

Samuel C. Randazzo (0016386)

Counsel of Record

Frank P. Darr (0025469)

Joseph E. Olikier (0086088)

Matthew R. Pritchard (0088070)

McNees Wallace 7 Nurick

21 East State Street, 17th Floor

Columbus, OH 43215

614.469.8000 (telephone)

614.469.4653 (fax)

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Counsel for Appellant,
Industrial Energy users-Ohio**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
STATEMENT OF THE FACTS AND CASE.....	2
ARGUMENT	4
Proposition of Law No. I [Response to IEU-Ohio’s Proposition of Law IV]:	
The Court will not reverse fact determinations where the record contains sufficient probative evidence to support those findings. The Court neither reweighs the evidence nor substitutes its opinion or judgment for that of the Commission on factual, evidentiary matters. <i>Discount Cellular v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957; <i>Payphone Ass’n v. Pub. Util. Comm.</i> , 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4.....	
A. The Commission’s decision that only a portion of the Settlement Agreement proceeds should be allocated to Ohio jurisdictional customers should be affirmed because it is supported by the record.....	4
B. IEU-Ohio’s argument should be rejected because it relies entirely upon a speculative analysis nowhere to be found in the record.....	7
CONCLUSION	10
PROOF OF SERVICE	12
APPENDIX	PAGE
R.C. 4903.09.....	1
Order Code RL34746, CRS Report for Congress, Power Plants: Characteristics and Costs (November 13, 2008) (Prepared by: Stan Kaplan, Specialist in Energy and Environmental Policy, Resources, Science, and Industry Division) (EXCERPTS).....	
	2

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Discount Cellular v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957	4
<i>Ideal Transp. Co. v. Pub. Util. Comm.</i> , 42 Ohio St.2d 195, 326 N.E.2d 861 (1975).....	9
<i>In re Duke Energy Ohio, Inc.</i> , 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201	5, 10
<i>Monongahela Power Co. v. Pub. Util. Comm.</i> , 104 Ohio St.3d 571, 2004- Ohio-6896, 820 N.E.2d 921	6
<i>Payphone Ass'n v. Pub. Util. Comm.</i> , 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4.....	4
<i>Stephens v. Pub. Util. Comm.</i> , 102 Ohio St.3d 44, 2004-Ohio-1798, 806 N.E.2d 527	10
<i>Utility Serv. Partners, Inc. v. Pub. Util. Comm.</i> , 124 Ohio St.3d 284, 2009- Ohio-6764, 921 N.E.2d 1038	5

Statutes

R.C. 4903.09.....	9
-------------------	---

Other Authorities

<i>In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company</i> , Case Nos. 09-872-EL-FAC, <i>et al.</i> (Entry on Rehearing) (April 11, 2012).....	3, 4
---	------

**In The
SUPREME COURT OF OHIO**

Ohio Power Company,	:	
	:	Case No. 12-1484
Appellant/Cross-Appellee,	:	
	:	On appeal from the Public Utilities
v.	:	Commission of Ohio, Case Nos.
	:	09-872-EL-FAC and 09-873-EL-FAC,
The Public Utilities Commission of	:	<i>In the Matter of the Fuel Adjustment</i>
Ohio,	:	<i>Clause for Columbus Southern Power</i>
	:	<i>Company, et al.</i>
Appellee.	:	

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

INTRODUCTION

Deciding how costs and benefits should be allocated to Ohio ratepayers is not unusual for the Public Utilities Commission of Ohio (the Commission). It is part of ratemaking. That is what happened here. The Commission decided that Appellant AEP-Ohio should allocate only a portion of the benefits of a coal contract to Ohio jurisdictional customers. This decision is based on evidence that AEP-Ohio allocated fuel costs between Ohio retail jurisdictional customers and non-Ohio retail jurisdictional customers. It is also based on the well-accepted regulatory principle of aligning costs and benefits.

Cross Appellant Industrial Energy Users of Ohio (IEU-Ohio) challenges this part of the Commission's decision. It bases its entire appeal upon a complicated, speculative

analysis that is not in the record. IEU-Ohio's argument requires the Court to blindly accept various assumptions and reweigh the record evidence. The Court should not do so. There is no need to. The Commission's decision is reasonable and supported by the record. It should be affirmed.

