

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Commission Review of)	
the Capacity Charges of Ohio Power)	Supreme Court Case Nos. 12-2098/13-228
Company and Columbus Southern Power)	
Company.)	Appeal from the Public Utilities
)	Commission of Ohio
)	
)	Case No. 10-2929-EL-UNC

**FIRST BRIEF
OF APPELLANT/CROSS-APPELLEE
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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") submits this brief on behalf of all the approximately 1.2 million residential utility customers of the Ohio Power Company ("Ohio Power" or "Utility"). OCC is the statutory representative of the residential customers of Ohio Power, per R.C. Chapter 4911. Ohio Power is an electric light company as defined by R.C. 4905.03(A)(3), and is a public utility pursuant to R.C. 4905.02. Ohio Power is also an electric distribution utility, which, pursuant to R.C. 4928.05, provides noncompetitive electric distribution service, and is subject to supervision and regulation by the Public Utilities Commission of Ohio ("PUCO" or "Commission").

The stated purpose of the proceeding below (the Capacity Case) was to fix the wholesale price for capacity¹ that the Utility should charge Marketers. (Supp. at 2). In Ohio, Marketers are entities that may vie to sell retail energy and capacity to customers of an electric distribution utility. Under R.C. Chapter 4928, these Marketers are referred to as Competitive Retail Electric Service ("CRES") providers.²

In the Capacity Case, the PUCO determined that the Utility could collect from third parties the Utility's fully embedded cost of capacity, even though the Utility would charge Marketers a much lower discounted wholesale rate for capacity. (R. 417 at 23, Appx. 31).³ The PUCO authorized the Utility, for accounting purposes, to defer the wholesale discount – the

¹ Capacity charges represent the costs to a utility for making its generation units available to provide electric service.

² Under the Ohio Administrative Code, Competitive Retail Service Providers are called "CRES" providers; but for purposes of clarity, OCC will refer to CRES providers as "Marketers." See also, R.C. 4928.03, which provides that customers must have comparable and nondiscriminatory access to retail electric services.

³ "R", as used herein, refers to the Record.

difference between the market-based rate it would charge the Marketers and the Utility's fully embedded cost. (R. 417 at 23, Appx. 31). This accounting authorization was the prelude to significant retail rate increases to "third parties," other than the Marketers. It was not until approximately one month later that the PUCO identified the "third parties" who were to pay increased retail rates for the discounted wholesale capacity provided to the Marketers. (Appx. 271, August 8, 2012 Ohio Power ESP Order at 36). The payers were to be all retail customers receiving electric service in the Utility's service territory.

From September 2012, to May 31, 2015, the discount for the wholesale capacity provided to Marketers is being set aside for later collection, or in accounting jargon, "deferred." During the period when the cost of the wholesale discount is being deferred, financing charges are accumulating, which will also be collected later from Ohio Power's retail customers. (R. 417 at 24, Appx. 32). Specifically, the wholesale discount and financing charges will be collected, over a period of time, from all retail customers, beginning in June 2015, when the Utility's Electric Security Plan ends. (Appx. 271, August 8, 2012 Ohio Power ESP Order at 36). And all "retail customers" includes customers who receive retail standard offer electric generation service from the Utility (non-shopping customers), as well as retail customers who have chosen to receive generation service from Marketers (the shoppers or choice customers).

Indeed, parties in the Ohio Power Electric Security Plan proceeding (Case No. 11-346-EL-SSO, et al.) have estimated that the capacity cost deferrals authorized as a result of the Capacity Case proceeding may be as great as \$725 million to \$800 million, before considering

the large expense of the carrying charges that the PUCO also permitted Ohio Power to amass.⁴ This means approximately \$725 million dollars of wholesale capacity discounts to Marketers will be collected from retail electric service customers.⁵ All customers in the Utility's service territory will be forced to pay an estimated \$725 million in retail rates to subsidize the discounted wholesale capacity being provided to Marketers. Non-shopping customers *will* pay twice for capacity—once for the wholesale capacity discount to Marketers, and the second time through the capacity component already included in retail standard service generation rates. And as a Commissioner acknowledged, shopping customers *may* also pay for capacity twice, unless the Marketers pass their wholesale capacity discount entirely through to customers through the retail rates they pay. (R. 417, Concurring and Dissenting Opinion of Roberto at 3-4, Appx. 52-53). This result is fundamentally unfair, unjust, and unreasonable. It also violates Ohio law.

This appeal also challenges a procedural error that the PUCO made. Specifically, the PUCO's failed to fulfill the requirements under R.C. 4905.26—the complaint statute. In order to change a rate under R.C. 4905.26, the PUCO must find that an existing rate is unjust and unreasonable.⁶ But there was no such finding by the Commission. In addition, the PUCO failed to find that there were reasonable grounds for the complaint before conducting a hearing, as required by R.C. 4905.26. Because it did not fulfill the requirements of the statute, it had no

⁴ Ohio Power is authorized to defer for future recovery the difference between \$188.88/MW-D and the PJM RPM prices for the period, which are: \$20.01/MW-D in the planning year ("PY") 2012; \$33.71/MW-D in PY 2013; and, \$153.89/MW-D in PY 2014. The resulting amounts to be deferred are thus \$168.87/MW-D, \$155.17/MW-D and \$34.99/MW-D, respectively. (July 2, 2012 Opinion and Order at 10). Customers will be responsible for paying the difference between Ohio Power's costs (\$188.188/MW-day) and the Reliability Pricing Model market-based prices. To calculate the capacity deferrals, these amounts will be multiplied by Ohio Power's actual shopping customer statistics from PY 2012, PY 2013 and PY 2014.

⁵ See, for example, Appx. 60.

⁶ In addition, under R.C. 4905.22, unjust and unreasonable charges by a utility are prohibited.

jurisdiction to set wholesale capacity rates for the Utility to charge Marketers. Nor did it have authority to order deferral of the wholesale discount for ultimate collection from retail electric service customers.

Accordingly, the Capacity Order and the Commission's Rehearing Entries implementing and upholding the Capacity Order in Case No. 10-2929-EL-UNC are unlawful and unreasonable. They should be reversed and remanded with instructions that retail electric service customers in the Utility's service territory should not be responsible for paying hundreds of millions of dollars for the discounted wholesale capacity provided to Marketers.

