

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**AMENDED THIRD MERIT BRIEF OF APPELLANT
OHIO POWER COMPANY**

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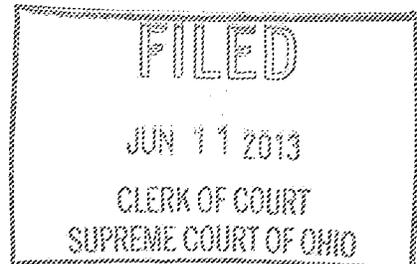
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REPLY IN SUPPORT OF AEP OHIO APPEAL

Appellant/Cross-Appellee Ohio Power Company (“Company” or “AEP Ohio”) contends that the Commission exercised its ability to phase-in the impact of an approved electric security plan by making a definitive ruling in its March 2009 *ESP I* Opinion and Order that AEP Ohio would be permitted to deferred recovery of certain fuel costs with a carrying cost at the Weighted Average Cost of Capital (“WACC”), through an unavoidable surcharge from 2009 to 2018. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO, Opinion and Order (March 18, 2009) (“*ESP I Order*”) at 23. (Appx. 105.) AEP Ohio contends that the Commission, having exercised the statutory option to phase-in rate increases and having made that definitive ruling in a final order, could not three years later reverse the balance provided by the recovery ordered in that ruling and reduce the carrying charge rate on the deferred costs from the WACC to the long-term cost of debt for the last seven years of the phase-in period, 2012-2018.

The Commission and Intervenors Industrial Energy Users-Ohio (“IEU”) and Office of the Consumers’ Counsel (“OCC”) argue to the contrary, that the Commission made no such definitive ruling in the *ESP I Order*, and that, even if it did, the Commission was free to change the balance it ordered after-the-fact, so long as it offered some reason for doing so. The factual record, however, soundly refutes their argument that there was no definitive ruling on the use of the WACC for the entire phase-in period. And, the law does not support the argument that the Commission has discretion to

reverse a prior, evidence-based finding as applied to a specific situation after its order has become final.

While this Court has held that the Commission is free to reevaluate its policies and positions and chart a new regulatory course prospectively, this Court has never held that the Commission is free to undo a prior evidence-based adjudication after-the-fact based solely on comments made in a later implementation docket. To so hold in this case would be a radical change in the law. If the Court were to adopt the Commission's position in this case, it will set the Commission apart from every other adjudicatory body in this State – the courts as well as other administrative agencies – by giving it the power to alter prior adjudicated findings whenever it sees an expedient reason for doing so. Such position is even further out-of-bounds in a case like this where the finding, that was abrogated years after-the-fact, dealt with an integral element allowing the Commission to exercise a unique statutory power to delay timely recovery of actual costs in exchange for a guarantee of later recovery. Adoption of the Commission's position in this case would be a sharp departure from the Court's long-standing commitment to the value of finality and stability in the rules of law governing the affairs of commerce in this State.

A. The Commission made a definitive determination in the *ESP I Order* that the WACC would be used during the entire phase-in period, 2009 through 2018.

The Commission contends that its *ESP I Order* “did not expressly set the carrying charge rate that would apply during the [2012-2018] recovery period.” (Merit Brief at 4.) The Commission reiterates this contention at page 22 of its Merit Brief, where it states that “[t]he *ESP I* Opinion and Order did not expressly address the issue of what the carrying charge would be once the collection period [2012-2018] commenced.” IEU also

argues that the Commission did not address the amount of carrying charges once the ESP period was over and the recovery period began. (IEU Brief at 2, 4.) This contention is false, and the Commission's own statements in its prior orders demonstrate that it is false. The Commission's *ESP I Order* specifically stated, at page 23:

[W]e find that the Companies have met their burden of demonstrating that the carrying cost rate calculated based on the [weighted average cost of capital] *is reasonable as proposed by the Companies.*

(Emphasis added.)

What did Columbus Southern Power and Ohio Power Company (the "Companies") propose with regard to the WACC carrying cost rate in *ESP I*? In the testimony of Leonard V. Assante submitted on behalf of the Companies in *ESP I*, Mr. Assante explained that the Companies proposed to use the WACC rate over the entire 10-year term of the phase-in period, including the 2012-2018 collection phase:

To cover the cost of financing [the deferrals], the Companies are proposing a carrying cost on the unrecovered balance of the deferred incremental FAC costs at their weighted average cost of capital (WACC) rate *over the entire ten-year phase-in plan period* in order to recover the cost of financing their deferred unrecovered FAC costs.

(Emphasis added.) Cos. Reply Comments, Attachment A, at page 8, lines 6-9. (AEP Supp. 12.)

Did the Commission understand that the Companies had proposed to use the WACC carrying cost rate to determine the cost of carrying the fuel cost deferrals throughout the ten-year period, including the 2012-2018 collection phase? Yes, the Commission clearly understood the Companies' proposal. At page 20 of its Opinion and Order in *ESP I*, the Commission summarized the Companies' proposal regarding use of the WACC carrying cost rate as follows:

Any deferred FAC expense remaining at the end of 2011 would be recovered, *with a carrying cost at the Weighted Average Cost of Capital (WACC), as an unavoidable surcharge from 2012 to 2018.* [Cos. Ex. 6, Exhibit LVA-1.] (Emphasis added.)

ESP I Order at 20. (Appx. 102.)

Thus, the Commission expressly noted in its *ESP I Order* that the Companies' proposal was to apply the WACC carrying cost rate throughout the 2012–2018 deferral collection period. Indeed, Cos. Ex. 6, Exhibit LVA-1 in *ESP I* (Cos. Reply Comments, Attachment A, at Exhibit LVA-1; AEP Supp. 27), which the Commission specifically cited and relied upon in its Opinion and Order, at page 20, to explain what the Companies had proposed, specifically states that one of the major assumptions of the Companies' proposal was the use of a before-tax weighted average cost of capital (WACC) of 11.15% for the entire 10-year period, including the 2012-2018 collection period. Accordingly, there can be no serious question raised concerning whether the Commission understood in 2009, when it issued its Opinion and Order, that it had approved the Companies' proposal to use the WACC carrying charge rate during the 2012-2018 collection phase.

Notably in that regard, at the same point in its *ESP I Order*, at page 23, where the Commission confirmed the use of the WACC carrying cost rate for that entire 10-year period, including 2012-2018, the Commission also rejected criticisms by intervenors that lower debt-only carrying charge rates should be used:

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 expense incurred for electric service already provided to the customers [fn.], ***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.

* * *

Therefore, we find that the collection of any deferrals, with carrying costs, created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 as necessary to recover the actual fuel expense incurred plus carrying costs.

(Emphasis added.) (Appx. 105.)

The Commission argues in its Merit Brief at 8 that AEP Ohio's appeal is based on a fundamental misreading of R.C. 4928.144, which, according to the Commission permits the Commission to apply different carrying charge rates at different points in the phase-in period. The Commission is arguing a point that has never been an issue in this case. AEP Ohio is not arguing that the statute requires the Commission to impose a single uniform rate throughout the phase-in period. AEP Ohio's appeal is based on the fact that the Commission made an express finding in the *ESP I Order* that the WACC rate was the proper rate to be applied throughout the entire period 2009-2018.

