

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Commission Review of)	Supreme Court Case Nos. <u>2012-2098</u>
the Capacity Charges of Ohio Power)	2013-0228
Company and Columbus Southern Power)	
Company.)	Appeal from the Public Utilities
)	Commission of Ohio
)	
)	Case No. 10-2929-EL-UNC

**THIRD MERIT BRIEF
OF APPELLANT/CROSS-APPELLEE
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I. INTRODUCTION

In this proceeding, the Court must decide whether the Public Utilities Commission of Ohio (“PUCO” or “Commission”) had authority, under R.C. 4905.26, to establish a new rate for customers to pay for capacity in the Ohio Power Company (“Ohio Power” or “Utility) Capacity Case.¹ Additionally, the Court must determine whether the PUCO has authority under Ohio law to permit a utility to charge customers twice for capacity. The answer to both of these inquiries should be no. The PUCO did not have jurisdiction to set a new rate for Ohio Power’s capacity because it failed to follow the statute. And the law does not authorize the PUCO to allow utilities to charge customers twice for capacity. Accordingly, the Court should reverse the PUCO.

Capacity charges represent the costs to a utility for making its generation units available to provide electric service. In the case below, the PUCO determined that Ohio Power would charge Marketers² a discounted wholesale rate for capacity. (OCC Appx. 31). Then, the PUCO authorized Ohio Power, for accounting purposes, to defer the wholesale discount with the discount being collected later from Ohio Power’s customers. Under this approach, Ohio Power is to be reimbursed for the wholesale discount given to Marketers. (OCC Appx. 31).

This accounting authorization was the prelude to significant retail rate increases to third parties, other than the Marketers. 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

¹ Pub. Util. Comm. No. 10-2929-EL-UNC.

² In Ohio, Marketers are entities that may vie to sell retail electric 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. But for purposes of clarity, OCC will refer to CRES providers as “Marketers.”

pay for the capacity discount would be the retail customers of Ohio Power.³ (OCC Appx. 271). Indeed, parties in the Ohio Power Electric Security Plan II proceeding (Case No. 11-346-EL-SSO, et al.) have estimated that the wholesale discount customers will pay may be as great as \$725 million to \$800 million, before considering the large expense of the financing charges that the PUCO also permitted Ohio Power to amass.⁴

The PUCO and Ohio Power contend that *all* customers (both shopping and non-shopping) should pay the wholesale discount (the difference between the discounted price Marketers will pay and Ohio Power's costs) because *all* customers benefit from the opportunity to shop for generation service, not just those who actually shop. (Ohio Power Br. at 33-34; PUCO Br. at 39-40). But this argument is contrary to Ohio law. Specifically, R.C. 4928.02(A) requires that "non-discriminatory" and "reasonably priced retail electric service" be available to consumers. And R.C. 4928.141 mandates that a utility is to provide retail electric service on a "comparable and non-discriminatory basis."⁵ The PUCO's actions violate both statutes because there will be a wholesale discount to Marketers. And that Marketer-discount will be later collected from retail customers. The result will be hundreds of millions of dollars added to

³ The Electric Security Plan II 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.

⁴ Ohio Power is authorized to defer for future recovery the difference between \$188.88/IYIW-D and the PJM RPM prices for the period, which are: \$20.01/IVIW-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 (\$188.88/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 OCC raised these arguments in OCC Proposition of Law No. 2 (OCC Br. at 19-20).

customers' bills. This is especially perplexing given that customers should be benefitting from current low capacity market prices, not charged double for alleged reasons of competition.

The PUCO contends that the wholesale discount to Marketers ordered by the PUCO in the Ohio Power Capacity Case will "satisfy Ohio's policy goals." (PUCO Br. at 38). The PUCO further argues that it is reasonable for all customers, whether they shop or not, to fund the Marketer-discount because "all customers are benefitting from the associated capacity." (PUCO Br. at 39). But this rationale defeats the purpose of Senate Bill 221, which is to promote customer choice toward ensuring reasonably price retail electric service. Requiring customers to pay twice for capacity does the opposite. Non-shopping customers already pay for capacity; it is embedded in the Ohio Power generation rate they pay ("standard service offer"). (OCC Supp. 33). Having these customers pay a second time for capacity is unlawful. The PUCO's decision may force customers to shop, but that was not the intent of the customer choice provisions of Senate Bill 221. Rather, Senate Bill 221 has always been about allowing, not forcing, customer choice. Thus, the decision below turns the purpose of Senate Bill 221 on its head.

