

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets.)	Supreme Court Case No. 12-0187
)	
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.)	Appeal from the Public Utilities Commission of Ohio
)	
)	Case Nos. 08-917-EL-SSO and 08-918-EL-SSO
On Remand)	

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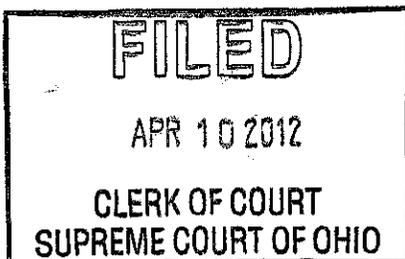
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I. INTRODUCTION

This appeal focuses on the Public Utilities Commission of Ohio's ("PUCO" or "Commission") decision on remand from this Court pertaining to \$368 million of provider of last resort ("POLR") charges, plus financing charges,¹ collected from April 2009 through May 2011. On remand, the PUCO found that Columbus Southern Power Company and Ohio Power Company ("CSP" and "OP," together "Companies") had not borne their burden of proving that the POLR charges were reasonable and lawful under R.C. 4928.143 (Appx. 019-023). Yet the PUCO declined to reduce the remaining electric security plan rates for these POLR collections, when it was required by law to do so. This Court should reverse the PUCO and remand the cause to the PUCO with the directive that the PUCO order the Companies to prospectively reduce the remaining electric security plan rates, scheduled to be collected from customers from 2012 to 2018.

II. STANDARD OF REVIEW

R.C. 4903.13 (Appx. 002) 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.

¹ See Testimony of OCC Witness Dr. Duann at 23, Attachment DJD-D. (Supp. 25). The \$368 million figure does not include financing or carrying charges accrued from 2009 through 2011. Nor does it include any of the estimated \$279 million of financing or carrying charges expected from 2012 through 2018. See *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144*, Pub. Util. Comm. No. 11-4920-EL-EDR et al., Application at Exhibit A, page 2 of 7 (Sept. 1, 2011). In this regard, OCC requests that the Court direct the PUCO to order a return of the carrying charges accrued beginning in April 2009 through May 2011 on \$368 million.

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 or are so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1, ¶ 8 of the syllabus (1975), *appeal after remand*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976). But questions of law, such as those raised by OCC's Proposition of Law I, are held to a different standard of review.

This Court has complete, independent power of review on questions of law. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979). Accordingly, legal issues are subject to a more intensive examination than are factual questions. OCC's Proposition of Law I challenges the PUCO's determination that it cannot prospectively adjust the remaining electric security plan rates because doing so would be retroactive ratemaking. In addressing this error the Court will need to determine whether the adjustments OCC requests would amount to retroactive ratemaking under the case precedent established by this Court. This requires a *de novo* review. In this context, the Court must consider and resolve the errors alleged by OCC.

III. STATEMENT OF FACTS

On July 31, 2008, the Companies filed their electric security plan ("ESP") applications with the PUCO. (R. 1, 2). On March 18, 2009, the PUCO issued an Opinion and Order ("ESP 1 Order") that approved but modified the Companies' electric security plans. (Supp. 210-286). The electric security plan rate was to be collected through a generation charge, a fuel adjustment charge, and other charges collected as add-ons to customers' bills, called "riders."² (Supp. 210-

² Under the electric security plan, rate increases were granted to cover provider of last resort service, environmental investment, generation charges, enhanced vegetation management, economic development, and energy efficiency and peak demand costs. (Supp. 210).

286). One such rider was to collect a charge called Provider of Last Resort. That rider was to collect \$457.6 million³ of revenues from the Companies' customers over three years. (Supp. 247-249).

These authorized increases, with few exceptions,⁴ were "capped" from 2009 through 2011.⁵ The capping or limiting of the increases was intended to make the increases more affordable (in the short term) to customers. (Supp. 231). Importantly though, these rates were only temporarily capped or limited. Any and all revenue increases above the capped rates would be collected from customers later, just not in 2009-2011. The Companies would call these later rate increases "incremental fuel expenses," notwithstanding the fact that the rate increases under the Companies' electric security plans were composed of many different provisions that had nothing to do with fuel expenses.⁶

These increases would not be forgotten or forgiven, but would be set aside or deferred for later collection in 2012 to 2018. (Supp. 231-232). And there was a cost to customers for paying these increases later, instead of now. Customers were required to finance the deferred increases

³ This amount is the total AEP Ohio POLR charges authorized to be collected over 2009-2011. On an annual basis \$97.4 million was collected from CSP customers and \$54.8 million was collected from OP customers. (Supp. 249). *See* Testimony of OCC Witness Dr. Duann at 23 (Supp. 25).

⁴ Exceptions to the "capped" increases included increases associated with the transmission cost recovery rider, increases associated with any new government mandates, future adjustments to the energy efficiency/peak demand reduction rider, and revenue increases associated with any future distribution base rate case. *See* (R. 214 at 20, R. 265 at ¶¶27, 28).

⁵ The Commission ordered a cap for CSP of 7% for 2009, 6% for 2010, and 6% for 2011. For OP, the Commission adopted a cap of 8% for 2009, 7% for 2010, and 8% for 2011. (Supp. 231). *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*, Pub. Util. Comm. Nos. 08-917-EL-AIR et al., Opinion and Order at 22 (Mar. 18, 2009) (*ESP 1 Order*).

⁶ *See* footnote 2.

starting in 2009 at a substantial interest rate tied to the Companies' cost of capital.⁷ (Supp. 232-233). The financing of the deferrals is expected to significantly increase customers' bills.⁸ At the time of the ESP 1 hearing, Companies' Witness Assante estimated that the interest costs on the deferrals would add another \$461 million to customers' bills. (Supp. 103). Customers would eventually be asked to pay for the deferrals and pay interest on these deferrals for an extended period –from 2009 all the way through 2018.

The Companies received the PUCO's permission to treat the increases in this manner because it was *a way*⁹ to keep rates more affordable during 2009-2011, a time that the PUCO described as "a difficult economic period." (Supp. 231). The Companies received accounting authority from the PUCO to delay charging customers for these increases. The PUCO gave the Companies the accounting authority they requested. (Supp. 232). This was called "deferral accounting" and the Companies' used their fuel adjustment clause to carry out the plan. (Supp. 229-232). Through the deferral accounting a three-year phase-in of rate increases was implemented allowing customers to pay part of the electric security plan increases later instead of now.

⁷ The Companies' cost of capital is referred to as the weighted average cost of capital or "WACC." The Companies derived their cost of capital from a capital structure composed equally of equity and long-term debt. (Supp. 61). The WACC changes monthly; but for 2009-2011, it was approximately 10-11%.

⁸ The Companies' estimate that OP customers will pay \$279 million in financing charges during the 2012-2018 collection period. *See In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144*, Pub. Util. Comm. No. 11-4920-EL-EDR et al., Application at Exhibit A, page 2 of 7 (Sept. 1, 2011). The \$279 million in financing charges does not include the cost to customers of financing the deferrals from 2009-2011. The financing charge from 2009-2011 is embedded in the \$628,073,320 deferral balance.

⁹ OCC and others (including the PUCO Staff) opposed creating such long-term deferrals. (Supp. 231). OCC opposed the phase-in on numerous grounds, including that the PUCO should not permit rate increases at such a high level that necessitates a phase-in plan. Moreover, OCC expressed concern with the added costs of deferrals.

Here's how the phase-in plan worked. The Companies would bill customers for all of the authorized rate increases, up to the specific yearly rate caps. If there was a difference between the yearly rate cap and the authorized increases, the Companies deferred the difference and called it "incremental incurred FAC costs." (Supp. 231). As explained earlier, however, the authorized rate increases that were deferred included many elements unrelated to the cost of fuel. The "incremental incurred FAC costs" were deferred whenever necessary to maintain the yearly rate caps. (Supp. 231). The Companies were thus permitted to phase-in the authorized increases and defer authorized rate increases in 2009, 2010, and 2011, as needed to meet the rate caps.¹⁰

The Companies were also given accounting authority to book a financing or carrying charge on the uncollected deferrals, beginning in 2009.¹¹ The deferrals created under the three-year phase-in were authorized to be booked as "regulatory assets" for accounting purposes. (Supp. 231). The deferrals/regulatory assets and the carrying costs created by the phase-in would be collected from customers over seven years--from 2012 to 2018. The PUCO directed the Companies to collect the deferrals and carrying costs created by the phase-in through "an unavoidable surcharge." (Supp. 231-232). The PUCO did not, however, approve a specific mechanism that was to collect the un-avoidable surcharge.

