

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Edison) Case No. 2013-0513
Company, The Cleveland Electric Illuminating)
Company and The Toledo Edison Company for) On Appeal from the Public Utilities
Authority to Provide for a Standard Service Offer) Commission of Ohio
Pursuant to R.C. §4928.143 in the Form of an)
Electric Security Plan.) PUCO Case No. 12-1230-EL-SSO

REPLY BRIEF OF APPELLANT
NORTHEAST OHIO PUBLIC ENERGY COUNCIL

Glenn S. Krassen (Reg. No. 0007610)
Counsel of Record
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216) 523-7071
gkrassen@bricker.com

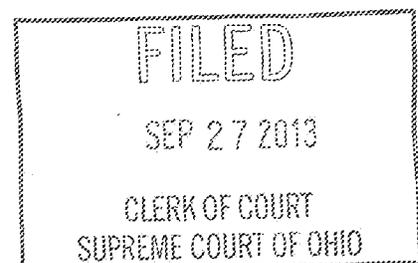
Dane Stinson (Reg. No. 0019101)
Mathew W. Warnock (Reg. No. 0082368)
J. Thomas Siwo (Reg. No. 0088069)
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
mwarnock@bricker.com
tsiwo@bricker.com

COUNSEL FOR APPELLANT
NORTHEAST OHIO PUBLIC ENERGY
COUNCIL

Richard Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio

William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
Counsel of Record
Assistant Attorneys General
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, OH 43215
Telephone: (614) 466-4397
Facsimile: (614) 644-8764
William.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us

COUNSEL FOR APPELLEE, PUBLIC
UTILITIES COMMISSION OF OHIO



Robert Kelter (admitted pro hac vice)
(Counsel of Record)
Justin Vickers (admitted pro hac vice)
Nick McDaniel (0089817)
ENVIRONMENTAL LAW AND POLICY
CENTER
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
Telephone: (614) 488-3301
Facsimile: (614) 487-7510
rkelter@elpc.org
jvickers@elpc.org
nmcdaniel@elpc.org

COUNSEL FOR APPELLANT
ENVIRONMENTAL LAW AND POLICY
CENTER

David A. Kutik (Reg. No. 0006418)
(Counsel of Record)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

James W. Burk (Reg. No. 0043808)
Carrie M. Dunn (Reg. No. 0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Facsimile: (330) 384-3875
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

COUNSEL FOR INTERVENING
APPELLEES OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. LAW AND ARGUMENT	2
A. <u>PROPOSITION OF LAW NO. 1: R.C. 4928.143(C)(1) REQUIRES THE COMMISSION TO COMBINE THE PRICE DETERMINED UNDER R.C. 4928.143(B)(1) WITH THE COSTS DETERMINED UNDER R.C. 4928.143(B)(2) AND COMPARE THAT RESULT TO THE MRO PRICE DERIVED UNDER R.C. 4928.142 IN DETERMINING WHETHER AN ESP IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO.....</u>	2
1. The Commission’s Reliance on the State Policy Considerations of R.C. 4928.02 is Misplaced.....	4
2. The Company’s Position Ignores that CSP II is Controlling.....	5
B. <u>PROPOSITION OF LAW NO. 3: EVEN IF THE COMMISSION COULD CONSIDER QUALITATIVE FACTORS IN DETERMINING WHETHER AN ESP IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO, IT IS UNLAWFUL TO CONSIDER QUALITATIVE FACTORS THAT FALL OUTSIDE OF THE PROVISIONS OF R.C. 4928.143 (B)(1) AND (2). CSP II.</u>	6
C. <u>PROPOSITION OF LAW NO. 4: AN ORDER OF THE PUBLIC UTILITIES COMMISSION OF OHIO IS UNLAWFUL IF IT APPROVES AN ESP THAT IS QUANTITATIVELY LESS FAVORABLE THAN THE EXPECTED RESULTS OF THE MARKET RATE OPTION PRICE DETERMINED UNDER R.C. 4928.142.....</u>	8
1. It is Unlawful to Include Distribution Costs as a Part of an MRO’s Generation Costs. R.C. 4928.142.....	8
2. Even if Distribution Costs Could be Included in the MRO’s Generation Costs, the Record Does Not Support that the Revenues to be Collected Under Rider DCR and the Distribution Rate Case Would be a “Wash.”	10
D. <u>NOPEC COMPLIED WITH R.C. 4903.10 IN BRINGING THIS APPEAL.</u>	12

E. PROPOSITION OF LAW NO. 5: THE COMMISSION MAY NOT TAKE ADMINISTRATIVE NOTICE OF TESTIMONY OFFERED IN ONE PROCEEDING TO SUPPORT AN APPLICANT’S BURDEN OF GOING FORWARD WITH THE EVIDENCE AND ITS BURDEN OF PROOF IN ANOTHER PROCEEDING.....16

F. PROPOSITION OF LAW NO. 6: AN APPLICANT FAILS IN ITS BURDEN OF PROOF IF IT FAILS TO SHOW THAT A PARTIAL STIPULATION IS THE RESULT OF SERIOUS BARGAINING AMONG THE PARTIES.18

III. CONCLUSION.....20

CERTIFICATE OF SERVICE21

TABLE OF AUTHORITIES

Page

CASES

Allen v. Pub. Util. Comm., 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988)..... 16, 17

Canton Storage and Transfer Co. v. Pub. Util. Comm., 72 Ohio St.3d 1,
647 N.E.2d 136 (1995)..... 1, 16, 17, 18

Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm., 163 Ohio St. 252, 126 N.E.2d 314
(1955)..... 18

Constellation Newenergy v. Pub. Util. Comm., 104 Ohio St.3d 530, 2004-Ohio-6767,
820 N.E.2d 885 20

Consumers' Counsel v. Pub. Util. Comm., 4 Ohio St.3d 111, 447 N.E.2d (1983) 16

Consumers' Counsel v. Pub. Util. Comm., 110 Ohio St.3d 394, 2006-Ohio-4706,
853 N.E.2d 1153 15

Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St.3d 123, 592 N.E.2d 1370 (1992)..... 7

Elyria Foundry Co. v. Pub. Util. Comm., 114 Ohio St.3d 305, 2007-Ohio-4164, 817
N.E.2d 1176 5

In Re Application of Columbus S. Power Co., 128 Ohio St.3d 402, 2011-Ohio-958, 945
N.E.2d 501 5

In Re Application of Columbus S. Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788,
945 N.E.2d 655 passim

In Re Application of Columbus S. Power Co., 129 Ohio St.3d 271, 2011-Ohio-2638,
951 N.E.2d 751 15

Ohio Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St.2d 153, 423 N.E.2d 820
(1981)..... 2, 3

Sunoco v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285 16

Time Warner AxS v. Pub. Util. Comm., 75 Ohio St.3d 229, 661 N.E.2d 1097 (1996)..... 20

Tongren v. Pub. Util. Comm., 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999)..... 3

STATUTES

R.C. 1.51 4

R.C. 4903.10 14, 15

R.C. 4909.15	3, 8, 10
R.C. 4909.15(C).....	12
R.C. 4928.02	4, 5
R.C. 4928.06	4
R.C. 4928.142	1, 2, 9, 11
R.C. 4928.142(A).....	9, 10
R.C. 4928.142(B).....	10
R.C. 4928.142(D) and (E).....	10
R.C. 4928.143	passim
R.C. 4928.143(B).....	7
R.C. 4928.143(B)(1)	passim
R.C. 4928.143(B)(2)	passim
R.C. 4928.143(B)(2)(a)-(i).....	2, 5, 6
R.C. 4928.143(B)(2)(h).....	8, 9, 10, 11
R.C. 4928.143(C)(1)	passim

RULES

Evid.R. 201	18
-------------------	----

REGULATIONS

Ohio Admin. Code 4910:1-35-03(C)(1)	18
---	----

I. INTRODUCTION

The Northeast Ohio Public Energy Council (“NOPEC”) seeks reversal of three overriding issues determined by the Public Utilities Commission of Ohio (“Commission”) in this proceeding (“*ESP 3 Case*”) that not only have prejudiced NOPEC (and other parties) in this proceeding but which, if left unchecked, will serve as dangerous precedent in future proceedings before the Commission.

