O.A.C. 4901:1-39-07(A) states that:

With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, *appropriate lost distribution revenues*, and shared savings. Any such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter.

Ohio Admin. Code § 4901:1-39-07(A) (West 2010), Appendix at 6, (Emphasis added).

Under the rule, the determination of an appropriate mechanism for recovery of costs related to, among other things, lost distribution revenues is a matter of Commission judgment.

Third, the Commission recognized the diverse interests represented by the Signatory Parties and that those parties negotiated and bargained for the provisions of the Stipulation, including the lost distribution revenue mechanism, and found the Stipulation to be reasonable. This consideration is proper under the Commission's three-part test to evaluate the Stipulation below. *See, Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 559 (1994). Under the test, a challenger must demonstrate that the Stipulation "as a package" does not benefit ratepayers and, taken as a whole, does not benefit customers and the public interest. IEU has failed to demonstrate that the EE/PDR rider is harmful to customers and the public interest.

In support of its argument, IEU relies largely on its claim that the Commission agreed with IEU's arguments but, nonetheless, adopted the Stipulation's lost distribution proposal. IEU further characterized the Commission's order as authorizing lost distribution revenue despite its holding that there is no evidence to support such cost recovery. This portrayal of the Commission's decision is inaccurate and IEU's claim is misguided. The Commission did express concern that CSP's current cost of providing distribution service is not known, given the intervening time since CSP's last distribution rate case. *Portfolio Plan Case* (Opinion and Order at 26) (May 13, 2010), Appellant's App. at 91. However, the Commission simultaneously made clear that it would consider adopting a similar mechanism for CSP on a longer-term basis if the Commission's concern about quantification of fixed costs is answered. *Id.* Thus, the Commission's concerns about the Stipulation's lost distribution revenue mechanism were qualified and, when considered in context, do not support IEU's assertion that the mechanism is unlawful and unreasonable.

This is especially true given that the Commission only authorized the mechanism on an interim basis while another alternative is developed and, later, considered. Thus, the assertion that Commission agreed with IEU is inaccurate.

IEU further argues that the Commission's approval of lost distribution revenue was unreasonable against the manifest weight of the evidence. Appellant's Brief at 9. IEU's argument ignores three Commission findings supporting the proposed lost distribution mechanism. First, with regard to the recovery of lost distribution, the Commission considered and accepted CSP's analysis of the applicability of R.C. 4928.66. *Portfolio Plan Case* (Opinion and Order at 26) (May 13, 2010), Appellant's App. at 91. The Commission found that a revenue decoupling mechanism provides for the recovery of revenue that may otherwise 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. *Id.*

Second, the Commission considered and accepted CSP's analysis of the applicability of O.A.C. 4901:1-39-07(A). *Id.* In its analysis of the rule, the Commission agreed that the need for a revenue decoupling mechanism arises from traditional rate designs that recover fixed distribution costs through volumetric charges. *Id.* The Commission also agreed that these designs leave utilities at risk of not collecting enough revenue to cover their fixed distribution costs when sales fall, and may provide an opportunity for utilities to collect revenue in excess of expenses if sales increase. *Id.* The Commission found that it is important to break or weaken the link between sales volume and the recovery of fixed distribution costs. *Id.*

Third, the Commission recognized the diverse interests represented by the Signatory Parties and that those parties negotiated and bargained for the provisions of the Stipulation, including the lost distribution revenue mechanism and found it to be reasonable. *Id.* The third finding is particularly appropriate under the Commission's three-part test to evaluate the Stipulation below. Under the test, a challenger must demonstrate that the Stipulation "as a package" does not benefit ratepayers and, taken as a whole, does not benefit customers and the public interest.

