

ORIGINAL

IN THE SUPREME COURT OF OHIO

<b>OHIO POWER COMPANY,</b>	:	
	:	
<b>Appellant/ Cross-Appellee</b>	:	<b>Case No. 2012-2008</b>
	:	
<b>v.</b>	:	
	:	<b>Appeal from the Public Utilities</b>
<b>THE PUBLIC UTILITIES</b>	:	<b>Commission of Ohio</b>
<b>COMMISSION OF OHIO,</b>	:	
	:	<b>Public Utilities Commission of</b>
<b>Ohio</b>	:	
	:	<b>Case Nos. 11-4920-EL-RDR and</b>
<b>Appellee.</b>	:	<b>Case Nos. 11-4921-EL-RDR</b>
	:	

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**FIRST MERIT BRIEF OF APPELLANT  
OHIO POWER COMPANY**

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**INITIAL MERIT BRIEF OF APPELLANT  
OHIO POWER COMPANY**

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**I. Introduction**

This case involves a Public Utilities Commission of Ohio (“Commission”) order that improperly seeks to redefine the administrative legal process by retaining the right to change it prior adjudicatory findings at any time, even from cases appealed to the Supreme Court of Ohio and considered final nonappealable orders. In this specific case the Commission reaches back over three years to a 2009 decision where it ordered the Ohio Power Company (“Company” or “AEP Ohio”) to defer collection of a portion of fuel costs in order to relieve the impact on customers and applied carrying costs as required by statute to order such a required phase-in recovery. However, when the time came for the Company to collect the deferred costs and approved carrying costs years later, the Commission decided to modify a central element of its 2009 decision to the detriment of the Company to the sum of \$130 million less in recovery than was ordered previously. The Company is left the victim of a bait and switch decision that punishes it for complying with, and relying on, the initial decision all these years, only to have the ordered result changed at the eleventh hour when it was set to recover the consideration relied upon to defer collection of the fuel costs all these years. The Company met its obligations under the Commission’s order and provided significant customer benefits through deferred collection of actual incurred fuel costs with the clear expectation that those deferred costs would be recovered from customers in the manner that the Commission clearly laid out in the same order.

The Commission is essentially asserting that there is no such thing as a final nonappealable order. If allowed to stand, the precedent asserted by the Commission in this case will set up a new and unmanageable manner of regulation in Ohio and perhaps in administrative proceedings across Ohio. The Commission's action would hold parties hostage to uncertainty in all matters decided by the Commission. The Commission has eviscerated the concept of finality and certainty leaving all litigants participating in proceedings before it in a regulatory trap not knowing if any decision made will change at a later date, even in cases where jurisdiction is lost by the Commission through an appeal to the Supreme Court of Ohio. The industry cannot operate in an environment where the finality of adjudicated facts is not respected.

In this brave new world asserted by the Commission, factual decisions relied upon by a utility to carry out a Commission order (regardless of whether they were made last week, last year or relied upon for years before) have no certainty because the Commission is allowed to simply change its mind at any time. Such a scenario ignores the basic underlying tenet in the judicial system of finality and binding legal decisions. The Court cannot allow the Commission to ignore the impact of its new chaos paradigm where the Commission has sole discretion to unilaterally change its mind regardless of the finality of the issue and the impact on those relying on the initial decision to their detriment.

At the core of utility regulation is the need for certainty. The Court is well aware that the utility industry is a highly regulated and technical area, but some things are integral to effective utility regulation, including certainty and confidence in Commission

decisions. The area of Ohio public utility law is guided by the *Keco Doctrine*<sup>1</sup> on the rate side, and that holding does not even allow retroactive application of Supreme Court of Ohio reversals to Commission orders found to be unlawful or unreasonable. Yet the Commission now promotes a new practice whereby it can unilaterally change its mind on an adjudicated fact years after the decision and apply that changed judgment in place of the original finding without regard to what was relied upon by the parties to the case where the fact was initially decided.

The Commission's practice is even more egregious in a circumstance like this where a statute provides the utility to opportunity to withdraw its electric security plan application and start over if it disagrees with a Commission order modifying the plan. But in this case the electric security plan period in question is already over so that check and balance is denied the utility. Despite the assurance of the Commission that this is in line with past actions, make no mistake, this is a complete paradigm shift that turns operating as a utility or even doing business in the utility industry in Ohio upside down.