Notably, there was no proposal in *ESP I* proceeding by any party to use bifurcated carrying cost rates during the 10-year 2009-2018 period, i.e., a WACC rate during the initial three-year 2009-2011 deferral accumulation phase and then some other rate, to be determined later, during the 2012-2018 collection phase. The intervenors' alternative proposal in *ESP I*, which the Commission rejected, was to use a lower debt-only cost of capital rate for the entire 10-year period. Nor did the Commission, on its own, in its *ESP I Order* leave open for future determination what the carrying cost rate would be during the 2012-2018 collection period. On the contrary, it specifically found that AEP Ohio had met its burden in *ESP I* of demonstrating that the carrying cost rate calculated based

on the WACC as proposed by AEP Ohio, which included using that carrying cost rate during the 2012-2018 collection phase, was reasonable. *ESP I Order* at 23. (Appx. 105.)

The Commission also took the extra step, in footnote 9, on page 23, of its *ESP I Order*, to explain why use of the WACC carrying cost rate, which is higher than a debt-only rate because it includes, as a weighted component of the total rate, a higher cost of equity component, was appropriate. The Commission expressly distinguished cases that did not include such a component in the carrying cost rate, which the intervenors relied upon to support their proposal of a debt-only carrying cost rate, by explaining that using a WACC rate was appropriate because of the extended 10-year period during which the Companies would be financing the deferred fuel costs:

[W]e believe that, with regard to the equity component, these cases are distinguishable from the current ESP proceeding, where we are establishing the Standard Service Offer and requiring the Companies to defer the collection of incurred generation costs associated with fuel over a longer period.

Thus, the Commission based its approval of the use of the WACC carrying cost rate, including its equity component, for the entire 10-year period specifically because of the very lengthy time over which the fuel costs would be deferred and then collected.

Subsequently, on rehearing in *ESP I*, the Commission rejected challenges by intervenors that the WACC rate was an unreasonably high carrying cost rate to use for the fuel deferrals:

- (21) OCC further contends that the use of a weighted average cost of capital (WACC) to calculate the carrying costs associated with the FAC deferrals is unreasonable and will result in excessive payments by customers.

* * *

- (29) With respect to OCC's and the Schools' issues regarding the FAC deferrals and carrying charges, we find that those issues were thoroughly addressed in our [ESP I] Order, at page 20-13, and that the parties have raised no new arguments regarding those issues. Accordingly, the Commission finds that rehearing on those assignments of error are denied

ESP I July 23, 2012, Entry on Rehearing, at pages 7, 10. (Appx. 167, 170.)

No party appealed the finding in *ESP I* to set the carrying cost rate for the fuel deferrals for the entire 10-year 2009-2018 period, including the 2012-2018 collection phase, at the WACC rate and, as a result, that decision became final and non-appealable. Subsequently, in its August 1, 2012 Finding and Order in the proceeding below, at page 17, the Commission confirmed that in the *ESP I Order* it had "authorized AEP Ohio to establish a regulatory asset to record and defer fuel expenses, with carrying costs at the pre-tax WACC rate of 11.15 percent, and recovery through a nonbypassable surcharge to commence on January 1, 2012, and continue through December 31, 2018." *In the Matter of the Application of Columbus Southern Power 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; 11-4921-EL-RDR, Finding and Order, (Aug. 1, 2012) ("*PIRR Order*") (Appx. 25.)

There can be no doubt that in *ESP I Order* the Commission approved the use of the WACC rate for the entire 10-year period. Indeed, the Commission's statements in its *PIRR* orders confirm that through those *PIRR* orders it was reversing and modifying its prior approval in *ESP I* of the WACC rate for the 2012-2018 collection period. For example, the *PIRR Order* at page 19, states, in pertinent part that:

the Commission finds it necessary to *depart from* our approval in the *ESP I Order* of AEP Ohio's proposed carrying cost rate. The Commission may change course, provided that it justifies the *reversal*.

(Emphasis added.) (Appx. 27.) In its October 3, 2012, Entry on Rehearing in the *PIRR* proceeding (“*PIRR Rehearing Entry*”) at pages 23-14 (Appx. 48-49), the Commission reiterated:

The Commission finds no merit in AEP Ohio’s argument that *our modification of the ESP I Order* was unreasonable or unlawful. . . . As we stated in the *PIRR Order*, the Court has continually recognized the Commission’s authority to *revisit* earlier orders as long as the Commission justifies its *modifications*.

(Emphasis added.)

The statements that the Commission made in its *PIRR Orders* completely belie the statements in its Merit Brief, at pages 4 and 22, that it is now simply filling in a blank spot that it had left open in its *ESP I Order* with a debt-only carrying charge rate for the 2012-2018 collection phase. What the Commission has done, as it recognized in its *PIRR Orders*, is to revisit, depart from, modify, and reverse the approval that it had previously given to AEP Ohio to use the WACC rate during the 2012-2018 deferral collection period as part of the Commission’s decision to phase-in the impact of the ESP on customers. If it had not already decided the matter in *ESP I Order*, it would not have had to revisit, modify, reverse, or depart from its prior decision in the *PIRR* proceeding.

The *ESP I Order* and *PIRR Order* clearly rule out the Commission’s contention on appeal, but the *PIRR Order* also aptly establishes that the position now being advanced to this Court was never adopted, or even alluded to, by the Commission in the proceeding below. The Commission expressly stated that it was departing from its prior decision, even entitling its discussion of the issue on rehearing as “Modification of Phase-In Plan.” *PIRR Entry on Rehearing* at 10. (Appx. 45.) Its attempt to interject an entirely new position on appeal is improper, in and of itself, and the new arguments

should be disregarded. The purpose of this Court's review is to determine if the Commission's final order lawful and reasonable, R.C. 4903.13, and it must do so based on the reasoning articulated by the Commission in its order. The Court cannot uphold the Commission's order in this case based on a rationale actually contradicted by the order itself.

B. This Court has never given the Commission *carte blanche* authority to modify prior adjudicatory determinations.

The Commission's cavalier "change is the essence of life" view as invoked in this case is truly astonishing. This Court has never given the Commission permission to modify its prior, evidence-based adjudicatory findings after they have become final. The "general rule" upon which the Commission relies applies when the Commission seeks "to revisit earlier regulatory decisions and modify them prospectively." *In re Application of Columbus S. Power*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 8. It has no application to a case, such as this, where the Commission's order modifies a prior adjudicatory decision and applies it to the situation previously adjudicated. That is a retrospective application of the modification, and is clearly prohibited.

1. The general rule upon which the Commission applies is limited to the prospective application of regulatory changes.

The Commission's *ESP I Order* provides a good example of a permissible *prospective* modification of a Commission policy or precedent. In the *ESP I* proceeding, certain intervenors opposed setting the carrying charge rate at the WACC, and argued that it should be set at the long-term cost of debt as the Commission had recently done in other recent AEP Ohio cases. The Commission disagreed, noting those cases were distinguishable from the 2008 ESP proceeding, and justified its change in position by

stating that the deferred costs in the ESP proceeding would be deferred and collected over a longer period and that its reduction in the deferral cap from the cap proposed by AEP Ohio could have the effect of requiring AEP Ohio to defer a higher percentage of fuel costs than otherwise proposed. *ESP I Order* at 23, n. 9. (Appx. 105.) The Commission's resolution of the carrying charge issue was a proper application of the "general rule" because the Commission was adjudicating a new situation and because it articulated valid reasons for deviating from its prior precedents.