First, NOPEC asks the Court to overturn the Commission’s determination that R.C. 4928.143(C)(1) permits it to consider qualitative benefits in approving an electric security plan (“ESP”). As explained in NOPEC’s merit brief, the General Assembly intended the ESP versus MRO¹ test set forth in R.C. 4928.143(C)(1) as a consumer protection provision, which prevents a utility from charging customers more under an ESP than they otherwise would pay for market rate electricity under an MRO. By permitting the consideration of qualitative benefits, the Commission ignored the legislative intent and this Court’s decision in *In Re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 945 N.E.2d 655 (“*CSP II*”).

Second, NOPEC requests the Court to overturn the Commission’s determination which took administrative notice of opinion testimony from prior proceedings after the close of the parties’ direct cases, effectively preventing the parties from responding to the information noticed. NOPEC requests that the Court expressly find that administrative notice of expert opinion testimony is not proper in Commission proceedings. *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 647 N.E.2d 136 (1995)

Third, NOPEC asks the Court to reverse the Commission’s finding that the partial stipulation that resolved this proceeding was the result of serious bargaining among the parties.

¹ “MRO” refers to the market rate offer described in R.C. 4928.142.

II. LAW AND ARGUMENT

A. PROPOSITION OF LAW NO. 1: R.C. 4928.143(C)(1) REQUIRES THE COMMISSION TO COMBINE THE PRICE DETERMINED UNDER R.C. 4928.143(B)(1) WITH THE COSTS DETERMINED UNDER R.C. 4928.143(B)(2) AND COMPARE THAT RESULT TO THE MRO PRICE DERIVED UNDER R.C. 4928.142 IN DETERMINING WHETHER AN ESP IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO.

In its merit brief, NOPEC explained in considerable detail that the legislative history and this Court's previous construction of R.C. 4928.143 required the Commission to determine the "pricing" of electric generation under R.C. 4928.143(B)(1) and the costs of the items included in the ESP under R.C. 4928.143(B)(2), and then combine the two in determining under R.C. 4928.143(C)(1) whether an ESP is more favorable in the aggregate than the price of an MRO, as determined under R.C. 4928.142. Moreover, this Court made explicitly clear that only the specific cost categories listed in R.C. 4928.143(B)(2)(a)-(i) could be included in an ESP. *CSP II*, at ¶ 35.

Appellees² pay scant attention to *CSP II*, other than to argue that it did not interpret the meaning of the "more favorable in the aggregate" language of R.C. 4928.143(C)(1). *See, e.g.,* Company Merit Br. at 18. Each argues (for slightly different reasons, as discussed subsequently) that this language permits the Commission to include items in an ESP in addition to the nine items listed in R.C. 4928.143(B)(2)(a)-(i), despite this Court's finding that R.C. 4928.143(B)(2) provides substantive limits on what can be included in an ESP.³ As stated in NOPEC's Merit Brief, appellees' argument flies in the face of *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981) ("*Consumers' Counsel I*"). NOPEC Merit Br. at 14.

² Appellees are the Commission and The Cleveland Electric Illuminating Company, The Toledo Edison Company and Ohio Edison Company (collectively, "the Company").

³ *See, CSP II*, at ¶ 34 ("...the appellees' interpretation would remove any substantive limit to what an electric security plan may contain, a result that we do not believe the General Assembly intended.").

Appellees attempt to distinguish *Consumers' Counsel I* on its facts, asserting that it was a case that involved the former ratemaking methodology under R.C. 4909.15. Commission Merit Br. at 13-14, Company Merit Br. at 18. The case is indistinguishable on legal principles, however. The Commission is, and always has been, a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly. *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999). In *Consumers' Counsel I*, the Court simply found that if an item could not be included in rates under a specific legislative provision, the Commission had no discretion to include it under a general provision. The Court stated:

The commission views [the general provision] R.C. 4909.15(D)(2)(b) ["with due regard as to all such other matters as are proper"] as a virtual wild card to be played whenever the commission in its discretion sees fit. We interpret the statute less sweepingly, first because the provisions are linked inextricably with the ratemaking factors contained in [the specific provisions of] R.C. 4909.15(A) and (B), and secondly because the General Assembly undoubtedly did not intend to build into its recently revised (1976) ratemaking formula a means by which the commission may effortlessly abrogate that very formula. [*Consumers' Counsel I*, 67 Ohio St.2d, at 165.]

The identical situation exists in this case. First, R.C. 4928.143(B)(1) and (2) are inextricably linked to R.C. 4928.143(C)(1). R.C. 4928.143(B)(1) requires an ESP to contain provisions related to "pricing," and R.C. 4928.143(B)(2) permits the inclusion in an ESP any of the listed terms and conditions contained therein. These provisions are linked to the "in the aggregate test" of R.C. 4928.143(C)(1), which requires the Commission to aggregate the "pricing" of electric generation service determined under R.C. 4928.143(B)(1) with "all other terms and conditions" determined under R.C. 4928.143(B)(2). Appellees do not contest this inextricable link, but as in *Consumers' Counsel I*, claim that the Commission may consider additional items than those specifically provided in R.C. 4928.143(B)(1) and (2), through a broad reading of the "all other terms and conditions" language of R.C. 4928.143(C)(1). As the Court determined in *Consumers' Counsel I*, the General Assembly simply has not provided the

Commission with this authority, which this Court confirmed in *CSP II*.

Second, considering that the General Assembly placed substantive limits on the cost categories that could be included in an ESP, as recognized in *CSP II*, it certainly did not intend for the Commission to disregard those limits by including non-quantifiable benefits in an ESP.

1. **The Commission's Reliance on the State Policy Considerations of R.C. 4928.02 is Misplaced.**

The Commission presents a unique, if untenable, construction of the "in the aggregate" language of R.C. 4928.143(C)(1). It cites R.C. 4928.06 for the proposition that the Commission must ensure that the state policies of R.C. 4928.02 are effectuated, and then argues that the "in the aggregate" language of R.C. 4928.143(C)(1) means that the Commission may include in an ESP items that satisfy R.C. 4928.02, and must approve an ESP if it is "a better way [than an MRO] to further the goals set out in the policy statute." Commission Merit Br. at 11-12. The practical problem with the Commission's argument is that, as the Commission and the Company have repeatedly recognized,⁴ an MRO is limited to a price consideration for energy supply and cannot contain the "benefits" that otherwise can be included in an ESP under R.C. 4928.143(B)(2). Under this construction, an MRO would never be more favorable than an ESP, nullifying the ESP v. MRO test.