As the appellant, IEU bears the difficult burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record, which it has failed to do. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 86, 765 N.E.2d 862, 867 (2002). R.C. 4903.13 provides that a Commission order "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." Ohio Rev. Code Ann. § 4903.13 (West 2010), Appendix at 7. Under this statutory standard, "this court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000), quoting *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988). In matters involving the Commission's special expertise and the exercise of discretion, the Court

will generally defer to the judgment of the Commission. *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262, 264 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990). Again, with the three Commission findings cited above, there is ample record evidence that supports the Commission's decision to adopt, on an interim basis the proposed lost distribution revenue mechanism and reject IEU's position in favor of CSP's. As a result, IEU has failed to meet its burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record.

In sum, R.C. 4928.66 provides statutory authority to support the Stipulation's distribution lost revenue mechanism; O.A.C. 4901:1-39-07(A) gives the Commission discretion as to what is an appropriate mechanism; the Commission approved the mechanism as part of negotiated Stipulation; and record evidence supports the approval. As such, the Commission lawfully authorized the lost distribution revenue mechanism and properly made its decision based upon evidence in the record. IEU's argument should accordingly be rejected.

PROPOSITION OF LAW II:

The Court should not reverse or modify a decision of the Commission as to a question of fact where, as here, there is sufficient probative evidence to show that the Commission's decision is not against the manifest weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988).

IEU asks this Court to reweigh evidence and reject factual findings made by the Commission. This is not the function of the Court in its review of Commission orders. The proper standard is found in R.C. 4903.13 which provides that a Commission order "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." Ohio Rev. Code Ann. § 4903.13 (West 2010), Appendix at 7. Under this statutory standard, "this court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO's determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000), quoting *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988). The appellant bears the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 84, 765 N.E.2d 862, 866 (2002). In matters involving the Commission's special expertise and the exercise of discretion, the Court will generally

defer to the judgment of the Commission. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262, 264 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990); *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 46 Ohio St. 2d 105, 107-108, 346 N.E.2d 778, 781 (1976). Where the relevant statute does not prescribe a particular formula, the Commission is vested with broad discretion in performing its duties. *Columbus v. Pub. Util. Comm'n*, 10 Ohio St. 3d 23, 24, 460 N.E.2d 1117, 1119 (1984).

A. The Commission properly considered the rate impacts on CSP customers in its order approving the Stipulation.

The Commission properly considered the overall rate impact upon CSP customers and appropriately rejected IEU's arguments in its order. IEU asserts that "the rate increases resulting from approval of the Stipulation, when considered in the context of the bevy of other rate increases hitting CSP customers, were unreasonable and unlawful." Appellant's Brief at 10. IEU further claims that "there is no indication in the Opinion and Order that the Commission ever considered price impact in its decision." *Id.* IEU's position is flawed. The Commission did, in fact, consider the rate impacts associated with the Stipulation and approved them as being lawful and reasonable. The Commission evaluated the benefits of the Stipulation to ratepayers on a variety of factors, including rate impacts. This same rate-impact argument was also used, and rejected, in IEU's hearing testimony and briefs, in an attempt to convince the Commission to reject the EE/PDR rider. IEU's rate-impact argument is misguided and should be rejected by this Court.

In fact, the second prong of the three-part reasonableness test for a Stipulation mandates a rate-impact analysis. In considering the reasonableness of a stipulation, the Commission uses the following criteria:

- (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (b) Does the settlement, as a package, benefit ratepayers and the public interest?
- (c) Does the settlement package violate any important regulatory principle or practice?

This Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities in *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm'n*, 68 Ohio St. 3d 559 (1994). The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. In the Commission's EE/PDR Order, as part of the three-part test, the Commission considered and rejected IEU's rate-impact argument as part of the decision to adopt the Stipulation in this case:

The Commission notes that we have recently rejected similar arguments by IEU-Ohio wherein IEU-Ohio claims that, because approval of the Stipulation will result in a rate increase for customers, a Commission order approving the Stipulation is unreasonable or unlawful, does not benefit ratepayers, and/or is not in the public interest. We find this argument to be without merit. The Commission evaluates the benefits of the Stipulation to ratepayers on a variety of factors, not just rates. Particularly in this case, we will consider whether AEP-Ohio's Action Plan sufficiently encourages energy efficiency, such that it is likely to achieve a reduction in energy consumption and an associated public benefit.