The Companies filed tariffs to implement the PUCO's Order on March 23, 2009. (R. 215). In filing their tariffs, the Companies expressly reserved their right to withdraw their applications, "consistent with R.C. 4928.143(C)(2)." (R. 215). The tariffs were approved. (R. 224). Customers began to pay the increased rates for electric service, subject to the yearly caps, beginning in April, 2009. And the deferral accounting enabling the phase-in of rates began as well.

¹⁰ See OCC Witness Duann Testimony at 24 (Supp. 26).

¹¹ See (Supp. 232).

The unavoidable surcharge to collect the deferred revenue increases and carrying costs, though approved in principle, would not be implemented until 2012. Attempts to implement the unavoidable surcharge would be made in the Companies' subsequent ESP filing, Case No. 11-346-EL-SSO,¹² as well as in separate applications.¹³

OCC and others applied for rehearing on April 17, 2009. (R. 235). On July 23, 2009, OCC's application for rehearing was denied. (R. 265). On November 4, 2009, the PUCO issued a Second Entry on Rehearing, denying the remaining applications for rehearing. (R. 279). On November 5, 2009, OCC filed its notice of appeal. (R. 280). A second appeal was filed by Industrial Energy Users-Ohio on November 17, 2009. (R. 282).

On April 19, 2011, this Court issued its order on the appeals. *In re: Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. (Appx. 123-145). With respect to the rate increases for provider of last resort service, the Court found that the manifest weight of the evidence contradicted the PUCO's finding that the POLR charge was based on cost.¹⁴ It reversed the PUCO's Order authorizing rate increases for POLR. The Court noted that the PUCO on remand, "may re-visit the issue"¹⁵ and advised that "[h]owever the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."¹⁶

¹² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Pub. Util. Comm. No. 11-346-EL-SSO et al, Application at 19 (Jan. 27, 2011) ("ESP 2").

¹³ See *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144*, Pub. Util. Comm. Nos. 11-4920-RDR, et al., Application (Sept. 1, 2011).

¹⁴ *Columbus S. Power Co.* (2011) at ¶29.

¹⁵ *Id.*

¹⁶ *Id.* at ¶30.

On April 26, 2011, OCC, along with a number of other intervening parties, requested that the PUCO either stay the collection of the POLR charge, or collect the charge subject to refund. (R. 291). On May 4, 2011, the PUCO directed the Companies to remove both the POLR and environmental carrying charges¹⁷ from their tariffs. (R. 294). Subsequently, on May 25, 2011, the PUCO determined that the POLR charges should instead be collected subject to refund as of June, 2011, until specifically ordered otherwise. (R. 316).

The Commission conducted an evidentiary hearing which commenced on July 15, 2011, and concluded on July 28, 2011. At the hearing, the Companies presented the testimony of three witnesses regarding the Companies' POLR obligation—Dr. Anil Makhija, Dr. Chantale LaCasse, and Laura J. Thomas. (R. 326-328). OCC Witnesses Mack A. Thompson and Dr. Daniel J. Duann presented testimony opposing POLR. (Supp. 001). Other intervenors, and the PUCO Staff filed testimony opposing POLR. (R. 354-356, 358, 361).

On September 1, 2011, the Companies filed an application requesting to collect the deferrals created under the phase-in of the ESP 1 rates. The collection mechanism was called a “Phase-In Recovery Rider.”¹⁸ The Companies requested that it become effective January, 2012.

On October 3, 2011, the PUCO issued its Order on Remand. *In the Matter of the Application of Columbus S. Power Co.*, Pub. Util. Comm. No. 08-917-EL-SSO, 2011 Ohio PUC LEXIS 1084 (Oct. 3, 2011). (Supp. 287-327). The PUCO concluded that the Companies failed to produce evidence of their actual POLR costs, despite being given the full opportunity to do

¹⁷ Carrying charges associated with environmental investment were also reversed in the *Columbus S. Power Co.* appeal and were remanded back to the PUCO with instructions that the PUCO “may determine whether any of the listed categories of [4928.143](B)(2) authorize recovery of environmental carrying charges.” *Columbus S. Power Co.*, at ¶35.

¹⁸ *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144*, Pub. Util. Comm. Nos. 11-4920-RDR, et al., Application (Sept. 1, 2011).

so.¹⁹ Additionally, the PUCO found that the modeling done by the Companies failed to measure POLR costs.²⁰ Further the Commission determined that “migration risk,” or the risk of customers leaving the Companies to shop, is not properly a part of a POLR charge.²¹

The Commission directed the Companies to refund the POLR charges collected subject to refund since June 2011. (Supp. 319-320). Specifically the Companies were ordered to apply the POLR revenues collected to any deferrals in the fuel adjustment accounts on each of the Companies’ books as to the date of the Order. Any remaining balance was to be credited to customers (on a per kilowatt hour basis) beginning in November, 2011.²² The Companies were ordered to include interest at a rate equal to the Companies’ long-term cost of debt, commencing with June 2011 until all the charges subject to refund are returned. (Supp. 319-320).

The PUCO, however, declined to use the \$368 million of POLR revenues (plus carrying costs) collected from customers during April 2009 through May 2011 to reduce the deferrals, as requested by OCC and IEU-Ohio. Such a proposed adjustment “would be tantamount to unlawful retroactive ratemaking” it concluded.²³ The Commission noted that it “cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified.”²⁴ OCC and OPAE (jointly), and IEU Ohio, among others, applied for rehearing. (R. 405). By its Entry on Rehearing, dated December 14, 2011

¹⁹ *In the Matter of the Application of Columbus S. Power Co.*, at 18-24.

²⁰ *Id.* at 24-29.

²¹ *Id.* at 30-32.

²² *Id.* at 38.

²³ *Id.* at 36.

²⁴ *Id.*

(Supp. 328-346), the Commission denied both OCC/OPAE's Application for Rehearing, as well as IEU Ohio's.²⁵

On that date as well, the PUCO approved the Companies' second electric security plan, and ordered tariffs to be filed to implement its order.²⁶ Rates under the new tariffs would begin starting January 1, 2012. As part of these tariffs, there was a "phase-in recovery rider" that began collecting the ESP 1 deferrals from all customers, except residential customers.²⁷

On February 1, 2012, IEU Ohio filed a Notice of Appeal with Assignments of Error 5 through 8 addressing how the PUCO failed to adjust the phase-in deferrals. (R. 416). On February 10, 2012, OCC filed a Notice of Appeal, containing two Assignments of Error, both focusing on how the Commission failed to reduce the Companies' electric security plan deferrals by the amount of the unjustified POLR charges. (R. 417).

On February 23, 2012, the PUCO rejected the Companies' second electric security plan (Appx. 157-169) and ordered the Companies to replace the ESP 2 rates (which had been in effect

²⁵ *In the Matter of the Application of Columbus S. Power Co.*, Pub. Util. Comm. No. 08-917-EL-SSO, 2011 Ohio PUC LEXIS 1326, Entry on Rehearing (Dec. 14, 2011). (Supp. 328-346).

²⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Pub. Util. Comm. No. 11-346-EL-SSO et al., Opinion and Order (Dec. 14, 2011). ("ESP 2 Order"). (Appx. 190-260).

²⁷ As part of the PUCO's order approving the ESP 2 rates, the PUCO adopted provisions of a Joint Stipulation that delayed the collection of the phase-in recovery rider from residential customers for twelve months. (Appx. 249-251, adopting provisions of the Joint Stipulation at 26-27).

for six weeks) with rates from their previous electric security plan, ESP 1.²⁸ On February 28, 2012, the Companies proposed a phase-in recovery rider to collect its ESP 1 deferrals.²⁹

OCC, jointly with the Appalachian Peace and Justice Network (“APJN”), opposed the phase-in recovery rider, as did numerous other parties. OCC and other parties argued that the rider was improper because no specific recovery mechanism – other than “an un-avoidable surcharge” – had been authorized in the ESP 1 Order. In a motion, OCC/APJN requested that the PUCO reject the phase-in recovery rider. OCC/APJN also requested a stay of the rider and alternatively sought that it be collected subject to refund, in order to protect customers.