In contrast, the Commission was not presented with a new situation in the *PIRR Order*. The Commission had already determined that the WACC would be the carrying charge rate for the fuel costs deferred in the *ESP I Order* and that order had been appealed to this Court and had become final. The Commission, therefore, lacked the authority to change that determination because the change would be a retrospective modification of a prior final order.

The cases the Commission relies upon (Merit Brief at 14-16) also entailed a prospective-only application of a change in regulatory policy. The Commission selectively quotes the Court's statement of the general rule in these opinions but completely ignores the contexts in which the Court finds the application of the general rule proper. Not one of the cases involved a situation in which the Commission was seeking to modify a prior adjudicatory finding.

The issue in *Columbus S. Power* was whether the Commission had properly exempted rate discounts being recovered under an economic development cost recovery rider imposed under a special arrangement providing discounted rates to two manufacturing customers from the maximum rate increases permitted under the *ESP I*

Order. IEU argued that the order on appeal was an impermissible modification of the *ESP I Order*. The Court disagreed, holding that because the *ESP I Order* had not addressed the specific rider and the Commission had not ruled out further exemptions from the rate-increase limit, the general rule of prospective modification was properly applied. *Columbus S. Power*, 2011-Ohio-4129, ¶ 8. In other words, the Commission was dealing with a new issue, not previously addressed, such that it was free to consider as a matter of first impression how the specific rider should be addressed in the existing regulatory scheme.

In re Application of Columbus S. Power, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, likewise did not involve the relitigation of a prior adjudicatory finding. In that case, OCC was challenging the Commission's authority to deviate from the general "precedent" established in pre-S.B. 221 cases in which the Commission had required electric utilities to share with retail customers the net profits from their wholesale power sales ("off-system sales"). The Court found that the Commission had provided good reason for treating off-system sales differently in the new post- S.B. 221 regulatory structure. The decision is based on a prospective-only application of new regulatory policy; it is not at all instructive as to the very different issue presented in this appeal. AEP Ohio is not contending that the Commission may not change course prospectively and apply a new rule or policy to new facts, when such change is justified; it is contending only that the Commission may not undo a prior final adjudicatory finding by applying a new rule to the same matter already decided.

Util. Serv. Partners, Inc. v. Pub. Util. Comm., 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, also clearly illustrates a prospective change in regulatory policy.

For a long time in Ohio, maintenance of gas service lines (the line that runs from the street to the home or business) was the responsibility of the customer, not the natural gas utility. Concerns about the safety of aging service lines led the Commission to undertake an investigation of whether it would be a better regulatory policy to have the natural gas utility assume responsibility for the service lines. Columbia Gas Company agreed and sought approval to change its tariff prospectively in order to assume responsibility for service line maintenance going forward. The Commission agreed, and the Court agreed that its approval of the tariff change was a permissible prospective change in course. The new tariff was not applied retroactively and there was no retrospective application of the new policy to an adjudicatory determination made in a prior final order.

Luntz Corp. v. Pub. Util. Comm., 79 Ohio St.3d 509, 684 N.E.2d 43 (1997) also involved a potential prospective-only change in regulatory policy. The issue in *Luntz* was whether the Commission had acted unreasonably in declining to change its views on when an electric utility had a duty to advise a customer of a better alternative rate. The Court held only that the Commission's decision not to change its policy on this issue was reasonable because *Luntz* had provided no compelling reason why a change should have to be made. *Id.* at 513. Thus, *Luntz*, like the other cases relied on by the Commission is readily distinguishable from this case.

The Commission has given the Court no precedent whatsoever for its position in this case – that it may overturn a final adjudicatory finding and apply a different finding to the very same issue previously decided. Nor is there any valid reason why the Court should now give the Commission free rein to void any and all prior adjudicatory findings when it believes new facts call its prior final decision into question. Any such holding

would leave all parties to Commission proceedings in a state of permanent regulatory limbo, unable to rely on a Commission order even after all proceedings, including review by this Court, are ended. The current state of the law – allowing for justified prospective changes in regulatory policy, while protecting the finality of prior orders from retrospective alteration – should be maintained.

2. Collateral estoppel precludes the relitigation of final administrative adjudications.

The additional cases cited by IEU (Merit Brief at 17) do not support the Commission's position here, but, to the contrary, confirm that the principle of collateral estoppel bars the relitigation of prior final administrative adjudications. In *Office of the Ohio Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d. 269, ¶ 12, the Court rejected OCC's collateral estoppel argument, finding that the doctrine was inapplicable in that case "because there was no relitigation in this matter of a point of law or finding of fact that was passed upon by the Commission in the [prior] case." The Court reaffirmed, however, that collateral estoppel does apply in Commission proceedings, which means, of course, that if the subsequent proceeding does entail a relitigation of a finding made by the Commission in a final order, then the Commission is not free to modify that finding. *Id.* at ¶ 11 (citing *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 475 N.E.2d 782 (1985)). The Commission's citation to the earlier *OCC v. Pub. Util. Comm.* case reinforces the point that collateral estoppel continues to be the controlling rule of law when the effect of a Commission order is to modify a prior adjudicatory finding, rather than chart a new regulatory course prospectively.

The issue in the 1985 case was whether the Commission properly limited the refund of over-recovered system loss costs to the audit period under review. OCC argued that the Commission should refund all excess system loss costs because the Commission now recognized that its rule governing the recovery of such costs resulted in an over-recovery. The Court rejected OCC's argument, holding that because the issue had been determined in a prior order, it could not be relitigated:

In a previous case involving CEI, the commission reviewed that company's fuel procurement practices, including the computation of system loss costs for the very time period which appellant now claims produced the unlawful overrecovery. . . . [T]he commission did not find an overrecovery of system loss costs, nor did it defer the issue to a subsequent EFC proceeding. Neither OCC, which participated in that case, nor any other party, filed an application for rehearing or appealed the order alleging an overrecovery by CEI.

The inevitable conclusion from these facts is that OCC is barred by the doctrines of *res judicata* and collateral estoppel from attempting to relitigate the issue of the EFC rate which was previously determined to be proper. These doctrines operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. . . . The doctrine of collateral estoppel has been applied to administrative proceedings.

Id., 16 Ohio St.3d at 10 (internal citations omitted).

The Court's analysis applies with equal force here. The issue of the proper carrying cost rate to be applied throughout the phase-in period was a controverted point, litigated and resolved in the *ESP I Order*. The use of the WACC was contested in the rehearing process and upheld by the Commission. Although the *ESP I Order* was appealed to this Court, no party challenged on appeal the use of the WACC as the carrying charge rate during the three-year 2009-2011 deferral accumulation period or during the subsequent seven-year 2012-2018 amortization and recovery period. Thus,

collateral estoppel, the rule that protects the “interest of affording finality” to Commission decisions, is the proper rule to apply in this case.