Portfolio Plan Case (Opinion and Order at 22-23) (May 13, 2010), Appellant's App. at 87-88.

This finding is consistent with the premise that the rate impacts are necessary to approve CSP's Plan. The rate impacts were further reviewed through the CSP Collaborative process, which included review and input by IEU, which has served as a Collaborative member from its inception in October 2008. The portfolio plan program was developed by way of a collaborative process which commenced in October 2008 (the "Collaborative"). Members of the Collaborative, including IEU, were invited to provide input and openly negotiate the Stipulation with other stakeholders. The Collaborative included interested stakeholders that represented residential, commercial and industrial consumer advocates, state regulatory agencies, environmentalists, the healthcare industry, education, and low-income consumer advocates. Collaborative members were afforded an opportunity to advocate their positions in negotiations. The Commission's order was not on a lark; rather it was part of well-reasoned package developed by the Collaborative.

Consistent with the above-quoted Commission finding made in response to IEU's arguments about rate impacts, customers can participate in energy efficiency and peak demand reduction programs under the Plan and offset the rate increases necessary to fund the programs. For mercantile customers, each can commit their energy savings and either receive an energy efficiency incentive payment or an exemption from the EE/PDR Rider. The EE/PDR Plan consists of cost-effective programs advanced in a manner consistent with the Commission's rules. In addition, even though there is a present cost for energy efficiency, the positive Total Resource Cost (TRC) test results for the proposed Plan

show that it is a low-cost option. A commitment to energy efficiency and demand reduction through modest bill increases helps to defer the need for new generation capacity in the future. These are the very underpinnings of the General Assembly's decision to impose energy efficiency and peak demand reduction mandates as part of S.B. 221.

IEU's opposition to CSP's recovery of compliance costs has served only to increase the future rate impacts for not only industrial and commercial customers, but for all customers. Without IEU's opposition to the plan during the Commission proceedings, the EE/PDR Rider would have become effective on January 1, 2010 as unanimously requested by the Signatory Parties. *Portfolio Plan Case* (Stipulation at 10) (November 12, 2009), Appellant's Supp. at 109. The EE/PDR Rider, effective January 1, 2010, would have spread recovery of the costs over an additional time period reducing customer rate impact. Because the EE/PDR did not become effective until the first billing cycle of June 2010, the recovery period was significantly shortened, thereby increasing the rate impact on CSP customers. The Commission appropriately considered the overall rate impact and rejected IEU's arguments in its decision.

IEU also summarizes the average rate impacts and typical bill comparisons of CSP customers as a result of the below EE/PDR case combined with the previous ESP and rate stabilization plans. Appellant's Brief at 11-12. However, many of the rate increases cited by IEU were already approved in CSP's ESP cases. *See CSP ESP Proceeding* (Opinion and Order at 22) (March 18, 2009) Appellant's App. at 182. Contrary to IEU's implication, the collection of costs incurred in connection with statutory compliance programs, like the EE/PDR program, should not be altered or offset by considerations of

rate increases previously approved in separate cases. This is especially true given that the EE/PDR Rider, approved by the Commission for this precise purpose, was created as part of the same decision that adopted the Companies' ESP rate increases. Moreover, the Commission has already explicitly determined that the EE/PDR Rider increases are outside of the rate caps established in the ESP cases and, as such, are not limited by the existence of those separate rate increases. *See CSP ESP Case Proceeding* (Entry on Rehearing at 31) (July 23, 2009), Appellant's App. at 136. It would directly undermine that determination for the Commission to find in this case that the EE/PDR Rider should be reduced due to the prior rate increases authorized under the ESP rate caps. The time and place for disagreeing and challenging those rate increases was in the ESP Cases, which IEU did challenge and continues to pursue before this Court in a separate appeal.² IEU should not be permitted a second bite of the apple in this case.

