

ORIGINAL

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

: Case No. 2012-0187
:
: Appeal from the Public Utilities
: Commission of Ohio
:
: Public Utilities Commission of Ohio Case
: Nos. 08-917-EL-SSO and 08-918-EL-SSO

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

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INITIAL BRIEF OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

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INITIAL BRIEF OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

BACKGROUND AND STATEMENT OF FACTS

After competition failed to develop as expected following the adoption of Amended Substitute Senate Bill 3 in 1999, the General Assembly enacted Amended Substitute Senate Bill 221 (“SB 221”) in 2008.¹ SB 221 requires an Electric Distribution Utility (“EDU”) to provide “a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.”² The standard service offer (“SSO”) may be in one of two forms: a Market Rate Offer (“MRO”)³ or an Electric Security Plan (“ESP”).⁴

On July 31, 2008, the Ohio-based EDUs of American Electric Power Corporation (“AEP”), Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”) (collectively, “Companies”), filed Applications for ESPs. Following hearings on the Applications in 2008, the Public Utilities Commission of Ohio (“Commission”) issued its Opinion and Order on March 18, 2009, modifying and approving an ESP for each Company. Three parts of that Opinion and Order remain relevant to this appeal. First, the Commission authorized the collection of a Provider of Last Resort (“POLR”) charge based on a formula that

¹ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 513 (2011) (“*Remand Decision*”) (Appx. at 265).

² Section 4928.141(A), Revised Code (Appx. at 380).

³ Section 4928.142, Revised Code (Appx. at 381).

⁴ Section 4928.143, Revised Code (Appx. at 385).

had nothing to do with the costs of providing POLR service.⁵ Second, the Commission authorized the recovery of carrying costs of environmental investments made by the Companies from 2001 to 2008 that had not been previously included in rates (Pre-2009 Component).⁶ Third, the Commission ordered that the Companies should phase-in any authorized increases so as not to exceed, on a total bill basis, certain percentage increase levels for each of the three years of the ESPs.⁷ “Any amount over the allowable total bill increase percentage levels [would] be deferred pursuant to Section 4928.144, Revised Code, with carrying costs.”⁸ Any deferred balance at the end of 2011 was to be recovered by a nonavoidable surcharge.⁹ Industrial Energy Users-Ohio (“IEU-Ohio”) and the Office of the Ohio Consumers’ Counsel (“OCC”) sought rehearing and appealed the Commission’s Opinion and Order.

In a decision issued on April 19, 2011, the Supreme Court of Ohio (“Court”) reversed the Commission’s Opinion and Order on three issues and remanded the case for further review on two of those issues.¹⁰ Initially, the Court found that the Commission had authorized an illegal retroactive rate increase, but found that there was no basis for a refund of the amounts illegally collected by the Companies.¹¹ Second, the Court held that the Commission had improperly

⁵ Opinion and Order at 40 (March 18, 2009) (Appendix at 110). (Appendix citations are abbreviated Appx. hereafter).

⁶ *Id.* at 28 (Appx. at 98).

⁷ *Id.* at 22 (Appx. at 92).

⁸ *Id.* This amount is referred to as the “phase-in deferral” amount and the phase-in authorized by the Commission was pursuant to Section 4928.144, Revised Code.

⁹ *Id.* at 22-23 (Appx. at 92-93).

¹⁰ *Remand Decision*, 128 Ohio St.3d 512 (Appx. at 259).

¹¹ *Id.* at 514-17 (Appx. at 266-69).

authorized the POLR charge because “the manifest weight of the evidence contradict[ed] the commission’s conclusion that the POLR charge [was] based on cost.”¹² The Court remanded the issue concerning POLR charges to the Commission.¹³ Third, the Court held that the Commission had illegally authorized the inclusion of the Pre-2009 Component that had not been previously included in rates because the Commission had authorized recovery on the “determination that R.C. 4928.143(B)(2) permit[ted] ESPs to include unlisted items.”¹⁴ This matter was also remanded to the Commission.¹⁵

After the Court remanded the two issues to the Commission, the Commission initially ordered the Companies to file revised tariffs removing the POLR charges and Pre-2009 Component.¹⁶ In response to the Commission’s order to file revised tariffs, the Companies sought rehearing¹⁷ and permission to allow the existing rates to remain effective, but collected subject to refund. The Companies also requested a procedural schedule to address the two matters remanded to the Commission by the Court.¹⁸

¹² *Id.* at 519 (Appx. at 269-70).

¹³ *Id.*

¹⁴ *Id.* at 520 (Appx. at 270-71).

¹⁵ *Id.*

¹⁶ Entry at 2 (May 4, 2011) (Appx at 150).

¹⁷ Columbus Southern Power Company’s and Ohio Power Company’s Application for Rehearing (May 6, 2011) (Supplement at 226). (Citations to the Supplement are cited as Supp. hereafter.)

¹⁸ Columbus Southern Power Company’s and Ohio Power Company’s Combined Motion to Establish a Procedural Schedule for the Remand Proceeding and to Reject or Hold in Abeyance the Tariffs filed on May 11, 2011, and Motion to Prospectively Convert the Affected Rates to Being Collected Subject to Refund, and Request for Expedited Ruling on Both Motions (May 11, 2012) (Supp. at 264).

While the Companies were continuing their attempts to maintain the illegal rates contained in their prior tariffs, IEU-Ohio sought Commission orders that addressed the full effects of the Court's April 19, 2011 decision on the Companies' ESPs and related matters. On May 10, 2011, IEU-Ohio filed a motion seeking a Commission order directing the Companies to reduce the phase-in deferral amounts that would be recovered through the unavoidable surcharge by amounts that had been determined to be unlawful by the Court.¹⁹ Additionally, IEU-Ohio identified several other areas that would be affected and should be addressed as a result of the Court's determination that the rates contained in the ESPs were illegal.²⁰ Besides filing the motion seeking additional Commission action as a result of the Court's decision, IEU-Ohio also filed an Application for Rehearing of the Commission's May 4, 2011 Entry. In its Application for Rehearing, IEU-Ohio requested that the Commission address the effects of the Court's decision on the phase-in deferral balance that accumulated as a result of the rate caps that the Commission authorized in the original 2009 Opinion and Order and the other related matters.²¹

On May 25, 2011, the Commission reversed its prior order that the tariffs be modified to eliminate the POLR charges and Pre-2009 Component and permitted the pre-*Remand Decision* rates to remain in effect, subject to refund. The Entry also set a procedural schedule to address

¹⁹ Motion Requesting Commission Orders to Bring the Electric Security Plans of Ohio Power Company and Columbus Southern Power Company into Compliance with the Ohio Supreme Court's Decision and Other Relief and Memorandum in Support at 7-9 (May 10, 2011) (Supp. at 253-55).

²⁰ *Id.* at 10-11 (determination of revenues subject to collection for economic development projects and universal service funding), at 11 (calculation of excessive earnings resulting from the ESP), at 11-12 (calculation of future ESP rates) (Supp. at 256-58).

²¹ Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio (May 16, 2011) (Supp. at 279).

the issues remanded by the Court.²² Because the Commission did not address the issue of the flow-through effects on the phase-in deferral and other matters of the Court's decision in its May 25, 2011 Entry, IEU-Ohio filed another Application for Rehearing on June 1, 2011.²³ Although the Commission denied IEU-Ohio's Application for Rehearing, it noted that "[t]he May 25, 2011, entry ... does not preclude IEU-Ohio from asserting, during the remand proceedings established by the entry, that the Commission should consider any flow-through effects on customers' bills, as may be necessary to comply with the Court's remand."²⁴

Parties filed testimony, and the remanded cases were presented to the Commission. During the remand hearing, the parties addressed three issues: the Pre-2009 Component; POLR charges; and the flow-through effects of the *Remand Decision*. In regard to the POLR charges, the Companies sought to demonstrate that the formula-based methodology properly valued POLR service.²⁵ IEU-Ohio presented substantial and credible testimony indicating that the formula-based approach failed to measure costs of POLR service.²⁶

Concerning the Pre-2009 Component, the Companies did not present any new testimony supporting authorization of recovery under Section 4928.143(B)(2), Revised Code. Instead, the Companies' witness indicated that there were several provisions that might serve as the basis for

²² Entry at 4-5 (May 25, 2011) (Appx. at 156-57).