On March 7, 2012, the Commission ruled that the continued rates should not include the phase-in deferrals.³⁰ Instead it ruled that it would address this issue in other cases--Case Nos. 4920-EL-RDR and 11-4921-EL-RDR. (Appx. 154). On March 14, 2012, the PUCO issued an Entry in those cases seeking comments and reply comments on the Companies’ rider applications.³¹ (Appx. 146-149). In comments filed on April 2, 2012, OCC opposed the collection of the rider on grounds, *inter alia*, that the deferrals identified should be reduced by the POLR revenues collected from April 2009 through May 2011. The PUCO has not ruled on the rider applications as of the filing of this brief.

²⁸ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Pub. Util. Comm. Nos. 11-346-EL-SSO et al., Entry on Rehearing (Feb. 23, 2012). (Appx. 157-169).

²⁹ *Id.*, New Proposed Tariffs to Implement Provisions, Terms and Conditions of Previous Electric Security Plan at 2 (Feb.28, 2012).

³⁰ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Pub. Util. Comm. Nos. 11-346-EL-SSO et al., Entry at ¶14 (March 7, 2012). (Appx. 154).

³¹ *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Pub. Util. Comm. Nos. 11-4920-EL-RDR et al., Entry (Mar. 14, 2012). (Appx. 146-149).

IV. STATEMENT OF LAW

Electric distribution utilities, such as the Companies, have the duty to establish a standard service offer in Ohio, either as an electric security plan or a market rate offer.³² In the case below, the Companies chose to establish a standard service offer through an electric security plan. An electric security plan is subject to R.C. 4928.143 (Appx. 019-021). Under R.C. 4928.143(B)(2), an electric security plan may include any of the provisions listed within that section. As this Court determined, however, if a given provision does not fit within one of the categories listed “following” (B)(2), it is not authorized by statute. *In re: Application of Columbus. S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32.

Additionally, the Commission may, under R.C. 4928.144 (Appx. 024), authorize a “just and reasonable” phase-in plan. Under that statute, the Commission may order a “just and reasonable” phase-in of “any rate or price established” under the standard service offer plan, inclusive of carrying charges. The statute requires the phase-in to be “just and reasonable” and “necessary to ensure rate or price stability for consumers.”³³

If the electric security plan includes a phase-in, the statute directs the PUCO to allow regulatory assets to be created, consistent with generally accepted accounting principles.³⁴ It refers to the Commission authorizing the deferral of “incurred costs” equal to the amount not collected, plus carrying charges.³⁵ “Regulatory assets” generally refer to nonrecurring costs approved by regulators that are collected over a period of years instead of at the time the expenditures are made, thereby lessening the immediate impact of such increases. The

³² R.C. 4928.141. (Appx. 015).

³³ R.C. 4928.144. (Appx. 024).

³⁴ *Id.*

³⁵ *Id.*

regulatory assets created here are the revenue increases that were deferred for later collection in order to maintain the Commission-ordered rate caps. The statute clarifies that the deferrals should be collected through a non-bypassable surcharge on “any such rate or price so established” for the utility.³⁶

V. ARGUMENT

PROPOSITION OF LAW NO. 1:

The Public Utilities Commission Must Reduce Phase-In Deferrals By Charges Not Proven To Be Reasonable And Lawful Under R.C. 4928.143(B)(2).

A. The PUCO Cannot Authorize Phase-In Deferrals That Were Created By An Electric Security Plan That Included POLR Charges That The Companies Failed To Justify.

1. The deferrals were residually created by the Electric Security Plan Rates.

The PUCO approved a phase-in of the Companies’ electric security plan rates to mitigate the impact of the increases on customers during a “difficult economic period.” (Supp. 231-232). Under the phase-in plan, the Companies were ordered to phase-in “any authorized increases” so as to not exceed specified rate caps.³⁷

The “authorized increases” were attributable to a number of provisions in the Companies’ electric security plan. The plan included increased revenues from a number of sources, not necessarily tied to cost-based or incurred expenses. Those sources of increased revenues included a fuel component as well as what the Companies described as “non-FAC components” that were part of the approved electric security plan. These other charges that were considered components of the “authorized increases” included charges for environmental capital investment,

³⁶ *Id.*

³⁷ The following rate caps were put in place: 2009-7% CSP, 8% OP; 2010-6% CSP, 7% OP; 2011-6% CSP, 8% OP. (Supp. 231).

transmission, and provider of last resort service.³⁸ According to Companies' Witness Rousch, all these components of the "authorized increases" would be lumped together to set the "phase-in FAC rate" that could be in effect, while still maintaining total bill increases at the capped levels.³⁹

The resulting regulatory assets are thus directly tied to the "authorized increases" – a pot of increased revenues that included both fuel and non-fuel related charges. For instance, if the "authorized increase" was reduced to exclude \$100 of POLR revenues, all other things being equal, the deferrals would be reduced by \$100. This happens because the phase-in rate would pick up \$100 more of the authorized revenue increases, which would directly reduce the deferrals. Concomitantly, the carrying charges being earned on the deferrals would be reduced as well.

2. The Electric Security Plan rates were not proven by the Companies to be reasonable and lawful under R.C. 4928.143(B)(2)(b).

The PUCO found that the Companies' POLR charges authorized as part of the ESP 1 were not supported by the record on remand.⁴⁰ Although the PUCO did order a refund of the POLR charges collected "subject to refund," it failed to further adjust the regulatory assets. The PUCO did not credit the remaining electric security plan rates for the POLR revenues customers had paid from April 2009 through May 2011.

³⁸ See Companies' Exhibit DMR-1, (Supp. 160-161). See also *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*, Pub. Util. Comm. Nos. 08-917-EL-AIR et al, Entry on Rehearing at 19-31 (July 23, 2009) (R. 265).

³⁹ See Testimony of Companies' Witness Rousch at 14. (Supp. 157).

⁴⁰ *In the Matter of the Application of Columbus S. Power Co.*, Pub. Util. Comm. No. 08-917-EL-SSO, Remand Order at 18-24 (Oct. 3, 2011). (Supp. 304-310).

This was an error that the PUCO had to fix to make the phase-in plan comply with R.C. 4928.143 (Appx. 019-023) and 4928.144 (Appx. 024). While the phase-in rates themselves could not be fixed, it was incumbent upon the PUCO to adjust the remaining elements of the phase-in: the regulatory assets and the collection of deferrals. Because both the regulatory assets and the collection of deferrals were based on rates not established as reasonable and lawful under R.C. 4928.143 (Appx. 019-023), the phase-in plan failed to comply with R.C. 4928.144 (Appx. 024). The PUCO only has authority under R.C. 4928.144 to order a phase-in of a “rate or price established under sections 4928.141 to 4928.143 of the Revised Code.” And under R.C. 4928.144, the PUCO may only authorize the collection of phase-in deferrals “on any such rate or price so established for the electric distribution utility by the commission.”

When the PUCO failed to fix the phase-in plan by reducing the regulatory assets for each dollar of unlawful POLR revenues collected, it was not following the law. It was allowing the Companies the opportunity to charge customers a rate that was not established as reasonable and lawful under R.C. 4928.143. (Appx. 019-023). And it was permitting a phase-in plan that was not just and reasonable under 4928.144 (Appx. 024). The PUCO failed to act to the detriment of 1.2 million residential customers of the Companies. Customers had no choice but to pay the POLR charges that ultimately were determined to lack evidentiary support.

When the PUCO failed to modify the remaining electric security plan rates, it also failed to fulfill its duties to ensure that “reasonably priced electric retail service”⁴¹ is available to the consumers in this state. “Reasonably priced electric retail service” is one of the state policies enumerated in R.C. 4928.02 (Appx. 010-011). Under R.C. 4928.06 (Appx. 013-014), the PUCO must ensure that the state policy objectives of R.C. 4928.02 (Appx. 010-011) are effectuated. Indeed this Court determined that the PUCO may not approve a rate plan that violates the policy provisions of R.C. 4928.02. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, *reconsid. denied*, 116 Ohio St.3d 1414, 2007-Ohio-6140, 876 N.E.2d 970.