IEU also argues that the Commission failed to consider the overall rate impact of the Stipulation under R.C. 4928.02(A), which directs the Commission to consider Ohio's goal to maintain reasonably priced retail electric service. Appellant's Brief at 12-13. IEU's legal claims are unfounded. R.C. 4928.02(A) states that "[i]t is the policy of this state to do the following throughout this state: (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service..." Ohio Rev. Code Ann. § 4928.02(A) (West 2010), Appendix at 1. Again, as stated above, the Commission did consider the rate impacts associated with the Stipula-

² The Commission's order modifying and approving an electric security plan for the AEP companies is under appeal in Supreme Court Case Nos. 2009-2298, 2009-2022, and 2009-1620.

tion and approved them as being lawful and reasonable. Beyond that, in following R.C. 4928.02, reasonable prices are only one of many policy factors the Commission must weigh in making its decision. In addition to considering prices under section (A) of R.C. 4928.02, the Commission must also:

- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers' protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;
- (L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;
- (M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;
- (N) Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Ohio Rev. Code Ann. § 4928.02 (West 2010), Appendix at 1. The Commission must strike a balance and with this balance in mind, the Commission evaluated the benefits of

the Stipulation to ratepayers on a variety of factors, not strictly prices. This Court has rejected similar policy arguments in the past in *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 874 N.E.2d 764 (2007) finding that neither R.C. 4929.02(A)(4) nor R.C. 4905.70 required approval of or funding for demand-side management and energy conservation programs. The Court there noted that the policy pronouncements contained in R.C. 4929.02 are guidelines that cannot be considered in isolation. Here, IEU argues that the guidelines should dictate the outcome. This is wrong. The Commission approved the Stipulation as part of a balanced overall rate package. The Court should reject IEU's overly narrow rate-impact argument.

B. The Commission's decision to adopt CSP's peak demand reduction proposal is reasonable and lawful.

With respect to the Commission-ordered peak demand reduction proposal, IEU again asks this Court to reweigh evidence and reject factual findings made by the Commission. This is an improper request on appeal. As mentioned above, the proper standard is found in R.C. 4903.13 which provides that a Commission order "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." Ohio Rev. Code Ann. § 4903.13 (West 2010), Appendix at 7.

In the case below, the Commission examined the record evidence and determined, as a factual matter, that the programs approved were designed to meet the statutory peak demand reduction mandates and that the associated costs were reasonable, explicitly rejecting IEU's evidence in the process. IEU would have this Court substitute its judg-

ment for that of the Commission with regard to the Commission's factual determinations. This is not the standard. The following arguments demonstrate that the Commission acted in accord with the evidence and explained its reasoning. This is what the law requires and the Commission should be affirmed.

1. The programs approved are designed to achieve the peak demand reduction requirements.

IEU argues that the plan adopted below is not designed to meet the peak demand reduction requirements. This argument is wrong. The proposal approved below was developed after a huge amount of effort by the utility and a variety of stakeholders. The utility employed a consultant to examine the market potential for compliance measures. *Portfolio Plan Case* (Opinion and Order at 4) (May 13, 2010), Appellant's App. at 69. It used a collaborative process, working with a great variety of stakeholders to develop its proposal. *Id.* All the stakeholders, other than IEU, have stipulated that the programs are designed to meet the statutory requirements. *Portfolio Plan Case* (Opinion and Order at 17) (May 13, 2010), Appellant's App. at 82. These parties include other industrial customers, specifically the Ohio Manufacturers' Association and the Ohio Energy Group. *Portfolio Plan Case* (Stipulation at 19) (November 12, 2009), Appellant's Supp. at 118. The Stipulation shows the calculation as to how the peak demand reduction will be achieved. *Portfolio Plan Case* (Stipulation, Attachment B) (November 12, 2009), Appellant's Supp. at 125. The entire point of the exercise was to achieve compliance with the requirements; in fact, the utility faces financial penalties if the standards are not met. Ohio Rev. Code Ann. § 4928.66(C) (West 2010), Appendix at 4. IEU's real objec-

tion is that the parties did not adopt all of its demands in the Stipulation. The record reveals that the plan approved below is intended to reach the statutory mandates. The Commission so found. It should be affirmed.