The PUCO's Opinion and Order and Rehearing Entries implementing and upholding the Opinion and Order in Case No. 10-2929-EL-SSO are unlawful and unreasonable. This Court should reverse the PUCO's decisions. Ohio's electric competition law does not allow the PUCO to require customers to pay for wholesale capacity discounts to support Marketers, especially when customers choose not to receive service from such Marketers.

II. ARGUMENT

A. The PUCO's Decision is Unlawful Because It Violated The Procedural Requirements Under R.C 4905.26 That Protect Participants (Including Customers) In Complaint Proceedings.

Under R.C 4905.26, 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. The PUCO did not meet these requirements. Thus, it had no jurisdiction to set a discounted wholesale capacity rate for Marketers. Neither did it have the jurisdiction to defer the discount for later collection from third parties.

In Proposition of Law No. 1 in OCC's First Merit Brief, OCC argued that the PUCO failed to follow the procedural requirements of R.C. 4905.26. (OCC Br. at 13-19). First, under R.C. 4905.26, the PUCO is required to find "reasonable grounds" for a complaint *before* holding a hearing. But the PUCO failed to establish that reasonable grounds existed for a complaint in this proceeding until *after* its Order and on its Second Entry on Rehearing. (OCC Appx. 98-99). Second, the PUCO failed to find that market-based capacity rates are, or will be, "unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law."⁶

In response to OCC's arguments, both the PUCO and Ohio Power (collectively "Appellees") assert in their Merit Briefs that the Commission properly exercised its authority under R.C. 4905.26. Ohio Power contends that the PUCO is not required to follow the precise procedural requirements set forth in the statute, and that the PUCO properly found reasonable grounds existed to initiate and pursue its investigation. (Ohio Power Br. at 19-20). The PUCO

⁶ R.C. 4905.26.

also argues that it had reasonable grounds to investigate and establish a new rate under R.C. 4905.26. (PUCO Br. at 9). But Appellees' arguments are unpersuasive because they fail to acknowledge that R.C. 4905.26 has specific requirements that were not followed by the PUCO.

Although the PUCO may initiate a complaint case, before doing so it must find that the existing rate is unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law. Only after such a finding can the Commission fix a time for hearing and prescribe public notification requirements. The PUCO has acknowledged that reasonable grounds for the complaint must be found: "R.C. 4905.26 requires that reasonable grounds for complaint be stated. ***This prerequisite should apply whether the Commission begins such a proceeding on its own initiative or on the complaint of another party." *In the Matter of the Investigation of The East Ohio Gas Company Relative to its Compliance with Natural Gas Pipeline Safety Standards and Related Matters*, 1987 Ohio PUC LEXIS 60 (1987). Despite this procedural requirement, there was no such finding by the PUCO in the Ohio Power Capacity Case. This is not an overly restrictive reading of the statute as Ohio Power contends (Ohio Power. Br. at 19); rather, this is a reiteration of the words that are in the statute.⁷

The PUCO did not make a finding of "reasonable grounds for a complaint" until after its October 17, 2012 Entry on Rehearing. (OCC Appx. 180). The Entry on Rehearing came three months after the Ohio Power Capacity Case was initiated. It came after an evidentiary hearing was held. It came after briefs were filed. It came after the Opinion and Order was issued. Only in its Second Entry on Rehearing did the PUCO find authority under R.C. 4905.26 to justify its actions. (OCC Appx. 98-99). In this regard, the PUCO failed to meet the statutory requirements.

⁷ Per R.C. 1.42 and 1.47(B), the plain language of a statute must control.

The statute, which allows the PUCO to change rates, requires that the PUCO must find that an existing rate is unjust and unreasonable. The PUCO must also find that there were reasonable grounds for the complaint *before* conducting a hearing.⁸ Thus, the reasonable grounds must have been stated in the PUCO's initial entry opening the investigation in the Ohio Power Capacity Case.

But an examination of that Entry shows that no reasonable grounds were stated. 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." (OCC Supp. 32). No amount of revision, clarification or back-tracking by the PUCO will cure this defect.

Ohio Power points to the PUCO's December 12, 2012, Entry on Rehearing to support its argument that the PUCO found "reasonable grounds" for a complaint. (Ohio Power Br. at 20.) In that Entry the PUCO stated: "[w]e believe that the Initial Entry provided sufficient indication of the Commission's finding of reasonable grounds for a complaint that AEP-Ohio's capacity charge may be unjust and unreasonable." (OCC Appx. 184). But the PUCO did not indicate where in the Initial Entry the reasonable grounds were actually stated. If the procedural requirements under R.C. 4905.26 were actually followed, it should be clear from reviewing the PUCO's Initial Entry that the PUCO was invoking its authority under R.C. 4905.26 to investigate the case. It is not.