²³ Application for Rehearing by Industrial Energy Users-Ohio of May 25, 2011 Entry and Memorandum in Support (June 1, 2011) (Supp. at 291).

²⁴ Entry on Rehearing at 4 (June 22, 2011) (Appx. at 398).

²⁵ Cos. Remand Ex. 1 & 3 (Supp. at 9 & 20).

²⁶ IEU-Ohio Remand Ex. 1 at 34; IEU-Ohio Remand Ex. 2 at 4-5 (Supp. at 48 & 56-57).

authorization of the Pre-2009 Component.²⁷ IEU-Ohio's witness on this issue, Joseph Bowser, testified that the Companies had failed to provide any testimony that supported the legal conclusions contained in the Companies' testimony. In particular, the Companies' testimony failed to demonstrate how the Pre-2009 Component would stabilize or provide certainty in the provision of retail electric service.²⁸ Further, the Companies did not offer any support for the economic need for additional compensation due to any incremental investment that may have been associated with the Pre-2009 Component.

Additionally, the unrefuted remand evidence demonstrated that the manner in which customers are provided stable or certain retail electric service has nothing to do with the ability of the Companies to bring their generating plants into environmental compliance. As members of PJM Interconnection, Inc. ("PJM"), the Companies did not (and do not) control the daily dispatch of their plants. Instead, PJM is responsible for ensuring that generation supply is adequate to meet demand.²⁹

On a day-ahead basis, and in real-time, PJM requires the capacity resources to submit offers to PJM and these offers reflect the prices at which the resources are willing to make themselves available to PJM to be dispatched in accordance with PJM's directions. PJM dispatches resources based upon the least cost set of offer prices to meet actual load that materializes within the PJM footprint and without regard to things like retail service areas.³⁰

²⁷ Cos. Remand Ex. 2 at 4 (Supp. at 18).

²⁸ IEU-Ohio Remand Ex. 3 at 8 (Supp. at 98).

²⁹ IEU-Ohio Remand Ex. 2 at 6 (Supp. at 58).

³⁰ *Id.*

The lack of risk regarding the physical supply of power was well-understood by the Companies.³¹

Finally, IEU-Ohio provided testimony supporting a Commission order addressing the flow-through effects of the Court's *Remand Decision*.³² IEU-Ohio witness Joseph Bowser testified that the Commission authorized the Companies to collect a total ESP revenue requirement, but then limited the amount of the total authorized revenue that could be collected during the ESP period ending December 31, 2011.³³ The residual amount of the total authorized revenue not collected during the ESP period accumulated in the phase-in deferral, which was subject to further review by the Commission and amortization through customer charges imposed after the ESP period. "To the extent the amount of revenue collected by the Companies during the ESP period was based on items that [were] not properly includable in an ESP, the amount of revenue deferred for future collection has been overstated."³⁴ To address the overstatement of the deferral amounts, Mr. Bowser recommended that the Commission "reduce the total authorized revenue by the amounts not properly collectible as part of an ESP, and subtract the amount actually collected from the adjusted ESP total to determine how much, if any, of the authorized revenue is properly deferred for future collection."³⁵ He testified further

³¹ *Id.* at 7 (Supp. at 59).

³² IEU-Ohio Remand Ex. 3 at 9-11 (Supp. at 99-101).

³³ *Id.* at 10 (Supp. at 100).

³⁴ *Id.*

³⁵ *Id.* At the time this matter was heard by the Commission, OP had a substantial outstanding deferral balance resulting from the bill limiters the Commission ordered, but CSP did not. *Id.* at 15 (Supp. at 105). CSP, however, had other substantial deferral balances in the form of regulatory assets that could have been reduced because of the flow-through effects of the Court's *Remand Decision*. *Id.*

that the reduction to the phase-in deferral related to the Pre-2009 Component was \$62.8 million and \$203 million for CSP and OP, respectively, and that the reduction related to the illegal POLR charges was \$235.3 million and \$132.4 million for CSP and OP, respectively.³⁶

The Companies did not challenge Mr. Bowser's approach or math. Instead, the Companies responded that consideration of the flow-through effects was outside the scope of the remand despite the Commission's prior Entry on Rehearing. Further, the Companies offered testimony on generally accepted accounting principles related to accounting conventions³⁷ and argued that it would be improper for the Commission to address the flow-through effects to reduce future charges because it would constitute retroactive rate-making.³⁸

Following the hearing, the Commission issued an Order on Remand. In the Order on Remand, the Commission rejected the Companies' attempt to justify the POLR charges based on the same formula-based methodology the Court had previously determined did not reflect the cost of providing POLR service.³⁹ Based on its determination that the Companies had failed to support authorization of a POLR charge, the Commission ordered that the POLR charges collected subject to refund be returned to customers and that POLR charges be removed from the ESP tariffs.⁴⁰

³⁶ *Id.* at 10-11 & 14 (Supp. at 100-01 & 104).

³⁷ Cos. Remand Ex. 7 at 3-4 (Supp. at 40-41).

³⁸ The Companies' arguments are summarized in the Order on Remand. Order on Remand at 35 (Oct. 3, 2011) (Appx. at 193) ("*Order on Remand*").

³⁹ *Id.* at 15-34 (Appx. at 173-92).

⁴⁰ *Id.*

In contrast to its decision to reject the Companies' request to continue the POLR charges, the Commission authorized the Pre-2009 Component to remain in rates. In support of this holding, the Commission found that there was sufficient evidence in the record in the 2008 hearings to find that the Pre-2009 Component could be approved under Section 4928.143(B)(2)(d), Revised Code.⁴¹ Further, the Commission determined that the Companies were not required to demonstrate that the ESP would not provide adequate compensation without the Pre-2009 Component.⁴² The Commission also found that its decision was "consistent with the broad authority granted to the Commission by Section 4928.143(B)(1), Revised Code, which authorizes ESPs to include 'provisions relating to the supply and pricing of electric generation service.'"⁴³

Finally, the Commission rejected the arguments of IEU-Ohio and OCC concerning the flow-through effects of the Court's *Remand Decision* on the phase-in deferral balances and other matters.⁴⁴ In refusing to reduce the phase-in deferral balances, the Commission determined that the flow-through recommendations of IEU-Ohio and OCC "would be tantamount to unlawful retroactive ratemaking."⁴⁵ The Commission continued, "[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."⁴⁶

⁴¹ *Id.* 13-14 (Appx. at 171-72).

⁴² *Id.* at 13 (Appx. at 171).

⁴³ *Id.* at 15 (Appx. at 173).

⁴⁴ *Id.* at 34-36 (Appx. at 192-94).

⁴⁵ *Id.* at 35-36 (Appx. at 193-94).

⁴⁶ *Id.* at 36 (Appx. at 194).

Following the Commission's Order on Remand, IEU-Ohio filed an Application for Rehearing requesting that the Commission reverse its findings on the Pre-2009 Component and the flow-through effects of the *Remand Decision*.⁴⁷ In general, the Commission cited its prior Order on Remand to deny rehearing, but on the issue of the application of flow-through effects, the Commission clarified that it could not order a refund of POLR charges that had previously been collected from customers.⁴⁸ After the Commission denied the Application for Rehearing, IEU-Ohio filed its Notice of Appeal.⁴⁹

STANDARD OF REVIEW

Section 4903.13, Revised Code, states that “[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.” In approving the Pre-2009 Component, the Commission did not legally or reasonably apply the requirements of Section 4928.143(B)(2)(d), Revised Code, and violated the law of the case in finding that the decision to approve the Pre-2009 Component was consistent with the authority granted to the Commission by Section 4928.143(B)(1), Revised Code. Further, the Commission's decision was unlawful and unreasonable because the Commission failed to address whether existing rates without the Pre-2009 Component provided adequate compensation for the Companies. Additionally, the Commission erred when it failed to account for the flow-through effects of the Court's *Remand Decision* on the deferral balances created by

⁴⁷ Application for Rehearing of Order on Remand and Memorandum in Support of Industrial Energy Users-Ohio (Nov. 2, 2011) (Appx. at 201).