2. There are no lower-cost ways to achieve compliance.

IEU presented evidence which, it believed, showed a less expensive way to achieve compliance with the statutory mandates. IEU's claim is based on the testimony of its witness. The Commission fully weighed the testimony of that witness and discussed its serious shortcomings. *Portfolio Plan Case* (Opinion and Order at 23-24) (March 18, 2009) Appellant's App. at 183-184. The Commission concluded:

The Commission finds that IEU-Ohio's analysis of AEP-Ohio's Action Plan and its comparison to the energy efficiency programs of other electric utilities was inadequate and not sufficiently detailed to convince the Commission that the costs of the AEP-Ohio's programs are excessive for the benefits. Our review of the record leads us to believe that the energy efficiency programs in AEP-Ohio's Plan are on par with those of the electric utilities referenced in this proceeding, and are consistent with the Commission's rules in Chapter 4901:1-39, O.A.C. We recognize that AEP-Ohio has proposed, in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA, which are currently pending before the Commission, to offer its own demand response programs.

Portfolio Plan Case (Opinion and Order at 24) (March 18, 2009), Appellant's App. at 184. Simply put, IEU's presentation was not convincing as a matter of fact. The Commission is the finder of fact. Its determination that the witness' lack of expertise, lack of personal knowledge of the attachments to the testimony, and lack of familiarity with

demand side management made his conclusions unconvincing should be accepted by this Court.

The argument presented by IEU is implausible on its face. That a customer might agree to curtail its usage when that curtailment is called for by PJM, a regional transmission organization, (that is to say, the customer participates in a PJM demand reduction program) does not have any necessary relationship to meeting the peak demand reduction requirements imposed on CSP. PJM and CSP do not necessarily have the same peak demand points. The statute imposes unique requirements on Ohio utilities. Coordination is needed to assure that participation in the PJM demand reduction program is meaningful in the context of the statutory peak demand reduction obligations imposed on CSP. The plan approved includes funding to the company for individual agreements with customers under which a customer commits to reduce its use when it is meaningful for CSP's peak demand reduction needs. *Portfolio Plan Case* (Opinion and Order at 16) (March 18, 2009), Appellant's App. at 176. Further, CSP has submitted a proposal to the Commission that would emulate the PJM programs in a way directed toward meeting the state law requirements. *In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Rider*, Case No. 10-343-EL-ATA (Application) (March 19, 2010), Second Supp. at 1. This proposal, upon which the Commission has not yet spoken, includes two different mechanisms under which customer participation in the PJM demand reduction program could be credited against the state law mandate.

3. Summary

The record shows that the plan approved below is intended to meet the statutory requirements. To the extent there is utility in meeting the mandated peak demand reduction requirements under Ohio law by means of the participation of a number of CSP's customers who participate in the PJM demand reduction program, that utility is being exploited as a matter of fact. IEU's claims to the contrary are not credible and the Commission so found. The Commission should be affirmed.

C. The Commission's decision prohibiting CSP and mercantile customers from relying on the benchmark comparison method for agreements reached after December 10, 2009 is reasonable and lawful.

SB 221 imposes significant energy efficiency and peak demand reduction requirements on electric distribution utilities, specifically:

(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 commit-

tees 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.

Ohio Rev. Code Ann. § 4928.66(A)(1) (West 2010), Appendix at 2. One way to meet these goals is to adopt programs under which the peak demand reduction or energy efficiency accomplished by mercantile customers can be recognized for purposes of meeting the mandates imposed on the electric distribution utility. This is authorized by statute, specifically:

(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.