The Commission's argument also must fail as a matter of statutory construction. Pursuant to R.C. 1.51, R.C. 4928.143(B)(2) is a specific provision that limits the items that can be contained in an ESP and prevails over the earlier-enacted general provisions of R.C. 4928.06, unless the provisions can be reconciled. The only proper reconciliation is that the Commission may use the provisions of R.C. 4928.143(B)(2) to effectuate the policies contained in R.C. 4928.02; however, the Commission may not stray beyond the specific items listed in R.C.

⁴ Company Ex. 3 at 14-15, NOPEC Supp. at 107-108; Staff Ex. 3 at 4, NOPEC Supp. at 120; Commission Order *ESP 3 Case* ("Order") at 56, NOPEC Appx. at 67.

4928.143(B)(2)(a)-(i), as it improperly has done in this case by considering non-quantitative factors in its determination.⁵

2. The Company's Position Ignores that CSP II is Controlling.

Contrary to the Commission's position, the Company in its merit brief argues that the Commission's consideration of state policy in R.C. 4928.02 is unnecessary to the determination of this proceeding. Company Merit Brief at 31. Instead, the Company maintains that (1) the plain language of R.C. 4928.143(C)(1), (2) the Court's precedent in *In Re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958, 945 N.E.2d 501 ("CSP I"), and (3) NOPEC's witness's testimony support the inclusion of non-quantifiable benefits in an ESP.

The Company contends that the plain meaning of the language of R.C. 4928.143(C)(1) ("including its pricing and all other terms and conditions") means that the Commission may consider issues other than "price," e.g., qualitative benefits. The Company cites *CSP I* for the same proposition.⁶ However, the subsequently decided *CSP II* is dispositive of this issue

⁵ The Commission cites *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 817 N.E.2d 1176 ("*Elyria*"), at ¶¶ 48-55, for the proposition that R.C. 4928.06(A) requires the Commission to weigh the state policies in R.C. 4928.02 in every proceeding. Commission Merit Br. at 10. *Elyria* is not on point inasmuch as it was decided before R.C. 4928.143 was enacted. As applied to R.C. 4928.143(B)(2), *Elyria* stands for nothing more than, if an item is properly included in an ESP under the limited categories listed in R.C. 4928.143(B)(2), parties may nevertheless contest its inclusion as violative of the state policies.

The Commission also cites *CSP II*, at ¶¶ 61-63, for the proposition that it has been left to the Commission how to carry out the state policies in R.C. 4928.02. Commission Merit Br. at 11. These paragraphs of *CSP II* merely stand for the proposition that the state policies are guidelines for the Commission to consider. They do not permit the Commission to include additional items in R.C. 4928.143(B)(2); rather, they permit the Commission to use the items listed in R.C. 4928.143(B)(2)(a)-(i) to effectuate state policy, or to ensure that the items included in an ESP do not violate state policy.

⁶ *CSP I* involved whether the costs to operate existing generating assets should be included in an ESP. These operating expenses thus were related to the "price" determination to be made under R.C. 4928.143(B)(1). The Court's dicta that R.C. 4928.143(C)(1) "does not bind the commission to a strict price comparison" merely recognizes that the commission is not limited to

considering that it limited inclusion in an ESP to the “price” determined under R.C. 4928.143(B)(1) and the nine specific “cost” factors listed in R.C. 4928.143(B)(2)(a)-(i).

The Company also relies on its cross examination of NOPEC witness Frye, a non-attorney, to support its legal construction of R.C. 4928.143(C)(1), by maintaining that witness Frye testified that the Commission may consider qualitative benefits under the ESP v. MRO test. Company Merit Brief at 19. As explained in footnote 10, the Company has taken witness Frye’s testimony wholly out of context. Under a proper reading of his testimony, witness Frye merely testified that, under his quantitative factual analysis, the proposed ESP fails the ESP v. MRO test. As a non-attorney, he appropriately deferred to the Commission (and to the parties’ legal arguments on brief) the legal question of whether an ESP v. MRO analysis under R.C. 4928.143 “could” consider qualitative benefits. Tr. Vol. III, at 34-36; NOPEC Reply Supp. at 3-5.

B. PROPOSITION OF LAW NO. 3: EVEN IF THE COMMISSION COULD CONSIDER QUALITATIVE FACTORS IN DETERMINING WHETHER AN ESP IS MORE FAVORABLE IN THE AGGREGATE THAN AN MRO, IT IS UNLAWFUL TO CONSIDER QUALITATIVE FACTORS THAT FALL OUTSIDE OF THE PROVISIONS OF R.C. 4928.143 (B)(1) AND (2).

In its merit brief, NOPEC showed that, even if the Commission could consider qualitative factors in determining whether an ESP is more favorable in the aggregate than an MRO, it would be unlawful for the Commission to consider qualitative factors that fall outside of the provisions of R.C. 4928.143(B)(1) and (2). NOPEC Merit Br. at 15. The Commission found that six provisions of the ESP constituted qualitative benefits that made the ESP qualitatively more favorable than the MRO. *See Id.*; Order at 55, NOPEC Appx. at 66.

The Company completely ignores NOPEC’s legal argument. Instead, the Company portrays this issue as a factual one and attempts to explain the benefits of the qualitative factors.

considering the “price” of generation at issue, but also the nine enumerated “cost” factors enumerated in R.C. 4928.143(B)(2), as more fully discussed in *CSP II*.

In doing so, the Company (like the Commission in its order and on brief)⁷ muddles the ESP v. MRO test (which does not consider qualitative factors) with the Commission's standard for approving partial stipulations, under which qualitative factors are considered in determining whether the partial stipulation "benefit[s] ratepayers and the public interest." *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). NOPEC has not raised the public interest issue under the stipulation, and the Court need not reach its merits.

Unlike the Company, the Commission attempts to argue that the qualitative factors the Commission considered fall within R.C. 4928.143(B); however, it attempts to offer support for only two of the six factors, and even those attempts fail. Commission Merit Br. at 20. As to the first factor, the Commission argues that the modification of the *ESP 2 Case* bid schedule goes to "price" and is permitted under R.C.4928.143(B)(1). However, R.C.4928.143(B)(1) permits the Commission to consider only the price being set for the two-year (2014-2016) *ESP 3 Case*. As NOPEC explained in its merit brief at 23, the Commission did consider the "price" that would be obtained under the two-year bid schedule presented in this *ESP 3 Case*. Because the price was being set by a competitive bid process for the ESP, as well as the MRO, the Commission concluded that the "price" of energy supply would be the same for both, and its quantitative analysis properly ended.

In its merit brief, the Commission is attempting to make a very different (and incorrect) *qualitative* analysis by comparing the results of the competitive bid process in this *ESP 3 Case* with that in the prior *ESP 2 Case*. The limiting provisions in R.C. 4928.143(B)(1) and (2) do not provide for this analysis. Indeed, the proper analysis is whether this ESP is more favorable than an MRO -- not a prior ESP. R.C. 4928.143(C)(1).

⁷ See Order at 55-56, NOPEC Supp. at 66-67; Commission Merit Br. at 19 (describing how the qualitative factors comport with the state policy guidelines in R.C. 4928.02).

As to the second factor, the Commission overreaches to claim that the distribution rate case freeze is a qualitative benefit recognized under R.C. 4928.143(B)(2)(h). The Commission confusingly contends that:

The [Delivery Capital Recovery] DCR mechanism pays the utility for investment in new plant and therefore the existence of the distribution rate case increase “stay out” provision is important to assure that the customers’ and utility’s interests are aligned...[Commission Merit Br. at 20.]