II. STANDARD OF REVIEW

R.C. 4903.13 governs this Court's review of PUCO Orders. It provides in pertinent part: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable***." The Court has interpreted this standard as one turning upon whether the issue presents a question of law or a question of fact.

OCC's appeal involves only questions of law. OCC's Proposition of Law One challenges the PUCO's failure to adhere to the statutory requirements set forth in R.C. 4905.26. Specifically, to change a rate under R.C. 4905.26, the Commission must find an existing rate to be unjust and unreasonable.

OCC's Propositions of Law Two and Three challenge the PUCO's unlawful approval of the capacity deferrals. OCC contends in Proposition of Law Two that the PUCO's decision will result in some retail customers paying double for capacity, in violation of R.C. 4928.141 and R.C. 4928.02(A). In addition, and as discussed in OCC Proposition of Law Three, all customers in the Utility's service territory will be forced to pay hundreds of millions of dollars in retail

rates to subsidize the discounted wholesale capacity being provided to Marketers, violating R.C. 4928.02(H), (L), and R.C. 4928.06.

This Court has complete, independent power of review on questions of law. *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370, 1373. This Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case. *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, 563. With this standard of review in mind, the Court must resolve the errors alleged by OCC.

III. STATEMENT OF FACTS

Ohio Power participates in the PJM Interconnection, LLC (“PJM”) capacity market. Ohio Power chose to be a Fixed Resource Requirement Entity for the planning years of 2012 through 2015. (R. 417 at 10, Appx. 18). As a Fixed Resource Requirement Entity, it must have dedicated capacity to serve all customers in its service territory, whether those customers are served by it or by Marketers. (R. 417 at 7, Appx. 15).

Participation in the capacity market is governed by an agreement called the Reliability Assurance Agreement. (R. 417 at 7, Appx. 15). Fixed Resource Requirement entities (like Ohio Power) are required⁷ to submit a Capacity Plan that covers all load,⁸ whether the load is being supplied by Ohio Power or a Marketer. (R. 417 at 7, Appx. 15). Under the Reliability Assurance Agreement, if a state has set the price for capacity, called a “state compensation method,” that methodology will be honored (R. 417 at 3, Appx. 11.) Under the Reliability

⁷ Under Section D.8 of Schedule 8.1 of PJM’s Reliability Assurance Agreement.

⁸ “Load” means the demand of an electric company’s system over a given amount of time.

Assurance Agreement, if a state does not have a “state compensation method,” then capacity is to be sold at market-based prices (PJM’s Reliability Pricing Model capacity auction prices).⁹ (R. 417 at 10, Appx. 18).

On November 24, 2010, American Electric Power Service Corporation (“AEPSC”), on behalf of Ohio Power and Columbus Southern Power Company,¹⁰ filed an application before the Federal Energy Regulatory Commission (“FERC”). It sought authority to change how it was compensated for its capacity costs. It requested cost-based capacity rates, rather than market-based rates. (Appx. 324).

On December 8, 2010, the PUCO opened a docket (“Capacity Case”) requesting comments with respect to: (1) what changes to the current state mechanism are appropriate to determine Ohio Power’s Fixed Resource Requirement capacity charges to Ohio CRES providers; (2) the degree to which Ohio Power’s capacity charges are currently being recovered through retail rates approved by the PUCO or other capacity charges; and (3) the impact of Ohio Power’s capacity charges upon CRES providers and retail competition in Ohio. (R. 2 at 2, Supp. 2). The PUCO’s December 8, 2010 Entry essentially prevented Ohio Power from changing its capacity compensation mechanism at FERC. (R. 2 at 2, Supp. 2). In this regard, the PUCO claimed that it had already expressly adopted a state compensation mechanism for the Utility, and thus, that state established capacity price should be honored. (R. 2 at 2, Supp. 2). The PUCO referred to the fact that it had established a market-based capacity price, as part of the Utility’s electric service plan. (R. 2 at 2, Supp. 2).

⁹ Hereinafter referred to as the “PJM market-based price.”

¹⁰ See *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, PUCO Case Nos. 10-2376-EL-UNC, Entry, (March 7, 2012) (Columbus Southern Power has since merged with Ohio Power).

Subsequently, on January 20, 2011, FERC issued an Entry rejecting AEPSC's request, stating in pertinent part:

[w]e reject the AEP Ohio Companies' filing. Section D.8 of Schedule 8.1 of the RAA provides that a 'state compensation mechanism will prevail' in allocating capacity costs to retail LSEs [load serving entities]. **In this case, the Ohio Commission has adopted such a state mechanism and we therefore reject the AEP Ohio Companies' filing.** (Appx. 367). (Emphasis added.) *FERC Case*, Docket No. ER11-2183, Order Rejecting Formula Rate Proposal at 4 (January 20, 2011).

AEPSC sought rehearing of the FERC Order. On March 24, 2011, FERC issued an Entry on Rehearing granting AEPSC's rehearing request only for the purpose of affording itself additional time for consideration of the matters raised. (Appx. 370). *FERC Case*, Docket No. ER11-2183, Order Granting Rehearing for Further Consideration (March 24, 2011). Further, on April 4, 2011, AEPSC filed a formal complaint against PJM alleging that the provision of the Reliability Assurance Agreement that mandates that a state compensation mechanism determines the capacity costs to retail load serving entities (Schedule 8.1, Section D.8 to the PJM RAA) is unjust, unreasonable, and unduly discriminatory. (Appx. 319). Both of these proceedings remain pending at FERC.

On September 7, 2011, a Stipulation and Recommendation was filed by a number of parties in Ohio Power's Electric Security Plan case (referred to by the Commission as "ESP 2") (PUCO Case No. 11-346-SSO, et al.), that included a compromise regarding Ohio Power's capacity pricing. (R.417 at 5, Appx. at 13).¹¹ The Stipulation and Recommendation purported to resolve issues in several Ohio Power cases (including the Ohio Power Capacity Case), and those cases were consolidated for the sole purpose of considering the Electric Security Plan Stipulation. (R. 417 at 5, Appx. 13). On December 14, 2011, the PUCO issued an Opinion and

¹¹ OCC was not a signatory party to this Stipulation.