Ohio Rev. Code Ann. § 4928.66(A)(2)(c) (West 2010), Appendix at 3. The Commission has done exactly this. It has approved programs under which mercantile customers can make their efficiency and demand reduction efforts available to the electric distribution utility. *Portfolio Plan Case* (Opinion and Order at 27) (May 13, 2010), App. at 92. The Stipulation proposed two such programs. They are:

To support the Companies' Self Direct Program as designed in the Plan to commit previously installed EE/PDR resources. "Option 1" provides mercantile customers the opportunity to receive a reduced incentive payment that is equivalent to an advance payment of a portion of the customer's EE/PDR Rider cost obligation due to the requirement that the customer continues to pay the EE/PDR Rider cost for the length of time that the customer would otherwise be exempt from the EE/PDR Rider. "Option 1" is for customers who have completed some EE/PDR projects but want to use the advanced payment to help support new EE/PDR investments. Option 1 also requires participating customers to continue paying the rider in support of further EE/PDR program efforts by the Companies. "Option 2" provides mercantile customers the opportunity to be exempt from the EE/PDR Rider if their committed energy savings equal the Companies' mandated benchmark requirement percentages of energy savings based on the customer's 2006-2008 average annual energy usage baseline. Residential customers will not contribute to the cost of the Self-Direct Program.

Portfolio Plan Case (Opinion and Order at 16) (May 13, 2010), Appellant's App. at 81.

The Commission simply approved Option 1. Option 2 (benchmark comparison method) required a more complicated treatment. Although at the time the Stipulation was submitted the benchmark comparison method was permitted, subsequently the rule was amended to eliminate that option. Thus, to comply with the rules as they existed at the

time the order below was issued, the Commission indicated that applications before the rule change would be permitted to use the benchmark comparison method. Those filed after the rule change would not. This is perfectly clear. The Commission stated:

In previous mercantile rider exemption cases considered by the Commission, we found that it would be both equitable and reasonable to accept a mercantile customer's application for rider exemption using the benchmark comparison method to determine whether a rider exemption is appropriate when, in reliance upon the prior version of Rule 4901:1-19-08, O. A. C, the customer and the electric utility reached agreement on the application between June 17, 2009 and December 10, 2009. However, mercantile customer rider exemption requests arising from agreements subsequent to the December 10, 2009 effective date of the rules shall not rely upon the benchmark comparison method. Thus, the segment of the Stipulation described herein in Section IV.I.3 of this Order, is clarified to reflect that a calculation that utilizes Option 2, the benchmark comparison method, is only available for applications for mercantile customer rider exemption for agreements entered into between June 17, 2009 and December 10, 2009. Further, we direct Staff to track volumes, and report quarterly to the Commission, percentages of nonresidential sales for customers that have been granted exemptions from the EE/PDR Riders.

Portfolio Plan Case (Opinion and Order at 27-28) (May 13, 2010), Appellant's App. at 27-28 (footnotes omitted). Although IEU argues that the Commission had no record support for its action, IEU is simply wrong. The Commission's reasoning is direct and stated in the order. The benchmark comparison method was no longer permitted under the rule and the Commission therefore rejected its use for applications after the rule change. IEU's argument in this case has no merit and should be rejected.

IEU's real objection is to the rule change. The Commission's reasoning for the rule change is perfectly clear as well. The Commission wanted to support all cost-effec-

tive demand side management and it believes that the rule change will promote that important state policy goal. It said:

To qualify for ratepayer funded support through an exemption from an otherwise applicable program cost recovery mechanism, a mercantile customer will need to demonstrate that energy savings and peak-demand reductions associated with the customer's programs are the result of investments that meet the TRC test, as defined in Rule 4901:1-39-01(Y), in order for the mercantile customer to be granted an exemption from the cost recovery mechanism under Rule 4901:1-39-07. We recognize that with respect to historical programs implemented prior to the adoption of these rules, there may be a need for greater flexibility and the consideration of waivers. In all cases, a mercantile customer must demonstrate why ratepayer funded support for its historical investment decision is appropriate. The Commission expects exemptions, where appropriate, will buy down the cost of cost effective mercantile customer efficiency programs to a simple two-year pay-back. Thus, the filing of cost data is appropriate both to ensure that cost-effective investments are being supported by ratepayer funded exemptions and to determine whether the exemption may be full or partial or may continue for more than one year. We have deleted from the rule, requirements for mercantile customer baseline energy use and peak demand because we do not anticipate basing exemptions on whether a particular mercantile customer has or has not achieved a percentage of energy savings equivalent to the electric utility's annual benchmark.