STATEMENT OF THE FACTS AND CASE

The case below was about determining how much AEP-Ohio's jurisdictional customers should pay in fuel cost. To do so, the Commission had to examine the costs and benefits of AEP-Ohio's contracts with its coal supplier (Coal Supplier). One specific contract at issue was the Settlement Agreement. Like most contracts, the Settlement Agreement had certain costs and benefits. The cost for AEP-Ohio was terminating a below-market-price coal contract (the Coal Contract) while agreeing to pay a higher price for coal going forward. The benefits were a cash payment and receipt of undeveloped coal reserves from the Coal Supplier. AEP-Ohio wanted to pass the costs of the Settlement Agreement on to Ohio jurisdictional customers but not the benefits. The Commission denied this request. It decided that AEP-Ohio must allocate a portion of the benefits of the Settlement Agreement to jurisdictional customers.

IEU-Ohio agreed that the benefits of the Settlement Agreement should be passed on to jurisdictional customers. IEU-Ohio, however, wanted the Commission to go a step farther. It wanted the Commission to order AEP-Ohio to pass all the benefits of the Settlement Agreement onto Ohio jurisdictional customers. In its Application for Rehearing, IEU-Ohio claimed that Ohio jurisdictional customers probably would have obtained all

the benefits of the Coal Contract if AEP-Ohio never would have terminated it. IEU-Ohio App. at 50-59.¹ And because IEU-Ohio believes jurisdictional customers would have obtained all the benefits of the Coal Contract, it claimed that jurisdictional customers should get all the benefits of the Settlement Agreement. *Id.*

The Commission disagreed with IEU-Ohio. The Commission determined, based on the evidence, that AEP-Ohio allocated fuel costs between Ohio retail jurisdictional customers and non-Ohio retail jurisdictional customers. *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. (In re AEP)* (Entry on Rehearing at 6) (April 11, 2012), IEU-Ohio App. at 32. The Commission wanted to ensure that the costs and benefits associated with AEP-Ohio rendering service to jurisdictional customers were properly aligned. Therefore, the Commission determined that allocating only a portion of the benefits of the Settlement Agreement to jurisdictional customers was the best way to achieve this goal. IEU-Ohio now appeals this aspect of the Commission's decision.

¹ References to the appendix to IEU-Ohio's appendix are denoted "IEU-Ohio App. at ____;" references to the second supplement to IEU-Ohio's merit brief are denoted "IEU-Ohio Sec. Supp. at ____;" references to the Commission's supplement are denoted "Supp. at ____;" references to the Commission's appendix attached hereto are denoted "App. at ____."

ARGUMENT

Proposition of Law No. I [Response to IEU-Ohio's Proposition of Law IV]:

The Court will not reverse fact determinations where the record contains sufficient probative evidence to support those findings. The Court neither reweighs the evidence nor substitutes its opinion or judgment for that of the Commission on factual, evidentiary matters. *Discount Cellular v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957; *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4.

- A. The Commission's decision that only a portion of the Settlement Agreement proceeds should be allocated to Ohio jurisdictional customers should be affirmed because it is supported by the record.**

The Commission's decision that only a portion of the Settlement Agreement proceeds should be allocated to Ohio jurisdictional customers is supported by the record. The record shows that there was a clear distinction between fuel expenses for Ohio retail jurisdictional customers and non-Ohio retail jurisdictional customers. As such, the Commission decided this distinction needed to be applied to revenues as well. The Entry on Rehearing points directly to the evidence the Commission relied upon:

AEP-Ohio witnesses and the financial auditor recognized that fuel expenses are allocated between Ohio retail expenses, non-Ohio retail expenses, or wholesale expenses. The same is true regarding the allocation of revenues.

In re AEP (Entry on Rehearing at 6) (April 11, 2012), IEU-Ohio App. at 32.