Order modifying and adopting the Electric Security Plan Stipulation, including the two-tier capacity pricing mechanism proposed therein. (R. 417 at 5, Appx. 13). However, on February 23, 2012, the PUCO rejected the Stipulation and Recommendation, ultimately finding that the Stipulation did not benefit customers and was not in the public interest. (R. 417 at 6, Appx. 14).

By Entry on March 7, 2012, the PUCO implemented an interim capacity pricing mechanism proposed by Ohio Power in a Motion for Relief filed on February 27, 2012. (R. 274 at 16-17, Supp. 23-24). Ohio Power claimed in its Motion for Relief that the state compensation mechanism (i.e., market-based pricing under the PJM Reliability Pricing Model) would materially harm Ohio Power and was confiscatory. (R. 247). Specifically, Ohio Power argued that receiving market-based prices for capacity would cause a “highly detrimental financial impact on [Ohio Power].” (R. 247 at 1). The Commission’s March 7, 2012 Entry granted Ohio Power’s request for relief for an interim period only. (R. 274 at 16, Supp. 23). The Commission held that without interim relief there might be an unjust and unreasonable result for Ohio Power. (R. 274 at 16, Supp. 23).

Accordingly, under the interim pricing mechanism, the PUCO directed Ohio Power to charge Marketers the PJM market-based price for capacity for the first 21 percent of each customer class that shopped and all customers (including mercantile customers) who shop through a governmental aggregation program that was approved on or before November 8, 2011. (R. 274 at 17, Supp. 24). For all other shopping customers,¹² Ohio Power was authorized to charge the CRES provider \$255/MW-day. (R. 274 at 17, Supp. 24). However, the PUCO also determined that if there was not a resolution of this issue on June 1, 2012, the price that Ohio

¹² Shopping customers are those customers who choose an alternative electric generation supplier.

Power was authorized to charge CRES providers would revert back to PJM market-based pricing.¹³

On March 14, 2012, the PUCO issued an Entry setting forth a procedural schedule for the Ohio Power's capacity proceeding. (R. 277 at 3, Supp. 28). That Entry states in pertinent part that "[the attorney examiner issues the following procedural schedule for hearing] to develop an evidentiary record on a state compensation mechanism. Interested parties should develop an evidentiary record on the appropriate capacity cost pricing/recovery mechanism including, if necessary, the appropriate components of any proposed capacity cost recovery mechanism ***." (R. 277 at 3, Supp. 28).

Throughout the course of the evidentiary hearing,¹⁴ Ohio Power sought a cost-based formula rate method for wholesale generation capacity service made available to Marketers serving retail customers in Ohio Power's service territory. (R. 53 at 23). Ohio Power argued that it is entitled to a cost-based capacity price of \$355/MW-day ("MW-D") for wholesale capacity made available to Marketers. (R. 53 at 23). Various intervening parties, including OCC, opposed Ohio Power's claims, and further argued that the state compensation mechanism should be the much lower PJM market-based prices, which are \$20.01/MW-D in the planning year ("PY") 2012; \$33.71/MW-D in PY 2013; and, \$153.89/MW-D in PY 2014. (R. 388; and R. 417 at 10, Appx. at 18).

The PUCO issued its Opinion and Order on July 2, 2012, holding that the state compensation mechanism for capacity would be PJM's RPM market-based prices. (R.417 at 23,

¹³ On April 30, 2012, Ohio Power filed a Motion for Extension of the interim relief granted by the Commission in the March 7, 2012 Entry. On May 30, 2012, the PUCO approved Ohio Power's request, through July 2, 2012. (R. 412).

¹⁴ The evidentiary hearing phase commenced on April 17, 2012, and concluded on May 15, 2012.

Appx. 31.) However, the PUCO found that if the Utility was limited to collecting market-based capacity costs from Marketers it would be “insufficient to yield reasonable compensation” to Ohio Power. (R. 417 at 23, Appx. 31). Thus, under the PUCO’s finding, Ohio Power was entitled to collect its full embedded cost of capacity, which the PUCO held is \$188.88/MW-D (as opposed to the \$355/MW-D requested by Ohio Power). (R. 417 at 23, Appx. at 31).

In order to stabilize the market and encourage shopping, the PUCO determined that Marketers should get a discount for the wholesale capacity they purchased from the Utility, based on the PJM market-based price.¹⁵ The PUCO then authorized Ohio Power to defer the wholesale discount given to Marketers and collect it from “third parties” in the future. (R. 417 at 23, Appx. 31). The PUCO acknowledged that the total discount would depend on the number of customers who shop, or switch to a Marketer. Finally the PUCO announced that it would address the method for collecting the capacity deferrals from “third parties” in the Utility’s Electric Security Plan case, a case whose evidentiary record was closed. (R. 417 at 23, Appx. 31).

On August 1, 2012, applications for rehearing of the Capacity Case were filed by various parties, including OCC. (R. 430, Appx. 54). Included in OCC’s Application for Rehearing, OCC argued that the capacity deferral mechanism would create unfair subsidies and result in double-payments by some customers. OCC also contended that the PUCO erred in allowing wholesale capacity costs to be deferred for collection from customers, instead of from Marketers. (R. 430, Appx. 76-79).

¹⁵ That price varies over the next three years from \$20.01/MW-D in the PY 2012; to \$33.71/MW-D in PY 2013; and to \$153.89/MW-D in PY 2014. (R. 417 at 10, Appx. 18).

On August 8, 2012, in the Utility's Electric Security Plan proceeding, the PUCO issued an Opinion and Order, confirming that the third parties who would pay for the capacity discount would be the retail customers of Ohio Power.¹⁶ (Appx. 271). In its decision, the PUCO approved a \$508 million charge called a Retail Stability Rider.¹⁷ The PUCO determined that Ohio Power will be permitted to collect its \$508 million Retail Stability Rider from its retail customers by a \$3.50/MWh charge, through May 31, 2014. That charge would increase to \$4/MWh from June 1, 2014 to May 31, 2015. (Appx. 271). Ohio Power was ordered to allocate \$1.00 of the Rate Stability Rider revenue towards recovery of its capacity deferrals ordered in the Capacity Case. (Appx. 271).