⁴⁸ Entry on Rehearing at 18 (Dec. 14, 2011) (Appx. at 256).

⁴⁹ Notice of Appeal of Appellant Industrial Energy Users-Ohio (Feb. 1, 2012) (Appx. at 1).

the rate caps and other related matters. The Commission also illegally and unreasonably allowed the Companies to retain amounts collected subject to refund that should have been returned to customers for the period in which the Companies had no authorization. Generally, these assignments of error raise legal issues to which the Court has “complete and independent power of review.”⁵⁰ (Proposition of Law No. 1 also identifies an instance in which the Commission’s decision is not supported by the manifest weight of the evidence.⁵¹) Based on these legal errors, the Court should reverse the Commission’s Order on Remand and direct the Commission to undertake the necessary actions to bring the Order on Remand into compliance with Ohio law.

ARGUMENT

PROPOSITION OF LAW NO. I

The Commission’s finding that the Companies may collect revenues for the carrying costs of 2001-2008 incremental environmental investments (Pre-2009 Component) pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that granting such collection would have the effect of providing certainty regarding retail electric service.

In the *Remand Decision*, the Court indicated that the Companies may not be authorized to recover the Pre-2009 Component unless recovery is permitted under one of the listed items contained in Section 4928.143(B)(2), Revised Code.⁵² In the Order on Remand, the Commission found that the requirements of Section 4928.143(B)(2)(d), Revised Code, were satisfied and allowed collection of the Pre-2009 Component, holding that “the environmental investment

⁵⁰ *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469 (1997).

⁵¹ The Court has determined that ruling on an issue without a supporting record is an abuse of discretion and reversible error. *Industrial Energy Users-Ohio v. Pub. Util. Comm’n of Ohio*, 117 Ohio St.3d 486 (2008).

⁵² *Remand Decision*, 128 Ohio St.3d at 520.

carrying charges have the effect of providing certainty to both the Companies and their customers regarding retail electric service, specifically generation service.”⁵³ In support of its decision, the Commission relied on testimony in the initial 2008 hearings indicating that a carrying cost is related to long-term investment and that Pre-2009 Component investments are necessary to keep coal-fired facilities running.⁵⁴ The Commission had to rely on the prior record because the Companies offered no new testimony in support of the Pre-2009 Component during the remand hearing.⁵⁵ Wholly absent from the record, however, was any indication that retail electric service would become less “certain” if the Companies were not permitted to recover the requested carrying charges for the Pre-2009 Component.

In its Application for Rehearing, IEU-Ohio pointed to the lack of record to support the Commission’s decision to authorize the Pre-2009 component under Section 4928.143(B)(2)(d), Revised Code.⁵⁶ In rejecting the assignment of error, the Commission concluded that there was sufficient evidence in the record from the initial hearing to support its decision.⁵⁷ Further, it rejected IEU-Ohio’s argument that the Companies had to demonstrate that the Pre-2009 Component was necessary to make retail electric service more probable, but then noted that the

⁵³ Order on Remand at 14 (Appx. at 172).

⁵⁴ *Id.* citing the direct and rebuttal testimony of Philip Nelson (Appx. at 172).

⁵⁵ Cos. Remand Ex. 2 (Supp. at 14). Mr. Nelson summarized his prior testimony and testified that he had been advised by counsel that various provisions of Section 4928.143(B)(2), Revised Code, authorized recovery of the revenues.

⁵⁶ Application for Rehearing of Order on Remand and Memorandum in Support of Industrial Energy Users-Ohio at 5-8 (Nov. 2, 2011) (Appx. at 208-211).

⁵⁷ Entry on Rehearing at 5 (Dec. 14, 2011) (Appx. at 243).

availability of lower cost coal-fired units would have the effect of “stabilizing prices.”⁵⁸ In denying the assignment of error, the Commission misstated both the applicable law and facts.

Section 4928.143(B)(2)(d), Revised Code, provides in relevant part that an ESP may include “charges relating to ... carrying costs ... as would have the effect of ... providing certainty regarding retail electric service.” There is no disagreement that the Companies were seeking a carrying charge within the meaning of the division. At issue is whether the Companies satisfied the additional requirement that the Pre-2009 Component charge has the effect of providing certainty regarding retail electric service provided during the ESP period (that did not commence until the beginning of 2009) or at any time.

The General Assembly provided a definition for “retail electric service.” As used in Section 4928.143(B)(2)(d), Revised Code, “retail electric service” is defined as “any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption.”⁵⁹

“Certainty,” however, is not a defined term in Chapter 4928, Revised Code. Because “certainty” is not defined, the Court first must look to the plain meaning of the term.⁶⁰ Plain meaning “is invariably ascertained by resort to common dictionary definitions.”⁶¹

⁵⁸ *Id.*

⁵⁹ Section 4928.01(A)(27), Revised Code (Appx. at 374).

⁶⁰ *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049 ¶ 14 (quoting *Sharp v. Union Carbide Corp.*, 38 Ohio St.3d 69, 70 (1988) (“[w]here a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning.”)).

⁶¹ *Fickle v. Conversion Technologies Internatl., Inc.*, 2011-Ohio-2960 at ¶ 29 (6th Dist. Ct. App.) June 17, 2011.

“Certainty” has several potential meanings. A fact may be a certainty.⁶² In this context, however, “certainty” denotes that the retail electric service is made probable of occurrence, dependable, or reliable.⁶³ The burden of demonstrating that the charge makes more certain the provision of retail electric service rests with the Companies.⁶⁴ Thus, the Companies had the burden to demonstrate that the Pre-2009 Component was necessary to make it probable that customers would receive retail electric service.

The Companies, however, did not demonstrate that the Pre-2009 Component was necessary to make retail electric service “certain.” They did not offer any new evidence to support authorization of the Pre-2009 Component, and the Commission relied on the referenced testimony from the 2008 hearing to support its findings in the Order on Remand. The first reference to the 2008 hearing testimony merely describes the nature of a carrying charge and states that it is the annual cost associated with a capital investment.⁶⁵ This testimony only described the nature of the carrying costs that the Companies were seeking to recover. It did not indicate how that recovery will provide certainty in the provision of retail electric service.

The second reference is to testimony regarding the use of investments in environmental plant to keep low-cost coal-fired generation running and compares the use of existing generation to the alternative of purchased power.⁶⁶ This testimony did not indicate that the charge was

⁶² Webster’s Ninth New Collegiate Dictionary at 222-23 (1983).

⁶³ *Id.*

⁶⁴ Section 4928.143(C)(1), Revised Code (Appx. at 386).

⁶⁵ Order on Remand at 13-14 (Appx. at 171-72).

⁶⁶ *Id.* at 14 (Appx. at 172). The Commission then supported its finding by reference to Commission Staff’s (“Staff”) testimony from the 2008 hearings that investment supporting compliance with environmental requirements is in the public interest. *Id.* The only findings the

necessary to make retail electric service more certain. In fact, the comparison of coal-fired generation to purchased power suggests exactly the opposite, *i.e.* that alternative generation resources were available. Lower cost power may in fact have the effect of lowering or “stabilizing prices,”⁶⁷ but the availability of lower cost power does not support the finding that the Pre-2009 Component made the availability of the power more “certain.”

This analysis is not intended to suggest that the Commission should not address whether the Companies should incur environmental upgrades to maintain their generation fleet. Instead, at issue here is whether those costs can be passed through to customers by relying on Section 4928.143(B)(2)(d), Revised Code. Because it is apparent that the Commission did not have any evidence to support the legitimacy of the charge under that section, the Commission resorted to an alternative rationale for authorizing the charge. The Commission attempted to legitimize its decision by offering that the investments allow the continued operation of coal-fired generation plants. As a result, the Commission concluded that customers benefit because the costs of these investments would be lower than if purchased power was used to satisfy customer demand.⁶⁸ This discussion, however, comes with no quantification and does not address whether there is a need to fund incremental environmental investments so as to provide certainty regarding retail electric service, as required under Section 4928.143(B)(2)(d), Revised Code.