The Financial Auditor, Mr. Ralph Smith, testified that AEP-Ohio's accounting ledgers distinguished between retail and non-retail expenses. Tr. I at 15-16, Supp. at 5-6, discussing Audit Report, Financial Audit Recommendation (Audit Report at 1.7), Supp.

at 1. He also stated that FAC expenses should only be allocated to Ohio retail customers. *Id.* Mr. Smith’s testimony is entirely consistent with the Audit Report, which describes in detail how AEP-Ohio allocated fuel costs between jurisdictional expenses and non-jurisdictional expenses (such as those assigned to off-system sales). Audit Report Exhibits 7.7 and 7.8, Monthly Retail FAC Costs, October – December 2009, Supp. at 8, 9. AEP-Ohio’s accounting expert, Timothy Dooley, testified regarding how credits against fuel costs should be allocated. Tr. I at 122, Supp. at 7.² Mr. Dooley testified that only a portion of the benefits of the Settlement Agreement would be assigned to Ohio retail jurisdictional customers. *Id.*

IEU-Ohio acknowledges that the Commission relied upon this evidence to make its decision. IEU-Ohio Brief at 38-39. It merely disagrees with the Commission’s reasoning and expects the Court to reinterpret the evidence. This is not the function of the Court. The Court has held that “reweighing the evidence is outside the scope of [the Court’s] function on appeal.” *In re Duke Energy Ohio, Inc.*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 17 (“In the pertinent section of its brief, Duke at best offers an alternative take on the evidence. As we have explained before, reweighing the evidence is outside the scope of our function on appeal.”); *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 35. Therefore, IEU-Ohio has the burden of showing that the Commission’s decision was “mani-

² The Commission’s Supplement includes an excerpt of the redacted, public version of Mr. Dooley’s testimony. The Commission is not relying on any confidential information in this merit brief.

festly against the weight of the evidence” and “so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29 (citations removed). Simply providing a differing view of the evidence is not enough.

The Commission’s decision was reasonable and grounded in the record. The evidence shows that AEP-Ohio allocated fuel expenses between Ohio retail jurisdictional customers and non-Ohio retail jurisdictional customers. Audit Report Exhibits 7.7 and 7.8, Monthly Retail FAC Costs, October – December 2009, Supp. at 8, 9. Therefore, the Commission determined that AEP-Ohio should only credit a portion of the Settlement Agreement to Ohio retail jurisdictional customers. This is entirely consistent with the Commission’s practice of matching expenses and revenues. In almost every case involving a utility, the Commission must determine what costs and benefits should be passed on to Ohio retail customers. The proceeding below was no different. IEU-Ohio admits the case below involved identifying “the cost and benefits that are properly associated with sales to SSO customers.”³ Merit Brief at 10. This is exactly what the Commission did. Its decision is lawful, reasonable, and should be affirmed.

³ “SSO” means “standard service offer.” SSO customers are AEP-Ohio’s non-shopping retail customers that purchase energy directly from AEP-Ohio at retail. These customers are “jurisdictional customers” subject to the FAC charge.

B. IEU-Ohio's argument should be rejected because it relies entirely upon a speculative analysis nowhere to be found in the record.

The Commission's decision to allocate a portion of the proceeds to Ohio retail jurisdictional customers is sound and based on the record. IEU-Ohio's position, on the other hand, is guess-work and not supported by record evidence.

IEU-Ohio's entire argument rests upon one premise – that the Mitchell generating station would have had the lowest average dispatch cost if AEP did not terminate the Coal Contract. *There is no evidence in the record to support this claim.* Rather, IEU Ohio relies upon its own pleadings and documents outside the record. For example, IEU-Ohio cites to its Application for Rehearing as support.⁴ This, of course, is not evidence. It is merely a reiteration of IEU-Ohio's legal argument.

IEU-Ohio also cites a Congressional Research Service Report (CRS Report) to support its claim that “the fuel costs for the Mitchell generating station would have likely been recovered exclusively from AEP-Ohio's SSO customers.” IEU-Ohio Merit Brief at 14, fn.46. *The CRS Report, however, is not in the record.* Further, the CRS Report simply states that, assuming all “[o]ther things... being equal, the lower a plant's heat rate, the higher it will stand in the economic dispatch priority order.” CRS Report at 4, App. at 2. Although this general principle may be true, it is not evidence that the Mitchell generating station would have had the lowest average dispatch cost.

⁴ IEU-Ohio Merit Brief, fn. 48, 131, and 132.