## **II. Background and Statement of Facts**

The Commission order approves the abandonment of a previously adjudicated fact in AEP Ohio's 2009 Electric Security Plan Order in Case Nos. 08-917-EL-SSO and 08-918-EL-SSO ("*ESP I*"). The change impacts the recovery of the fuel costs ordered to be deferred in that case by the Commission pursuant to a specific statutory provision requiring that any such deferral with carrying charge be fully defined at the time - which it was - and is now as admitted by the Commission, being modified after the fact in the case underlying this appeal.

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<sup>1</sup> *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 2d 254, 141 N.E. 2d 465 (1957).

On March 18, 2009, the Commission issued its Opinion and Order in *ESP I*, AEP Ohio's first electric security plan (*ESP I* Opinion and Order) case. As part of that decision, to alleviate the impact of the new standard service offer, the Commission ordered AEP Ohio to phase in certain generation costs. The Commission is authorized to phase-in portions of an Electric Security Plan under R.C. 4928.144 and it modified the Company's filed application to do so in that case. This statute allows the Commission to phase in the impact of an ESP over a period of time inclusive of carrying charges.

In its initial *ESP I* application, AEP Ohio proposed that during the three-year ESP period a portion of its fuel expenses for any customer rate schedule that would otherwise receive annual increases exceeding 15% should be deferred and recovered with carrying charges as part of a phase-in plan under R.C. 4928.144. (*ESP I* Opinion and Order at 22.) (App. at 104) The Company proposed that the carrying cost on the unrecovered deferred balance be set at the before-tax weighted average cost of capital ("WACC") **over the entire phase-in period.** (*Id.* at 23.) (App. at 105) The Company provided testimony in support of this recommendation with its application and applied it over the entirety of period. Various parties objected to and commented on the Company's proposal. OCC and others specifically objected to the use of the WACC in determining carrying costs and argued that the deferral balance should be calculated on a net-of-tax basis. *Id.*

After much debate and advocacy among the participating parties, and after fully considering and rejecting the specific arguments regarding the WACC and net-of-tax recommendation, the Commission adopted the Company's proposal in the *ESP I* application with only one modification. (*Id.* at 22-23.) (App. at 104-105) The Commission lowered the overall rate caps from the 15% proposed by the Company, but

otherwise approved the phase-in plan as proposed by the Company. *Id.* The Commission expressly found that “the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable **as proposed by the Companies**” and that “the carrying charges on the FAC deferrals should be calculated on a gross-of-tax rather than a net-of-tax basis in order to ensure that the Companies recover their actual fuel expenses.” (*Id.* at 23.) (App. at 105). That proposal that was approved by the Commission included the authorization “to establish a regulatory asset to record and defer fuel expenses with carrying costs, at the weighted average cost of capital (WACC), with recovery through a nonbypassable surcharge to commence in 2012 and continue through 2018.” (*PIRR Finding and Order*<sup>2</sup> at ¶¶2 and 35.) (App. at 10 and 25); (citing the *ESP I* Entry on Rehearing at 6-10.) (App. at 166-170) In order to carry out the acquisition of the generation at a time when the recovery was being deferred the parent company AEP Corporation infused \$550 million of equity capital into AEP Ohio. (*PIRR Finding and Order* at *Id.* at ¶17.) (App. at 17.)

While the *ESP I Order* was subject to various appeals before this Court, no party appealed the Commission’s decision to approve the phase-in plan for fuel expense deferrals at the WACC carrying charge **over the entire phase-in period**. The case proceeded to a decision at the Court with portions related to an environmental charge and provider of last resort charge remanded to the Commission. The finding establishing the

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<sup>2</sup> *In the Matter of the Columbus Southern Power Company and Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-El-RDR and 11-4921-EL-RDR, Finding and Order (August 1, 2012) (hereinafter referred to as the “*PIRR Finding and Order*”)

carrying charge as WACC was not remanded to the Commission for further proceedings and therefore became a final and nonappealable at that time.