The Commission tries to avoid the inescapable conclusion that it was not free to alter its finding that AEP Ohio carried its burden of proving the WACC rate was the correct rate for setting carrying charges throughout the phase-in period by arguing (Merit Brief at 13) that “*res judicata*,” which encompasses both claim preclusion and issue preclusion or collateral estoppel, does not bar reconsideration of an issue where “a change in facts raises a new material issue from the prior action,” citing *State ex rel. Westchester Estates v. Bacon*, 61 Ohio St.2d 42, 399 N.E.2d 81 (1980), and that *res judicata* has limited application to it because it retains “on-going jurisdiction over the phase-in,” citing *State ex rel. B.O.C. Group v. Indus. Comm.*, 58 Ohio St.3d 199, 569 N.E.2d 496 (1991). In these arguments, it continues to demonstrate a proclivity to advance broad statements of a rule of law where it serves as a means to its desired end, while ignoring entirely the context in which the rule is properly applied. In both of these cases, the Court identified discrete reasons why *res judicata* did not apply under the facts in the case.

In *Westchester Estates v. Bacon*, the Court held that *res judicata* did not apply because the development plan submitted in the second zoning proceeding differed so substantially from the plan presented in the prior proceeding that, the second zoning appeal presented an entirely new “cause of action.” While the Commission cites to a number of “changes” occurring after it issued the *ESP I Order* – the continuing economic recession, a higher percentage of deferrals than expected, and the enactment of the securitization law, – none of these “changes” gives rise to a new cause of action or

provides a basis to collaterally challenge the prior finding that the WACC rate was the appropriate rate. The Commission's broad view of the type of "change," that can nullify the finality of administrative orders would completely immunize it from the doctrines of *res judicata* altogether.

In *B.O.C. Group v. Indus. Comm.*, the Court held *res judicata* did not apply because a statute, R.C. 4123.52(A), gives the industrial commission continuing jurisdiction over workers' compensation cases and authorizes it to "make such modification or change with respect to the former findings or orders with respect thereto, as, in its opinion is justified." Thus, the "continuing jurisdiction" that creates an exception to *res judicata* principles is case-specific; the exception is not triggered whenever an administrative agency has on-going, general oversight over the affairs of the entities it regulates. No statute – neither the general supervisory statutes cited by the Commission (Merit Brief at 14-15) nor R.C. 4928.144, the specific phase-in statute, gives the Commission continuing jurisdiction over cases after they are fully adjudicated and reviewed on appeal by this Court. Quite to the contrary, the rehearing and appeals process mandated in R.C. 4903.10-.13, gives finality to the Commission's findings and orders in each case, notwithstanding the Commission's general jurisdiction over public utilities.

The Commission relies on two statutes to argue that because the General Assembly expressly limited the Commission's authority to abrogate or modify an order exempting a natural gas company from regulation, R.C. 4929.08(A)(2), and limited its authority to revoke or modify a final financing order permitting an electric distribution utility to securitize phase-in recovery charges, and R.C. 4928.235(B), it must be

presumed that the Commission has unfettered discretion to alter all other prior adjudications. (Merit Brief at 16-17.) That argument runs afoul of the long-standing rule of law that the common law cannot be abrogated by “mere implication.” *Vaccariello v. Smith*, 94 Ohio St.3d 380, 384, 763 N.E.2d 160 (2002). (“[I]n the absence of language clearly showing the intention to supercede the common law, the existing common law is not affected by the statute, but continues in full force.”). There is no merit to the Commission’s argument that by making a narrow exception to the common law rules of *res judicata* in R.C. 4929.08(A)(2) or by expressly reinforcing such principles in R.C. 4928.235(B), the General Assembly intended to abrogate the common law that *res judicata* principles apply to administrative agencies, including the Commission.

3. The reasons the Commission offers to support altering its prior finding do not justify the abrogation of a prior final order.

Because the Commission lacks the power to abrogate or alter a prior final, evidence-based order, its reasons for wanting to do so are irrelevant. Presumably no court or administrative agency would want to abrogate or alter a prior final judgment without some good reason for doing so, yet the law favors finality even where the prior judgment may have unforeseen consequences. *Res judicata* principles do not apply only to good judgments that withstand the test of time; they apply to all final adjudications, even those that with hindsight might have been better decided differently. In addition, however, none of the reasons the Commission offers for abrogating its prior *ESP I* finding that the proper carrying charge rate is the WACC withstand scrutiny. The Commission made a decision to exercise its right to phase-in the costs of an electric security plan to protect customers from the impact of immediate payment of the full costs. The decision to exercise that right carries with it the duty to follow through on the

implementation of the balance provided through the full recovery of the costs deferred with the assigned carrying charge rate set when the statutory right was exercised in the *ESP I Order*.

First, the Commission's argument that the level of deferral turned out to be substantially more than expected cannot justify abrogating its evidence-based determination that the WACC was the proper carrying charge rate for the entire deferral period. The fact that the Commission's analysis of the likely deferral balance understated the balance that actually occurred does not give it license to undo its final order. A judgment is entitled to finality even if the assumptions made by the trier of fact prove to be overly optimistic. *Ohio Pyro v. Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 25 (In the absence of a jurisdictional defect or fraud, "a judgment is considered 'valid' (even if it might have been flawed in its resolution of the merits of the case) and is generally not subject to collateral attack."); *Motor Ins. Corp. v. Burns*, 24 Ohio App.2d 162, 164, 265 N.E.2d 560 (1970) ("A mere error in the entering of a judgment will not justify setting it aside on the court's own motion at the subsequent term.").

Second, the fact that, subsequent to the issuance of the *ESP I Order*, the General Assembly enacted a new law permitting electric distribution utilities to securitize phase-in recoveries does not undermine the finality of the *ESP I Order*. Judgments are always predicated on the law as it currently exists, and a change in law does not invite the reconsideration of all prior inconsistent judgments. *Natl. Amusements v. Springdale*, 53 Ohio St.3d 60, 63, 558 N.E.2d 1178 (1990) ("Generally, a change in decisional law which might arguably reverse the outcome of a prior civil action does not bar application

of the doctrine of res judicata.”); *Phung v. Waste Management*, 71 Ohio St.3d 408, 413, 644 N.E.2d 286 (1994) (relitigation of a wrongful-discharge claim precluded by *res judicata*, despite fact that the General Assembly subsequently enacted Ohio Whistleblower Protection Act); *Toledo, F. & F. R. Co. v. Toledo & O.C.R. Co.*, 114 Ohio St. 98, 108, 150 N.E. 621 (1926) (municipal ordinance “cannot supercede [a prior judgment] by invoking some statute not applicable when the judgment was entered.”) Quite to the contrary, the Ohio Constitution protects the finality of judgments by expressly prohibiting the retroactive application of laws. Ohio Constitution, Article II, Sec. 28.

Moreover, the new securitization law does not give electric distribution utilities a unilateral right to securitize deferrals. The utility’s right to issue phase-in recovery bonds and receive phase-in recovery charges is dependent upon Commission approval and is subject to the vagaries of market conditions. In an application for approval to issue phase-in recovery bonds the utility has the burden to demonstrate that securitization will result in “measurably enhancing cost savings to customers and mitigating rate impacts to customers as compared with traditional financing mechanisms or traditional cost-recovery methods available to the electric distribution utility.” R.C. 4928.232(D)(1). Thus, the new law is not a guaranteed better, or even equivalent, alternative to the phase-in ordered in the *ESP I Order*. Inevitably, the modification of the carrying charge rate made in the *PIRR Order* will make it all the more challenging for AEP Ohio to satisfy the cost savings/rate mitigation requirements of the new law should it seek to securitize the *ESP I* deferrals by issuing phase-in recovery bonds. Even if securitization is a realistic alternative in this instance, an application for issuance of phase-in recovery bonds could

not even be filed with the Commission until this appeal is decided and there are no further proceedings before the Commission on remand. *See* R.C. 4928.23(J) (requiring the amount of phase-in costs, including carrying charges to be determined “pursuant to a final order for which appeals have been exhausted”). Realistically, the earliest time at which phase-in recovery bonds for the costs and charges covered by the PIRR could be issued is 2015, or sometime mid-way through the PIRR collection period. The Commission clearly oversells securitization as a valid justification for modifying the carrying charges during the collection period.