The PUCO stated that it will determine the ultimate deferred discount to be paid by customers based on Ohio Power's actual shopping statistics and the amount that has been contributed through the Retail Stability Rider. (Appx. 271). The PUCO maintained that its decision is in the "best interests of both customers and [Ohio Power]." (Appx. 271.) In this regard, the PUCO opined that the Retail Stability Rider contributes to paying off Ohio Power's capacity deferrals and will thus avoid customers paying high deferral charges for years into the future. (Appx. 271).

Meanwhile, in the Capacity Case, the PUCO issued an Entry on Rehearing granting applications for rehearing for purposes of further consideration on August 15, 2012. (R. 445 at 2). And on October 17, 2012, the PUCO issued an Entry on Rehearing granting in part and

¹⁶ The Electric Security Plan Proceeding case is under appeal at the court, with appeals filed by OCC, Ohio Power, FirstEnergy Solutions, Ohio Energy Group, Kroger, and IEU-Ohio. See Supreme Court No. 13-0521.

¹⁷ The Retail Stability Rider "allows for [Ohio Power] to continue to provide certainty and stability for [Ohio Power's] [Standard Service Offer] plan while competitive markets continue to develop as a result of [Reliability Pricing Model priced capacity]." (Appx. 271).

denying Applications for Rehearing. (R. 459, Appx. 90). The PUCO granted rehearing in its October 17 Entry on Rehearing for the “limited purpose of clarifying that the investigation initiated by the Commission in this proceeding was consistent with **Section 4905.26, Revised Code**, as well as with [its] authority under Sections 4905.04, 4905.05, and 4905.06, Revised Code.” (R.459 at 9-10, Appx. 98-99). (Emphasis added).

The PUCO rejected OCC’s arguments raised on rehearing regarding the deferral recovery mechanism stating: “[w]e find that all of these arguments were prematurely raised in this case. The Capacity Order did not address the deferral recovery mechanism. Rather, the Commission merely noted that an appropriate mechanism would be established in the [Ohio Power Electric Security Plan] Case and that any other financial considerations would also be addressed by the Commission in that case.” (R. 459 at 51, Appx. 140).

On November, 16, 2012, OCC, Industrial Energy Users-Ohio (“IEU”), and FirstEnergy Solutions Corp. (“FES”) filed applications for rehearing of the PUCO’s October 17 Entry on Rehearing. OCC argued on rehearing that the PUCO erred in citing to R.C. 4905.26 as authority for its decision in the case, as the PUCO failed to follow the requirements of the statute. (R. 464 at 7, Appx. 164). In addition, OCC argued that it was unreasonable and unlawful for the PUCO to address the mechanics of the deferral recovery mechanism in the Ohio Power Electric Security Plan proceeding. (R. 464 at 10, Appx. 167).

On December 12, 2012, the PUCO issued an Entry ordering that the Applications for Rehearing of OCC, IEU and FES be denied. (R. 467, Appx. 187). Specifically, the PUCO affirmed its Opinion and Order where it found OCC’s claims of unfair competition, unlawful subsidies and double payments to be premature. The PUCO came to this conclusion because it “had not yet determined how and from whom [Ohio Power’s] deferred capacity costs would be

recovered.” (R. 467 at 11, Appx. 186). And, with respect to OCC’s claims that R.C. 4905.26 was violated, the PUCO determined that it is not required to make a rote finding of reasonable grounds when it initiates a complaint case. (R. 467 at 5 and 9, Appx. 180, 184). In addition, the PUCO declared that it “may establish new rates under Section 4905.26, Revised Code, if the existing rates are unjust and unreasonable, which is exactly what has occurred in the present case.” (R. 467 at 9, Appx. 184).

On January 11, 2013 OCC filed an application for rehearing of the PUCO’s December 12, 2012 Entry. (R. 471, Appx. 188). OCC argued that the PUCO erred in finding for the first time in the case that there were “reasonable grounds” for a complaint relating back to the PUCO’s December 2, 2010 Entry initiating the case. (R. 471 at 3-8, Appx. 192-197). OCC’s application was denied on January 30, 2013. (R. 474, Appx. 200). It is from this PUCO decision that OCC, IEU-Ohio and FES have filed their Notices of Appeal.

IV. ARGUMENT

PROPOSITION OF LAW NUMBER ONE:

The PUCO may not set or change a rate in a complaint proceeding unless a complaint is properly initiated, reasonable grounds for a hearing are found, and there is a finding that the rates charged are unjust and unreasonable.

In its October 17, 2012 Entry on Rehearing the PUCO attempted to fortify its July 2, 2012 Order in the Capacity Case. To this end, the PUCO, three months after-the-fact (in the rehearing stage), added authority under R.C. 4905.26 for its actions. (R. 459 at 9-10, Appx. 98-99). In this regard, the PUCO granted rehearing in its October 17 Entry for the “limited purpose of clarifying that the investigation initiated by the Commission in this proceeding was consistent with Section 4905.26, Revised Code, as well as with [its] authority under Sections 4905.04, 4905.05, and 4905.06, Revised Code.” (R. 459 at 9-10, Appx. 98-99). But the plain language of

the statute (R.C. 4905.26) must control.¹⁸ And that language clearly requires more than a hearing and notice. Those requirements were simply not met here.

Specifically, R.C. 4905.26 states:

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, **is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential**, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses. (Emphasis added.)

It must be shown that the existing rate in question is, or will be, “unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.”¹⁹ But there was no such finding by the PUCO in the Capacity Case.

This Court has found that “the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that the rates charged by a utility are unjust and unreasonable.” *Allnet Communications Servs., Inc. v. Pub. Util. Comm.*, 32 Ohio St.3d 115, 117, 1987 Ohio LEXIS 352, 512 N.E.2d 350 (1987). Thus, only after an investigation and hearing pursuant to R.C. 4905.26 can the PUCO determine that existing rates are unjust or unreasonable. Then the PUCO can remedy the situation by ordering new rates be

¹⁸ See R.C. 1.42 and R.C. 1.47.

¹⁹ R.C. 4905.26.

put in effect. *Ohio Utilities Co. v. Pub. Util. Comm.*, 58 Ohio St.2d 153,157, 1979 Ohio LEXIS 406, 389 N.E.2d 483, (1979).