On September 11, 2011, AEP Ohio, as directed by the Commission in *ESP I Order*, filed applications in Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR (“*PIRR*”) for implementation of the phase-in recovery rider mechanism, to recover the deferred fuel costs and carrying charges in the manner already approved by the Commission in the 2009 *ESP I* Opinion and Order. In the August 1, 2012 *PIRR* Finding and Order in this case, the Commission approved the application but admitted to modifying the *ESP I* decision, redefining the deferral such that the carrying costs previously approved on the deferral balance will be based on the WACC only until such time as the recovery period begins and thereafter will be changed to be based on the Company’s long-term cost of debt rate. (*PIRR* Finding and Order at ¶35.) (App at ) This modification lowered the amount of carrying charges previously authorized and relied upon by the Company, to defer collection of the deferred fuel costs, by \$130,185,906. (*Id.* at ¶7.) (App at ??.)

When AEP Ohio challenged the Commission’s ability to change a previous adjudicated decision, the Commission specifically admitted it was modifying the previous decision when it stated that it “does not agree with AEP-Ohio that the *ESP 1* Order cannot be modified in any way by the Commission.” (*Id.* at ¶35.) (App. at 25-26) The Commission reiterated this admission in its Entry on Rehearing. Specifically, the Commission’s *PIRR* Entry on Rehearing stated, “[t]he Commission finds no merit in AEP-Ohio’s argument that **our modification of the *ESP 1* Order** was unreasonable or

unlawful.” (*PIRR* Entry on Rehearing<sup>3</sup> at ¶36.) (App. at 172). The Commission again denied AEP Ohio’s request to correct this error on rehearing and allowed the admitted after the fact modification to the 2009 *ESP I* Opinion and Order to stand.

On November 30, 2012, AEP Ohio filed a timely notice of appeal of the Commission’s refusal to honor the decisions made in initial *ESP I* proceeding back in March of 2009. After the filing of the appeal by AEP Ohio other parties also filed appeals of other matters involved in the case creating cross appeals.

### **III Law and Argument**

The law and argument in this case is very simple and focused in comparison to typical appeals from the Commission. In this case the Commission’s actions are under review and the question is whether the Commission must honor the finality of a final nonappealable order or if it has unlimited power to change past decisions irrespective of the resulting impact of those modified decisions on those that relied on the finality of the assumed final nonappealable order. The Company asserts that the Commission is bound by the finality of a decision and must comply with and honor prior holdings on specific facts. The Commission has the authority to change its policy or direction on how it views certain policy issues in the industry when it can justify the change in its rationale compared to prior decisions. But that is different from this case where the Commission

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<sup>3</sup> *In the Matter of the Columbus Southern Power Company and Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-El-RDR and 11-4921-EL-RDR, Fifth Entry on Rehearing (October 3, 2012)( hereinafter referred to as the “*PIRR* Entry on Rehearing”).

admits to modifying an adjudicated fact relied upon by the Company in a previous case or controversy.

The Commission's retroactive modification of the adjudicated fact leaves the Company without recourse to the detriment over \$130 million. Had the Commission made its modified ruling originally in 2009, when it was appropriate to make the determination under the applicable statute, the Company had certain due process rights to withdraw from the Commission's modifications to the filed electric security plan under R.C. 4928.143. However, the Commission's actions have ensured that the statutory right enumerated by the General Assembly in the statute is now non-existent. The Commission changed the adjudicated fact after that electric security plan was already complete.

The Company is left with no option but to appeal to this Court to seek its review authority to instruct the Commission to honor its 2009 order and honor the sanctity of the findings of final nonappealable orders. The Company respectfully requests that the Court find the Commission orders in this case unreasonable and unlawful and remand the proceeding to the Commission solely for the purpose of reinstating the carrying charges approved in the 2009 decision that the Commission admits that it modified in 2012 and that the Company relied upon in the interim.

**A. The Commission's final order modifying the previously-adjudicated carrying cost ordered to authorize the Commission's ordered phase-in of the ESP I decision is unreasonable and unlawful. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975)**

The Commission does not have the jurisdiction or authority to change an adjudicated fact from a 2009 order that had been appealed to this Court and was a final nonappealable order. Yet that is exactly what the Commission did in the case on appeal.

The Court should find that the Commission's actions were unreasonable and unlawful and remand the case with the sole instruction to apply the weighted average cost of capital carrying charge to the entire life of the deferrals ordered in the *ESP I* Opinion and Order.