Although its language is confused, the Commission apparently is saying that because the DCR mechanism requires customers to make accelerated payments to the utility for certain distribution infrastructure costs as a part of the ESP under R.C. 4928.143(B)(2)(h), the utility will not initiate a rate case to recover those same expenses from customers under the traditional distribution ratemaking statutes, R.C. 4909.15. However, the utility is precluded from recovering these costs in a rate case in any event because to do so would constitute double recovery, which is unlawful. The rate freeze provides no benefit in this context. To the extent that appellees contend that a rate case could recover more than the infrastructure costs recovered under R.C. 4928.143(B)(2)(h) and, thus, that there is a benefit to consumers of not recovering those costs during the ESP, the limiting language of R.C. 4928.143(B)(2)(h) simply does not provide for the inclusion of these other traditional rate case costs in an ESP case. *CSP II*, at ¶ 35.

C. **PROPOSITION OF LAW NO. 4: AN ORDER OF THE PUBLIC UTILITIES COMMISSION OF OHIO IS UNLAWFUL IF IT APPROVES AN ESP THAT IS QUANTITATIVELY LESS FAVORABLE THAN THE EXPECTED RESULTS OF THE MARKET RATE OPTION PRICE DETERMINED UNDER R.C. 4928.142.**

1. **It is Unlawful to Include Distribution Costs as a Part of an MRO’s Generation Costs. R.C. 4928.142.**

In its merit brief, NOPEC explained that it was unlawful for the Commission to include \$405 million in costs for a hypothetical distribution rate case in the calculation of the MRO price, because the MRO price is determined solely by a competitive bid process for electric

supply (generation) service. R.C. 4928.142. The Commission does not directly address this issue on brief; rather, it attempts to finesse it, as it did in its Order (Order at 56, NOPEC Supp. at 67), by claiming that the Commission did not “add” distribution costs to the MRO, but rather “removed” the DCR’s infrastructure costs from the ESP.⁸ Commission Merit Br. at 18. The Commission’s position is without merit. Because the ESP contains distribution infrastructure costs to be recovered under R.C. 4928.143(B)(2)(h) through the DCR mechanism, the Commission is statutorily required to quantify them. The only way to consider the DCR cost to be a “wash,” as the Commission did in its Order (as explained subsequently), is also to include the hypothetical rate case costs in the MRO price, which is unlawful under R.C. 4928.142.

For its part, the Company argues that the language in R.C. 4928.143(C)(1) that requires the Commission to compare the proposed ESP to the “*expected results* that would otherwise apply under section 4928.142,” permits the Commission also to consider hypothetical distribution rate increases as a part of the MRO determination. (Emphasis supplied.) However, R.C. 4928.142(A) requires the Commission to “establish a standard service price for retail electric *generation* service.” (Emphasis added.) Nowhere does the statute mention the inclusion of distribution costs in the price of the MRO. Contrary to the Company’s assertions, the “expected results” language of R.C. 4928.143(C)(1) merely recognizes that, in conducting the ESP v. MRO test, the Commission will not actually conduct a competitive bid process through the solicitation of bids from various electric suppliers to determine an MRO price. Instead, it must determine through its own studies or those of the parties, what the “expected results” of the

⁸ Contrary to the Company’s assertion, NOPEC raised this issue on rehearing and throughout this proceeding. See NOPEC Commission Reply Brief at 11, NOPEC Reply Supp. at 7; NOPEC Application for Rehearing at 6, fn. 11, NOPEC Appx. at 123 (“Furthermore, the statutory ESP v. MRO analysis nowhere provides for quantitative provisions to be removed from the calculation simply because they might constitute a “wash” at some point in the future.”).

competitive bid process under R.C. 4928.142(A) and (B) would be if actually held.⁹

2. **Even if Distribution Costs Could be Included in the MRO's Generation Costs, the Record Does Not Support that the Revenues to be Collected Under Rider DCR and the Distribution Rate Case Would be a "Wash."**

Appellees do not dispute that the signatory parties to the partial stipulation erred by including in the ESP the \$293.7 million in Regional Transmission Expansion and Planning ("RTEP") costs already authorized in the previous *ESP 2 Case*. Nor do they dispute that the Commission appropriately excluded these costs from the *ESP 3 Case*. If the Court concludes that distribution costs can be included in the MRO price, contrary to the preceding discussion, the quantitative analysis required by R.C. 4928.143(C)(1) focuses on whether the hypothetical distribution rate case costs included in the MRO calculation and the DCR costs included in the ESP calculation are essentially a "wash," as appellees contend.

Appellees frame the issue as a purely factual one, and ask the Court to consider it under its more deferential standard of review for questions of fact. However, as explained in NOPEC's merit brief, the issue also presents issues of law, the first of which is the recognized "timing" issue. Company witness Ridmann admitted that the purpose of R.C. 4928.143(B)(2)(h) was to permit utilities to recover infrastructure investments sooner than they otherwise would be able to if they were required to recover the investments in a rate case under R.C. 4909.15. Indeed, the appellees do not contest that during the two-year term of this ESP 3 (June 2014 through May 2016), consumers will pay \$29 million more for the ESP than the MRO because of this timing difference. Company Ex. 3 at 18, NOPEC Supp. at 111. As explained previously, in conducting the ESP v. MRO test, the Commission must compare the aggregated costs of the two-year ESP

⁹ R.C. 4928.142(D) and (E) do not apply because the Company does not own generating facilities.

(including the DCR costs contained in R.C. 4928.143(B)(2)(h)) with the results that would be expected if a competitive bid process were undertaken to obtain generation service under an MRO for the two-year term. The statutes thus limit the Commission's inquiry to the costs that fall within the two-year term of the ESP. By considering recovery of costs that extend beyond the ESP's term, the Commission violated R.C. 4928.142 and 4928.143(B)(1), (B)(2) and (C)(1).

The Company attempts to oversimplify the issue by asserting that logic dictates that distribution costs recovered under the DCR also could be recovered under a traditional distribution rate case. Company Merit Br. at 24. The Company's position simply ignores the central timing issue. Moreover, even Staff witness Fortney testified that he did not believe that recovery would be the same under the DCR and a traditional rate case. Tr. Vol. II at 266; NOPEC Supp. at 200. For this reason, the Commission adopted its staff's "wash" argument and found that the costs recovered under either method would be "substantially equal." Order at 56, NOPEC Appx. at 67. In doing so, the Commission violated the "more favorable" standard contained in R.C. 4928.143(C)(1). The Company asserts that the "more favorable" standard applies only to the final comparison of the aggregated ESP cost to the MRO cost, and not their component parts. Company Merit Br. at 24. The Company's argument is without merit. Clearly, to maintain the integrity of the "more favorable" standard, its component parts must be quantified for the term of the ESP. The Company's position would set a dangerous precedent and place us on the slippery of ignoring the differential between other component parts, e.g. the generation price for an ESP under R.C. 4928.143(B)(1) and the MRO price under R.C. 4928.142.