Third, the Commission’s argument that a change in the carrying charge rate for the collection period is reasonable because the risk of non-collection drops once collection commences ignores that fact that collection through a nonbypassable charge was guaranteed at the time the *ESP I Order* was entered because that is what the law requires. R.C. 4928.144, which authorizes the Commission to order a phase-in of rates by deferring incurred costs, requires the phase-in order to provide for the collection of those deferred costs, plus carrying charges, “through a nonbypassable surcharge.” The fact that collection is assured through a nonbypassable charge is not a new fact that surfaced only after the original WACC finding was made. The Commission knew – at the time it found that AEP Ohio had carried its burden of proving the WACC rate was the appropriate carrying charge rate – that the risk of non-collection was mitigated by the fact that there would be a nonbypassable charge applicable to all customers, including those who buy electricity from a different generation supplier.

4. The Commission's Third Proposition of Law raises a wholly irrelevant argument.

The Commission's third proposition of law is based on an entirely faulty premise. AEP Ohio never suggested in the proceedings below or in its merit brief that R.C. 4928.144 guaranteed it a specific rate of return or that the *PIRR Order's* abrogation of the carrying charge rate previously found to be reasonable in the *ESP I Order* had a confiscatory effect. The reason why the Commission advances such an extraneous argument is unclear, but, if the Commission is attempting to suggest that it has unfettered discretion to abrogate its prior final evidence-based findings so long as it stops short of confiscation of the utility's property, its position is beyond belief. The fact that the Commission would even make a confiscation argument in this case speaks volumes in terms of the extent to which it wishes to be exempt from the rules of law governing the finality of judgments and in terms of how it will broadly wield the power to abrogate its final adjudications if the Court now opens the door for it to do so.

5. The Commission's final order retroactively modified a key term of an expired ESP denying the Company the ability to exercise its statutory right under R.C. 4928.143(C)(2)(a) to withdraw from an ESP.

IEU contends that AEP Ohio's argument that it was denied the right to withdraw from the plan approved in 2009 due to a modification made to the final *ESP I Order* in 2012 is meritless. IEU argues there is no precedent to support the position and that the estoppel position is disingenuous. The Commission argues that the right to terminate the plan ended with the end of the plan. A review of the orders and the law show that it is IEU's and the Commission's positions that are disingenuous.

As indicated in AEP Ohio's First Merit Brief, R.C. 4928.143(C)(2)(a) provides the right for a utility to withdraw its application if the Commission makes a modification the utility is unwilling to implement or accept. The current holding establishes a perverse precedent. It allows the Commission to approve an electric security plan one year and then years later change the outcome of the approval, leaving the utility without the ability to exercise its right provided to it by the General Assembly to withdraw its application. The Commission has not admitted to such a blatant modification to an electric security plan before, meaning this case is establishing a new precedent. The Court should not allow precedent that allows the Commission to render the right provided to utilities in the statute meaningless.

IEU's other arguments are directed to the statute itself. IEU argues that an EDU should be required to say yes to an ESP Order and not just have the right to withdraw. Unfortunately for IEU's argument that is not part of the statute. The statute does not require acceptance, it only provides a right to withdraw. IEU's preference for what the statute should say does not negate the denial of the Company's right to withdraw by a retroactive modification to the 2009 *ESP I Order*. The argument that the Company was not harmed and did not declare whether it would have withdrawn is also meritless. The record recognizes that the after-the-fact modification has an impact of over **\$130 million**.

The Commission's response to this argument serves as an admission of its unlawful retroactive action modifying the carrying charge in this case. The Commission argues that the right to terminate the modified plan ends when the plan date is over. (Merit Brief at 11.) The underlying premise in the Commission's argument is that when an ESP plan is complete the associated elements and consideration of the element are

also complete. If that is the case then the Commission's actions to modify elements of that plan after the fact shows the unlawfulness of the modification. The right to withdraw from a modified plan is a check and balance on the actions of the Commission. If the Commission can unilaterally remove the statutory right of a utility to withdraw a modified plan by simply waiting until the ESP period is over to make its modifications when there is no recourse for the utility then it makes a mockery of the statute and allows the Commission to evade the balance provided by the General Assembly.

The opportunity to assess whether or not to withdraw the plan after that modification was never provided to the Company and that illustrates the unreasonable and unlawful action by the Commission. AEP Ohio was denied the right to exercise its statutory right by the Commission's untimely action and the Court should order the Commission to withdraw its untimely modification.

RESPONSE TO CROSS-APPEALS

The issues raised in IEU's and OCC's cross appeals are untimely and in some cases already under review in other appeals before this Court. The question about what the Commission should have done when establishing the deferral in the *ESP I Order* and the impact of the Commission's actions after this Court remanded parts of the *ESP I Order* are items covered by other dockets and not properly part of this appeal. This case did not even involve an evidentiary hearing, but was based on comments filed by parties concerning the implementation of one of the decisions made in the *ESP I Order*. Yet, IEU and OCC seize this case as another opportunity to re-argue issues from other cases and improperly ask this Court to reach back and overturn decisions previously made in the *ESP I Order* or issues decided in the remand of that order. *In the Matter of the*

Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets, Case No. 08-917-EL-SSO, Order on Remand (Oct. 3, 2011) (“*Remand Order*”). The arguments are untimely and unfounded and should be denied.

A. IEU’S CROSS-APPEAL ARGUMENTS.

- 1. The calculation of the deferral to account for taxes is a final nonappealable issue determined in the *ESP I* Opinion and Order and is not an issue properly before the Court.**
(Response to IEU Cross Appeal 1; IEU Brief at 25-32)

IEU asserts error by the Commission for a fact that was not even under review in the underlying proceeding. In the *ESP I Order*, the Commission declined to adjust the carrying charges on the deferred balances for accumulated deferred income taxes (“ADIT”). The Commission’s decision not to make this adjustment became final once this Court resolved the appeal of the *ESP I Order* because the Commission’s decision not to make this adjustment was not asserted as error in the appeal of the *ESP I Order*. See *In re Application of Columbus S. Power*, 2011-Ohio-1788. IEU’s request to relitigate this issue in this case is unreasonable and unlawful.

The Commission correctly pointed out in its *PIRR Order* that the ADIT issue was already considered and addressed in the *ESP I* proceeding. *PIRR Order* at 19. (Appx. at 27); *PIRR Entry on Rehearing* at ¶ 26 (Appx. 42-43). IEU, however, creates the appearance that the Commission addressed the matter anew and on the merits in this case. Conspicuously left out of IEU’s synopsis of the Commission’s response to its ADIT argument is the clear language in the actual Finding and Order that the Commission declines to adopt the recommendation as it was already considered and addressed in the *ESP I Order*. Also not cited by IEU, is the language in the rehearing

paragraph it used to summarize the Commission's position which includes the fact that the Commission was simply affirming its decision from its *ESP I* decision. As pointed out by the Commission, the topic was decided in the *ESP I Order* and is not properly before this Court at this time in this case.