**1. A Commission modification to an adjudicated fact in a final nonappealable order is unreasonable and unlawful.**

- a. The Commission Order is unreasonable and unlawful because it confuses its authority to justify a change in industry policy and statutory interpretation with an ability to reverse an adjudicatory determination in a prior final order undisturbed on appeal.**

The Commission has only limited authority to modify prior orders and may not reverse a prior final adjudication of an issue. Yet this is exactly what the Commission has done in the underlying case on appeal. As the Court's precedent shows, the Commission has the authority to change its position on policy issues that are applied to the industry, but not as to adjudicated facts it reaches on specific cases for specific utilities in its judicial role.

The principle the Commission relies upon to change its prior actions is premised upon a statement first made by the Court in its opinion in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975) ("*CEI Case*"). In that decision the Court spoke generally to the precedential effect of changing the Commission's administrative and statutory interpretations and did not provide authority for the Commission to abandon previously made factual findings and change the application of those facts to a specific utility. The Court stated:

In respect to two issues raised herein, the Commission, in its opinions and orders in subsequent proceedings, has reversed the position taken in these proceedings. In addition, the Commission has departed from its prior

determinations in respect to the Lake Shore property used by the Company. Although the Commission should be willing to change its position when the need therefore 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.

The Court was speaking to the Commission's authority to prospectively change a "**policy position**" or a statutory interpretation of its ratemaking authority, and not to the authority to reverse a prior final adjudication of an issue.

The *CEI* case did not establish a general rule giving the Commission discretion to reverse prior orders so long as it justifies the change, especially where (as here) the prior order has otherwise been fully implemented and the modification retroactively extinguishes a statutory right of the utility and causes financial harm to the sum of \$130 million. The decision shows that the Court actually recognized two distinct situations –

- 1) where the Commission deviates from its own prior "**policy position**" or interpretation on a general issue, and
- 2) where the Commission seeks to reverse an adjudicatory determination in a prior final order undisturbed on appeal.

The *CEI Case* suggests that in the first situation the Commission has the limited authority to change its **policy position** when the need for change is clear or it is shown that prior decisions are in error. The *CEI Case* analyzes a number of different elements of the Commission's specific rate case decisions leading to the fact that it is unreasonable and unlawful for the Commission to change a prior adjudicatory order but administrative interpretations of a law should be set aside only when judicial construction makes it imperative. (*Id.* at 431.) The Commission's determination in the *ESP I Order* that carrying cost on the fuel deferrals would be calculated gross-of-tax using a WACC basis

falls squarely within this specific holding in the *CEI Case* as an adjudicated finding that cannot be changed after the fact, not a general policy position that the Commission may revisit in the presence of error or new thinking.

The *CEI Case* shows that the position offered by the Commission is incomplete and in error. The *CEI Case* notes that as to two of the issues in the appeal, the Commission has subsequently “reversed the position taken in these proceedings.” The two issues are discussed at pages 412 and 418 of the opinion. Both issues involved a change by the Commission due to a different view of the statutory basis for the ratemaking decision. One of the issues was even impacted again later by a statutory change again causing the Commission to change its position and make the finding in the *CEI Case* distinguished on this point. *Babbit v. Pub. Util Comm*, 59 Ohio St.2d 81, 86, 391 N.E.2d 1376, 1379 (1979). In each of these instances discussed in the *CEI Case*, the Commission changed the going-forward “**policy position**” on an interpretation of administrative issues; it did not seek to change elements of a prior final nonappealable order.

The contrast to the change in a policy position or statutory interpretation can be found in the Court’s treatment of the Commission’s change from a adjudication in the *CEI Case*. The Court reviewed the Commission’s departure from a prior determination on the status and treatment of specific Lake Shore property. The Court references what it considers to be a different scenario altogether than the limited picture provided by the Commission in this appeal – a departure from “**prior determinations.**” This issue is discussed at page 416 of the Court’s opinion. The Commission concluded in the case underlying the appeal of the *CEI Case* that because the filled lands upon which the

Company's Lakeshore Power Plant is situated is land titled to the State of Ohio; it should not be included as the Company's property for rate base purposes. The Company argued, however, that "this identical question was at issue" in two prior Commission proceedings and in both instances the land was included in rate base. The Court noted that the issue also was appealed to the Court after the first proceeding and not disturbed. The Court held: "We are not inclined to now reexamine or overrule the foregoing holding. The Commission's conclusion not to include the filled land in the Company's rate base is not in conformity with that decision and therefore is *unreasonable and unlawful*." (emphasis added) (*CEI Case* at 416.)