This Court has held that reasonable grounds for the complaint must be found before the hearing commences. Specifically, this Court has held that "R.C. 4905.26 requires that

⁸ R.C. 4905.26.

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 Utilities Co. v. Public Utilities Com.*, 58 Ohio St.2d 153, 164, 389 N.E.2d 483 (1979) (Emphasis added). Notably, if the Court finds that the PUCO failed to state reasonable grounds for a complaint in its Initial Entry, then the Court must also find that the PUCO did not have jurisdiction to set the Ohio Power capacity rate.

There are other errors as well. In order to change existing rates, the PUCO must find that the existing rate complained of *is* unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law.⁹ But the PUCO did not make such a finding. Instead, the PUCO found that a state compensation mechanism (for capacity) “based on [PJM market-based] pricing could risk an unjust and unreasonable result for [Ohio Power].” (OCC Appx. 107). Thus, there was no conclusive finding that market-based capacity prices **are** unjust or unreasonable. And, throughout the history of the Ohio Power Capacity Case, the PUCO never alleged that rates, set in accordance with PJM’s market-based capacity pricing, are unjust, unduly discriminatory or preferential, or otherwise in violation of the law. In fact, in its Initial Entry opening the investigation in this case, the PUCO expressly approved the use of market-based pricing as the state compensation mechanism (for capacity). (OCC Supp. 2).

Ohio Power cites to *Ohio Consumers’ Counsel*, 2006-Ohio-4706, ¶ 29, citing *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 686 N.E.2d 501 (1997) to support its argument that OCC’s Proposition of Law No. 1 is overly restrictive. (Ohio Power Br. at 24-25.)

⁹ R.C. 4905.26.

But in *Ohio Consumers' Counsel*, the Court acknowledged that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding without compelling the affected utility to apply for a rate increase under R.C. 4909.18. *Id.* at 400. This is a different point entirely than what OCC is arguing in this appeal. OCC is not arguing that the PUCO could not have investigated Ohio Power's alleged costs for capacity under R.C. 4905.26. Rather, OCC is arguing that under R.C. 4905.26, 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 stated, and there is a finding that the rates charged are unjust and unreasonable. The PUCO did not satisfy these requirements.

Ohio Power also cites to *Allnet Communication Services, Inc. v. Public Utilities Com.*, 32 Ohio St. 3d 115, 512 N.E.2d 350 (1987) to support its argument against OCC's appeal. But in *Allnet Communications* the Court held that "R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO." *Id.* at 117. Again, OCC is not arguing what types of matters may be reviewed by the PUCO under R.C. 4905.26 for purposes of this appeal. Rather, OCC is arguing that the procedural requirements under R.C. 4905.26 were not followed in this case. Neither Ohio Power nor the PUCO cited to any authority refuting OCC's position.

The PUCO correctly points out that the Court has held that the Commission has considerable authority under R.C. 4905.26 to initiate proceedings and to investigate the reasonableness of any rate of charge (PUCO Br. at 9). But OCC's argument is not disputing that assertion. Therefore, the PUCO's argument against OCC Proposition of Law No. 1 is not instructive to the Court.

The PUCO failed to state that reasonable grounds for a complaint existed, and the PUCO failed to determine that Ohio Power's existing capacity prices, based on PJM market-based pricing, were unjust or unreasonable. Accordingly, the PUCO had no jurisdiction to establish a wholesale capacity rate for the Utility to charge Marketers. And, the PUCO had no jurisdiction to allow the Utility to defer a wholesale discount given to Marketers for future collection from the Utility's retail customers. For these reasons, the Court should find that the PUCO did not have authority under R.C. 4905.26 to cause customers to pay twice for capacity service.

B. OCC Proposition of Law No. 2 Is Proper For The Court's Determination in This Appeal Because This Court Has Held That A Party May Argue That Harm To Customers Resulted From An Unlawful and Unreasonable PUCO Accounting Order.