Instead of citing such evidence, IEU-Ohio argues that the absence of evidence is evidence itself. It claims that the fact there is no evidence that the Mitchell generating station *would not* have had the lowest dispatch cost is proof the Mitchell generating station *would* have had the lowest dispatch cost.⁵ This suspect argument turns IEU-Ohio's burden on its head. It is IEU-Ohio's burden to identify evidence in the record that supports its claim. It cannot do so. The Commission's decision is reasonable and supported by the record. IEU-Ohio cannot prove otherwise by merely claiming the record does not disprove its analysis. This is especially true here because its analysis is not even in the record.

On the few occasions IEU-Ohio does cite to the record it still cannot find support for its argument. For example, IEU-Ohio cites to AEP-Ohio's witness, Phillip Nelson, who testified that fuel costs associated with the least cost generation output are allocated to SSO customers. IEU-Ohio Merit Brief at 39, fn. 130; *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 Nos. 08-917-EL-SSO, *et al.* (*In re AEP SSO*) (Direct Testimony of Philip J. Nelson at 12) (July 31, 2008), IEU-Ohio App. at 180. This testimony takes IEU-Ohio's argument nowhere. The Commission does not dispute this basic point from of

⁵ IEU-Ohio Merit Brief at 17 ("AEP-Ohio did not submit evidence indicating that this result would not have occurred."); IEU-Ohio Merit Brief at 38-39 ("[T]he assertion in AEP-Ohio's testimony that it allocated a portion of the [Settlement Agreement] payments to SSO customers does not demonstrate that SSO customers were not entitled to the entire amount."); IEU-Ohio Merit Brief at 40 ("[T]he Entry cited zero evidence to demonstrate that the Mitchell generating station would not have had the lowest average dispatch cost...").

Mr. Nelson's testimony. This does not prove, however, that the Mitchell generation station would have had the lowest average dispatch cost if the Coal Contract was not terminated.

Because the record does not support its claims, IEU-Ohio must look elsewhere. To prove its case, IEU-Ohio submits an elaborate analysis, which requires pages of calculations regarding what the average dispatch cost at the Mitchell station theoretically could have been. IEU-Ohio claims that this analysis is a "simple calculation." IEU-Ohio Merit Brief at 16. This analysis is anything but "simple." More importantly, *it's not evidence*. This complex analysis was not presented at the hearing. IEU-Ohio's witness did not testify in support of this analysis. IEU-Ohio expected the Commission to apply this analysis despite the fact IEU-Ohio never presented it during the hearing. The Commission cannot consider evidence that is never presented. It must base its decision upon the record. R.C. 4903.09, App. at 1. *Ideal Transp. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 195, 326 N.E.2d 861 (1975), syllabus ("The Public Utilities Commission must base its decision in each case upon the record before it."). As such, the Court should affirm the Commission's factual determination because IEU-Ohio's "fact-based" analysis is not in the record.

Although IEU-Ohio's analysis relies upon a few portions of the record, these sporadic citations are not enough to show the Commission's decision was against the manifest weight of evidence. IEU-Ohio cites sections of the Audit Report for numbers to

input into its analysis.⁶ These numbers, by themselves, are not disputed by the Commission. What is in dispute is IEU-Ohio's analysis and conclusion, neither of which is supported by evidence. Without such evidence, IEU-Ohio cannot meet its burden on appeal. *In re Duke Energy Ohio*, 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201 at ¶ 26 (Appellant failed to conclusively show that the Commission's factual determination was contrary to the record evidence); and *Stephens v. Pub. Util. Comm.*, 102 Ohio St.3d 44, 2004-Ohio-1798, 806 N.E.2d 527, ¶ 16 ("It is apparent from [appellant's] arguments that he is asking this court to examine in minute detail the record below and to weigh the evidence. We decline to do so.") The Court should reject IEU-Ohio's invitation to comb through the voluminous record and reweigh the evidence. The Commission's decision is reasonable and supported by the record. It should be affirmed.

CONCLUSION

Costs and benefits go hand in hand. The Commission's decision reflects this basic principle. The evidence shows that Ohio jurisdictional customers only paid a portion of AEP-Ohio's fuel costs. The Commission determined, naturally, that Ohio jurisdictional customers should only be allocated a portion of the benefits related to these fuel costs. This decision is reasonable and is supported by the record. IEU-Ohio's argument is nei-

⁶ IEU-Ohio Merit Brief, fn. 54- 56.

ther. It is just a different interpretation of the record and a highly speculative one at that.
IEU-Ohio's appeal should be denied and the Commission's decision should be affirmed.