The Commission's rationale for denying IEU's ADIT tax argument was already provided in the *ESP I Order*. In AEP Ohio's initial ESP proceeding the Commercial Group, Sierra Club and OCC raised the tax ADIT issue, arguing for the deferral to be determined based on a net-of-tax basis. *ESP I Order* at 21. (Appx. 103.) The Commission provided its rationale and its finding that AEP Ohio would not be able to recover the full amount of its deferral on a net-of-tax basis. (*Id.* at 23-24.) The Commission explicitly found, "[t]herefore, we find that the carrying charges on the FAC [fuel adjustment clause] 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 24.) The arguments to the contrary were again denied on rehearing. *ESP I Entry on Rehearing* at ¶ 29. (Appx. 170.) The proper procedure to seek reversal of a Commission determination is to seek rehearing and then if not successful file an appeal to this Court. IEU did not challenge the ADIT finding by the Commission in rehearing or on appeal. IEU, thus, is barred from raising this untimely argument at this time.

While IEU's argument is untimely, AEP Ohio will respond to some of the arguments offered the Court on this subject. Among the arguments IEU tries to raise at this late stage is its claim that the *PIRR Order* is unlawful because the phase-in deferral violates the policy provisions found in R.C. 4928.02 discussing reasonably priced rates. (IEU Brief at 30.) IEU reacts as if the Commission did not justify the establishment of

the PIRR mechanism as just and reasonable in the *ESP I* decision. However, in the Commission's *ESP I Order* the Commission discussed the need to ensure rate or price stability and to mitigate the impact on customers during the difficult economic times. *ESP I Order* at 22. (Appx. 104.) The reasonableness of the decision to order a phase-in of the electric security plan, absent IEU's preferred tax treatment, was established in 2009 and not appealed.

IEU also attempts to use the Commission's approval of ADIT tax treatment for AEP Ohio's Distribution Investment Rider ("DIR") mechanism in its most recent ESP proceeding as a subsequent admission that it should be applied in this case. This argument is without merit. The DIR is a distribution rider with a specific purpose that is not comparable to the PIRR. The DIR seeks recovery for distribution items both already invested and still being developed under an investment plan filed with the Commission over a shorter period of time. The PIRR, in contrast, involves recovery of deferred fuel costs and associated carrying costs, not investment in the distribution system. The DIR also was part of an overall package approved by the Commission in the latest ESP proceeding, while the deferrals captured by the PIRR are a statutory requirement triggered by the Commission's exercise of its right to phase-in fuel elements of the electric security plan it authorized in a completely different case. The two matters are not comparable and there is no error in treating them differently.

Parties should not be allowed or encouraged to create new appellate vehicles for issues they fail to raise timely or lose in the appellate process from Commission proceedings. A ruling in this case that factual determinations from prior final orders already reviewed by this Court on appeal are open to constant re-review based solely on

the inclusion of the issue by Intervenors in subsequent cases, undermines the very definition of a final order as well as this Court's appellate jurisdiction. IEU claims it has the authority to force the Commission to reconsider past factual determinations even when IEU had the opportunity to appeal that determination in a timely manner as part of the *ESP I* appellate process, but chose not to do so. IEU's position is without merit. The Court should deny IEU's second or third bite at this very old apple.

2. IEU's arguments on the orders in the Commission's *ESP I Remand Order* are not properly before the Court in this proceeding and should be rejected.

(Response to IEU Cross-Appeal 2)

IEU also raises an argument related to the October 3, 2011 *Remand Order* currently before the Court in Case No. 2012-187 (*ESP Remand Appeal*) and attempts to bootstrap the issue into this appeal. As indicated in its own Merit Brief in this case, IEU discusses its position and testimony provided in the *ESP Remand Appeal* for support in this appeal. (IEU Brief at 33-35). IEU points out that its argument in the orders underlying the *ESP Remand Appeal* was rejected by the Commission and that it appealed that decision to this Court. (*Id.*) The application of the decisions in the *Remand Order* are matters properly left to the appeal in that case and not appropriate for consideration in this case.

B. OFFICE OF CONSUMERS' COUNSEL CROSS-APPEAL ARGUMENTS.

1. Offsetting recovery of the fuel costs in the PIRR by the amount of Provider of Last Resort charges validly collected constitutes unlawful retroactive ratemaking.

(Response to OCC Cross Appeal Prop 1)

OCC's first argument is that the Commission erred when it declined to reduce the deferrals related to the *ESP I Order* by the amount of Provider of Last Resort ("POLR")

charges validly collected from April 2009 to May of 2011. OCC attempts to distance itself from the appropriate appeal, the *ESP Remand Appeal*, in the first sentence of its argument by comparing this docket to that appeal. (OCC Brief at 11.) But in fact OCC attempts to circumvent the prohibition against retroactive ratemaking and seeks to infuse the issues related to the Commission's decisions in the *Remand Order*, and now on appeal in the *ESP Remand Appeal*, into the present case.

The relief OCC seeks constitutes unlawful retroactive ratemaking. Regardless of whether it calls it an adjustment, a credit, a reduction in deferrals, or an offset, what OCC seeks is a refund of the amounts AEP Ohio was authorized to collect in accordance with its approved ESP and the tariffs on file with the Commission. OCC bases its argument on the faulty premise that the POLR charges were “unlawfully” collected during this period of time. A remand order does not render the existing rates unlawful, the “rate schedule filed with the Commission remains in effect until the commission executes this court’s mandate by an appropriate order.” *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 245 N.E.2d 778, Syllabus 1 (1976). *See also Keco v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 259, 141 N.E.2d 465 (1951). The Court’s decision remanding the *ESP I Order* back to the Commission for further consideration of the basis of the POLR charge in no way invalidated the POLR charges already collected. OCC’s argument that the Commission should now offset the fuel deferrals to account for validly collected tariffed rates is unfounded and should be denied.

In this case, OCC argues that the PIRR is merely a mechanism to collect authorized rate increases from another case. Specifically, OCC states, “[t]he PIRR is the

mechanism for collecting AEP's rate increases authorized in the *ESP I Order* that AEP could not collect because of the yearly capped rates." (OCC Brief at 11-12.) OCC repeats the fact that this is an issue in the *ESP Remand Appeal* before this Court at the end of its argument. (*Id.* at 12-13.) Yet, OCC seeks to overturn Commission decisions authorized in those other cases in this appeal. OCC's argument contradicts its own statement that this case only provides the mechanism for recovery and not the grounds for overturning the underlying Commission decision. Accordingly, the Court should deny OCC's improper proposition of law.

In addition to showing that the decisions being appealed in this case are not from the *PIRR Order*, OCC's statement that the PIRR is the mechanism for collecting AEP Ohio's rate increases also raises another important distinction that should be corrected to ensure the arguments are considered in the proper context. OCC mistakenly groups other electric security plan elements into what it asserts is recovered in the *PIRR Order*, including economic development, vegetation management, and other costs. (OCC Brief at 12.) OCC is incorrect. The Commission was very clear in the *ESP I Order* that the deferral dealt with the fuel costs that resulted from the fuel adjustment clause, not these other plan elements. Specifically, the Commission stated:

Any amount over the allocable total bill increase percentage levels will be deferred pursuant to Section 4928.144, Revised Code, with carrying costs. . . . As required by Section 4928.144, Revised Code, any deferred FAC expense balance remaining at the end of 2011 shall be recovered via an unavoidable surcharge.