The Commission’s failure to follow the statutory structure of Section 4928.143(B)(2)(d), Revised Code, also lead it to ignore evidence of the actual dispatch of power that demonstrated

Commission made regarding the Staff testimony in the Opinion and Order was that Staff recommended that they be recovered and that Staff had confirmed that the amounts the Companies were requesting were accurate. Opinion and Order at 25 (Appx. at 95).

⁶⁷ Entry on Rehearing at 5 (Dec. 14, 2011) (Appx. at 243).

⁶⁸ Order on Remand at 14 (Appx. at 172).

that the Pre-2009 Component had no effect on the certainty of retail electric service. As the unrefuted testimony demonstrated, “PJM dispatches resources based upon the least cost set of offer prices to meet actual load that materializes within the PJM footprint and without regard to things like retail service areas. Thus, the dispatching of generation to meet the load of the Companies’ customers is managed by PJM.”⁶⁹ In its Entry on Rehearing, however, the Commission determined that actual generation dispatch was not relevant to its decision.⁷⁰ The assertion that CSP and OP customers benefited from lower-cost coal-fired generation, therefore, is directly contradicted by the manner in which power is actually dispatched to those customers.

In summary, OP and CSP did not provide any evidence that the Pre-2009 Component is necessary to provide certainty in the provision of retail electric service, and the references to the record used by the Commission to support authorization of the Pre-2009 Component fail to demonstrate that the statutory requirements of Section 4928.143(B)(2)(d), Revised Code, are satisfied. Moreover, the unrefuted testimony regarding the manner in which electric service is dispatched by PJM demonstrated that the Pre-2009 Component would have no bearing on certainty of retail electric service. Because the manifest weight of the evidence does not support the Commission’s authorization of the Pre-2009 Component under Section 4928.143 (B)(2)(d), Revised Code, the Commission’s decision is unlawful.

PROPOSITION OF LAW NO. II

The Commission’s finding that the Companies may collect revenues for the Pre-2009 Component pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that their other revenues did not provide adequate compensation.

⁶⁹ IEU-Ohio Remand Ex. 2 at 6-7 (Supp. at 58-59). The Companies’ testimony in the 2008 hearings is consistent with Mr. Murray’s description. Vol. XI at 58-60 (Supp. at 3-6).

⁷⁰ Entry on Rehearing at 5 (Dec. 14, 2011) (Appx. at 243).

The Companies, through the entirety of these proceedings, have made no claim that the revenue from the rates and charges other than those found illegal by the Court's April 19, 2011 decision is inadequate to compensate the Companies for SSO service. IEU-Ohio noted that there was not an economic basis for authorizing recovery, but the Commission rejected IEU-Ohio's position, stating that there was no support "that AEP-Ohio is required to make such a showing or pass an earnings test as a condition of recovery."⁷¹ In response to the assignment of error raised in IEU-Ohio's Application for Rehearing, the Commission further concluded that IEU-Ohio cited no authority to require the Companies to address the adequacy of their revenue or Commission policy requiring such review,⁷² but went on to state that there was "an economic basis" for permitting recovery because the Pre-2009 Component had not been reflected in rates previously.⁷³ In permitting recovery for the Pre-2009 Component without addressing the economic need, however, the Commission has violated its own policy regarding the legal basis for authorizing rate increases under Section 4928.143(B)(2), Revised Code, and the resulting decision is unlawful and unreasonable.

The Commission established the policy of requiring a showing of economic need for the additional revenue in its initial Opinion and Order in this case. In the Opinion and Order, the Commission refused to approve a separate rider for various elements of the Companies' proposed Enhanced Service Reliability Plan without addressing those costs in the context of a

⁷¹ Order on Remand at 13 (Appx. at 171).

⁷² Entry on Rehearing at 6 (Dec. 14, 2011) (Appx. at 244).

⁷³ *Id.*

full rate review.⁷⁴ IEU-Ohio specifically noted this Commission ruling in its Application for Rehearing.⁷⁵ Yet, the Commission without explanation incorrectly concluded that IEU-Ohio had not cited any authority to support such a requirement to address revenue adequacy (or the need to impose higher rates on customers) and that the Commission did not have such a policy.

The Commission then determined that there was an economic justification because the Pre-2009 Component had not been reflected in rates previously. The lack of prior rate recognition, however, does not address the issue created by the Commission's policy. The Commission's policy addressed whether existing revenue is sufficient; if existing revenue is sufficient, then there would be no justification for imposing higher rates on customers. By changing or avoiding the question, the Commission denied IEU-Ohio's assignment of error by allowing the Companies to increase electric bills without satisfying the test imposed by the Commission's policy and precedent for determining whether and, if so, how much electric bills should be increased.

By first asserting that there was no standard and then changing the prior standard, the Commission's decision on IEU-Ohio's assignment of error was the regulatory equivalent of a "heads-AEP-Ohio wins, tails-consumers-lose"-coin toss. "Although the Commission should be willing to change its position when the need therefor is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law."⁷⁶ In this instance,

⁷⁴ See, e.g., Opinion and Order at 34 (Mar. 18, 2009) (enhanced service reliability) (Appx. at 104).

⁷⁵ Application for Rehearing of Order on Remand and Memorandum in Support of Industrial Energy Users-Ohio at 8-9 (Nov. 2, 2011) (Appx. at 211-12).

⁷⁶ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n of Ohio*, 42 Ohio St.2d 403, 431 (1975).

however, the Commission failed to acknowledge the legitimate application of its prior policy and precedent that there must be some economic justification for the rate increase resulting from the inclusion of the Pre-2009 Component in rates before rates can be increased. Because the Commission has failed to follow its own precedent, customers faced unwarranted increases in their generation rates that are, for the reasons explained herein, further reflected in the phase-in deferral amounts subject to future collection from consumers. As a result, the Commission's Order on Remand is unlawful and unreasonable.

PROPOSITION OF LAW NO. III

The Commission's authorization of the Pre-2009 Component pursuant to Section 4928.143(B)(1), Revised Code, was unlawful and unreasonable in that it is based on a statutory provision that was not advanced by any party to the proceeding and was beyond the scope of the Court's remand directing the Commission to determine if a provision of Section 4928.143(B)(2), Revised Code, supports collection of these revenues.

In remanding the Pre-2009 Component for the Commission's further review, the Court was specific as to the scope of the review the Commission could undertake. After rejecting the Commission's argument that it had the authority to approve the Pre-2009 Component without reference to a specific provision of Section 4928.143(B)(2), Revised Code, the Court went on to state "the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges."⁷⁷

In prosecuting this case, the parties understood the Court's remand was limited to a review of the applicability of Section 4928.143(B)(2), Revised Code. A review of the Companies' testimony and post-hearing initial and reply briefs demonstrates that the only grounds on which the Companies sought recovery of the Pre-2009 Component were various

⁷⁷ *Remand Decision*, 128 Ohio St.3d at 520 (Appx. at 270-71).

subdivisions of Section 4928.143(B)(2), Revised Code.⁷⁸ The parties opposing the Companies' rate increase for the Pre-2009 Component did not support any recovery, but their attention also was properly directed at the application of Section 4928.143(B)(2), Revised Code. The Commission Staff similarly premised its support for authorization on Section 4928.143(B)(2)(d), Revised Code.⁷⁹

The Commission, however, reached well beyond the record on which any of the parties argued to find some justification for allowing the Companies to continue to recover the Pre-2009 Component in their rates. In authorizing recovery of the Pre-2009 Component charges, the Commission concluded "that our decision in this case is consistent with the broad authority granted to the Commission by Section 4928.143(B)(1), Revised Code."⁸⁰ The Commission then added that "[t]he carrying charges are a specific component of the Companies' standard service offer generation rates and are directly related to environmental investments made at generating facilities which are used to serve standard service offer customers."⁸¹

In response to an assignment of error indicating that the Commission violated the law of the case, the Commission's Entry on Rehearing stated that "nothing in the [Supreme Court's remand] decision precludes the Commission from considering other statutory provisions that may be relevant in resolving the remanded matter of the Companies' environmental carrying charges. The law of the case doctrine does not limit the Commission's authority to fully

⁷⁸ Columbus Southern Power Company's and Ohio Power Company's Initial Post-Hearing Brief on Remand at 13-15 (Aug. 5, 2011) (Supp. at 130-32); Columbus Southern Power Company's and Ohio Power Company's Reply Brief on Remand at 35-37 (Aug. 12, 2011) (Supp. at 215-17).