In allowing the Companies’ phase-in plan to remain intact, the PUCO did not change the value of the regulatory assets. The value of these assets will drive the collection of the remaining electric security plan increases. These increases will be charged to customers when the Companies begin to collect the non-bypassable surcharge for the phase-in deferrals. The non-bypassable surcharge will likely be collected from customers over the next six years--2012 through 2018. These rate increases are significant, and include the overstated (by \$368 million) deferred revenue increases and the financing costs associated with carrying the deferrals from 2009 through 2018. When these unlawful and unreasonable rates are charged, it will be detrimental to consumers.

⁴¹ See R.C. 4928.02. (Appx. 010-011). The Commission has characterized the state policies of R.C. 4928.02 as “important objectives which the Commission must keep in mind when considering all cases filed pursuant to that chapter [4928] of the code. Therefore in determining whether the ESP meets the requirements of Section 4928.143, Revised Code, the Commission takes into consideration the policy provisions of Section 4928.02, Revised Code, and we use these policies as a guide in our implementation of Section 4928.143, Revised Code.” *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Pub. Util. Comm. No. 08-936-EL-SSO, Opinion and Order at 14 (Nov. 25, 2008). (Appx. 526).

Because the non-bypassable surcharge will likely be collected, based on charges that were not established as reasonable and lawful under R.C. 4928.143 (Appx. 019-023), customers will be significantly harmed at a time when the current economic climate is bleak. The Commission instead could have considerably aided customers had it heeded its duties under the law to ensure reasonably priced electric retail service.⁴² But it did not. When the phase-in recovery rider rates go into effect, and reasonably priced electric retail service is not available, customers are not receiving their due under the law. The PUCO's order is unreasonable in this regard, as well as unlawful.

The finding that millions of dollars in rates were not justifiably collected from customers and yet nothing can be done is something difficult for customers to understand. Indeed this Court noted the "apparent unfairness" of such a proposition in its decision in *In re: Columbus S. Power Co (2011)*. There, the Court determined that there could be no refund even though the PUCO unlawfully allowed the Companies to collect \$63 million from customers.⁴³ Here though, the PUCO could have lawfully adjusted the remaining electric security plan rates. Yet the PUCO chose not to do so, based upon an erroneous interpretation of the law. This was unreasonable.

This Court need not automatically and uncritically accept whatever the Commission does. *Consolidated Rail Corp. v. Pub. Util. Comm.*, 47 Ohio St.3d 81, 84, 547 N.E.2d 1176 (1989); *see, also, Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292, 303-305, 57 S.Ct. 724, 81 L.Ed.2d 1093 (1989). Especially here where there was a lawful and reasonable basis for the PUCO to act and yet it chose not to. The PUCO failed to act to protect customers and ensure

⁴² See R.C. 4928.02(A). (Appx. 010).

⁴³ *In re: Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶17.

reasonably priced electric service. That is reason enough for the Court to reverse the PUCO's decision.

B. The Commission Unlawfully And Unreasonably Determined That It Could Not Reduce The Electric Security Plan Residual Phase-In Deferrals By The Unjustified POLR.

1. In order for there to be retroactive ratemaking there must be ratemaking.

In the proceeding below the Commission found that the Companies failed to provide any evidence of their actual POLR costs.⁴⁴ On that basis the Commission directed the Companies to refund the POLR revenues collected subject to refund since June 2011. Specifically the Companies were ordered to apply those POLR revenues to any deferrals in the fuel adjustment accounts on the Companies' books as of the date of the Order. Any remaining balance was to be credited to customers beginning in November 2011.⁴⁵

With respect to the \$368 million of POLR charges collected from April 2009 through May 2011, however, the Commission declined to act. It determined it would not apply that revenue to offset the deferrals. Such a proposed adjustment "would be tantamount to unlawful retroactive ratemaking" the PUCO concluded.⁴⁶

The Commission, however, is mistaken. This Court has over time determined that certain matters are not "retroactive ratemaking" because they are simply not "ratemaking." The line of Ohio Supreme Court cases establishing this principle began in 1977, when the Court addressed a gas cost provision known as the purchased gas cost adjustment in *Ford Motor Co. v. Pub. Util. Comm.*, 52 Ohio St.2d 142, 370 N.E.2d 468 (1977).

⁴⁴ *In the Matter of the Application of Columbus S. Power Co.*, Remand Order at 22-24 (Oct. 3, 2011 (Supp. 308-310)).

⁴⁵ *Id.* at 38.

⁴⁶ *Id.* at 36.

In that case, one of the issues before the Court was whether a utility's gas purchases that pre-dated the purchased gas adjustment clause (and were deferred) could be collected without engaging in retroactive ratemaking.⁴⁷ The purchased gas adjustment clause allows gas companies to adjust rates according to fluctuations in the cost of procuring the gas sold to customers.⁴⁸ The process provides for the filing of schedules allowing for increases and decreases independently of proceedings under R.C. 4909.18 (Appx. 006). Finding that the utility sought no increase, but rather sought to modify a schedule, this Court concluded that there was no retroactivity.⁴⁹

In 1982, the Court was again faced with a challenge to the uniform purchased gas adjustment clause. *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 512, 433 N.E.2d 568 (1982). This time the appeal focused on the gas cost recovery rate component and whether the PUCO's order to pass through supplier refunds from prior periods constituted retroactive ratemaking.

The Court concluded there was no retroactive ratemaking because there was no ratemaking: "It is axiomatic that before there can be retroactive ratemaking, there must, at the very least, be ratemaking. We are not convinced that the commission's actions at issue herein constitute ratemaking as that term is customarily defined."⁵⁰ Moreover, the Court went onto address the applicability of *Keco*⁵¹ assuming, *arguendo*, that the Commission engaged in

⁴⁷ See Ohio Constitution, Article II, Section 28: "The general assembly shall have no power to pass retroactive laws * * * ." (Appx. 025).

⁴⁸ R.C. 4905.302(A)(1)(a). (Appx. 003).

⁴⁹ *Ford Motor Co.*, 52 Ohio St.2d at 149-150, 370 N.E.2d 468.

⁵⁰ *River Gas Co.*, 69 Ohio St.2d at 512, 433 N.E.2d 568.

⁵¹ *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465, (1957).

ratemaking. It concluded that appellants' reliance on *Keco* was "misplaced."⁵² The Court found that the PUCO had determined gas costs to be collected prospectively from customers, and that it was appropriate (and also required) to deduct supplier refunds.

2. There is no ratemaking where the PUCO merely grants a utility accounting authority to defer the collection of rate increases.

In order to facilitate the phase-in, the PUCO permitted the Companies' accounting authority to defer "any amount over the allowable total bill increase percentage levels." (Supp. 231). In other words, the Commission permitted the deferral of any of the "authorized increases" as was necessary to keep the annual ESP rate increase (fuel and non-fuel increases) within the PUCO-ordered rate caps. Carrying charges were to be booked on the uncollected deferrals starting in 2009 and ending in 2018.

Companies' Witness Assante testified to the specific accounting that would occur under the phase-in of ESP 1 rate increases. During 2009 through 2011, the Companies would defer the authorized increases as "unrecovered FAC costs" placing them in Account 182.3, Other Regulatory Assets, with a credit to fuel expense, Account 501, Fuel. The amount of "uncollected FAC cost" would reflect any of the residual dollars left after the ESP 1 revenues, including POLR, were collected under the capped rates. ESP 1 revenues generated by the proposed phase-in plan from 2012 to 2018 would be recorded in revenue income and would be heavily offset by the amortization of the phase-in deferrals being collected in Account 182.3, Other Regulatory Assets. This amortization would occur through a credit to the regulatory asset accounts and a charge to Account 501, Fuel in the amount of the deferred revenue increases. Separate

⁵² *River Gas Co.* at 513-514.

accounting would be necessary to establish the carrying costs being accrued and collected on the regulatory assets.⁵³

With the booking of the deferrals, regulatory assets were created. Booking the uncollected rate increases in this way is permissible and consistent with FAS 71,⁵⁴ and supported by generally accepted accounting principles.⁵⁵ Thus, what the Commission approved was phase-in rates, rate caps, the phase-in methodology, and the deferral accounting that was to occur to facilitate the phase-in.