ESP I Order, FAC Deferral Section at 22-23. (Appx. 104-105.) The *PIRR Order* also recognized that AEP Ohio was authorized to establish a regulatory asset to record and defer fuel expenses. *Remand Order* at 2, 7. (Appx.10, 25 .) Despite attempts by

intervenors to assert otherwise, the record is clear – the PIRR mechanism is focused on the recovery of deferred fuel costs and the authorized carrying charges.

a. OCC seeks to relitigate the finding in the *ESP I Order* that established the “justness and reasonableness” of the phase-in ordered under R.C. 4928.144.

(Response to OCC Prop 1 (1-2))

OCC’s arguments ignore the fact that the PIRR is merely an implementation instrument to give effect to findings made in the *ESP I Order*. OCC improperly uses this appeal to accuse the Commission of not implementing a phase-in deferral that was just and reasonable under R.C. 4928.144. (OCC Brief at 11-15.) This argument is an untimely appeal of the *ESP I Order*.

OCC argues that the establishment of the PIRR violated R.C. 4928.143(B)(2)(a). (OCC Brief at 11-12.) OCC also argues that the implementation of the *ESP I Order* is not just and reasonable. (*Id.* at 13-15.) However, OCC’s arguments ignore the fact that it is again arguing with the establishment of the deferral under R.C. 4928.144 in the *ESP I Order* rather than challenging the mechanism carrying out the factual determinations in the underlying *PIRR Order*. As recognized by OCC in its argument, the Commission tied its implementation of the PIRR to R.C. 4928.144 and the findings in the *ESP I Order*. (OCC Brief at 14.) The application of R.C. 4928.144 was in the *ESP I Order* and any appeal of that issue was tied to that order not the order appealed in this case.

The “just and reasonable” analysis should be focused on the decision to “phase-in” the rate or price from the electric security plan. That analysis was done in the *ESP I Order* when the Commission made the decision to exercise R.C. 4928.144 and order the phase-in. The *PIRR* docket was opened merely to implement those prior decisions and

the balance required under R.C. 4928.144 when the Commission decides to phase-in a plan rather than allow it to be collected in full from the beginning.

R.C. 4928.144 guarantees recovery of the fuel costs deferred with carrying charges in exchange for the ability for the Commission to authorize any just and reasonable phase-in of a rate or cost approved under R.C. Chapter 4928 to ensure rate or price stability for consumers. The finding that ordering a phase-in of part of an electric security plan is just and reasonable is made at the time the phase-in right is exercised by the Commission. That finding was made in the *ESP I Order* and not the PIRR mechanism implementation. OCC seeks to redefine R.C. 4928.144 and ignores the fact that the Commission is required to make certain determinations at the time it decides to exercise its right to phase-in decisions approved under R. C. Chapter 4928. The determination on whether the Commission's actions and ordered phase-in is just and reasonable is made at that time when the Commission is exercising that right to ensure rate or price stability for customers – that time has passed.

OCC also attempts to rely upon the Commission's unreasonable and unlawful modification of the carrying charge rate in this proceeding to justify its attempt to pull its argument from the *ESP Remand Appeal* into this case concerning the appropriateness of the deferral established in the *ESP I Order*. As discussed in the AEP Ohio's First Brief and other sections in this brief responding to the various Second Briefs, the Commission did not have jurisdiction to make the modifications to the *ESP I Order* in this PIRR proceeding now on appeal. The arguments raised by OCC show why the concept of a final appealable order is important. The substance of OCC's argument is that all past factual decisions are always up for a review and challenge by parties whenever the prior

final decision is at all related to issues in a future case, regardless of what the Commission decided when it made its decision and in this case when implementing the statutory tradeoff to phase-in plans in exchange for the recovery guaranteed under R.C. 4928.144. OCC proposes a dangerous proposition of law and one that could fill Commission cases and appeals with countless repetitive arguments for years – no issue will ever be final. OCC’s argument is misplaced and untimely and should be denied.

b. Crediting the provider of last resort charges incurred under a valid Commission Order through the PIRR constitutes retroactive ratemaking in violation of the Keco Doctrine. (Response to OCC Prop 1(3))

OCC relies upon a mistaken application of case law to create the perception of a path around the prohibition against retroactive ratemaking established in *Keco Industries v. Cincinnati & Suburban Bell Telephone Co.* (OCC Brief at 15-18.) As with the other arguments raised by OCC this argument also finds itself untimely. OCC cites to the Commission’s denial of this argument in the *PIRR Order* that incorporates the Commission’s response to this same argument in the *Remand Order*. The Commission properly considered the *ESP I* remand from the Court dealing with the provider of last resort charge in the *Remand Order*. OCC seeks to have the provider of last resort charges that were validly part of rates from April 2009 through May 2011 refunded to customers through the PIRR. The Commission previously pointed out that “the adjustments proposed by OCC and IEU would be tantamount to unlawful retroactive ratemaking.” (OCC Brief at 16, citing the *PIRR Order* at 20.) The Commission dealt with this issue in the *Remand Order* where the issue is now on appeal in the *ESP Remand Appeal*. OCC’s attempt to pull the issue into this case is inappropriate and untimely.

OCC asserts that if there is a mechanism involved that permits retroactive adjustments then there is no concern with violating the *Keco* doctrine's prohibition against retroactive ratemaking. However, implicit in this analysis is a failure to recognize the nature of the R.C. 4928.144 tradeoff exercised by the Commission. To ensure rate or price stability for customers the Commission phased-in the *ESP I* recovery of the fuel related costs in exchange for guaranteeing AEP Ohio recovery of the amount phased-in plus carrying charges. Stated differently, "but for" the Commission's decision to exercise its ability to phase-in the *ESP I* plan under R.C. 4928.144, AEP Ohio would have received a certain level of timely recovery that was denied. Instead, the statute guarantees recovery of that approved level from the *ESP I* plan through a deferral. OCC seeks to abandon R.C. 4928.144 and the inherent balance codified by the General Assembly that ensures that when the Commission acts to phase-in approved electric security plans to ensure price or rate stability for customers there is a guarantee of deferred recovery with carrying charges for the utility.

The fact that elements of the approved electric security plan were later disapproved by the Commission on rehearing after remand to the Commission by the Court does not erase the validity of that part of the plan while in effect. OCC seeks to undo the bargain in R.C. 4928.144 by not guaranteeing that AEP Ohio receives the amount of the approved plan it would have received "but for" the Commission's exercise of its right under the statute.

Commission mechanisms that make prospective adjustments typically are statutory schemes that authorize a utility to pass variable fuel costs directly to consumers through forecasted costs in the upcoming year versus the known costs from the preceding

year. *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 513, 433 N.E.2d 568 (1982). Those mechanisms are constantly adjusting and in flux dependent on the resultant price of the fuel for that period versus the expected price in the future.

Prospective mechanisms are not intended to serve as a catch-all mechanism or a tracker in case the unexpected occurs, like a valid Commission order is later overturned or partially remanded on appeal. The PIRR mechanism was established to reflect the guarantee of recovery of fuel costs promised under R.C. 4928.144 when the Commission phased-in the electric security plan.