So to order new rates (as the PUCO did) the PUCO must find that the existing rates are unjust and unreasonable. But the PUCO did not make such a finding. Instead, the PUCO found that a state compensation mechanism “based on [PJM market-based] pricing *could risk* an unjust and unreasonable result for [Ohio Power].” (R. 459 at 18, Appx. 107) (Emphasis added). Thus, there was not a conclusive finding that PJM RPM capacity prices would, in fact, be unjust or unreasonable. And notably, the PUCO authorized a deferral in the Capacity Case, not a new rate. This distinction is important because R.C. 4905.26 give the PUCO authority to examine rates, not establish a deferral.

In fact, two Commissioners, in their concurring opinions, specifically stressed that they were not describing PJM market-based prices rates as unjust or unreasonable: “[o]ur opinion of this result, in this case, should not be misunderstood as it relates to [PJM market-based prices]; *by joining the majority opinion we do not, in any way, agree to any description of [PJM market-based] capacity rates as being unjust or unreasonable.*” (R. 417, Concurring Opinion of Porter and Slaby at 1, Appx. 48) (Emphasis added). And throughout the history of the Ohio Power Capacity Case, the PUCO never alleged that rates, set in accordance with PJM’s market based pricing, are unreasonable, unjust, unduly discriminatory or preferential, or otherwise in violation of law. In fact, an examination of the record below shows quite the opposite. For instance, in its initial Entry opening the investigation in this case, the PUCO expressly approved the use of PJM market-based pricing. (R. 2 at 2, Supp. 2).

The PUCO further determined in its Opinion and Order that public policy requires Ohio Power to charge Marketers the PJM market-based price through the 2014-2015 PJM delivery year. (R. 417 at 23, Appx. 31). Specifically, the PUCO recognized that PJM market-based pricing for capacity “will further the development of competition in the market,” and that it “will stimulate true competition among suppliers in [Ohio Power’s] service territory.” (R. 417 at 23, Appx. 31). The PUCO continued that “[PJM market-based] capacity pricing has been used successfully throughout Ohio and the rest of the PJM region and puts electric utilities and [Marketers] on a level playing field.” (R. 417 at 23, Appx. 31). Additionally, PJM market-based pricing has been determined to be reasonable through FERC’s approval of the Reliability Assurance Agreement. Indeed, the default pricing mechanism under the Reliability Assurance Agreement for capacity is market-based. And all other Electric Distribution Utilities in Ohio are currently compensated for capacity service based on market-based pricing.

In sum, if the PUCO did determine that PJM market based capacity prices are unjust and unreasonable (as it contends it did), then it is unclear why it would simultaneously determine that it would be proper for Ohio Power to charge Marketers these unjust and unreasonable prices (i.e., implement a state compensation mechanism for Ohio Power based on PJM market based prices).

The second part of OCC’s first proposition of law relates to the requirement for the PUCO to find “reasonable grounds” before holding a hearing. R.C. 4905.26 requires that “if it appears that **reasonable grounds** for complaint are stated, the commission shall fix a time for

hearing and shall notify complainants *** thereof.”²⁰ But the PUCO never established that reasonable grounds existed for a complaint in this proceeding. In fact, when the Attorney Examiner established a procedural schedule for this proceeding the stated purpose was to “establish an evidentiary record on a state compensation mechanism.” (R. 49 at 2, Supp. 32). Instead, the PUCO “clarified” – two years later in its October 17, 2012 Entry – that reasonable grounds for a complaint were set forth in its December 8, 2010 Entry in the Ohio Power Capacity Case. (R. 459 at 9, Appx. 184).

An examination of the PUCO’s December 8, 2010 Entry initiating the capacity proceeding shows that there was no finding of reasonable grounds. In fact, there are only two findings in the PUCO’s December 8, 2010 Entry. First, the PUCO stated that it is adopting as a state compensation method for Ohio Power the current capacity charges set in the PJM auction (R. 2 at 2, Supp. 2). Second, the PUCO found that “a review is necessary in order to determine the impact of the proposed change²¹ to Ohio Power’s capacity charges.” (R. 2 at 2, Supp. 2).

This Court has held that reasonable grounds for the complaint must be found before the commencement of a hearing. Specifically, this Court has held that “R.C. 4905.26 requires that **reasonable grounds for complaint be stated** before the commission can conduct a hearing and order a utility to produce information. This prerequisite should apply whether the Commission begins such a proceeding on its own initiative or on the complaint of another party.” *Ohio*

²⁰ The Commission has held “Section 4905.26, Revised Code, permits customers to file complaints or objections to any rate or classification of a utility and, **if reasonable grounds are shown**, the Commission will set the matter for hearing and the burden of proof shall be upon the complainant” (Emphasis added.) *In the Matter of the Complaint of Ken Meek, Complainant, v. Gem Beach Marina, Inc.*, 1990 Ohio PUC LEXIS 947 at 11.

²¹ The “proposed change” referred to AEPSC’s application at FERC to establish cost based rates.

Utilities Co. v. Public Utilities Com., 58 Ohio St.2d 153, 164, 1979 Ohio LEXIS 406, 389 N.E.2d483, (1979) (Emphasis added).

In *Western Reserve Transit Authority v. Public. Utilities Com.*, this Court found that although the procedural requirements contained in R.C. 4905.26 were clear, they were not observed by the Commission in that case. *Western Reserve Transit Authority v. Public Utilities Com.*, 39 Ohio St.2d 16, 19, 1974 LEXIS 388, 313 N.E.2d 811, (1974). This Court continued by holding that a “tentative” finding for “reasonable grounds” was without legal authority. *Id.* In other words, reasonable grounds for a complaint must actually exist before the PUCO can order a hearing pursuant to R.C. 4905.26. This Court has held that “[n]otwithstanding the broad scope of the statute, however, *Ohio Utilities* also held that the “reasonable grounds for complaint” requirement of R.C. 4905.26 must still be met before the PUCO is required to order a hearing. That requirement applies whether it is the PUCO, or any other party, which initiates the proceeding under R.C. 4905.26.” *Allnet Communications Services, Inc. v. Public Utilities Com.*, 32 Ohio St.3d 115, 117, 1987 Ohio LEXIS 352, 512 N.E.2d 350 (1987).