⁷⁹ Order on Remand at 12 (Appx. at 170).

⁸⁰ *Id.* at 15 (Appx. at 173).

⁸¹ *Id.*

consider the issues remanded by the Court.”⁸² In reaching beyond Section 4928.143(B)(2), Revised Code, to justify authorization for the Pre-2009 Component, however, the Commission unfairly invented and injected an alternative theory of recovery in violation of the law of the case established by the Court’s remand.

Applicable to both judicial and administrative proceedings,⁸³ the doctrine of the law of the case provides “that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.”⁸⁴ As the Court has found, “the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.”⁸⁵ The effect of applying the law of the case to a remand results in a narrowing of the legal arguments that may be further litigated: “Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court’s determination of the applicable law.”⁸⁶ “[A]bsent extraordinary circumstances, such as an intervening decision by [the Supreme Court], an inferior court has no

⁸² Entry on Rehearing at 7-8 (Dec. 14, 2011) (Appx. at 245-46).

⁸³ *Worthington City Schools Board of Education v. Franklin County Board of Revision*, 129 Ohio St.3d 3, 7 n.2 (2011); *Colonial Village, Ltd., v. Washington County Board of Revision*, 123 Ohio St.3d 268, 272-73 (2009).

⁸⁴ *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984).

⁸⁵ *Id.*

⁸⁶ *Id.*

discretion to disregard the mandate of a superior court in a prior appeal in the same case.”⁸⁷

Failure to follow the law of the case is a ground for reversal.⁸⁸

In failing to follow the law of the case, the Order on Remand was unlawful and unreasonable. The Court’s order regarding the Pre-2009 Component was specific: the Commission was to determine if the Pre-2009 Component was supported by a provision of Section 4928.143(B)(2), Revised Code.⁸⁹ The parties understood the Court’s directive and followed it. Nonetheless, the Commission went beyond the law of the case and the record developed in the remand hearing to authorize the Companies to increase electric bills for the Pre-2009 Component based on Section 4928.143(B)(1), Revised Code.

Proper application of the law of the case established by this Court by its decision reversing the original ESP order is particularly compelling in this instance. As discussed above, the Commission’s findings authorizing recovery under Section 4928.143(B)(2)(d), Revised Code, do not find support in the record. Because there is no support for the Commission’s finding that the record justifies recovery of the Pre-2009 Component under Section 4928.143(B)(2)(d), Revised Code, the only remaining basis for authorization is the Commission’s reliance on Section 4928.143(B)(1), Revised Code. Reliance on the latter division, however, was unlawful. Thus, the Commission did not have any basis to authorize the Pre-2009 Component and the Commission’s Order on Remand should be reversed.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.*

⁸⁹ *Remand Decision*, 128 Ohio St.3d at 520 (Appx. at 270-71).

PROPOSITION OF LAW NO. IV

The Commission unlawfully and unreasonably permitted a rate increase and collection of the Pre-2009 Component during a period in which there was no legal authority to permit collection of the Pre-2009 Component.

By the terms of the Order on Remand, the Commission permitted the Companies to leave in rates the Pre-2009 Component from the time of the Court's remand through the date the Commission issued the Order on Remand.⁹⁰ During that period, the Court had concluded that the Commission had not properly authorized the Pre-2009 Component and the Commission had not determined that a provision of Section 4928.143(B)(2), Revised Code, authorized recovery. In particular, the Commission, in its May 25, 2011 Entry, permitted the Companies to continue to collect the Pre-2009 Component without a determination that recovery was permitted and after the Commission had initially directed the Companies to remove the Pre-2009 Component. By permitting the Companies to retain the revenues from the time the Commission made collection of the Pre-2009 Component subject to refund through the time that the Commission issued its Order on Remand, the Commission unlawfully and unreasonably allowed the Companies to collect and retain revenues for which there was no legal authorization.

Under Section 4928.141, Revised Code, an EDU is authorized to establish an SSO in the form of either an MRO under Section 4928.142, Revised Code, or an ESP under Section 4928.143, Revised Code. If the EDU selects an ESP, then the authorized ESP may contain only those provisions set out in Sections 4928.143(B)(1) and (2), Revised Code. While division (B)(1) states that the SSO shall include a provision for the supply and pricing of electric generation service, other provisions may be authorized under division (B)(2), but only if those

⁹⁰ Order on Remand at 15 (Appx. at 173).

provisions fall within the terms of the list contained in (B)(2). “So if a given provision does not fit within one of the categories listed ‘following’ (B)(2), it is not authorized by statute.”⁹¹

In its April 19, 2011 decision, the Court found that the Commission had failed to provide a legal justification supporting the collection of revenues for the Pre-2009 Component. Following the Court’s decision, the Commission did not issue any order or entry that found that the Pre-2009 Component was properly recoverable under Section 4928.143(B)(2), Revised Code, until October 3, 2011. Notably, the Commission, in the May 4, 2011 Entry, recognized that the Companies had no claim to continue to collect the illegally authorized charges and ordered the Companies to file revised tariffs reducing rates by removing the Pre-2009 Component and POLR charges.⁹² The Commission subsequently permitted the Companies to continue to collect its then-current rates subject to refund on May 25, 2011, beginning with the June 2011 billing cycle,⁹³ but it did not make any finding that the Pre-2009 Component was lawfully includable in rates. Only after the Commission issued the Order on Remand on October 3, 2011 can it be claimed that collection of the Pre-2009 Component was authorized.⁹⁴

For the period of April 19, 2011 until October 3, 2011, therefore, the continued collection of the Pre-2009 Component was without legal authority. The Court had found that the Commission’s justification for allowing collection of the Pre-2009 Component was unlawful, but

⁹¹ *Remand Decision*, 128 Ohio St.3d at 520 (Appx. at 270-71).

⁹² Entry (May 4, 2011) (Appx. at 149).

⁹³ Entry (May 25, 2011) (Appx. at 153).

⁹⁴ The legality of the authorization to collect the Pre-2009 Component remains at issue, as discussed above. In this proposition of law, the focus is on the unlawfulness of the Pre-2009 Component between the time that the Court remanded the 2009 Opinion and Order and the Commission’s decision to authorize the Pre-2009 Component on October 3, 2011.

tariffs recognizing the Court's decision did not become effective until the June 2011 billing cycle. That situation remained unchanged until October 3, 2011. As a result, the Pre-2009 Component was not lawfully authorized for the period of May 25, 2011 to October 3, 2011. Despite the lack of authorization, the Commission permitted the Companies to retain the amounts collected subject to refund. The Commission's decision to allow the Companies to retain the amounts collected subject to refund was unlawful and should be reversed. Further, the Commission should be directed to flow-through the effects of removing the Pre-2009 Component by reducing the phase-in deferral balance, as discussed below.

PROPOSITION OF LAW NO. V

The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of the phase-in deferral balance of OP on the theory that the proposed adjustment "would be tantamount to unlawful retroactive ratemaking."

PROPOSITION OF LAW NO. VI

The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of the phase-in deferral balance of OP based on a finding not supported in the record that the "past rates ... have already been collected from customers."

PROPOSITION OF LAW NO. VII

The Commission's Order on Remand is unlawful and unreasonable in that it extended the prohibition of retroactive ratemaking to prevent the adjustment of the phase-in deferral balance subject to collection in the future and which were subject to further adjustment by the Commission's order establishing the basis for such deferral balance.

PROPOSITION OF LAW NO. VIII

The Commission's Order on Remand is unlawful and unreasonable in that it failed to address the flow-through effects of the Court's finding of the Commission's original Opinion and Order on the deferral balance, recovery of delta revenues, and the earnings of the Companies.