When the Commission approves deferral accounting for a utility, it does not equate to the unequivocal right to collect the deferral.⁵⁶ Indeed this Court has duly noted that accounting and ratemaking are not functionally equivalent. *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St.3d 91, 104, 447 N.E.2d 733 (1983). Instead, the Court has recognized there is a distinction which exists between accounting practices and ratemaking. *Office of Consumers' Counsel v. Pub. Util. Comm.*, 6 Ohio St.3d 377, 378, 453 N.E.2d 673 (1983); *see also Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 308-309, 2007-Ohio-4164, 871 N.E.2d

⁵³ Testimony of Companies' Witness Assante at 13. (Supp. at 66).

⁵⁴ Financial Accounting Standard (FAS) 71 states, in part, that before a regulated utility can book deferrals as regulatory assets, it must be "probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable costs for rate-making purposes." Accounting for the effects of Certain Types of Regulation, Statement of Financial Accounting Standards No. 71 (Fin. Accounting Standards Bd. 1982). (Appx. 092).

⁵⁵ Testimony of Companies' Witness Assante at 11. (Supp. 64).

⁵⁶ *See In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Pub. Util. Comm. No. 09-786-EL-UNC, Finding and Order at 16 (June 30, 2010) (Appx. 310) (in discussing how deferrals should be treated for purposes of the significantly in excess earnings test of R.C. 4928.143(f), the Commission noted the authority to defer is not the authority to collect).

1176 (holding that the PUCO's accounting authority is distinct from the ratemaking statutes).

The distinction is one which the PUCO itself has embraced on many occasions.⁵⁷

For instance, after FirstEnergy withdrew its electric security plan (after the PUCO modified and approved it), it filed to implement a "Rider FUEL" to collect the cost of purchasing power to provide SSO service.⁵⁸ FirstEnergy sought the relief because the rates in effect after it withdrew its application did not contain a mechanism to collect purchased power.

The Commission ultimately approved FirstEnergy's Rider FUEL to collect "actual, reasonable, and prudently incurred purchased power costs." (Appx. 480-481). It permitted one of the FirstEnergy subsidiaries the accounting authority to defer, with carrying costs, any amount

⁵⁷ See e.g. *In re: Columbus S. Power Company for an Accounting Order To Defer Demand Side Management Program Expenditures and Net Lost Revenues*, Pub. Util. Comm. No. 94-2305-EL-AAM, Entry (Apr. 13, 1995) (finding that the deferral and collection of expenses, including carrying costs, are accounting matters, not ratemaking matters) (Appx. 567-574); *In re: Application of CEI to Modify Current Accounting Procedures to Defer and Amortize Operating Expenses for Perry Nuclear Plant*, Pub. Util. Comm. No. 87-109-EL-AAM, 1998 Ohio PUC LEXIS 163, Entry (Feb. 2, 1988) (approving the deferral of operating expenses incurred after the nuclear unit's in service date was found to be a matter of accounting, not ratemaking) (Appx. 589-593); *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Pub. Util. Comm. No. 09-712-GA-AAM, 2010 Ohio PUC LEXIS 47, Entry on Rehearing (Jan. 7, 2010) (allowing the deferral of environmental and remediation costs, but noting that approval of deferral accounting is not ratemaking) (Appx. 328-335); *In the Matter of the Application of Ohio Edison to Continue and Modify Certain Regulatory Accounting Practices and Procedures To Establish a New Tariff Option as Part of a Rate Stabilization and Service Area Development Program*, Pub. Util. Comm. No. 92-1424-EL-AAM, 1992 Ohio PUC LEXIS 1019, Entry on Rehearing (Dec. 2, 1992) (allowed utility to accrue and capitalize carrying charges on deferred expenses related to Beaver Valley 2 nuclear unit, and declared that this accounting entry, like other PUCO accounting entries, does not control ratemaking treatment). (Appx. 575-576).

⁵⁸ *In the Matter of the Application of OE, CEI and TE for approval of Rider FUEL and Related Accounting Authority*, Pub. Util. Comm. Nos. 09-21-EL-ATA; 09-22-EL-ATA, Application (Jan. 9, 2009); see also Finding and Order ¶2, 4 (Jan. 14, 2009) ("*FirstEnergy Rider FUEL case*"), Entry Nunc Pro Tunc (Jan. 29, 2009). (Appx. 480, 481).

exceeding the Rider FUEL.⁵⁹ Specifically with respect to the accounting authority granted, the Commission noted that the “reasonableness of the deferred amounts and recovery thereof, if any, will be examined and addressed in a future proceeding before the Commission.”⁶⁰ The Commission then reiterated that “deferrals do not constitute ratemaking, and cited to *Elyria Foundry Co.*⁶¹

Another recent example of the PUCO acknowledging the distinction between accounting and ratemaking occurred in response to an application filed by Duke Energy of Ohio (“Duke” or “DE-Ohio”) along-side its electric security plan case. *In the Matter of Duke Energy Ohio for Authority to Change Accounting Methods*, Pub. Util. Comm. No. 08-711-EL-AAM, Finding and Order at ¶3 (Jan. 14, 2009). Duke sought authority to defer and create regulatory assets and carrying charges for costs incurred during the 2008 Hurricane Ike wind storm. Duke proposed to collect the charges through a rider mechanism –DR-IKE, with the initial rider set at zero.⁶² Duke would later file for Rider DR-IKE which was structured to collect the deferred storm costs and carrying charges over three years. The Commission allowed Duke to defer its costs over the objections of OCC.⁶³ “The determination of the reasonableness of the deferred amounts and the recovery thereof, if any, will be examined and addressed in a future proceeding before the

⁵⁹ *In the Matter of the Application of OE, CEI and TE for approval of Rider FUEL and Related Accounting Authority*, Pub. Util. Comm. Nos. 09-21-EL-ATA; 09-22-EL-ATA, 2009 Ohio PUC LEXIS 23, Finding and Order (Jan. 14, 2009). (Appx. 480-488).

⁶⁰ *Id.* at ¶12.

⁶¹ *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 308-309, 2007-Ohio-4164, 871 N.E.2d 1176.

⁶² *Duke Energy Ohio*, Case No. 08-711-EL-AAM at ¶5.

⁶³ *In the Matter of Duke Energy Ohio for Authority to Change Accounting Methods*, Case No. 08-711-EL-AAM, Finding and Order (Jan. 14, 2009). (Appx. 476-479).

commission. As the Supreme Court has previously held, deferrals do not constitute ratemaking.” (Citation omitted).⁶⁴

Duke-Ohio then filed its application to set its Rider DR-IKE to collect the 2008 Storm costs that it had received accounting authority to defer.⁶⁵ Significantly the PUCO ruled that, *inter alia*, approximately \$14 million of the deferred expenses would be disallowed because Duke-Ohio failed to prove that the expenses were reasonable and prudently incurred.⁶⁶

The PUCO’s Order in the subsequent Duke rider filing case, disallowing the collection of previously deferred expenses, shows an example, post-S.B. 221, of the distinction between ratemaking and accounting. Had there been no difference, there would have been no basis to disallow the collection of storm rider deferrals. The collection of deferred storm expenses would not have been able to be challenged as the Commission had already “authorized” their recovery.

But, as indicated in the *Duke Rider* case and the *FirstEnergy Rider FUEL* case cited above, there is a distinction between authorizing revenues or expenses to be deferred and authorizing the “recovery” of such revenues or expenses. Granting a utility the right to defer revenues or expenses does not equate to the unequivocal right to collect the deferred revenue or expense. This is inherently tied to the fact that deferral accounting is not ratemaking.

When the PUCO permitted the Companies to defer incremental revenue increases under the phase-in of rates, it was merely giving the Companies accounting authority to create the

⁶⁴ *Id.* at ¶9.

⁶⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of Its Distribution Reliability Rider*, Pub. Util. Comm. No. 09-1946-EL-RDR, Application. (Dec. 11, 2009); *see also* Opinion and Order at 2 (Jan. 22, 2011) (“*Duke Rider* case”). (Appx. 270).

⁶⁶ *In the Matter of the Application of Duke Energy Ohio, Inc.*, Opinion and Order at 17 (Jan. 11, 2011). (Appx. 285). This Court recently affirmed the PUCO’s Order, which was appealed by Duke-Ohio. *In re: Application of Duke Energy Ohio, Inc.*, Slip Opinion No. 2012-Ohio-1509.

deferrals. It was not ruling upon whether the deferrals could be collected for ratemaking purposes. Nor was it ruling upon the appropriateness of the deferral balance. That decision would have to be made later, when the Companies seek to actually collect the deferrals.