But, as explained above, the PUCO never found reasonable grounds, and thus, the statute it relies upon was not complied with. The Commission is a creature of statute. *See Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840, ¶ 13. It has no jurisdiction other than that accorded to it by the General Assembly. *Id.* As such, the Commission was without jurisdiction to allow the Utility to defer the wholesale discount to the Marketers for future collection from its retail customers.

Given these details, the PUCO failed to comply with the requirements set-forth under R.C. 4905.26. The PUCO failed to find that PJM market-based pricing is unjust or unreasonable, and subsequently failed to find that reasonable grounds for a complaint existed. Accordingly, the

PUCO was without jurisdiction to establish a wholesale capacity rate for the Utility to charge Marketers. And, the PUCO was also without jurisdiction to allow the Utility to defer the wholesale discount to the Marketers for future collection from its retail customers.

PROPOSITION OF LAW NUMBER TWO:

The PUCO cannot permit a utility to defer the difference between its costs of capacity and the wholesale discounted rate it charges marketers when it will cause customers (both shopping and non-shopping) to pay twice for capacity—a result that is unreasonable and violates R.C. 4928.141 and R.C. 4928.02(A).

A. It is unreasonable for customers to pay twice for the same service.

R.C. 4928.02(A) requires that “non-discriminatory” and “reasonably priced retail electric service” be available to consumers. R.C. 4928.141 mandates that a utility is to provide retail electric service on a “comparable and non-discriminatory basis.” But as a result of the PUCO’s decision, there will be a wholesale discount to Marketers. And that Marketer-discount will be later collected from retail customers. That results in hundreds of millions of dollars being added to customers’ bills.

Standard Service Offer customers are already paying Ohio Power for capacity through standard service offer generation rates. In fact, Ohio Power acknowledged that standard service offer generation rates produce revenues that cover their fully embedded cost of capacity. (R. Trans Vol. III at 716, Supp. 33). Indeed, the record reflects that these customers pay nearly double the fully embedded cost rate for capacity. (R. Trans Vol. III at 716, Supp. 33). Unfortunately for standard service offer generation customers, the PUCO failed to recognize that these non-shopping customers are already paying Ohio Power for capacity. (R. Trans Vol. III at 716, Supp. 33). Thus, requiring non-shopping customers to pay capacity deferrals for the discount provided to Marketers will, under the mechanism devised by the PUCO, eventually force them to pay twice for capacity. This result is unjust and unreasonable.

One Commissioner saw this bad result unfolding also for shopping customers. That Commissioner concluded (in her dissent) that shopping customers may indeed bear the burden of paying for the subsidy provided to Marketers as a result of the Ohio Power Capacity Order. She explained that shopping customers *may* pay twice for the capacity unless the Marketers directly pass through PJM market-based prices:

If the retail providers do not pass along the entirety of the discount, **then consumers will certainly and inevitably pay twice for the discount today granted to the retail suppliers.** To be clear, unless every retail provider disgorges 100 percent of the discount to consumers in the form of lower prices, shopping consumers will pay more for Fixed Resource Requirements service than the retail provider did. This represents the first payment by the consumer for the service. Then the deferral, with carrying costs, will come due and the consumer will pay for it all over again -- plus interest. (R. 417 July 2, 2012 Opinion and Order, Concurring and Dissenting Opinion of Commissioner Cheryl L. Roberto at 4, Appx. 53) (Emphasis added.)

And as explained *supra*, non-shopping customers *will* pay more than double for capacity.

The PUCO stated that it had the “intention of adopting a state compensation mechanism that achieves a reasonable outcome for all stakeholders.” (R.417, at 23, Appx. 31). But customers paying twice is not a reasonable outcome. Moreover, there is no provision in the Ohio Revised Code that permits an electric distribution utility to charge customers twice for the same service. This result is unjust and unreasonable.

PROPOSITION OF LAW NUMBER THREE:

The PUCO is not authorized to permit a utility to defer for collection from retail electric customers the difference between the utility’s costs of capacity and the wholesale discounted rate it charges marketers.

- A. The PUCO violated R.C. 4928.02(H), (L), and R.C. 4928.06, when it authorized the Utility to defer the Marketer-discount for future collection from retail customers.**

Under R.C. 4928.06, the Commission has a duty to ensure that the policy specified in R.C. 4928.02 is effectuated. Indeed, this Court has expressly held that the PUCO may not

approve a rate plan that violates the policy provisions of R.C. 4928.02. *Elyria Foundry Co. v. PUC*, 114 Ohio St.3d 305, 317, 2007-Ohio-4164, 876 N.E.2d 1176.

Ohio's state electric policy is encompassed in R.C. 4928.02. In this regard, R.C. 4928.02(H) states:

It is the policy of this state to do the following throughout this state:

* * *

(H) Ensure *effective* competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates; (Emphasis added.)

This policy reflects the underpinnings of the market-based approach to generation service adopted by the General Assembly. Competitive generation service is to be the engine for creating reasonably priced retail electric service to customers within the state of Ohio.

But the PUCO's decision permitting Ohio Power to defer the difference between its costs of capacity and the wholesale discount rate it charges Marketers for capacity is not fueling the engine of competition. Quite to the contrary, the PUCO has created an unlawful subsidy. All retail customers will pay increased retail rates so that Marketers receive a discount for wholesale capacity. The PUCO determined that the Utility's cost of providing wholesale capacity service was \$188.88/MW-day—a price reflecting the Utility's fully embedded cost of providing the capacity. (R. 417 at 33, Appx. 41).

Thus, Marketers are charged a rate for wholesale capacity that is below the Utility's cost to provide the service (the PJM market-based price). This below-cost pricing for wholesale capacity service is an anti-competitive practice whereby retail customers unequivocally subsidize Marketers. This violates Ohio law. The noncompetitive retail electric service—capacity

service—will provide a subsidy to underwrite the competitive retail services provided by Marketers—sale of retail capacity and energy to customers. Consequently, the PUCO’s decision is unlawful and inconsistent with R.C. 4928.02(H).

In its July 2, 2012 Opinion and Order, the PUCO states:

The Commission will authorize [Ohio Power] to modify its accounting procedures, pursuant to Section 4905.13, Revised Code, **to defer incurred capacity costs not recovered from CRES provider billings** during the ESP period to the extent that the total incurred capacity costs do not exceed the capacity pricing that we approve below. Moreover, the Commission notes that we will establish an appropriate recovery mechanism for such deferred costs and address any additional financial considerations in the 11-346 proceeding. (R. 417 at 23, Appx. 31) (Emphasis added).