Finally, in addition to the legal infirmities discussed above, the Commission's finding that these costs are substantially similar is without such record support as to show misapprehension, mistake, or a disregard of duty. As stated in NOPEC's merit brief, the effects

of the timing differences created by approving this DCR rider could be extended indeterminately. NOPEC Merit Br. at 28-29. For example, consider that the lag in revenue collection caused by the “date certain” under a traditional rate case is six months (R.C. 4909.15(C)). The customers would pay for 24 months of infrastructure improvements under the accelerated recovery of the ESP, but only 18 months if a traditional rate case were used to collect these costs. At the end of this current ESP, the Company could request a two-year ESP with a DCR rider, and again customers would pay for 36 months of infrastructure improvements under the ESP versus 30 months under the traditional rate case. Such ESPs could continue indefinitely. There is no evidence of record that ESPs or the DCRs included therein will ever end. Thus, the Commission’s decision that the cost recovery under either method is a wash is speculative at best. Indeed, the Commission’s intended criticism of NOPEC’s position actually supports it. The Commission states that, “All components of the ESP approved in the case below end with the plan. What happens after the current ESP ends is unknown and unknowable now.” Commission Merit Br. at 17, fn. 10. Thus, the Commission agrees that the infrastructure cost recovery should be considered only within the 2-year term of the ESP and that costs considered thereafter – over “the long run” – would be speculative.

D. NOPEC COMPLIED WITH R.C. 4903.10 IN BRINGING THIS APPEAL.

Throughout this proceeding, NOPEC has maintained – in its written pre-filed testimony, at hearing, on rehearing and now before this Court – that R.C. 4928.143 does not provide for the consideration of qualitative benefits in determining whether an ESP is more favorable in the aggregate than an MRO. In his written pre-filed direct testimony, NOPEC witness Mark Frye testified that the proposed ESP should be rejected because it failed the quantitative analysis required by R.C. 4928.143, i.e., the ESP v. MRO test. NOPEC/NOAC Jt. Ex. 1, at 7, NOPEC Supp. at 7. He reaffirmed his testimony during redirect examination at hearing. Tr. Vol. III, at

54, NOPEC Reply Supp. at 6. Moreover, in its application for rehearing, NOPEC argued that R.C. 4928.143 does not permit the consideration of qualitative benefits and went on to argue in the alternative that if the Commission chose to consider them, the “alleged” qualitative benefits were insufficient to outweigh the quantitative analysis. NOPEC Application for Rehearing at 7, NOPEC Appx. at 124.

The Commission was well aware of NOPEC’s legal position that R.C. 4928.143 did not countenance consideration of qualitative benefits, but chose to ignore it. Instead, it relied on the cross-examination of NOPEC witness Frye, who is not an attorney, that the Commission “could approve *hypothetically* an ESP that had rates higher than market rates.” Tr. Vol. III, at 36, NOPEC Reply Supp. at 5. (emphasis supplied). Based upon this testimony, the Commission found:

As a preliminary matter, the record indicates widespread agreement with respect to the need to examine both qualitative and quantitative benefits under the ESP v. MRO Test. *** NOPEC’s witness Frye agreed that the Commission may approve an ESP under the ESP v. MRO test even if the ESP included rates higher than market rates (Tr. III at 36). [Second Entry on Rehearing at 23; NOPEC Appx. at 102.]

Ignoring the impropriety of the Commission basing a legal determination on the basis of a non-lawyer’s cross-examination,¹⁰ the Commission’s finding is important because it shows that

¹⁰ The Commission considered NOPEC witness Frye’s statement out of context. Counsel for the Company cross-examined witness Frye with the goal of eliciting testimony that an ESP may include qualitative benefits (further evidence that this issue was at play throughout this proceeding). Tr. Vol. III, at 32 – 36, NOPEC Reply Supp. at 1-5. The line of questioning was as follows:

Q. All right. And isn’t it true that you’re not testifying in this case as to whether the ESP is more favorable than an MRO?

A. I’m testifying that the quantitative test that the companies put forward fails the ESP versus MRO test. As for the other potential factors that the Commission may consider, they’re obviously welcome to do so. That’s up to them.

the Commission considered whether qualitative benefits could be considered under the ESP v. MRO test found in R.C. 4928.143. For purposes of R.C. 4903.10, this Court has found that an

Q. So let's get back to my question. So you're not testifying in this case whether the ESP is more favorable than an MRO, correct?

A. I don't know what the Commission would consider in the quantitative versus qualitative question. I'm commenting in my testimony about the quantitative aspects of it. What the Commission chooses to take into account in the quan—or the qualitative aspect of it is their decision.

Q. (By Mr. Kutik) Mr. Frye, isn't it true that you're not rendering an opinion as to whether the ESP is more favorable in the aggregate than an MRO?

A. That's correct.

Q. Now, although you've made some comments about the quantitative comparison of the ESP compared to an MRO, you're not taking a position as to whether the Commission should consider qual – qualitative aspects, correct?

A. I am not.

Q. In fact, you believe that the Commission could approve hypothetically an ESP that had rates higher than market rates, correct?

A. They could.

Tr. Vol. III, at 34-36, NOPEC Reply Supp. at 3-5. On redirect examination (Tr. III, at 54, NOPEC Reply Supp. at 7), witness Frye clarified his testimony:

Q. Mr. Frye is it your position that this particular ESP before the Commission should be rejected?

A. It is.

Q. And, more specifically, is it your position that this particular ESP proposal before the Commission should be rejected because it fails the quantitative ESP v. MRO test?

A. As I indicated on page 7, line 18 through 22 [of my pre-filed direct testimony], that's correct.

NOPEC witness Frye is an energy consultant who holds a Bachelor of Science degree in energy technology. He is not an attorney. NOPEC/NOAC Jt. Ex. 1, at 3; NOPEC Supp at 3. Considering his testimony in context, it is clear that witness Frye is testifying that, under his quantitative factual analysis, the proposed ESP fails the ESP v. MRO test. As a non-attorney, he appropriately deferred to the Commission (and to the parties' legal arguments on brief) the legal question of whether an ESP v. MRO analysis under R.C. 4928.143 could consider qualitative benefits. The Commission mischaracterized witness Frye's testimony by stating that he agreed with "the need to examine both qualitative and quantitative benefits under the ESP v. MRO test" when he only deferred to the Commission in an area outside of his expertise. Second Entry on Rehearing at 23; NOPEC App. at 102. Appellees are equally wrong to use witness Frye's out-of-context testimony for the legal proposition that the ESP v. MRO Test should include qualitative benefits. He simply was not qualified as an expert witness in law.

issue is properly raised before the Court if the appellant “challenged” a Commission finding on rehearing and the Commission addressed the issue in its entry on rehearing. *Consumers’ Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶ 34 (“*Consumers’ Counsel II*”). This record is clear that NOPEC challenged whether R.C. 4928.143 permitted the consideration of qualitative benefits not only on rehearing, but throughout this proceeding, and that the Commission addressed the issue.

Significantly, although the Commission carefully guards its jurisdiction, it has not bothered to raise the R.C. 4903.10 argument in its merit brief. Indeed, even the Company is forced to admit that NOPEC raised this issue on rehearing (Company Merit Br. at 14), and complains only that the issue was not raised with sufficient specificity. The Company relies on *In Re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, 951 N.E.2d 751 (“*CSP III*”) to support its position. *CSP III* is not on point. There, the Court held that the appellant “failed to meet its burden to identify a legal problem with the commission’s order” before the Court. *CSP III*, at ¶ 20. Of concern to the Court was that the appellant did not cite a statute upon which its argument was based, what the applicable statutory standard was, or how the order failed to abide by the standard. In this proceeding, NOPEC clearly identified the legal problem with the Commission’s order. It made clear that R.C. 4928.143 was the statutory basis of its position, that the statute countenanced only a quantitative analysis of the ESP v. MRO test, and that the Commission violated the statute by considering qualitative benefits. The Commission considered this issue and wrongly decided it, prompting this appeal. *Consumers’ Counsel II* is controlling.