As part of the evidence presented in the remand hearing, IEU-Ohio and OCC offered a reasonable and legally proper way to assure that phase-in deferral balances were properly restated so as to avoid charging customers in the future for amounts that were not properly included in rates. IEU-Ohio further recommended that adjustments needed to be made in other areas affected by the Companies' ESPs directly impacted by the Court's decision. In its Order on Remand, however, the Commission refused to implement those recommendations on the basis that the proposed adjustment to deferrals subject to future collection "would be tantamount to unlawful retroactive ratemaking."⁹⁵ The Commission also asserted that the prohibition on retroactive ratemaking applied because the Commission could not "order a prospective adjustment to account for past rates that have already been collected from customers."⁹⁶ The Commission further rejected IEU-Ohio's recommendation that the Commission address other matters affected by the Court's remand.⁹⁷

In its Application for Rehearing, IEU-Ohio again urged the Commission to address the flow-through effects of the Court's *Remand Decision* on the deferral balances and other matters, but the Commission again rejected IEU-Ohio's position. In denying IEU-Ohio's Application for

⁹⁵ Order on Remand at 35-36 (Appx. at 193-94).

⁹⁶ *Id.* at 36 (Appx. at 194).

⁹⁷ *Id.*

Rehearing, the Commission relied on its discussion in the Order on Remand for the most part.⁹⁸ The Commission, however, also indicated that the “past rates” it referred to when it determined that it could not prospectively adjust rates related to the “unjustified POLR charges that have in fact already been collected from customers.”⁹⁹ Even with that “clarification,” however, the Commission’s refusal to flow-through the effects of the illegally authorized charges on the phase-in deferral balance and other related issues was unlawful and unreasonable.

The rationale for adjusting deferrals for flow-through effects of the remanded issues is straight-forward. Prior to the Commission’s May 4, 2011 Entry, OP estimated that the accumulated phase-in deferral eligible for future collection would be \$643 million by late 2011.¹⁰⁰ However, OP’s estimate of the phase-in deferral balance eligible for future collection was a residual calculation. It was the difference between the revenue collected during the ESP period subject to the bill increase limitations and the revenue increases that would have otherwise occurred without such limitations. The difference, OP’s estimate of the phase-in deferral balance, was significantly excessive because embedded in the math that produced OP’s estimate is an allowance for revenues which cannot be lawfully recognized for purposes of establishing rates and charges. In other words, the principal and interest effects of the illegally authorized charges were embedded in the phase-in deferral because the phase-in deferral dollar amount was accumulated, for accounting purposes, assuming that total revenue authorized by the Commission (to be collected during the ESP period and after) included the illegally authorized

⁹⁸ Entry on Rehearing at 17 (Dec. 14, 2011) (Appx. at 255).

⁹⁹ *Id.* at 18 (Appx. at 256).

¹⁰⁰ OCC Remand Ex. 2 at 24 (Supp. at 113).

charges. But for the illegally authorized charges, the phase-in deferral balance subject to future collection would have been substantially less.

The 2009 ESP Opinion and Order authorized OP and CSP to, individually, collect a total revenue amount, part of which was collectable during the term of the current ESP and part of which (the phase-in deferral portion) was deferred for collection in the future.¹⁰¹ The portion of such total authorized revenue deferred for future collection was a subset of the total revenue collection that the Commission may lawfully authorize through the exercise of its authority in Section 4928.143, Revised Code. The amount of the revenue deferred for future collection through a phase-in mechanism must also be “just and reasonable.”¹⁰²

In keeping with this “just and reasonable” standard and for purposes of determining the proper dollar amount includable in the phase-in deferral balance, the Commission was required, in compliance with the Court’s *Remand Decision*, to reduce the total authorized revenue in the current ESP Opinion and Order by the amount of revenue that the Commission previously included illegally in this total. Because the portion of the total authorized revenue that was deferred for collection is defined by a residual calculation, the phase-in deferral balance must be reduced by an amount equal to that portion of the revenues authorized by the Commission in its ESP Opinion and Order that the Court determined were unlawful. If OP is permitted to collect the deferred balance calculated as if the revenue amounts the Commission authorized in the current ESP Opinion and Order were lawful, the requirement that the phase-in rates are just and reasonable cannot be satisfied.

¹⁰¹ Opinion and Order at 20-24 (Mar. 18, 2009) (Appx. at 90-94).

¹⁰² Section 4928.144, Revised Code (Appx. at 393).

Thus, Section 4928.144, Revised Code, and the Court's *Remand Decision* require a restatement of the dollar amount of the phase-in deferral balance eligible for future collection to properly reflect the value associated with the Companies' unlawfully authorized revenue increases plus an appropriate allowance for carrying charges. Unless the phase-in deferral balance is restated and substantially lowered, the amount of revenue increase which the Court has held to be unlawful will be embedded in the amount of revenue deferred for future collection. Unless the phase-in deferral balance is restated, the injustice of the unlawfully authorized increases will be perpetuated for seven years through a phase-in rider that ignores reality and the law.

The effects of the Court's *Remand Decision*, however, are not limited to the deferred balance OP will be seeking to recover. Additionally, the *Remand Decision* affects the amount of revenue which OP and CSP may lawfully collect through mechanisms that allow, as permitted by the Commission, recovery of "delta revenue." Delta revenue is the revenue difference between rates and charges in a reasonable arrangement and the revenue produced by rates and charges in an otherwise applicable tariff schedule.¹⁰³ For example, the Commission has authorized the Companies to collect delta revenue from consumers as a result of a reasonable arrangement for Ormet Primary Aluminum Corporation ("Ormet").¹⁰⁴ The unlawful revenue increases identified by the Court are embedded in the revenue produced by the otherwise applicable rate(s) for Ormet. Thus, the amount of delta revenue eligible for collection as a result of the Ormet reasonable arrangement has been overstated in the past and will be overstated going

¹⁰³ Rule 4901:1-38-01(C), Ohio Administrative Code (Appx. at 371).

¹⁰⁴ *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company. and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009) (Appx. at 289).

forward unless the unlawfully authorized revenue is removed from the rates and charges in the otherwise applicable tariff schedule(s).¹⁰⁵

Similarly, the operation of the Universal Service Fund (“USF”) generates revenue recovery that is overstated. This fund provides bill payment assistance to income eligible residential consumers, and other consumers pay USF charges to make OP and CSP whole for the difference in the amount collected from income eligible customers and the amount such customers would have paid on the otherwise applicable rate.¹⁰⁶ As in the case of the delta revenue illustration above, the unlawfully authorized revenue caused the otherwise applicable rate to be higher than the lawful rate and, in turn, increased the magnitude of the USF charges that have been paid and will continue to be paid until the unlawfully authorized revenue and all of its implications are stripped from all rates and charges (including riders).¹⁰⁷

The third illustrative area involves the effect of the unlawfully authorized revenue increases and the operation of the significantly excessive earnings test (“SEET”).¹⁰⁸ Revenues unlawfully authorized and collected must, for ratemaking and SEET purposes, be classified, dollar-for-dollar, as revenues the utility actually received as a result of the ESP (after taxes, the revenues become net income on the Companies’ income statements). If the Commission properly jurisdictionalizes the income statement and the balance sheet values that drive the SEET

¹⁰⁵ IEU-Ohio Remand Ex. 3 at 12-13 (Supp. at 102-03).

¹⁰⁶ Section 4928.51 *et seq.*, Revised Code (Appx. at 378).

¹⁰⁷ IEU-Ohio Remand Ex. 3 at 12-13 (Supp. at 102-03).

¹⁰⁸ Section 4928.143(F), Revised Code (Appx. at 388).

determination (as IEU-Ohio has argued is required by Ohio law¹⁰⁹), the SEET can provide the Commission with an opportunity to rectify, at least in part, the effect of unlawfully authorized and collected revenue.¹¹⁰

In summary, the Court has determined that the Commission authorized CSP and OP to unlawfully bill and collect a higher amount of total revenue, a portion of which was collectable during the ESP period with the residual balance to be collected through the post-ESP phase-in mechanisms. More than three years have passed since the Companies implemented the unlawful authority to increase electric bills over the objections of every consumer group that participated in these proceedings. Hundreds of millions of dollars of consumers' wealth were unlawfully transferred to the Companies, and this unlawful wealth transfer will be compounded during the phase-in period unless the Court blocks the Commission from perpetuating this illegal wealth transfer by allowing the residual effects to remain in the phase-in deferral balance, the delta revenue recovery mechanism, the USF rider and the SEET.