In the *CEI Case*, the Court did not allow the Commission to take a prior adjudicated fact specific to the Company and change the applicability of that fact in a later proceeding. That is even more applicable in the present case where the underlying docket on appeal was established solely to implement the mechanism approved in the *2009 ESP I*. The carrying cost based on the WACC from 2012-2018 was already established in consideration of the deferral and should not be reexamined or modified from its holding.

The language in the *CEI Case* is also useful in pointing out the Court's guidance on the importance of predictability and respect for precedent. Even considering a change in a position on policy issues, the Court warned the Commission against changes. The Court stressed the Commission's need to respect its precedent to assure predictability of Commission decisions as "essential in all areas of law, including administrative law." (*CEI Case* at 431.). The Court was only discussing actions to ensure consistent rulings on positions before the Commission dealing with administrative interpretation of a given

law. (*Id.*) The Court felt it important to clarify that its comments on deviating from prior positions involved statutory construction. (*Id.*) That is wholly different than changing an adjudicated fact.

The Court's warning to the Commission should go even further when it is applied to prior adjudicated facts from a litigated proceeding. The WACC was the approved carrying cost ordered in the 2009 *ESP I* decision to apply from 2012-2018. This was not even a case of being consistent with prior findings, but instead just carrying out the exact finding made in the initial *ESP I* decision when the time to pay the carry cost payment of the deferrals came due. But in this case the Commission merely changed its mind on its adjudicated determination, regardless of the fact that the Commission did not assert any claim or error with the previous fact. The predictability highlighted by the Court as "essential" in the broader instance of general policy positions and interpretations is surely violated by the Commission's actions in this case changing adjudicated matters relied upon by a utility to carry out an order.

**b. *Res Judicata* principles apply to matters before the Commission and prevent the unreasonable and unlawful Commission modification to the 2009 *ESP I* Order.**

*Res Judicata* bars the Commission from modifying the prior adjudicated fact from the *ESP I* Order. While the Commission can prospectively change policy decisions and ratemaking determinations, this Court has held that *res judicata* applies to an adjudicatory decision made in a prior final order. [See *Office of the Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10 (1985) ("OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate (an issue that was previously litigated) in the prior proceeding and was passed upon by the commission. OCC cannot now attempt to reopen the question.".)] There is a clear distinction between

administrative orders that are legislative in nature and orders that are adjudicatory in nature. *Res judicata* principles do not apply to the former but are clearly applicable to the latter. [*Cincinnati Bell v. Pub. Util. Comm.*, 12 Ohio St.3d 280 (1984) (citing *State Corp. Comm. of Kansas v. Wichita Gas Co.* (1934), 290 U.S. 561, 569, 54 S.Ct. 321, 324, 78 L.Ed. 500).]

The Commission may have some limited authority to change its general policy positions, like its legislative duties when justified, but it has no jurisdiction to change or modify an adjudicatory determination made in a prior final order, especially one appealed to the Supreme Court of Ohio. Once an appeal is filed with the Court, jurisdiction over the case passes from the Commission to the Court. Absent a remand, the Commission never regains jurisdiction over decisions already determined in the case. That is why the Commission could not reverse the prior determination in the *CEI Case* that CEI's Lakefront Power Plant was to be included in its rate base and OCC could not challenge the over-recovery of system loss costs from a prior period. In each instance the Commission would be reversing a prior order made final by the exhaustion of the appeal process, thereby in effect reversing a judgment of the Supreme Court itself. So too, the Commission lost jurisdiction over the establishment of the WACC for recovery in years 2012-2018, after it was finally adjudicated at the conclusion of the appeal of the *ESP I Order*.

The Court should ensure that the Commission recognizes the difference in reconsidering an overall policy position versus retroactively modifying an adjudicated fact from a previous case that is relied upon by a Company making subsequent actions to

effectuate that factual finding. In the present case, the Commission is estopped from changing the decision reached on this adjudicated fact.