On August 14, 2013, the PUCO and Ohio Power filed a Motion, arguing that OCC's Proposition of Law No. 2 should be dismissed. Under that OCC proposition of law, the Court would decide whether Ohio law (R.C. 4928.141 and R.C. 4928.02(A)) is violated when a utility is permitted to defer the difference between its costs of capacity and the wholesale discounted rate it charges Marketers. (OCC First Merit Brief Case No. 2013-288 at 19). The Appellees reassert the same arguments against OCC Proposition of Law No. 2 in their Merit Briefs. (PUCO Br. at 36, Ohio Power Br. at 30). Appellees contend that the Ohio Power Capacity Case Order did not address the deferral recovery mechanism, and thus, OCC's Proposition of Law No. 2 is not appropriate for this appeal. (PUCO Br. at 36, Ohio Power Br. at 30). Appellees contend that the "proper vehicle" for OCC Proposition of Law No. 2 is the appeal of the Ohio Power Electric Security Plan II case (Ohio Supreme Court Docket No. 2013-521). (PUCO Br. at 36, Ohio Power Br. at 30). But Appellees are wrong.

First, this Court is not precluded from deciding in this proceeding whether Ohio law (R.C. 4928.141 and R.C. 4928.02(A)) is violated. While the PUCO and Ohio Power are correct

in asserting that the actual deferral “mechanism” was implemented in the Ohio Power Electric Security Plan II case, the PUCO in the case below authorized accounting that was the prelude¹⁰ to allowing the Utility to increase customer rates in that Ohio Power Electric Security Plan II case. Thus, OCC’s Proposition of Law No. 2 is properly raised in this appeal.

Second, 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. The Court has recognized the PUCO’s discretion under R.C. 4905.13, and 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, as OCC explained in its First Brief, the Ohio Supreme Court addressed a similar challenge to a PUCO accounting order in *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176. Specifically, in *Elyria Foundry*, the Court found that the PUCO violated R.C. 4928.02(G) when it gave the utility accounting authority to collect deferred increased fuel costs through future distribution rates. *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶¶ 50, 57. Thus, the Court has previously found accounting orders (deferrals) to be unlawful when they resulted in harm that could occur in the future.

Ohio Power contends that the *Elyria* case is not instructive in this appeal because “there was no harm to ratepayers from the accounting deferral authorization here” as there was in *Elyria*. (Ohio Power Br. at 30). But that argument is flawed. The PUCO’s approval of the

¹⁰ See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 392, 2006-Ohio-5853, 856 N.E.2d 940, where the Ohio Supreme Court acknowledged that accounting deferrals can be the prelude to rate increases for a utility’s customers.

capacity deferrals will harm customers because it will result in customers paying twice for capacity. In fact, the harm to shopping customers (i.e., paying twice for capacity) as a result of the PUCO's decision in the Ohio Power Capacity Case was acknowledged by one

Commissioner:

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 non-shopping (standard service offer) customers will be harmed because they are already paying Ohio Power for capacity through standard service offer generation rates. (OCC Supp. 33). They will pay a second time when they are charged for the discount given to Marketers. These facts support OCC's Proposition of Law No. 2, which concludes that under the PUCO's Order below customers will be harmed because they will pay twice for the same service.

Finally, the Ohio Supreme Court has found that “the fact that subsequent orders may result in more direct effects does not mean that the orders allowing accounting-procedure changes are not final.” *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶25. In *Ohio Consumers' Counsel* the Court concluded that OCC was permitted to argue on appeal that “customers have already been harmed by PUCO actions that [OCC claimed] were unreasonable or unlawful.” *Id.* Even if the Ohio Power Electric Security Plan II Order resulted in more direct effects than the decision in the Ohio Power Capacity Case, OCC is not precluded from bringing this issue before the Court in this case.

In this appeal, the PUCO's approval of the capacity deferrals (that will harm customers and will result in customers paying twice for capacity) is being challenged. This is a proper issue for the Court to decide in this case. Accordingly, the PUCO and Ohio Power's argument to dismiss OCC Proposition of Law No. 2 should be denied.

C. It is Unlawful for Standard Service Offer (Non-Shopping) Customers to Pay Twice For Capacity Because There Is No Evidence that Customers Will Benefit From Being Charged Twice For The Same Service (Capacity).

In addition to arguing that OCC Proposition of Law No. 2 should be dismissed, both Ohio Power and the PUCO argue that all customers should pay the capacity deferrals because all customers benefit from competition. (Ohio Power Br. at 33-34; PUCO Br. at 38-39). But those are empty words about competition that would have customers paying higher bills for a benefit (competition) that should instead be reducing customers' bills. Indeed, Ohio Power's customers have been waiting fourteen years, since R.C. Chapter 4928 in 1999, for the benefits of the General Assembly's intended transition to electric competition. The Ohio Power Capacity Case decision will result in retail customers paying hundreds of millions of dollars to Ohio Power above the market price of electricity. This result violates the law, is unreasonable, and is contrary to the intent of Senate Bill 221.