Requiring a proper restatement of the dollar amount of the phase-in deferral balance subject to future collection is consistent with Commission treatment of deferral balances and approved by this Court. The Commission has recognized its duty to supervise what is recovered

¹⁰⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Sup. Ct. Case No. 2011-751, Brief of Appellant, Industrial Energy Users-Ohio (Aug. 8, 2011) (available at <http://www.sconet.state.oh.us/tempx/692091.pdf>). In the case dealing with the SEET, IEU-Ohio has argued that the Commission misapplied Section 4928.143(F), Revised Code, so that the Companies escape the review of the EDU's ESP-related earned return on common equity.

¹¹⁰ Section 4928.143(F), Revised Code. The Commission has adjusted the deferral balance for significantly excessive earnings. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order at 35 (Jan. 11, 2011) (Appx. at 341).

from customers regardless of the accounting treatment the Companies have used to book accumulated dollar amounts for accounting purposes. In a 1991 CSP rate case, for example, the Commission applied the terms of the Zimmer Restatement Case settlement to reduce CSP's booked allowance for funds used during construction ("AFUDC") to restate the book amount because the amount that CSP had recorded for accounting purposes was inconsistent with proper regulatory accounting and the terms of the settlement.¹¹¹ As this Court has concluded, the law that is applied to determine what can be collected in utility rates and not a utility's accounting treatment dictates what can be included in utility rates.¹¹²

The Commission itself recognized in the discussion in the Opinion and Order establishing the total rate increase phase-in that the phase-in deferral amount booked by the Companies for accounting purposes was not controlling on the question of how much of the deferral balance was eligible for collection from customers. In setting the bill-increase limitations for the ESP period, the Commission held: "[W]e exercise our authority pursuant to Section 4928.144, Revised Code, and find that the Companies should phase-in any authorized increases so as not to exceed, on a total bill basis, an increase of 7 percent for CSP and 8 percent for OP for 2009, an increase of 6 percent for CSP and 7 percent for OP for 2010, and an increase of 6 percent for CSP and 8 percent for OP for 2011 are more appropriate levels."¹¹³ The Commission continued

¹¹¹ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 15-18 (May 12, 1992) (Appx. at 279-82), *aff'd in part and rev'd in part*, *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535 (1993).

¹¹² *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St.3d 305, 309-10, (2007).

¹¹³ Opinion and Order at 22 (March 18, 2009) (Appx. at 92).

that “[a]ny amount over the *allowable total bill increase* percentage levels will be deferred.”¹¹⁴ Following the ESP period, the amount of the phase-in deferral balance eligible for recovery from consumers was to be based on the balance remaining at the end of 2011.¹¹⁵ Moreover, the Commission required annual prudence and accounting reviews of various charges or riders such as the fuel adjustment clause (“FAC”) included in the Commission’s total revenue authorization reserving the final determination of how much of the total revenue could be collected through such charges or riders to a subsequent proceeding to examining the “appropriateness” of the Companies’ accounting and prudence.¹¹⁶ By design, therefore, the dollar amount of the residually determined phase-in deferral balance was always a function of how much revenue was collected through such riders and charges and how much of the total revenue authorized by the Commission was actually collected during the ESP period. The residually determined amount of the phase-in deferral balance was always a moving dollar amount subject to subsequent Commission reviews and determinations before any amount of the phase-in deferral balance could be transformed into charges imposed on customers in the future.

In contrast to the Commission’s refusal to adjust the phase-in deferral balance in the proceeding below, the Commission has required OP to restate the dollar amount of phase-in deferral in a subsequently decided case. In the recent case addressing OP’s improper accounting and excessive recovery through its FAC, the Commission ordered OP to restate the dollar

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *Id.* at 22-23 (Appx. at 92-93). The Commission recognized that the deferrals could be adjusted throughout the ESP term if the Fuel Adjustment Clause (“FAC”) expense in a given period was less than the maximum phase-in FAC rate. *Id.* at 22 (Appx. at 92).

¹¹⁶ Opinion and Order at 15 (Mar. 18, 2009) (Appx. at 85).

amount of the residually determined phase-in deferral balance.¹¹⁷ The adjustment arose out of an agreement by OP in 2008 to terminate a contract with a low-priced coal supplier in exchange for \$30 million in cash, payable in installments, and other value in the form of rights to a West Virginia coal reserve.¹¹⁸ In 2009, OP had to buy coal to replace the coal supply that would have come from the terminated contract, but the new coal purchased was much more expensive than the coal supply available under the terminated contract.¹¹⁹ Also in 2009, OP began to recover the cost of fuel, including the higher cost replacement coal through a FAC.¹²⁰ While OP passed on the higher cost of the replacement coal to customers through the FAC, the value it received for terminating the low-priced coal contract was not netted against this higher coal cost and, as a result, the value OP received for agreeing to raise the FAC paid by customers was given to OP's shareholder. In its Opinion and Order associated with the 2009 FAC audit process, the Commission determined that customers should be given the value of the settlement and the coal reserve through a reduction in the phase-in deferral balance.¹²¹ In support of the reduction to the phase-in deferral balance for the overstated FAC, the Commission explained that "the long-term coal agreement was an OP asset for which the value would have flowed-through to OP ratepayers through the ESP period but for the extraordinary circumstances related to the early contract termination. Given these factors, ... in order to determine the real economic cost of coal

¹¹⁷ *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order at 12-14 (Jan. 23, 2012) (Appx. at 356-58) ("2009 FAC Case").

¹¹⁸ *Id.* at 4 (Appx. at 348).

¹¹⁹ *Id.* at 12 (Appx. at 356).

¹²⁰ *Id.* at 2 (Appx. at 346).

¹²¹ *Id.* at 12 (Appx. at 356).

used during the audit period, more of the value realized by AEP for entering into the Settlement Agreement should flow-through to OP ratepayers through a credit to OP's under-recovery and deferrals."¹²²

In contrast to the Commission's recent decision to reduce the phase-in deferral balance for the value that OP received from the termination of the low-priced coal contract but did not properly account for, the Commission failed, in the proceeding below, to direct the Companies to correct their accounting to reduce the phase-in deferral balance for the effects of the Court's *Remand Decision*. In reaching this decision, the Commission incorrectly determined that it would be engaging in retroactive ratemaking.¹²³

There is no disagreement that the Commission is precluded from engaging in retroactive ratemaking. "[U]tility ratemaking by the Public Utilities Commission is prospective only. The General Assembly has attempted to balance the equities by prohibiting utilities from charging increased rates during the pendency of commission proceedings and appeals, while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal."¹²⁴

The Commission, however, does not engage in retroactive ratemaking when it adjusts the dollar amount of a phase-in deferral balance that will only be in rates at some future time if the adjustment is required to remove that portion of the balance that was illegally authorized. This is not a situation where the relief requested would retroactively reduce the revenue the Companies have already collected from rates and charges applied to services rendered in the past. Instead,

¹²² *Id.* at 13 (Appx. at 357).

¹²³ Order on Remand at 36 (Appx. at 194).

¹²⁴ *Lucas Cty. Comm'rs v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 348 (1997).

the relief requested would prevent the Companies from collecting that portion of the illegally authorized revenue that has been embedded in the deferral balance and to reduce the deferral balance eligible for collection in the future by the illegal amount (principal and interest) that was embedded in the deferral balance.

The Commission's characterization of the phase-in deferral balance adjustment and other accounting relief requested below as improper retroactive ratemaking is inconsistent with the long understood legal and ratemaking principle that any downward adjustment to costs which a utility books for accounting purposes does not amount to illegal retroactive ratemaking.¹²⁵ Moreover, this Court has noted that the authorization of the deferral is independent of the decision to permit recovery in rates.¹²⁶ As the Commission noted in a case authorizing deferrals, "[t]he determination of the reasonableness of the deferred amounts and the recovery thereof, if any, [is] examined and addressed in a future proceeding before the Commission." Simply put, authorization of deferrals does not constitute ratemaking.¹²⁷ If, hypothetically, the Commission authorized the Companies to adopt accounting practices that allowed the Companies to defer the expense associated with political contributions or support of organizations dedicated to illegal activities, the Companies would not be protected from a Commission decision disallowing inclusion of the deferred amount in rates because of the principle of retroactive ratemaking.