As made clear by the Commission in those cases, there is a distinction between deferral accounting and ratemaking. As the Commission noted, deferral accounting is not ratemaking. When there is no ratemaking, there can be no retroactive ratemaking. *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 512, 433 N.E.2d 568 (1982). On this basis the Court could determine that the PUCO was not precluded from adjusting the deferral balance, even if the adjustment was retroactive in nature.

3. When rates have not been fully collected, the Public Utilities Commission may order a credit without engaging in retroactive ratemaking.

In the Order on Remand, the Commission found that proposed adjustments to the fuel deferral balance recommended by OCC and others would be “tantamount to unlawful retroactive ratemaking.” (Appx. 637-638). The Commission reasoned that it had authorized the Companies to defer any increased revenues over the capped increase, pursuant to R.C. 4928.144 (Appx. 024). It had also directed that any deferred balance remaining at the end of 2011 is to be collected through a non-bypassable surcharge from 2012 through 2018. (Appx. 638).

The PUCO noted that it agreed with the Companies that an adjustment to the FAC deferral balance, “which we previously authorized to be collected as a means to recover the Companies’ actual fuel expenses incurred plus carrying costs, would be contrary to the Court’s prohibition against retroactive ratemaking and refunds.” (Appx. 638). The PUCO cited to *In re: Application of Columbus S. Power Co.*,⁶⁷ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*

⁶⁷*In re: Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 516, 2011–Ohio-1788, 947 N.E.2d 655.

(2009)⁶⁸ and *Lucas County Commrs v. Pub. Util. Comm.*,⁶⁹ for support. (Appx. 36). The PUCO characterized OCC as asking it to provide customers with a refund for the Companies' past POLR charges (and environmental carrying charges), which were collected from April 2009 through May 2011. "[W]e cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified." (Appx. 638).

But such reasoning mischaracterizes what occurred, as explained below, and reveals a misunderstanding of the principles of retroactive ratemaking and Ohio Supreme Court precedent. When the Commission stated that the past rates "have already been collected from customers" it was not factually correct. While *some* of the past 2009-2011 ESP rates have been collected from customers, there is a large portion of 2009-2011 ESP rates that are yet to be collected. The portion of the 2009-2011 ESP rates that are yet to be collected relates to the deferred revenue increases that were authorized under the Companies' standard service offer. These deferred revenue increases were estimated by the Companies to be \$628 million for OP.⁷⁰ The deferred revenue increases were created while the 2009-2011 ESP rates were in effect. The deferred revenue increases were a subset of the electric security plan increases and were intended to be collected from customers during 2012-2018 through an un-avoidable surcharge.

⁶⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 367, 2009-Ohio-604, 904 N.E.2d 853.

⁶⁹ *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 349, 686 N.E.2d 501 (1997).

⁷⁰ No deferrals were expected for CSP. In fact the Company estimated that for CSP there would be a need to credit customers for approximately \$3.9 million at the end of 2011. *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144*, Pub. Util. Comm. Nos. 11-4920-RDR, et al., Application, Exhibit A, page 1 of 7 (Sept. 1, 2011).

The fact that a deferred component of the 2009-2011 ESP rates continues to exist and will be collected over the next six years is an important point. It is a distinguishing factor which the PUCO failed to recognize when it concluded that OCC's proposed adjustment could not be undertaken.

The key distinction is that in the cases cited by the PUCO the rates being examined had been fully collected and were not continuing into the future. Thus, any adjustments would necessarily reach back to past (expired) rates and would be made to different future rates, running directly into the retroactive ratemaking prohibition first announced in *Keco*.⁷¹

For instance, in *Lucas County Commrs.* the rates that the appellant sought to remedy, through a refund, were rates that had expired.⁷² The rates appealed in *Lucas County Commrs.* stemmed from an experimental mechanism called a "weather normalization adjustment program."⁷³ The weather normalization program was agreed to in a stipulation and was a pilot program effective for a limited time--December 1994 through April 1995. After the pilot expired, Lucas County filed a complaint with the PUCO alleging that the weather normalization adjustment mechanism was unjust and unreasonable, and caused customers to overpay the utility by \$8.5 million.⁷⁴ Lucas County sought an \$8.5 million refund, through a rebate or service credit. The utility, Columbia Gas, moved to dismiss the complaint, claiming that such a refund would violate *Keco*.⁷⁵ The PUCO granted the motion to dismiss. Lucas County appealed.

⁷¹ *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465, (1957).

⁷² *Lucas County*, 80 Ohio St.3d at 348, 686 N.E.2d 501.

⁷³ *Id.*

⁷⁴ *Id.* at 344.

⁷⁵ *Id.*

This Court noted that the weather normalization program was an experimental program.⁷⁶ Importantly, it observed that the PUCO had not approved any mechanism for adjusting the rates of the weather normalization program. Additionally, the Court emphasized that Lucas County failed to seek relief during the time that the weather normalization program (and the rates) were in effect.⁷⁷ Instead, Lucas County filed its complaint after the weather normalization program had been discontinued. The Court affirmed the PUCO, concluding that “there simply was no revenue from the challenged program against which the utilities commission could balance alleged overpayments, or against which it could order a credit. Absent such revenue, the commission would be ordering Columbia Gas to balance a past rate with a different future rate and would thereby be engaging in retroactive ratemaking, prohibited by *Keco*.”⁷⁸

A fair reading of *Lucas County Commrs.* is that if there was revenue against which the Commission could have ordered a credit, then there would be no retroactive ratemaking. So if the rates were not yet fully collected and were continuing, an adjustment, such as the one sought by Lucas County, could have been made. Such an adjustment would not be balancing past rates with a different future rate that is impermissible under *Keco*. Instead, the adjusting could have lawfully occurred within the same continuing, existing rates--rates (in the form of deferred balances) that had not been fully collected. But in *Lucas County Commrs.*, as the Court noted, there was no revenue available because the rates had expired. The rates had been fully collected and were not continuing. Any adjustment would have been a balancing of past rates, with different future rates, amounting to retroactive ratemaking.

⁷⁶ *Id.* at 348.

⁷⁷ *Id.*

⁷⁸ *Lucas County Commrs.* at 348-349, 686 N.E.2d 501.

The Commission also relies upon *In re: Columbus S. Power Co.* (2011),⁷⁹ to argue against remedying the unjustified POLR collection. In that appeal the Court addressed OCC's request to remedy what the Court determined was unjustified PUCO action allowing the utility to collect \$63 million from customers through retroactive rates.⁸⁰

The retroactive ratemaking that OCC complained of pertained to adjusting two different sets of rates. The Commission was prospectively adjusting new electric security plan rates based on lower revenues collected in past pre-electric service plan rates. The pre-electric service plan rates in fact had expired when the electric security plan rates were implemented.⁸¹ Thus, the PUCO was balancing past rates, which had expired, with different future rates. The Court found the PUCO violated the case precedent against retroactive ratemaking as well as R.C. 4928.141(A).⁸² (Appx. 015).

When it came time to remedy this retroactive ratemaking, however, the Court determined that it could not do so.⁸³ The Court noted that the “unlawful rate increase”—the separable \$63 million element —“lasted until the end of 2009 and has been fully recovered, so reversing the retroactive increase will not reduce ongoing rates.”⁸⁴ The Court's holding was based on a fact pattern similar to that found in *Lucas County Commrs.*, where the rates had been fully collected and their collection was not continuing. In the facts at issue in the *In re: Columbus S. Power* appeal, the discrete \$63 million rate component (allowing 12 months of revenue to be collected in nine months) was identifiable and could be segregated out of the 2009 ESP rate increase. That

⁷⁹ *In re: Columbus S. Power Co.*, 128 Ohio St.3d 516, 2011–Ohio-1788, 947 N.E.2d 655.

⁸⁰ *Id.* at ¶15-21.

⁸¹ *Id.* at ¶9.

⁸² *Id.* at ¶10, 13, and 14.

⁸³ *Id.* at ¶15-21.

⁸⁴ *Id.* at ¶15

component was in effect only from April 1, 2009 through December 31, 2009. The rate element relating to the retroactive piece (collecting 12 months of revenue in nine months) had been fully collected by December 31, 2009, and was not a part of rates that continued into the future.