Respectfully submitted,

Michael DeWine (0009181)
Ohio Attorney General

William L. Wright (0018010)
Section Chief



Thomas W. McNamee (0017352)
Counsel of Record

Devin D. Parram (0082507)
Assistant Attorneys General
Public Utilities Section

180 East Broad Street, 6th Fl
Columbus, OH 43215-3793

614.466.4397 (telephone)

614.644.8764 (fax)

thomas.mcnamee@puc.state.oh.us

devin.parram@puc.state.oh.us

**Counsel for Appellee,
The Public Utilities Commission of Ohio**

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Third Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 20th day of February, 2013.



Devin D. Parram
Assistant Attorney General

Parties of Record:

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Kathleen M. Trafford
Daniel R. Conway
Porter Wright Morris & Arthur
41 South High Street
Columbus, OH 43215

Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
Matthew R. Pritchard
McNees Wallace 7 Nurick
21 East State Street, 17th Floor
Columbus, OH 43215

APPENDIX

**APPENDIX
TABLE OF CONTENTS**

Page

R.C. 4903.09..... 1

Order Code RL34746, CRS Report for Congress, Power Plants:
Characteristics and Costs (November 13, 2008) (Prepared by: Stan
Kaplan, Specialist in Energy and Environmental Policy, Resources,
Science, and Industry Division) (EXCERPTS)..... 2

§ 4903.09. Written opinions filed by commission in all contested cases

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

CRS Report for Congress

Power Plants: Characteristics and Costs

November 13, 2008

Stan Kaplan
Specialist in Energy and Environmental Policy
Resources, Science, and Industry Division



Prepared for Members and
Committees of Congress

Economic Dispatch and Heat Rate. The generating units available to meet system load are “dispatched” (put on-line) in order of lowest variable cost. This is referred to as the “economic dispatch” of a power system’s plants.

For a plant that uses combustible fuels (such as coal or natural gas) a key driver of variable costs is the efficiency with which the plant converts fuel to electricity, as measured by the plant’s “heat rate.” This is the fuel input in British Thermal Units (btus) needed to produce one kilowatt-hour of electricity output. A lower heat rate equates with greater efficiency and lower variable costs. Other things (most importantly, fuel and environmental compliance costs) being equal, the lower a plant’s heat rate, the higher it will stand in the economic dispatch priority order. Heat rates are inapplicable to plants that do not use combustible fuels, such as nuclear and non-biomass renewable plants.

As an illustration of economic dispatch, consider a utility system with coal, nuclear, geothermal, natural gas combined cycle, and natural gas peaking units in its system:

- Nuclear, coal, and geothermal baseload units, which are expensive to build but have low fuel costs and therefore low variable costs, will be the first units to be put on line. Other than for planned and forced maintenance, these baseload generators will run throughout the year.
- Combined cycle units, which are very efficient but use expensive natural gas as a fuel, will meet intermediate load. These cycling plants will ramp up and down during the day, and will be turned on and off dozens of times a year.
- Peaking plants, using combustion turbines,³ are relatively inefficient and burn expensive natural gas. They run only as needed to meet the highest loads.⁴

An exception to this straightforward economic dispatch are “variable renewable” power plants — wind and solar — that do not fall neatly into the categories of baseload, intermediate, and peaking plants. Variable renewable generation is used as available to meet demand. Because these resources have very low variable costs they are ideally used to displace generation from gas-fired

³ A combustion turbine is an adaption of jet engine technology to electric power generation. A combustion turbine can either be used stand-alone as a peaking unit, or as part of a more complex combined cycle plant used to meet intermediate and baseload demand.

⁴ This alignment of generating technologies is for new construction using current technology. The existing mix of generating units in the United States contains many exceptions to this alignment of load to types of generating plants, due to changes in technology and economics. For instance, there are natural gas and oil-fired units built decades ago as baseload stations that now operate as cycling or peaking plants because high fuel prices and poor efficiency has made them economically marginal. Some of these older plants were built close to load centers and are now used as reliability must-run (RMR) generators that under certain circumstances must be operated, regardless of cost, to maintain the stability of the transmission grid.