Even still, the Company complains that all of the support an appellant provides for its position in its merit brief to this Court must also have been specifically provided to the

Commission on rehearing, e.g., NOPEC’s analysis of the legislative history of the statute at issue and other statutory analyses. This Court has refused to accept such a stringent test. In *Sunoco v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, the Court found that an appellant’s general assertion on rehearing – that the Commission erred in construing a contract’s most-favored nation clause – was sufficient to permit the appellant to support its position by providing further specific contractual analyses to the Court, e.g., that the Commission erred by relying on the heading of the clause when the contract prohibited the use of headings to interpret the scope and intent of any clause. That *Sunoco* permits such further analytical support is even more pertinent to appeals involving statutory construction, considering that the Court reviews legal issues *de novo*. See, e.g., *Consumers’ Counsel v. Pub. Util. Comm.*, 4 Ohio St.3d 111, 447 N.E.2d (1983) (The Court has complete and independent power of review as to questions of law, and legal issues are to be given more intense examination than factual questions.).

E. PROPOSITION OF LAW NO. 5: THE COMMISSION MAY NOT TAKE ADMINISTRATIVE NOTICE OF TESTIMONY OFFERED IN ONE PROCEEDING TO SUPPORT AN APPLICANT’S BURDEN OF GOING FORWARD WITH THE EVIDENCE AND ITS BURDEN OF PROOF IN ANOTHER PROCEEDING.

In its merit brief, NOPEC explained how the Court had retreated from *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988) (“*Allen*”) in *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 647 N.E.2d 136 (1995) (“*Canton Storage*”). Specifically, *Allen* permitted the administrative notice of the entire record in one transportation proceeding to approve the applications of various carriers in a subsequent proceeding. However, the Court retreated from that broad proposition in *Canton Storage*, in which the Commission adopted the testimony of certain applicants to support the applications of other applicants. The Court found, “This prejudiced [the complaining parties] by eliminating applicants’ need to make

a record at the commission. This was not our intent in *Allen*.” *Canton Storage*, 72 Ohio St.3d at 8. In this *ESP 3 Case*, the Commission ran afoul of *Canton Storage* by relying on the opinion testimony of witnesses in the *ESP 2 Case* to support the *ESP 3 Case* application.

Appellees attempt to distinguish *Canton Storage* on two bases. The first is the *Canton Storage* Court’s statement that the Commission “never expressly took administrative notice of any testimony below.” *Canton Storage*, 72 Ohio St.3d at 8. However, the Court clearly decided *Canton Storage* as though administrative notice were taken (“Administrative notice of the testimony in this proceeding prejudiced the [complaining parties] because the applicant’s burden of proof was reduced by this use of the testimony.”). *Id.*

Appellees also attempt to distinguish *Canton Storage* on the basis that the testimony noticed from the *ESP 2 Case* supported the *same utility’s* application in the *ESP 3 Case*. Commission Merit Br. at 24-25. Again, appellees miss the point. The point of *Canton Storage* is that each *application* must be supported by its own testimony:

...the commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction. [*Canton Storage*, 72 Ohio St.3d, at 8.]

As NOPEC explained in its merit brief, it did not have the opportunity to prepare or respond to the evidence, because it did not learn of the evidence to be noticed until after its direct case, and that of the Company, had concluded. Appellees unreasonably argue that NOPEC could have opposed the evidence in the *ESP 2 Case* to which it was a party;¹¹ however, NOPEC was a signatory party to the stipulation in the *ESP 2 Case* and the terms of the stipulation prevented it

¹¹ The Company relies on *Allen* for this proposition (Company Merit Br. at 32-34); however, *Allen* is distinguishable because the Commission in its *Allen* order admonished those applicants being granted statewide authority not to contest future applications seeking the same authority. The *Allen* applicants could have contested the Commission’s admonition on rehearing, but didn’t. NOPEC, pursuant to the stipulation in the *ESP 2 Case* was legally bound not to contest the stipulation on rehearing, even if it didn’t agree with all of its terms.

from contesting any issues with which it may not agree. NOPEC Merit Br. at 36. Moreover, the matters at issue in the *ESP 3 Case* differed from the *ESP 2 Case*, and NOPEC should have been permitted to prepare and respond to those differences, as discussed in NOPEC's merit brief (at 38) as to the administrative notice taken of Staff witness Turkenton's *ESP 2 Case* testimony.¹²

The testimony from the prior proceedings was noticed in this case to support the Company's burden of proof in the *ESP 3 Case*. As stated in NOPEC's merit brief (at 40), it is unclear the reliance the Commission placed on the noticed testimony versus that provided subject to cross examination at the ESP 3 hearing. This case should be remanded to make that determination. *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 126 N.E.2d 314 (1955). In addition, NOPEC asks this Court to adopt Ohio Evid.R. 201 for Commission proceedings, or to reaffirm its intent in *Canton Storage* that testimony from one proceeding must not be noticed to support an application in another proceeding, especially opinion testimony.

F. PROPOSITION OF LAW NO. 6: AN APPLICANT FAILS IN ITS BURDEN OF PROOF IF IT FAILS TO SHOW THAT A PARTIAL STIPULATION IS THE RESULT OF SERIOUS BARGAINING AMONG THE PARTIES.

By statute, the Commission has 275 days to issue an order after a utility files an electric security plan ("ESP") with its supporting testimony. R.C. 4928.143(C)(1); Ohio Adm. Code 4910:1-35-03(C)(1). During this interim period, the parties typically engage in negotiations. However, in this case, the Company first entered into a partial stipulation with selected parties to resolve the case. It then filed a five-page document purporting to be an application on April 13,

¹² The Commission states that Turkenton's noticed testimony from the *ESP 2 Case* is irrelevant to this proceeding as only Staff witness Fortney's testimony in the *ESP 3 Case* reflects Staff's position at hearing. Commission Merit Br. at 25. The Commission's position supports NOPEC's claim of prejudice, because Turkenton's testimony opined as to eleven benefits of the ESP, whereas Fortney's testimony listed four, and the Commission relied on some of the benefits supported by Turkenton's testimony in approving this *ESP 3 Case*.

2012 (but which merely incorporated the partial stipulation by reference) (Company Ex. 1; NOPEC Supp. at 25), supported the application with a single witness' testimony (which erroneously found the ESP to be quantitatively more favorable to an MRO by more than \$200 million (Company Ex. 3 at 16; NOPEC Supp. at 109)), requested that a hearing be held within 10 days (April 23, 2012) and that the Commission approve its application within 19 days (May 2, 2012) (Company Ex. 1 at 4; NOPEC Supp. at 28).

Problematically, in this expedited approval process, the Company, Staff and other signatory parties made a nearly \$300 million mistake by including in the partial stipulation an agreement not to collect RTEP costs. The Commission already had authorized this RTEP credit in the previous *ESP II Case*, of which the Company, Staff and signatory parties were fully aware as participants in that case. Company Ex. 1 at 25, NOPEC Supp. at 59; *see, also*, Company Ex. 3, WRR Att. 1, NOPEC Supp. at 114 (which included the RTEP credit). After the non-signatory parties protested inclusion of the RTEP credit, the Commission appropriately removed it as an ESP credit, resulting in an ESP that was less favorable than an MRO by \$7.6 million, not considering present value. *See, e.g.*, Staff Ex. 3 at 3, NOPEC Supp. at 119; NOPEC Br. at 24.