**2. The regulatory precedent relied upon by the Commission does not support the finding that the Commission can make changes or modifications to the 2009 *ESP I* Order.**

The Finding and Order and Entry on Rehearing rely upon citations to sound regulatory practice and longstanding Commission precedent in defense of the modification made to the carrying charge. However, the underlying orders ignore the Commission's own rationale when establishing the deferral and carrying charges in 2009 that distinguished this circumstance from other circumstances, based upon the specific facts and circumstances litigated in the 2009 *ESP I* proceeding, perhaps more appropriately governed by longstanding precedent. The Commission's own precedent supports reversal of the Commission's improper modification of the previous adjudicated fact as unreasonable and unlawful.

The circumstances relied upon by the Commission for its contention that the changes are aligned with Commission precedent are also not persuasive as the Commission itself previously distinguished the facts of this deferral and carrying cost approval and made its initial decision out of respect for hard economic impact on customers. The only rationale the Commission gave for changing its finding is that these are hard economic times and that the modification follows the Commission's precedent. Neither of these bases for the modification are valid justifications when viewed in context with the Commission's initial order.

The Commission ordered the phase-in and the associated carrying charges because of a concern with the economy and the impact on customers. Specifically, the

Commission modified the 15 percent cap proposed by the Company and lowered ordering a phase-in of the rates “...necessary to ensure rate or price stability and to mitigate the impact on customers during this difficult economic period...” (*ESP I* Opinion and Order at 22.) (App at. 104.) Then in the Finding and Order in the underlying appeal the Commission decided to modify its initial adjudicatory finding stating “it is unreasonable for the WACC rate to be imposed on the deferral balance after collection begins, particularly during this period of lingering economic recession.” (*PIRR* Finding and Order at 18 ¶ 35.) (App at. 26.). This leaves the utility in an impossible position. The costs associated with the generation were phased-in over time to mitigate the impact on customers in a difficult economic time (in exchange they were deferred with a certain level of guaranteed carrying charges). Then when it comes time to collect those deferrals and carrying charges created by the Commission to assist customers in difficult economic times, the Commission finds that economic times are difficult and so it will further change its initial order and take away those ordered carrying costs that were relied upon by Company. A concern for the economic situation led to the initial adjudicatory finding and cannot be used as a new fact justifying a modification at this point in time based on the same concern.

It is also unreasonable and unlawful for the Commission to ignore its own words already distinguishing this situation from the long standing precedent it now cites in its orders. The Commission asserts that the modification of its previously adjudicated fact is “consistent with sound regulatory practice and longstanding Commission precedent.” (*Id.*) But a closer look at the Opinion and Order in the *ESP I* case shows that the Commission distinguished the longstanding precedent it now uses to justify the

modification (*ESP I* Opinion and Order Footnote 9 on page 23) (App at. 105) (the Commission points out how the long-term of this deferral and other factors make it unique.) Specifically the Commission already found that in the ESP it is establishing the Standard Service Offer and requiring the Companies to defer the collection of incurred generation costs associated with fuel over a longer period. (*Id.*) The Commission also pointed out that the case had other factors influencing the reasonableness of the prior adjudicated fact related to the FAC deferral cap. In other words, the matter was already distinguished, by the Commission, from the other precedent the Commission now cites for authority. The Commission's retreat from this position without anything beyond its change shows the unreasonableness of its position.

**3. The Commission ordered change of the previously authorized Weighted Average Cost of Capital carrying cost to the long-term cost of debt is unreasonable and unlawful.**

The Commission should reinstate its previous adjudicatory finding from the *ESP I* proceeding and authorize the Company to collect carrying charges on the unamortized balance of deferred fuel costs based on AEP Ohio's Weighted Average Cost of Capital. As discussed above, in its March 18, 2009 *ESP I* decision the Commission previously considered this very argument and denied the present modification:

Based on the record in this proceeding, we do not find the intervenors' arguments concerning the calculation of the carrying charges persuasive. Instead, for purposes of a phase-in approach in which the Companies are expected to carry the fuel expenses incurred for electric service already provided to the customers, we find that the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the WACC is reasonable as proposed by the Companies.