As OCC points out, the Court itself recognized the nature of the prohibition against retroactive ratemaking in its remand of the *ESP I Order*. (OCC Brief at 17.) But in that analysis the Court respected the nature of the prohibition against such retroactive action and the nature of the regulatory system for public utilities. The application of OCC's proposition would be to circumvent the *Keco* doctrine anytime there was any unrelated mechanism that deferred any level of any cost at any time. There is no difference between crediting a refund to customers and crediting it against a deferral owed to AEP Ohio.

OCC's argument is nothing more than an attempt to circumvent the prohibition against retroactive ratemaking and eviscerate the balance established by the General Assembly when empowering the Commission to phase-in electric security plans under R.C. 4928.144. OCC's argument should be denied as untimely and unfounded.

- c. **The deferrals established pursuant to the phase-in provisions of R.C. 4928.144 in the *ESP I Order* are from a valid ratemaking order and are not an issue properly on appeal in this case.** (Response to OCC Prop 1(3)(a-c))

OCC argues that there is no ratemaking order where the Commission grants a utility accounting authority to defer the collection of rate increases. (OCC Brief at 18.) OCC's argument again ignores the reality of the R.C. 4928.144 phase-in deferral and stretches the applicability of the cases it relies upon to establish its argument.

The argument also mirrors the exact same argument made in OCC's appeal of the *ESP I Remand Order* on appeal at this Court in Case Number 2012-187. In fact OCC's argument does not just cover the same subject area, it applies the same language almost verbatim from the merit brief filed in the *ESP Remand Appeal* docket. Specifically, a review of OCC's merit brief filed with the Supreme Court on April 10, 2012, in docket 2012-187 shows pages 17-23 of that brief mirror the same arguments and language used on pages 18-24 of its brief in this docket. Large sections of the OCC's *Remand Order* Brief also appear in later portions of its brief in this docket through page 34 of the text. The only departure in substance between the two sections is that in the argument in the *ESP I Remand* docket OCC includes a discussion of the specific accounting that would take place under the phase-in of the rate caps. The fact that OCC would cut and paste the same words to support both appeals is illustrative of the fact that OCC's entire argument is untimely and is burdening this Court with redundant appeals. The Court should recognize that OCC is bootstrapping the appeal of the *ESP I Order* and *Remand Order* into the appeal of the *PIRR Order* in this docket and deny the argument as unfounded and untimely.

Recognizing these arguments are already before the Court in the *ESP Remand Appeal*, the Company will not go point by point dealing with the untimely and inapplicable arguments raised by OCC. But OCC attempts to analogize this case to other cases in which the Commission or Court has not found retroactive rate regulation. Just as in the *Remand Order* docket, OCC's lengthy discussion of these cases adds no weight to the real topic at hand. Cases involving deferral accounting, where the reasonableness of the deferral amount is not determined or there is no right to collect the deferral, e.g. those cited by OCC at 20-24, are simply inapposite, because, as discussed above, the *ESP I Order* did mandate the recovery of the deferrals by a specific means, an "unavoidable surcharge" as required by R.C. 4928.144, and relating to a specific time, 2012 through 2018. The reasonableness or the recoverability of the deferrals was not left for a later determination.

Similarly, OCC's attempt to distinguish *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997), the *Remand Order*, and other cases in which unlawful retroactive ratemaking was found to exist (OCC Brief at 26) is dependent on its misreading of the *ESP I Order*. Here, just as in those cases, OCC is seeking to recoup a charge that has expired; there is no current stream of POLR revenues against which prior payments can be offset. The deferral balance is not a pot of "deferred revenue increases" just waiting to be collected; it is comprised of actual fuel expenses with carrying costs that the Commission ordered to be recovered via a surcharge in 2012 through 2018.

OCC's attempt to compare this case to *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993) fares no better. (OCC Brief at 29-30.)

In that case, the Court properly required the Commission to provide a mechanism to allow Columbus Southern Power to recover approved revenues the Commission improperly deferred because the revenues sought to be recovered constituted a portion of the rates to which the Company was already entitled under the existing rate order. The later recovery order, therefore, was consistent with the original ratemaking order. Here in contrast, OCC is seeking to deprive AEP Ohio of a significant portion of an actual cost recovery the Commission ordered to be collected in exchange for the right to phase-in the electric security plan under R.C. 4928.144. The proposed remedy countermands the original ratemaking order. There is no doubt about it. OCC is seeking to compel the Commission to retroactively modify its prior ratemaking order.

Another proceeding relied upon by OCC is the outcome of the Company's 2009 fuel adjustment clause proceeding. (OCC Brief at 31-35.) First and foremost, this is not Supreme Court precedent that OCC relies upon. In fact, AEP Ohio has an open appeal from the Commission's erroneous decision in that case to this Court in docket 2012-1494. Regardless of that outcome, the fuel clause case involves the question of whether actions prior to the fuel clause period should be considered in the fuel clause proceeding, as opposed to this case where OCC seeks to adjust a future rate to make up for changes from a remand order from the Court on a charge that no longer exists. The two scenarios are not properly comparable. OCC's reliance upon this case as precedent is inappropriate.

2. **Public Utilities Commission of Ohio orders are presumed valid and enforceable upon issuance and the denial of suggestions by commenters in a docket that the orders be subject to refund do not require extensive Commission treatment.**
(Response to OCC Prop 2)

OCC's final argument is an allegation that the Commission violated R.C. 4903.09 by not justifying the denial of OCC's request to issue the order subject to refund. (OCC Brief at 35.) OCC takes issue that the Commission responded to its request to make its implementation of the PIRR subject to refund by referring to the fact that adjustments proposed by OCC would be tantamount to retroactive ratemaking. OCC confuses its request for the Commission to second guess its decision and make it subject to refund with a factual issue in the case that the Commission had under review and was weighing evidence to determine.

The decision to make an order subject to refund is rare and is a discretionary decision within the control of the Commission. OCC admits in its rehearing application with the Commission that the "subject to refund" concept was only a suggestion made by OCC. (OCC Appx. 552.) There is no affirmative duty that the Commission develop detailed analysis based on every suggestion made in a docket. Another important fact is that this case did not even involve an evidentiary record. The implementation of the *ESP I Order* through the PIRR was done based on a set of comments requested by the Commission. It is well established that Commission orders are presumed valid upon execution until changed on rehearing or overturned by the Court on appeal. The assumption that anything would be subject to refund due to an argument or suggestion raised by a party in a case undermines the *Keco* doctrine and defies the authority of the Commission. OCC's argument should be denied.

CONCLUSION

AEP Ohio asks that the Court reverse and remand the Commission's decision and instruct the Commission to restore the Weighted Average Cost of Capital as the proper carrying charge rate for the entire deferral period, 2009 – 2018. AEP Ohio asks that the Court affirm the Commission's decision as proper with respect to the issues raised on cross-appeal.

Respectfully submitted,



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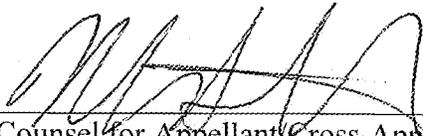
The undersigned counsel certifies that the Ohio Power Company's Amended Third Merit Brief was served by First-Class U.S. Mail upon the counsel for all parties to this appeal on this 11th day of June, 2013.

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