Had the Company, Staff and other signatory parties sought to have this case processed under the standard (and fair) procedure whereby a formal application was filed, complete with the Company's testimony describing the quantitative and alleged qualitative benefits of the proposed ESP, and serious bargaining ensued among all parties thereafter, the parties opposing the ESP would have informed the Company and Staff of the obvious RTEP error, as they did in their testimony in this case, and a partial stipulation would not have included this mistake. The RTEP mistake is indicative that the partial stipulation was not the result of serious bargaining.

Approval of the partial stipulation as conducted in this proceeding will set dangerous precedent which would allow utilities in future cases to (1) avoid filing a formal application in a proceeding upon which to commence negotiations, (2) first present a stipulation to prospective parties for their comment, with the utility's discretion to negotiate further with individual parties or not, (3) enter into individualized, confidential negotiations with selected parties and agree to their specialized interests, (4) ignore the interests of the broad customer class, (5) file a partial stipulation with the selected parties (rather than a formal application) to prevent objective review of the extent or seriousness of negotiations that took place, and (6) under the Commission's construction of *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, fn. 2, 661 N.E.2d 1097 (1996) and *Constellation Newenergy v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, claim that the stipulation cannot be second-guessed because members of a customer class whose specialized interests were met signed it.

III. CONCLUSION

Appellant respectfully submits that the Commission's July 18, 2012 Opinion and Order and January 30, 2013 Second Entry on Rehearing should be reversed.

Respectfully submitted,



Glenn S. Krassen (Reg. No. 0007610)
BRICKER & ECKLER LLP
1001 Lakeside Avenue, Suite 1350
Cleveland, OH 44114
Telephone: (216) 523-5405
Facsimile: (216)523-7071
gkrassen@bricker.com

Dane Stinson (Reg. No. 0019101)
Mathew W. Warnock (Reg. No. 0082368)
J. Thomas Siwo (Reg. No. 0088069)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dstinson@bricker.com
mwarnock@bricker.com
tsiwo@bricker.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Appellant Northeast Ohio Public Energy Council* was served upon the parties of record this 27th day of September 2013, via electronic transmission and regular mail.



Dane Stinson (Reg. No. 0019101)

Robert Kelter (admitted pro hac vice)
(Counsel of Record)
Justin Vickers (admitted pro hac vice)
Nick McDaniel (0089817)
ENVIRONMENTAL LAW AND POLICY
CENTER
1207 Grandview Avenue, Suite 201
Columbus, OH 43212
rkelter@elpc.org
jvickers@elpc.org
nmdaniel@elpc.com
COUNSEL FOR APPELLANT
ENVIRONMENTAL LAW AND POLICY
CENTER

Richard Michael DeWine
(Reg. No. 0009181)
Attorney General of Ohio
William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas McNamee (Reg. No. 0017352)
(Counsel of Record)
Assistant Attorneys General
PUBLIC UTILITIES COMMISSION OF
OHIO
180 East Broad Street, 6th Floor
Columbus, OH 43215
William.wright@puc.state.oh.us
Thomas.mcnamee@puc.state.oh.us
COUNSEL FOR APPELLEE, PUBLIC
UTILITIES COMMISSION OF OHIO

David A. Kutik (Reg. No. 0006418)
(Counsel of Record)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

James W. Burk (Reg. No. 0043808)
Carrie M. Dunn (Reg. No. 0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
burkj@firstenergycorp.com
cdunn@firstenergycorp.com
COUNSEL FOR INTERVENING
APPELLEES OHIO EDISON COMPANY,
THE CLEVELAND ELETRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Edison) Case No. 2013-0513
Company, The Cleveland Electric Illuminating)
Company and The Toledo Edison Company for) On Appeal from the Public Utilities
Authority to Provide for a Standard Service Offer) Commission of Ohio
Pursuant to R.C. §4928.143 in the Form of an)
Electric Security Plan.) PUCO Case No. 12-1230-EL-SSO

**APPELLANT NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S
REPLY BRIEF APPENDIX**

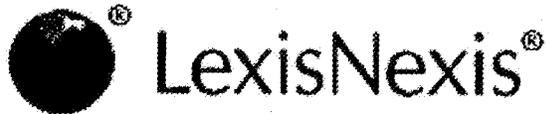
NORTHEAST OHIO PUBLIC ENERGY COUNCIL
REPLY BRIEF APPENDIX
INDEX

Page

OHIO REVISED CODE

R.C. 1.51.....001

R.C. 4903.10.....002



1 of 1 DOCUMENT

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 24, 26-37
*** Annotations current through April 22, 2013 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER I. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

[Go to the Ohio Code Archive Directory](#)

ORC Ann. 1.51 (2013)

§ 1.51. Special or local provision prevails over general; exception

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

HISTORY:

134 v H 607. Eff 1-3-72.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Applicability of RC §§ 1.41 to 1.59, RC § 1.41

Case Notes

0001



1 of 1 DOCUMENT

Page's Ohio Revised Code Annotated:
Copyright (c) 2013 by Matthew Bender & Company, Inc., a member of the LexisNexis Group.
All rights reserved.

Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 24, 26-37
*** Annotations current through April 22, 2013 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

Go to the Ohio Code Archive Directory

ORC Ann. 4903.10 (2013)

§ 4903.10. Rehearing

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing

0002

is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

HISTORY:

125 v 274 (Eff 10-2-53); 129 v 1610 (Eff 10-18-61); 147 v H 215, Eff 9-29-97.

NOTES:

Related Statutes & Rules

Ohio Rules

Notice of appeal from the Public Utilities Commission, SCtPracR II § 3.

OH Administrative Code

Applications for rehearing. *OAC 4901-1-35.*

Case Notes

ANALYSIS Affidavit of notice to parties Analyzation of evidentiary record by commission or examiner Applicability

0003

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Edison) Case No. 2013-0513
Company, The Cleveland Electric Illuminating)
Company and The Toledo Edison Company for) On Appeal from the Public Utilities
Authority to Provide for a Standard Service Offer) Commission of Ohio
Pursuant to R.C. §4928.143 in the Form of an)
Electric Security Plan.) PUCO Case No. 12-1230-EL-SSO

**APPELLANT NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S
REPLY BRIEF SUPPLEMENT**

NORTHEAST OHIO PUBLIC ENERGY COUNCIL
REPLY BRIEF APPENDIX
INDEX

Page

*In the Matter of the Application of Ohio Edison Company,
The Cleveland Electric Illuminating Company, and The Toledo
Edison Company for Authority to Provide for a Standard Service
Offer Pursuant to R.C. 4928.143 in the Form of an Electric
Security Plan, PUCO Case Nos. 12-1230-EL-SSO,
Hearing Transcript Volume III, pages 32-36 and 54 (June 6, 2012) 001*

*In the Matter of the Application of Ohio Edison Company,
The Cleveland Electric Illuminating Company, and The Toledo
Edison Company for Authority to Provide for a Standard Service
Offer Pursuant to R.C. 4928.143 in the Form of an Electric
Security Plan, PUCO Case Nos. 12-1230-EL-SSO,
Northeast Ohio Public Energy Council Reply Brief, page 11
(Hearing Transcript Volume III, pages 32-36 and 54 (June 29, 2012) 006*

1 testifying about that, or you didn't believe you
2 testified about that, in the 11-346 case?