Starting January 1, 2010, there were to be new ESP SSO rates implemented, subject to discrete rate caps, with no rate element pertaining to collecting 12 months of revenue in nine months.

In comparison, in the proceeding below, there was no separable, short-term rate element that had expired. Unlike the separable rate element in *In re: Columbus S. Power Co.* (2011), the POLR rate element was a direct part of the ESP rates beginning in April 2009. The POLR charge was in effect until the Commission ordered it taken out in October 2011.

And the POLR charge had a significant impact on the remaining electric security plan rates that are to be collected through the phase-in recovery rider. POLR collections contributed to more than half of the unamortized deferral balance that will be collected through the rider. This is because \$457 million of POLR charges, along with the other ESP rate increases, were lumped together in order to set the value of the phase-in rates. The value of the phase-in rates drove the level of deferred electric security plan rate increases. Thus, reversing the POLR element, by crediting the unamortized deferral balance, will reduce ongoing rates. These “ongoing rates” are the phase-in recovery rider rates to be collected from 2012 through 2018. In contrast in *In re: Columbus S. Power Co.* (2011), reversing the retroactive portion of the 2009 electric security plan rates would not reduce ongoing rates.

Finally, the Commission relies on *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2009),⁸⁵ to assert that OCC's adjustment amounts to retroactive ratemaking. In that case, OCC

⁸⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853.

appealed, *inter alia*, the utility's infrastructure maintenance fund ("IMF"), a component of the utility's rate stabilization plan.

The PUCO filed a motion to dismiss OCC's appeal based, in part, on the fact that the infrastructure maintenance fund was a component of the utility's rate stabilization plan and the rate stabilization plan was no longer in effect.⁸⁶ Instead, standard service offer rates would be charged to customers beginning January 1, 2009, based on a new Commission order, consistent with S.B. 221.⁸⁷ Thus, the PUCO argued there was "no possibility of an effective remedy"⁸⁸ because a refund of the infrastructure charge would violate the prohibition on retroactive ratemaking.⁸⁹ This Court agreed, and concluded that it could not implement lower prospective rates since the rate stabilization plan structure (and the rates) were no longer in effect.⁹⁰

Again, as seen in *Lucas County Commrs. and Ohio Consumers' Counsel (2009)*, the holding of the Court turned upon the issue of whether the rates sought to be adjusted had been fully collected or were continuing to be collected. The Court noted that the rate stabilization plan rates had been fully collected and were no longer being collected. Thus, the Court would have had to balance those past rates with future different standard service offer rates. It thus declined to engage in retroactive ratemaking.

Here, though, the electric security plan rates that OCC seeks to adjust have not been fully collected. A significant portion of the 2009-2011 ESP SSO rates, the deferred revenue increases created as a result of phase-in rates, continues into the future, where they will be collected by the

⁸⁶ *Id.*, see also PUCO Motion to Dismiss (Jan. 2, 2009).

⁸⁷ *Id.*

⁸⁸ *Ohio Consumers' Counsel (2009)*, PUCO Motion to Dismiss at 8 (Jan. 2, 2009).

⁸⁹ *Id.*

⁹⁰ *Ohio Consumers' Counsel (2009)* at 362-363.

phase-in recovery rider. Thus, unlike *Lucas County, In re: Columbus S. Power Co.*, and *Ohio Consumers' Counsel (2009)*, the adjustment for past unjustified collections is not being sought against different, future rates. Rather the adjustment OCC seeks is against the remaining portion of the 2009-2011 ESP SSO rate increases – the deferred revenue increases.

That deferred revenue increase portion of the 2009-2011 ESP SSO rates remains to be collected and includes revenues authorized for later collection in order to phase-in the 2009-2011 SSO rate increases. Hence, a portion of the 2009-2011 ESP rates, not different future rates, are sought to be prospectively lowered. There is no attempt to balance past rates with different, future rates. There is but one set of rates at issue which the Court may adjust. They are the remaining 2009-2011 ESP rates that have not been collected and will continue to be collected from 2012 through 2018. These 2012 through 2018 rates are the direct result of the phased-in 2009-2011 ESP rates. They relate to the revenue increases authorized under the Companies' standard service offer that were deferred to meet the rate caps.

The existence of phase-in deferrals creates a mechanism that permits the PUCO to make rate adjustments to fully remedy the POLR overcharges, without running afoul of retroactive ratemaking. Such rate adjustments are akin to the adjustment this Court permitted in *Columbus S. Power Co.*, (1993)⁹¹ despite claims that the adjustment constituted retroactive ratemaking. See also *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 517, 620 N.E.2d 821 (1993) (the companion case where the same issues and arguments were presented as set forth in *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993)).

In that case, this Court considered the utility's request to order the PUCO (on remand) to provide a mechanism to collect revenues that had been deferred by the utility, in response to a

⁹¹ *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993).

PUCO phase-in order.⁹² The PUCO's phase-in order was reversed on appeal and the utility sought to undo the accounting and collect the revenues deferred while the appeal was pending.⁹³ IEU had argued that such recovery is prohibited by *Keco*. The Court, however found no retroactive ratemaking, determining that the utility's collection of deferred revenues would not violate the prohibition on retroactive ratemaking.⁹⁴ The Court ruled that the PUCO's initial order had specifically authorized collection of the deferred revenues and thus the revenues constitute a portion of the rates to which CSP is entitled.⁹⁵

The significance of the Court's ruling for the case at hand is the Court recognized that deferrals resulting from a phase-in plan are an inherent component of the rates that were approved by the PUCO. Thus, any rate adjustment made by the Court was an adjustment to existing rates that continued to be collected, not an adjustment of past rates against different future rates. The similarities between *Columbus S. Power Co (1993)*, and this appeal should be noted. In the present case, there was also a phase-in plan (albeit a lawful one), where revenues were deferred for future collection. Like the utility in *Columbus S. Power Co. (1993)*, OCC is seeking to adjust the remaining electric security plan rates (the deferred revenue increase portion) in response to a Supreme Court decision. OCC's request to adjust the remaining electric security plan rates is not retroactive ratemaking, just as the utility's request in *Columbus S. Power Co. (1993)* was not.

Moreover, the PUCO itself has on a number of occasions made adjustments to deferral balances, at times overruling parties' objections on the basis of retroactive ratemaking. For

⁹² *Columbus S. Power Co*, 67 Ohio St.3d at 541.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

instance, the PUCO, in 2011, ordered Duke-Ohio to modify a rider to remove the collection of lost generation revenues beginning December 10, 2009.⁹⁶ The PUCO did so even though it had approved the rider in the context of another case, Duke's electric security plan case.⁹⁷ Duke argued that the Commission's action amounted to retroactive ratemaking. The Commission found there was no retroactive ratemaking.⁹⁸

In another Order, the PUCO reduced the jurisdictional allocation factor used to collect deferred capital and operating costs. The utility objected to this ruling because the allocation factor was different than the factor the utility had used in its deferral accounting approved by the PUCO.⁹⁹ The utility argued that the change in allocation factors of the deferrals was retroactive ratemaking. The Commission disagreed.¹⁰⁰

Most recently, the PUCO rejected claims of retroactive ratemaking in the Companies' 2009 fuel audit proceeding,¹⁰¹ and ultimately ordered a remedy that OCC and IEU have sought in

⁹⁶ *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Energy Efficiency and Peak-Demand Reduction Programs and Portfolio Planning*, Pub. Util. Comm. No. 09-1999-EL-POR, 2011 Ohio PUC LEXIS 186, Entry on Rehearing at ¶9 (Feb. 9, 2011). (Appx. 264).

⁹⁷ *In the Matter of the Application of Duke Energy Ohio Inc., for Approval of an Electric Security Plan*, Pub. Util. Comm. No. 08-920-EL-SSO et al. 2008 Ohio PUC LEXIS 377, Opinion and Order (Dec. 17, 2008). (Appx. 489-532).

⁹⁸ *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Energy Efficiency and Peak-Demand Reduction Programs and Portfolio Planning*, Pub. Util. Comm. No. 09-1999-EL-POR, 2011 Ohio PUC LEXIS 186, Entry on Rehearing at ¶9 (Feb. 9, 2011). (Appx. 264).

⁹⁹ *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Pub. Util. Comm. No. 89-1001-EL-AIR, 1990 Ohio PUC LEXIS 1125, Entry on Rehearing (Oct. 11, 1990). (Appx. 577-588).