The PUCO reflected on state policies in forming its decision to allow Marketers to reimburse Ohio Power at the PJM market-based capacity price, stating: “[Reliability Pricing Model]-based capacity pricing is thus a reasonable means of promoting shopping in [Ohio Power’s] service territory and advancing the state policy objectives of Sec. 4928.02.” (R. 417 at 14, Appx. 22). However, the PUCO also ruled that Ohio Power, as a Fixed Resource Requirement Entity, was entitled to its costs for its Fixed Resource Requirement capacity obligations. (R. 417 at 33, Appx. 41). But the PUCO’s approved mechanism creates deferrals that ultimately will be borne by retail consumers. The result is an unlawful subsidy, where retail customers are responsible for making up the difference between the PJM market-based wholesale capacity price (charged to Marketers) and Ohio Power’s costs. This subsidy violates R.C. 4928.02(H).

Indeed, in one Commissioner’s concurring and dissenting opinion in the Ohio Power Capacity Case, she referred to the payment that customers will make as a “significant, no-strings-attached, unearned benefit” to entice more sellers into the market. (R. 417, Roberto Dissent at 4, Appx. 53). She further stated that the deferral mechanism is “an unnecessary, ineffective, and

costly intervention into the market” that she could not support. (R. 417, Roberto Dissent at 4, Appx. 53). OCC agrees, as there is no legal basis to extend this financial benefit to Marketers at the expense of retail customers. And there is especially no basis to make non-shopping customers pay for this anticompetitive subsidy. To do so would be contrary to both R.C. 4928.06(A) and R.C. 4928.02(H).

It would also be contrary to R.C. 4928.02(L), which states, in part, that:

It is the policy of this state to do the following throughout this state:

* * *

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

R.C. 4928.02(L) charges the PUCO to protect at-risk populations (like customers). But in creating the capacity deferrals, the PUCO ensured that neither the Marketers nor the Utility would bear the majority of the costs of capacity. As Commissioner Roberto stated in her dissent, “[U]nless every retail provider disgorges 100% of the discount to consumers in the form of lower prices, shopping customers will pay more for [FRR] service than the retail provider did.” (R. 417, Roberto Dissent at 4, Appx. 53). Accordingly, the PUCO opened the door for residential customers, and including populations at-risk, to bear the brunt of the deferred wholesale discounts given to Marketers.²²

OCC and other intervening parties recommended during the Capacity Case that Ohio Power’s charge for capacity be set at the market price, through the use of the PJM Reliability Pricing Model, period.²³ If this had been done, there would have been no discount for capacity,

²² Note that pursuant to R.C. 4928.15(A), competitive retail electric service must be consistent with state electric policies.

²³ See, for example, Appx. at 69.

no subsidy to Marketers, no deferrals, and competition would have been furthered. But the PUCO's decision seems to be an attempt to thread a needle between what the Utility wants (revenue protection for loss of system load) and what Marketers want (market-based capacity prices). Customers are caught in the middle, where the middle is defined as paying Ohio Power hundreds of millions of dollars in deferred capacity costs in order to satisfy the Utility and Marketers.

This Court has held that a PUCO "order is unlawful if it is inconsistent with relevant statutes or with the state or federal constitutions." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio- 5853, 856 N.E.2d 940, ¶4. And although the PUCO recognized that "[Reliability Pricing Model-based capacity pricing will further the development of competition in the market" the PUCO's Capacity Order is inconsistent with other state electric policies set forth in R.C. 4928.02(H), and (L). (R. 417 at 23, Appx. 31). Since the PUCO's Order is contrary to these policies, it should be reversed.

B. The PUCO's accounting order resulted in harm to the Utility's retail customers.

This Court has recognized that a party may argue that harm resulted from a PUCO accounting order that the party claims was unlawful and unreasonable.²⁴ R.C. 4905.13 grants the PUCO authority to establish a system of accounts for public utilities and to prescribe the manner in which the accounts must be kept. This Court has recognized the PUCO's discretion under

²⁴ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, generally, see also, *OCC v. PUC of Ohio*, 16 Ohio St.3d 21 at fn1, 475 N.E.2d 786, (1985), where this Court held: "[w]e are compelled to recognize that accounting changes have a substantial practical impact on ratemaking. Although the station connections expenses resulted from events occurring within the test-year period, characterization of those expenses after the test-year period has the practical effect of manipulating a test-year component after the test year and effectively creates a test-year loophole. This demonstrates how inextricably accounting methodologies are linked to the rates consumers may be compelled to pay."

R.C. 4905.13, and it has held that the Court “generally will not interfere with the accounting practices set by the commission.” *Consumers’ Counsel v. Pub. Util. Comm.*, 32 Ohio St.3d 263, 271, 513 N.E.2d 243, (1987). However, in the context of a claimed violation of R.C. 4928.02(G) and (L), the PUCO’s Order was not merely an accounting order.

In *Elyria Foundry*, this Court addressed a similar challenge to a PUCO accounting Order, brought in conjunction with the claim that the PUCO had violated R.C. 4928.02. Specifically, in *Elyria Foundry*, this Court found that the PUCO violated R.C. 4928.02(G)²⁵ when it gave FirstEnergy accounting authority to collect deferred increased fuel costs through future distribution cases. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871, N.E.2d 1176, ¶70.

In *Elyria Foundry*, appellants, Elyria Foundry Company and WPS Energy Services, Inc. (“WPS”) appealed orders of the PUCO that approved a “rate-certainty plan” filed by FirstEnergy Corporation on behalf of its operating companies: Ohio Edison, Toledo Edison, and Cleveland Electric Illuminating (collectively, “FirstEnergy”). *Id.* at ¶1. FirstEnergy’s rate-stabilization plan aimed at preventing the expected rate shock of moving to market rates. *Id.*, at ¶3. The PUCO authorized FirstEnergy to file an application to adjust its electricity-generation charges to recover increases in the cost of fuel from January 1, 2006, through 2008. *Id.*, at ¶47. The application was limited to fuel-cost increases that were above FirstEnergy’s fuel costs for 2002. *Id.*, at ¶3. According to the rate-stabilization plan, the PUCO would approve the recovery of increased fuel costs only after a hearing and upon FirstEnergy’s justification of the generation-rate increase. *Id.*

²⁵ Note that former R.C. 4928.02(G) is now R.C. 4928.02(H).