3 A. My testimony in the 11-346 case does
4 include some conversation about the aggregate test of
5 an ESP versus an MRO.

6 Q. All right. Well, in this case you're not
7 testifying about whether the Commission should or
8 should not approve the ESP, correct?

9 A. My testimony in this case revolves around
10 the fact that the quantitative test that FirstEnergy
11 put forward includes RTEP charges, and when you
12 exclude those RTEP charges, the quantitative test for
13 an ESP versus an MRO has failed, and, therefore,
14 because it fails, I was pointing out to the
15 Commission that that failure was, in fact, there and
16 that that should be taken under consideration when
17 they're evaluating the ESP.

18 Q. Now, let's get to my question.

19 A. Fair enough.

20 Q. Which is, you're not testifying on the
21 subject of whether or not the Commission should adopt
22 or approve the ESP, correct?

23 A. I believe my testimony indicates that on
24 page 7, lines 16 through 22 -- or my answers on line
25 18 through 22 talks about the fact the ESP fails the

1 quantitative test, as I just mentioned, and doesn't
2 provide sufficient benefits to residential and small
3 business consumers.

4 MR. KUTIK: Your Honor, I move to strike
5 as nonresponsive.

6 EXAMINER WILLEY: Do you have a response,
7 Mr. Warnock?

8 MR. WARNOCK: I think he is explaining
9 his answer. The question was about the test, and he
10 is explaining ---

11 MR. KUTIK: No. My question was about
12 whether or not the Commission should approve the ESP
13 as proposed.

14 MR. WARNOCK: I think that's up to the
15 Commission, not up to the witness.

16 EXAMINER WILLEY: I am going to deny your
17 motion to strike. I am going to give the witness
18 some leeway in providing a full answer.

19 But, Mr. Frye, I would like you to please
20 listen carefully to counsel's question and answer
21 that question rather than elaborating.

22 THE WITNESS: Yes, your Honor.

23 Q. (By Mr. Kutik) Let's try it again. Isn't
24 it true you are not testifying in this case, not
25 rendering an opinion as to whether the Commission

1 should or should not approve the ESP?

2 A. The Commission can approve it or not
3 approve it.

4 Q. That's not my question.

5 A. The test -- would you let me finish,
6 Mr. Kutik?

7 Q. Please, go ahead.

8 A. I'm not testifying whether or not the ESP
9 should be necessarily approved by the Commission.
10 The Commission has the ability to do that if they so
11 choose.

12 Q. So you're not rendering an opinion as to
13 whether the Commission should or should not approve
14 the ESP, correct?

15 A. My opinion is rendered in my testimony
16 that the quantitative test has failed in the ESP III
17 case.

18 Q. Again, you are not rendering an opinion
19 as to whether the Commission shouldn't approve the
20 ESP?

21 A. No, I am not.

22 Q. All right. And isn't it true that you're
23 not testifying in this case as to whether the ESP is
24 more favorable than an MRO?

25 A. I'm testifying that the quantitative test

1 that the companies put forward fails the ESP versus
2 the MRO test. As for the other potential factors
3 that the Commission may consider, they're obviously
4 welcome to do so. That's up to them.

5 Q. So let's get back to my question. So
6 you're not testifying in this case whether the ESP is
7 more favorable than an MRO, correct?

8 A. I don't know what the Commission would
9 consider in the quantitative versus the qualitative
10 question. I'm commenting in my testimony about the
11 quantitative aspects of it. What the Commission
12 chooses to take into account in the quan -- or the
13 qualitative aspect of it is their decision.

14 EXAMINER WILLEY: Mr. Frye, sorry to
15 interrupt you. I just want to tell you again, I
16 would like you to please listen carefully to
17 counsel's question and directly answer that question.
18 You know, I will give you some leeway as far as
19 giving a full reply, but I wouldn't like you to
20 elaborate so far beyond the question that was asked.

21 THE WITNESS: Yes, your Honor. I'll try
22 to do better.

23 EXAMINER WILLEY: Thank you.

24 Q. (By Mr. Kutik) Mr. Frye, isn't it true
25 that you're not rendering an opinion as to whether

1 the ESP is more favorable in the aggregate than an
2 MRO?

3 A. That's correct.

4 Q. Now, although you've made some comments
5 about the quantitative comparison of the ESP compared
6 to an MRO, you're not taking a position as to whether
7 the Commission should consider qual -- qualitative
8 aspects, correct?

9 A. I am not.

10 Q. In fact, you believe that the Commission
11 could approve hypothetically an ESP that had rates
12 higher than market rates, correct?

13 A. They could.

14 Q. And you also believe that if the
15 Commission approved an ESP that included rates below
16 market rates, that that would be anti-competitive?

17 A. It may.

18 Q. With regard to the DCR and your comments
19 about the DCR and how that should be handled in the
20 quantitative aspect of the ESP versus MRO test, you
21 believe that the DCR should be included and
22 considered as part of the ESP side of the ESP versus
23 MRO test, correct?

24 A. To the extent the companies included that
25 in their test, yes.

1 By Mr. Warnock:

2 Q. Mr. Frye, is it your position that this
3 particular ESP before the Commission should be
4 rejected?

5 A. It is.

6 Q. And, more specifically, is it your
7 position that this particular ESP proposal before the
8 Commission should be rejected because it fails the
9 quantitative ESP versus MRO test?

10 A. As I indicated on page 7, lines 18
11 through 22, that's correct.

12 Q. Mr. Frye, do you remember the questions
13 from counsel for the companies relating to rider DCR
14 and the \$45 million proposed increase?

15 A. Yes.

16 Q. Can you please explain that and relate it
17 to rider DCR as -- as approved as part of the ESP II
18 case?

19 A. It's my understanding that the current
20 ESP DCR has various caps for recovery that the
21 companies can recover that expand by \$15 million a
22 year and that the companies are proposing to keep
23 going with the rider DCR with incremental \$15 million
24 a year increases. That's where the \$45 million --
25 15 million in the first year incrementally compared to

Within this two year time frame, it is apparent that Rider DCR is not a “wash” when compared to the results of an expected distribution rate case. Further, the statutory ESP vs. MRO analysis nowhere provides for quantitative provisions to be removed from the calculation simply because they might constitute a “wash” at some point in the future. In reality, Rider DCR provides FirstEnergy with up to a \$405 million distribution revenue windfall in 2015 and 2016 highlighting FirstEnergy’s failure to satisfy the quantitative ESP vs. MRO analysis.

Second, and ignored by FirstEnergy, is the fact that a “distribution rate case would afford all parties and the PUCO an extensive period to review any rate increase request. . . the consideration of expert testimony, and the presentation of arguments by all affected persons to assure that the resulting distribution rates approved by the Commission are just and reasonable.”³⁰ Mr. Fortney also explained that distribution rate cases are “what the Commission staff, especially the utility department of the Commission staff, does best.”³¹ Dumping distribution-related investments into Rider DCR defeats the traditional distribution rate case protections established under Ohio law that provide regulatory oversight over the propriety of FirstEnergy’s distribution-related investments. These protections involve a formal investigation conducted by Staff resulting in a written Staff report, establishment of a date certain, and allowing the Commission to determine an appropriate rate of return on the permitted distribution investments.

³⁰ *Id.*, p. 52.

³¹ Tr. Vol II, p. 265.