Despite the direction provided by the Court's prior decisions and the Commission's recognition that authorization of deferrals do not result in ratemaking (retroactive or otherwise),

¹²⁵ *River Gas Co. v. Pub. Util. Comm'n of Ohio*, 69 Ohio St. 2d 509 (1982).

¹²⁶ *Elyria Foundry Co. v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 305, 308-09 (2007).

¹²⁷ *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM, Finding and Order at 2 (Jan. 14, 2009) (Appx. at 286).

the Commission concluded that an adjustment to the deferral balance would be “tantamount to unlawful retroactive ratemaking.”¹²⁸ In support of that conclusion, the Commission relied on three Court decisions that are not applicable. Initially, the Commission cited the Court’s *Remand Decision*.¹²⁹ The problem with retroactive ratemaking in the Commission’s original Opinion and Order in the case below arose when the Commission permitted the Companies to recover three months of rate increases, \$62 million, prior to the effective date of the tariffs authorized by the Opinion and Order. Finding that the Commission could not order rates to be effective until approved under Section 4928.141(A), Revised Code, the Court stated that “present rates may not make up for dollars lost ‘during the pendency of commission proceedings,’” and concluded that “the commission violated the law when it granted AEP additional rates to make up for the regulatory delay.”¹³⁰ The “no refund” rule, however, prevented the Court from ordering a refund of the \$62 million already collected from customers thereby depriving consumers of this portion of the illegal wealth transfer authorized by the Commission.¹³¹ Because OCC had not sought a bond in conjunction with a stay request as required by state statute (and which is practically impossible), the Court concluded it could not order a refund.¹³²

¹²⁸ Order on Remand at 35-36 (Appx. at 193-94).

¹²⁹ Order on Remand at 36 n.40 (Appx. at 194).

¹³⁰ *Remand Decision*, 128 Ohio St.3d at 515 (Appx. at 266-67).

¹³¹ *Id.* at 516 (Appx. at 267-68).

¹³² *Id.* at 516-17 (Appx. at 267-69).

In the Remand hearing, however, IEU-Ohio sought to have the Commission consider the residually determined phase-in deferral balance of OP (or the merged OP and CSP¹³³) for purposes of determining how much of that booked or accounted for balance would be eligible for future recovery in light of the determination that the Commission's total revenue authorization included illegal amounts. Inasmuch as the Commission has never determined whether any of the phase-in deferral balance is eligible for recovery in future rates, the Court's holding concerning retroactive ratemaking does not prevent the Commission from requiring the Companies to restate the phase-in deferral balance or take into account the remand in addressing other related issues such as delta revenue recovery.

In addition to its citation to the *Remand Decision*, the Commission also relied improperly on the *Lucas County* and *Ohio Consumers' Counsel* cases.¹³⁴ In the *Lucas County* case, the Court agreed that the Commission properly dismissed a complaint seeking a refund when the complaint was filed after the challenged rates had been collected. In affirming the Commission's decision, the Court stated, "The Public Utilities Commission of Ohio is 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 was approved

¹³³ Since the *Remand Decision* was issued, the Companies have filed applications seeking to establish a mechanism to recover the deferral balances. The Commission initially approved, but subsequently rejected, a settlement that would have established such a mechanism. The Companies then sought to unilaterally implement recovery, but the Commission rejected tariffs that included the recovery mechanism and indicated that it would address the matter at a later time. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Entry at 4-5 (Mar. 7, 2012) (Appx. at 406-07).

¹³⁴ Order on Remand at 36 n.40 (Appx. at 194).

by the commission, but which has expired by its own terms.”¹³⁵ In the *Ohio Consumers’ Counsel* case, the Commission moved to dismiss an appeal on the basis that the underlying order had been superseded by the Commission’s adoption of a new order, thus precluding any prospective relief for consumers. In contrast to the situations presented in each of these cases, IEU-Ohio is not seeking a Commission order for a refund of amounts already collected from customers. If the Commission had addressed the actions recommended by IEU-Ohio, it instead would be setting the just and reasonable level of the prospective recovery as required by Section 4928.144, Revised Code, and adjusting the recovery of other revenues in a manner consistent with the terms of the remand.

Moreover, the Commission itself recently recognized that a reduction of the deferral balance did not result in retroactive ratemaking. In the *2009 FAC case* discussed previously, OP argued that the prohibition on retroactive ratemaking prevented the Commission from crediting the value of the benefits received from the termination of the coal contract.¹³⁶ In rejecting OP’s argument, the Commission correctly stated that it was

...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 the coal used by the Companies to generate electricity during the 2009 FAC audit period. The proceeds AEP-Ohio received for entering into the Settlement Agreement are but one of the components which impact the Companies cost to provision electricity during 2009.¹³⁷

¹³⁵ *Lucas County Commissioners*, 80 Ohio St.3d at 349.

¹³⁶ *2009 FAC Case*, Opinion and Order at 13 (Appx. at 357).

¹³⁷ *Id.* at 13-14 (Appx. at 357-58).

Thus, the Commission itself has recognized that the prohibition against retroactive ratemaking does not prevent adjustments to the phase-in deferral balance to reflect only the legally recognizable ratemaking components applicable to the establishment of an SSO.

Yet the Commission in this case refused to consider the required reduction in the deferral balance to account for the effects of the *Remand Decision* and its own determination that the POLR charges were illegal. In reaching that result, the Commission concluded that it was prohibited from acting on the requested adjustments to phase-in deferral amounts by asserting that the credit would be “tantamount” to unlawful retroactive ratemaking¹³⁸ and concluding that the prior POLR charges had already been collected from customers.¹³⁹ The phase-in deferral balance, however, is an accounting estimate of the yet-to-be-collected portion of the total revenue authorized by the Commission in its initial, and now illegal, ESP decision. In determining the amount of the phase-in deferral balance eligible for recovery in future rates, moreover, the Commission must determine that the phase-in is “just and reasonable.”¹⁴⁰ Thus, the Commission’s legal conclusion in the Order on Remand 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,”¹⁴¹ is premised on a condition (that rates have already been collected from customers) that is not correct. Further, the decision denied customers the protections afforded by Section 4928.144, Revised Code, which requires the Commission to find that the phase-in is just and reasonable.

¹³⁸ Order on Remand at 35 (Appx. at 193).

¹³⁹ Entry on Rehearing at 18 (Dec. 14, 2011) (Appx. at 256).

¹⁴⁰ Section 4928.144, Revised Code (Appx. at 393).

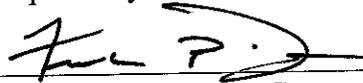
¹⁴¹ Order on Remand at 36 (Appx. at 194).

As IEU-Ohio demonstrated, the amounts embedded in total revenue due to illegal rates amount to over \$600 million.¹⁴² In order to assure that consumers are not burdened in the future by the effects of illegally authorized rate increases that are residually embedded in the phase-in deferral balance, delta revenue charges, USF charges, and the SEET, the Commission must consider and address the flow-through effects of the illegally authorized charges on the amount eligible for collection in the future from consumers. If the Court does not reverse the Commission and direct it to provide the relief requested, customers will be burdened for years to come with the residual effects of the illegal rates the Commission approved in 2009.

CONCLUSION

The Commission's Order on Remand unlawfully and unreasonably authorized the continuing collection of the Pre-2009 Component and failed to address the flow-through effects of the Court's *Remand Decision* on the phase-in deferral balance and other matters. Because the Commission's Order on Remand is unlawful and unreasonable, the Court should reverse it with directions to bring the Order on Remand into compliance with Ohio law.

Respectfully submitted,



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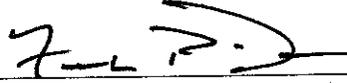
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¹⁴² IEU-Ohio Remand Ex. 3 at 10-11 & 14 (Supp. at 100-01 & 104).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Brief of Appellant, Industrial Energy Users-Ohio*, was served upon the parties of record on April 10, 2012 *via* electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



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