WPS Energy Services, Inc. argued that the PUCO approved, in the rate certainty plant, accounting authorizations to defer fuel costs and other expense items that were unlawful, unreasonable, and not in the public interest. *Id.*, ¶42. Specifically, WPS asserted that the PUCO authorized an unlawful and unreasonable subsidy. *Id.* In this regard, WPS claimed that the PUCO violated R.C. 4928.02(G) when it authorized an accounting deferral that permits fuel costs for generation service to FirstEnergy's Standard Service Offer customers to be charged to FirstEnergy's distribution-service customers who are not receiving POLR service. *Id.*, ¶47. This Court agreed with WPS. And the Court reversed the orders of the PUCO that authorized the fuel-cost deferrals, finding that it is Ohio's policy to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies. *Id.*, ¶70. Consequently, the matter was remanded to the PUCO to remedy the statutory violation. *Id.*

In the present case, the PUCO authorized accounting changes that will cause customers to pay the capacity costs that Marketers – the cost causers – should be responsible for paying. Accordingly, this matter should also be remedied by this Court for the statutory violations described above.

C. The PUCO's approval of the capacity deferrals violates the regulatory principle of cost causation.

The PUCO should have required Ohio Power to collect its alleged costs for capacity from the parties to whom the wholesale capacity service is provided – the Marketers. This treatment is consistent with the ratemaking principle of cost causation. Under this principle, costs are to be attributed to the groups or entities who caused the cost (i.e., the costs were brought into existence as a direct result of providing the service to the group or entity). These capacity costs were created as a direct result of providing capacity service to Marketers. Not only would this result

have been consistent with the regulatory principle of cost causation, it would have also eliminated the unlawful result of double-payments and subsidies by customers.

Despite its decision to the contrary in the Capacity Case, the PUCO has recognized that one of the goals of regulation is that the cost causer is the cost payer.²⁶ Indeed, in a recent FirstEnergy case, the PUCO confirmed its stalwart adherence to the principle of cost causation when it determined that revenue shortfalls associated with a residential rate should be recovered solely from the residential class, not other classes.²⁷ But in the Capacity Case the PUCO failed to follow its own precedent because it held that customers (who already pay for capacity) will have to pay \$725 million dollars in capacity deferrals. The PUCO's failure to respect its own precedent violates *Cleveland Electric Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975) (*Cleveland Electric Illuminating*). *Cleveland Electric Illuminating* and its progeny²⁸ hold that the PUCO should "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law including administrative law."²⁹ This it did not do.

²⁶ See, e.g., *In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Revise its General Exchange Tariff* PUCO No. 7, Finding and Order at ¶6 (Jan. 24, 1989). See also *In re Duke Energy Ohio*, Case No. 07-589-GA-AIR, Opinion and Order at 17-19; (May 28, 2008); *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, Opinion and Order at 22-24 (Oct. 15, 2008); *In re Vectren Energy Delivery of Ohio*, Case No. 07-1080-GA-AIR, Opinion and Order at 11-14 (Jan. 7, 2009) (cases holding that SFV rate design would assure more equitable allocation of distribution system costs to cost-causers); *In the Matter of the Commission Investigation into the Resale and Sharing of Local Exchange Telephone Service*, Case No. 85-119-TP-COI, Opinion and Order at 25-27 (noting the Commission policy of favoring measured service rates to local resellers as a means of assessing the cost of service to the cost causers rather than spreading it among all ratepayers).

²⁷ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Opinion and Order at 62-63 (May 25, 2011).

²⁸ See for example *Office of Consumers; Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49,461 N.E.2d 303.

²⁹ *Cleveland Electric Illuminating*, 42 Ohio St.2d at 431.

Additionally, *Cleveland Electric Illuminating* requires that while the PUCO may change its position, it must justify the change by showing there is a clear need for change and must show that the prior decisions are in error.³⁰ The PUCO does not show there is a clear need to change its policy in this regard. Moreover, the PUCO does not claim that its prior decisions are in error. Consequently, the PUCO has violated *Cleveland Electric Illuminating* and in doing so ended up with an unreasonable and unlawful result for customers.

When the cost causation principle is followed, the responsibility for costs falls on those causing the costs. But here, the PUCO's decision in the Capacity Case results in retail customers subsidizing private business enterprise - the Marketers' business. This is unlawful, unjust, and unreasonable.

V. CONCLUSION

OCC is seeking to reverse, vacate, or modify the PUCO's Capacity Order as well as the PUCO's Entries implementing and upholding the Capacity Order in Case No. 10-2929-EL-UNC. Such action is appropriate because the PUCO's rulings are unlawful and unreasonable as discussed above. As addressed in OCC Proposition of Law Number One, the PUCO was without jurisdiction to establish a wholesale capacity rate that the Utility could charge Marketers. And, the PUCO was also without jurisdiction to allow the Utility to defer the wholesale capacity discount to the Marketers for future collection from its retail customers. The PUCO never found that PJM market-based capacity prices are unjust or unreasonable, nor did the PUCO find reasonable grounds existed for a complaint. Accordingly, OCC requests that this Court find the PUCO did not meet the requirements of R.C. 4905.26, and that its Capacity Order therefore lacks the requisite authority.

³⁰ *Id.*

Alternatively, even if the Court finds the PUCO complied with R.C. 4905.26, this case should be remanded with instructions that customers should not be responsible for paying the capacity deferrals, and accompanying financing charges. As explained earlier, the PUCO's Capacity Order will result in double payments by customers, and an unlawful subsidy whereby customers will be pay for the capacity discounts provided to Marketers. As a result of that PUCO decision, customers will be harmed in an amount that has been estimated to be between \$725 and \$800 million dollars.

Respectfully submitted,

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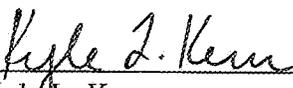
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Brief by the Office of the Ohio Consumers' Counsel was served upon the below parties via electronic transmission this 15th day of July 2013.



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