In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technology, Resources, and Climate Regulations, and Review of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Amended Substitute Senate Bill No. 221, Case No. 08-888-EL-ORD (Entry on Rehearing at 13-14) (October 15, 2009), Second Supp. at 52-53. The Commission has determined, in its discretion, that the better way to achieve the statutory mandates is to focus on the deployment of all cost-

effective energy efficiency. It has changed its rule accordingly and its decision should be affirmed. The Commission continues to examine this situation. To this end, it has, subsequent to the order below, approved a pilot program to last for eighteen months, which would allow the use of the benchmark comparison method, albeit with some restrictions. *In the Matter of a Mercantile Application Pilot Program Regarding Special Arrangements with Electric Utilities and Exemptions from Energy Efficiency and Peak Demand Reduction*, Case No. 10-834-EL-EEC (Entry) (September 15, 2010) Appellant's App. at 97. Thus, even if there were merit in IEU's criticism, and there is not, the question is moot.

Fundamentally, IEU objects to the policy adopted by the Commission and attempts to dress this policy dispute as a legal claim. It is for the Commission to set policy, not IEU. The Commission has done so, reasonably, and has succinctly explained its reasoning. Its decision should be affirmed.

CONCLUSION

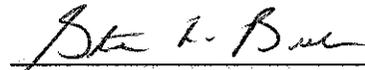
IEU makes policy arguments and asks this Court to reweigh evidence and reject factual findings made by the Commission. These are improper requests in the context of an appeal of a Commission Order. It is the Commission's duty to determine its own policy and it has broad authority to do so. As shown above, each of IEU's challenges are either expressly permitted by statute or are policy decisions supported by properly examined record evidence. This Court should not substitute its judgment for that of the Commission. The Commission's decision is in accord with the evidence and its reason-

ing was fully explained. IEU's policy arguments should be rejected and the Commission should be affirmed.

Respectfully submitted,

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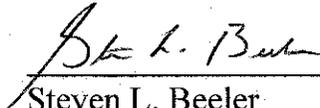
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PROOF OF SERVICE

and second supplement

I hereby certify that a true copy of the foregoing Merit Brief submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid upon the following parties of record, this 8th day of December, 2010.



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4928.02 State policy.

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

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

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

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

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

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

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

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

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

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy. In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

4928.66 Implementing energy efficiency programs.

(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.

4901:1-39-04 Program portfolio plan and filing requirements.

(A) Each electric utility shall design and propose a comprehensive energy efficiency and peak-demand reduction program portfolio, including a range of programs that encourage innovation and market access for cost-effective energy efficiency and peak-demand reduction for all customer classes, which will achieve the statutory benchmarks for peak-demand reduction, and meet or exceed the statutory benchmarks for energy efficiency. An electric utility's first program portfolio plan filed pursuant to this rule, shall be filed with supporting testimony prior to January 1, 2010. Each electric utility shall file an updated program portfolio plan by April 15, 2013, and by the fifteenth of April every third year thereafter, unless otherwise directed by the commission.

(B) Each electric utility shall demonstrate that its program portfolio plan is cost-effective on a portfolio basis. In general, each program proposed within a program portfolio plan must also be cost-effective, although each measure within a program need not be cost-

effective. However, an electric utility may include a program within its program portfolio plan that is not cost-effective when that program provides substantial nonenergy benefits.

(C) Content of filing. An electric utility's program portfolio plan shall include, but not be limited to, the following: (1) An executive summary and its assessment of potential pursuant to paragraph (A) of rule 4901:1-39-03 of the Administrative Code.