(*ESP I*, Opinion and Order at 23 note omitted.)(App. at 105.) Further, as stated in the December 14, 2011 Opinion and Order in the *ESP II* proceeding<sup>4</sup> where this question was a topic and the Commission found the WACC reasonable. Specifically the Commission stated:

The Companies offer that the carrying charge rate on deferred fuel expense was argued extensively by the parties to the *ESP 1* case, and the Commission ultimately decided that the WACC, as proposed by the Companies, was reasonable. ... The Commission agrees with the Signatory Parties that the **carrying charge on the deferred fuel expenses was established in the *ESP 1* proceeding.**

(*ESP II*, Opinion and Order at 58, vacated on rehearing) (App. at 277.) The Stipulation approved in the December 14, 2011 Opinion and Order was later unapproved on Rehearing, but the factual findings are still valid Commission admissions. In sum, the carrying charge issues were fully litigated in the *ESP I* case and the Commission adjudicated that the WACC was a reasonable carrying cost rate as proposed by the Company as later verified in a subsequent decision. The Commission admits that it approved the WACC recovery over the entire period in the Finding and Order in this case (See *PIRR* Finding and Order at 17-18) (App. at 25-26.) In accordance with the *ESP I* decision and §§4928.144 and 4928.143(C)(2)(b), Ohio Rev. Code, the Commission must order the implementation of the WACC as the appropriate carrying cost rate to use during the 2012-2018 amortization and recovery period.

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<sup>4</sup> *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, Case No. 11-346-EL-SSO et. al* (“*ESP II*”).

The statutory duty to provide for carrying costs under R.C. 4928.144, when the Commission exercises its right to phase-in a price or rate is not in question. R.C. 4928.144 states in pertinent part:

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

Emphasis added. These are specific findings the Commission must make to exercise its statutory right to phase-in prices through deferrals under R.C. 4928.144. While the Commission may choose a different policy for the phasing-in of future electric security plans as a policy change, it cannot retroactively modify its adjudicatory decision concerning this exercise of R.C. 4928.144 from the now completed ESP I period.

The admitted modification to the *ESP I* determination, in addition to being legally infirm, also ignores the actions taken by the Company in reliance upon the Commission's original compliance with R.C. 4928.144 that established the phase-in and associated carrying costs through 2018. As admitted by the Commission in the Finding and Order, it adopted the provision of the original ESP plan authorizing deferrals with carrying costs at the pre-tax WACC rate and recovered by a nonbypassable **surcharge to start on January 1, 2012, and continue through December 31, 2018.** (*PIRR* Finding and Order at 17.)(App. at 25.) The WACC carrying charge award left undisturbed totals around \$130 million and was a materially beneficial provision of the *ESP I* decision. In 2009, the AEP Corporation parent company contributed \$550 million in equity to Ohio Power

when it became clear that there would be fuel deferrals that would be recovered over a number of years to effectuate the phase-in ordered by the Commission, supported by the ordered carrying charges. (*Id.*) While the Commission ordered the Company to phase-in the recovery of the fuel costs the fuel still had to be obtained over that time by the Company and that came at a cost. The Company moved forward acquiring the fuel with the understanding that it would be receiving the ordered WACC carrying costs in exchange for the delay in recovering generation costs. The Commission should not change the underlying approvals that the Company relied upon and made financial decisions to carry out the Commission's order in the *ESP I* proceeding. The Commission should reinstate the carrying charges based on a WACC as the appropriate carrying cost as approved in the *ESP I* final, non-appealable *ESP I* order.

The Commission's unilateral change to the carrying charge after the term of the *ESP* period and after the Company took all actions to effectuate the phase-in as ordered by the Commission is unreasonable and unlawful. This change in the carrying charge provision from the 2009 decision amounts to approximately \$130 million and would have been cause for AEP Ohio to withdraw from the voluntary plan, had it been decided that way in 2009. The ability for the Commission to unilaterally change that decision or modify the plan of this one remaining issue from the past expired plan renders the statutory right for a utility to withdraw meaningless. The Company cannot withdraw from a prior *ESP* plan that is no longer in effect (see discussion below). The Company is trapped by the Commission's retroactive modification, unarmed without the General Assembly's enumerated check and balance to counteract Commission modifications.