¹⁰⁰ *Id.* at 578.

¹⁰¹ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Pub. Util. Comm. Nos. 09-872-EL-FAC, Opinion and Order (Jan. 23, 2012). (Appx. 170-189).

this appeal—it credited the Companies’ fuel deferrals to compensate customers for overpayments related to a pre-fuel audit period.¹⁰² The Commission’s actions in this closely related case reveal an apparent inconsistency between that case and this case, which is not easily explained.

The 2009 Fuel Audit proceeding was explicitly contemplated in the Companies’ electric security plan case. It was the first of three annual proceedings in which the cost of fuel used to generate electricity supplied for 2009-2011 was to be reviewed for prudence, reconciliation, and accounting. As part of the proceeding, Financial and Management/Performance audits were conducted.

Numerous audit recommendations were made, including *inter alia*, recommendations pertaining to the causes of large under-recovery of fuel costs in 2009.¹⁰³ The Auditor singled out two contract events that were the sources of the large under-recovery of fuel costs.¹⁰⁴ One of the events pertained to a buy-out of a coal contract in 2008. This buyout led to an increase in the Companies’ 2009 fuel (mostly coal) expenses. The 2008 buyout was structured as a Settlement Agreement where in return for the Companies buying out the long-term coal contract, they received a lump sum payment (\$30 million) and a coal reserve in West Virginia. Ohio Power booked the coal reserve as an unregulated asset in 2008, and valued it at \$41 million.¹⁰⁵

The auditor recommended that the Commission should review whether any proceeds from the Settlement Agreement should be credited against Ohio Power’s fuel expense under-

¹⁰² *Id.* at 12. (Appx. 181).

¹⁰³ *Id.* at 3-6. The under-recovery of fuel costs in 2009 was \$37.5 million for CSP and \$297.6 million for OP. (Appx. 172-175).

¹⁰⁴ *Id.* at 4. (Appx. 173).

¹⁰⁵ *Id.*

recovery.¹⁰⁶ It concluded that the contract was an OP asset and the value (i.e. a lower-than-market price of coal supply) associated with it would have flowed through to OP customers had there not been a buy out of the contract.¹⁰⁷ As it were, the difference between the replacement coal and the contract price of the coal caused a drastic increase in the cost of fuel, and the large OP fuel expense under-recovery.¹⁰⁸ The Auditor noted that “[e]quity suggests that the Commission should consider whether some of the realized value should be credited against the under-recovery.”¹⁰⁹

On January 23, 2012, the Commission issued an Opinion and Order in Case No. 09-872-EL-FAC. The Commission determined that “all of the realized value from the Settlement Agreement should be credited against OP’s FAC under-recovery, namely the portion of the \$30 million 2008 lump sum payment not already credited to OP ratepayers as well as the \$41 million value of the West Virginia coal reserve that AEP booked when the Settlement Agreement was executed.”¹¹⁰ Additionally, the Commission ordered that AEP hire an auditor specifically to examine the value of the West Virginia coal reserve and to make a recommendation as to whether there is any increased value associated with the coal reserve that could be credited against OP’s under-recovery.

In reaching its decision, the Commission described the long-term coal agreement as a utility asset whose value (lower coal costs) would have been given to customers but for the early

¹⁰⁶ *Id.* at 5. (Appx. 174).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 4. (Appx. 173).

¹⁰⁹ *Id.* at 6. (Appx. 175).

¹¹⁰ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Pub. Util. Comm. Nos. 09-872-EL-FAC et al., Opinion and Order at 12 (Jan. 23, 2012). (Appx. 181).

contract termination. The Commission determined that the real economic cost of coal used during the audit period should include “more of the value realized by AEP” for entering into the Settlement Agreement. That value should have been realized by the utility’s customers through a credit to OP’s under-recovery and deferrals.

In reaching its decision the Commission discussed in detail the Companies’ arguments opposing crediting of the fuel deferrals with the revenues of the Settlement Agreement.¹¹¹ The Companies had argued that the Commission was prohibited from making such retroactive adjustments under *Keco* and *Lucas County Commrs.* The Commission described the Companies’ arguments as “unavailing.”¹¹²

Keco, the Commission announced, does not apply in this situation. “The Commission is not considering modifying a previous rate established by a Commission order through the ratemaking process as the Court considered in *Keco*. Rather, the Commission, by ordering the Companies to credit more of the proceeds from the Settlement Agreement to OP’s deferral balance, is establishing a future rate based upon the real cost of coal used by the Companies to generate electricity during the 2009 FAC audit period.”¹¹³ Likewise it found that *Lucas County Commrs.* does not apply either. “In *Lucas Cty.*, the Court held that the Commission was not statutorily authorized to order a refund of, or credit for, charges previously collected by a public utility where those charges were calculated in accordance with an experimental rate program which has expired. As noted above, the Commission has not made a determination modifying

¹¹¹ *Id.* at 13-14. (Appx. 182-183).

¹¹² *Id.* at 13. (Appx. 182).

¹¹³ *Id.*

the rate the Companies collected during 2009. Additionally, there is no experimental rate program involved in the current case. Thus, *Lucas Cty.* does not apply in this matter.”¹¹⁴

This Commission Order is instructive because these fuel costs deferrals which were credited for the Settlement Agreement proceeds are the very same fuel deferrals that OCC and IEU argue should be adjusted for POLR revenues collected from customers. But in the fuel adjustment clause proceeding the Commission determined that the fuel deferrals *can* be reduced on a going forward basis to adjust for a past event--a 2008 settlement agreement--without amounting to retroactive ratemaking.

While the Commission in the fuel proceeding indicated it was establishing a future rate, the Commission failed to recognize that OCC is seeking to accomplish a similar objective here—establishing a future phase-in recovery rate based upon the real costs of the SSO, which should reflect no POLR element. OCC and IEU seek the same type of crediting in this appeal where the fuel deferrals to be collected are reduced on a going forward basis to adjust for the past unjustified collection of POLR. The adjustments OCC seeks are not retroactive ratemaking, just like the adjustments the PUCO authorized in the fuel proceeding were not.

There is no attempt to balance past rates with future different rates. There is but one set of rates at issue here. They are the remaining 2009 -2011 ESP rates that have not been collected and will continue to be collected from 2012 through 2018. These 2012 through 2018 phase-in recovery rates are but a continuation of the 2009-2011 ESP rates. Because the rates continue to be collected and have not been fully collected, there is no balancing of past rates with different future rates. Thus, there is no retroactive ratemaking.

¹¹⁴ *Id.* at 14. (Appx. 183).

VI. CONCLUSION

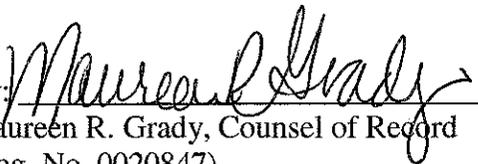
At issue here for 1.2 million residential customers is the Companies' future collection of unlawful charges related to residual revenue increases that included unjustified amounts for POLR. The POLR charges were charges the Ohio Supreme Court determined were not justified on the basis of the record during the initial phase of the case. And these are the same charges the PUCO also ruled were not justified in the Remand Order.

While the Commission remedied the collection of unjust POLR charges from May through December 2011, it failed to remedy the effect of the unlawful POLR charges collected from April 2009 through May 2011. The residual rates remaining from the ESP 1 rates will soon begin to be collected from customers. From April 2009 through May 2011, the Companies' customers paid residual ESP rates that were formed in part by the unjustified POLR charges. Unfortunately, and in violation of the law under the Order on Remand, customers will be forced to continue to pay residual electric security plan phase-in rates from 2012 through 2018 that reflect the impact of the unjustified POLR charges.

This Court should reverse the Commission's Order on Remand. The Court should instruct the Commission to provide prospective relief to customers through reduced phase-in recovery rates for the unjustified POLR charges collected.

Respectfully submitted,

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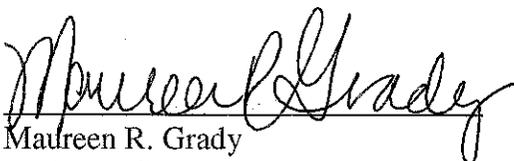
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Merit Brief on behalf of the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via First Class mail, postage prepaid this 10th day of April, 2012.


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