(2) A description of stakeholder participation in program planning efforts and program portfolio development.

(3) A description of attempts to align and coordinate programs with other public utilities' programs.

(4) A description of existing programs. The electric utility shall provide a summary of existing programs with a recommendation for whether the program should continue and, if so, a description of its relationship to any proposed programs. If a program has previously been approved and is unchanged, the electric utility may reference the program description currently in effect. If the electric utility is proposing to modify an existing program, the electric utility shall provide a description of the proposed modification and the basis for proposed changes.

(5) A description of proposed programs. An electric utility shall describe each program proposed to be included within its program portfolio plan with at least the following information: (a) A narrative describing why the program is recommended pursuant to the program design criteria in this chapter.

(b) Program objectives, including projections and basis for calculating energy savings and/or peak-demand reduction resulting from the program.

(c) The targeted customer sector.

(d) The proposed duration of the program.

(e) An estimate of the level of program participation.

(f) Program participation requirements, if any.

(g) A description of the marketing approach to be employed, including rebates or incentives offered through each program, and how it is expected to influence consumer choice or behavior.

(h) A description of the program implementation approach to be employed.

(i) A program budget with projected expenditures, identifying program costs to be borne by the electric utility and collected from its customers, with customer class allocation, if appropriate.

(j) Participant costs, if any.

(k) Proposed market transformation activities, if any, which have been identified and proposed to be included in the program portfolio plan.

(l) A description of the plan for preparing reports that document the electric utility's evaluation, measurement, and verification of the energy savings and/or peak-demand reduction resulting from each program and the process evaluations conducted by the electric utility. The independent program evaluator will prepare an independent evaluation, measurement, and verification plan at the direction of the commission staff to monitor, verify, evaluate and report on the energy savings and peak-demand reductions resulting from utility programs and mercantile customer activities. The independent program evaluator's plan may rely on data collected and reported by the electric utility.

(D) Unless otherwise ordered by the commission, any person may file objections within sixty days after the filing of an electric utility's program portfolio plan. Any person filing objections shall specify the basis for all objections, including any proposed additional or alternative programs, or modifications to the electric utility's proposed program portfolio plan.

(E) The commission shall set the matter for hearing and shall cause notice of the hearing to be published one time in a newspaper of general circulation in each county in the electric utility's certified territory. At such hearing, the electric utility shall have the burden to prove that the proposed program portfolio plan is consistent with the policy of the state of Ohio as set forth in section 4928.02 of the Revised Code, and meets the requirements of section 4928.66 of the Revised Code.

4901:1-39-07 Recovery mechanism.

(A) With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings. Any such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter.

(1) The extent to which the cost of transmission and distribution infrastructure investments that are found to reduce line losses may be classified as or allocated to

energy efficiency or peak-demand reduction programs, pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code, shall be limited to the portion of those investments that are attributable to and undertaken primarily for energy efficiency or demand reduction purposes.

(2) Mercantile customers, who commit their peak-demand reduction, demand response, or energy efficiency projects for integration with the electric utility's programs as set forth in rule 4901:1-39-08 of the Administrative Code, may individually or jointly with the electric utility, apply for exemption from such recovery.

(B) Any person may file objections within thirty days of the filing of an electric utility's application for recovery. If the application appears unjust or unreasonable, the commission may set the matter for hearing.

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4929.02 [Effective Until 9/13/2010] Policy of state as to natural gas services and goods.

(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 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.

Effective Date: 06-26-2001; 2008 SB221 07-31-2008

This section is set out twice. See also § 4929.02, as amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

4905.70 Energy conservation programs.

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Notwithstanding sections 4905.31, 4905.33, 4905.35, and 4909.151 of the Revised Code, the commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing, peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage. The commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer to such of their residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter. Under the rule, a customer who selects such option may be required by the company, where no such meter is already installed, to pay for such meter and its installation. The rule shall require each company to bill such of its customers who select such option for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.