**B. The Commission's final order retroactively modified terms of an expired Electric Security Plan denying the Company the ability to exercise its statutory right to withdraw from the expired ESP and is therefore unreasonable and unlawful. R.C. 4928.143(C)(2)(a).**

The Commission is estopped by R.C. 4928.143 from unilaterally modifying a provision of the *ESP I* decision after the plan's period is over due to the Company's statutory right to withdraw from the ESP based on Commission modifications. The Commission's admitted decision to change its mind on the carrying cost issue, to the Company's detriment of \$130 million, also admits an abandonment of the Company's statutory rights under R.C. 4928.143. The action by the Commission denies AEP Ohio the ability to exercise its statutory right to withdraw from the Commission modified plan.

There is a sequence to establishing an electric security plan under R.C. 4928.143 that the Commission's modifications to its initial ESP decision in this case violate. First, a utility files a plan. Second, the duty shifts to the Commission to accept, deny or modify and accept. Once the Commission acts, the utility has the right to consider the entirety of the modifications made and determine if it will withdraw from the plan or not. Fundamentally, an electric security plan is a voluntary plan offered by a utility, and if modified and approved by the Commission the utility still has the right to withdraw. Therefore, a holding that allows the Commission to defer a large part of an ESP plan under R.C. 4928.144 for future recovery as part of its overall modifications, and then turn around years later and adversely diminish the approved terms of that collection when the other terms of the plan are complete and without an opportunity to exercise the right to withdraw, is unreasonable and unlawful. Specifically, R.C. 4928.143 (C)(2) states in pertinent part:

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

The Commission's underlying Finding and Order purports to retroactively modify the approval of the Electric Security Plan, even though the Commission review period has passed and the ESP has expired and otherwise been fully implemented.

The Commission action violates R.C. 4928.143(C)(2) because it is impossible for AEP Ohio to exercise its right under the statute to withdraw from the ESP and terminate the plan because it is already over. The statute contemplates the Commission making the decision to modify, reject or accept the utility's application so that the utility can weigh any proposed modifications to decide whether to move forward or start over with a new application. This statutory process was abandoned by the Commission in the underlying proceeding.

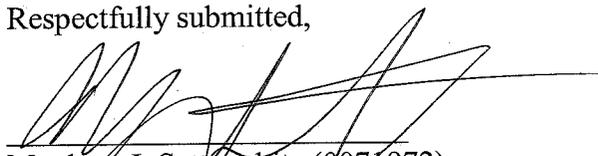
Through its *ESP I* decision in 2009, the Commission defined an ESP modification and approval for the Company to consider withdrawal in its consideration of the initial ESP. The Company did not withdraw, and implemented the plan modified by the Commission, acting to ensure customers had the necessary fuel even though the recovery of the associated costs would not be provided until a later date, with defined carrying charges. The duty of the Commission to define the carrying costs upfront essentially defines the parameters of the bargain the Commission seeks to make with its modification of the plan filed by the utility. If a utility relies upon that representation and does not withdraw its application, the Commission is then estopped from unilaterally changing its prior finding once the plan period is over and the benefit of the deferral is

realized. The Commission's action serves to deny the Company the opportunity to exercise the General Assembly's enumerated check and balance of withdrawal to ensure the reasonableness of Commission modifications. The Commission's after-the-fact modification eviscerates the statute and is therefore unlawful and unreasonable. The case should be remanded to the Commission with specific instructions to honor the 2009 adjudicated fact, finding a WACC carrying cost on the deferred fuel to be recovered from 2012-2018.

#### **IV. Conclusion**

For the foregoing reasons, the Court should reverse and remand the Commission's decision below as specified above to restore the carrying costs to the weighted average cost of capital.

Respectfully submitted,



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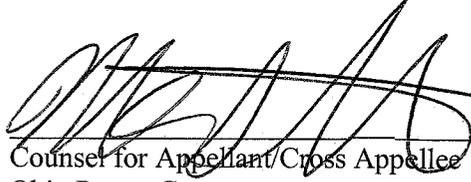
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**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that Ohio Power Company's First Merit Brief was served by First-Class U.S. Mail upon counsel for all parties to the proceeding on this 8<sup>th</sup> day of February 2013.

  
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