As explained in OCC's First Merit Brief (OCC Br. at 19-20), 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. There

is no provision in the Ohio Revised Code that permits an electric distribution utility to charge customers twice for the same service.

Under the PUCO's decision below from June 2012 to June 2013, Marketers will pay \$20/MW-day. From June 2013 to June 2014, Marketers will pay \$33/MW-day. Marketers will pay \$153/MW-day for June 2014 through June 2015. (OCC Appx. 18). All these charges to the Marketers are below what the PUCO determined to be Ohio Power's cost for the capacity (\$188.88/MW-day). (OCC Appx. 18, OCC Appx. 41). Hence, the Marketers are getting capacity from Ohio Power at a discount. They are paying less than what the PUCO found to be Ohio Power's cost. And the PUCO is requiring retail customers to reimburse Ohio Power for the discount it must provide to Marketers.

The PUCO permitted Ohio Power to defer capacity costs, based on the difference between Ohio Power's embedded capacity cost (\$188.88/MW-day) and the PJM market price charged to Marketers. (OCC Appx. 31). The amounts being "deferred" are recorded on the accounting books of Ohio Power for later collection from retail customers. The deferral (or discount to Marketers) itself was created out of the notion that paying Ohio Power the prevailing PJM market price would not reasonably compensate Ohio Power for the capacity it was providing to the Marketers. (OCC Appx. 31).

Not only does it violate the law to have customers pay twice for a service,¹¹ it is also unreasonable to have customers pay twice for capacity for the sake of competition. The PUCO contends that the discount given to Marketers should be funded by all customers because all customers benefit from the opportunity to shop afforded by market-priced capacity. (PUCO Br.

¹¹ See R.C. 4928.141 and R.C. 4928.02(A).

at 39). But this assertion is flawed. Non-shopping customers choose to receive generation service from Ohio Power rather than from a Marketer. In other words, they elect not to shop for their electric service. Charging these customers twice for capacity punishes them for their decision not to shop. If a customer elects not to shop, why should that customer be responsible for paying for the capacity discounts given to Marketers? The non-shopping customer does not cause the cost. The PUCO wants customers to pay for the “opportunity to shop,” but if customers choose not to take advantage of that opportunity, why should they be charged for it?¹²

Moreover, the PUCO’s decision in the Ohio Power Capacity Case interferes with the competitive market, as noted by one Commissioner. In her concurring and dissenting opinion, Commissioner Roberto opined that she was “not convinced on the record before [the PUCO] that competition has suffered sufficiently or will suffer sufficiently...to warrant intervention in the market.” (OCC Appx. 53). Commissioner Roberto recognized that there were other options available to the Commission, such as “shopping credits granted to consumers to promote consumer entry into the market.” (OCC Appx. 53). With more buyers in the market, in theory, more sellers could enter the market, and prices would fall. (OCC Appx. 53). But rather than incent customers to shop, the PUCO determined that all customers would pay for shopping, whether they chose to be served by a Marketer or not.

The PUCO’s decision should have been different. It should have been a decision that complied with the law. For example, if the PUCO would have implemented market-based

¹² The problem of double-payments is not limited to non-shopping customers. Shopping customers will also not benefit from the capacity discount provided to Marketers unless Marketers pass on the entire discount to customers. And the PUCO cannot force this to happen. This negative result for customers was noted by one Commissioner in her concurring and dissenting opinion. (Appx. 53).

capacity prices for Marketers, and reimbursed Ohio Power, based on market prices, then this problem would have been eliminated. Customers would not be responsible for subsidizing a wholesale discount to Marketers. But in an effort to thread a needle between what the Utility wants (revenue protection) and what Marketers want (market-based capacity prices), customers are caught in the middle. Here the middle is defined as customers paying Ohio Power hundreds of millions of dollars in deferred capacity costs in order to satisfy both the Utility and Marketers.

The PUCO stated that it had the “intention of adopting a state compensation mechanism that achieves a reasonable outcome for all stakeholders.” (OCC Appx. 23). But there is no scenario where customers paying twice is 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 outcome could not have been what the General Assembly envisioned when it enacted Senate Bill 221. A customer paying twice for capacity for competition’s sake is simply an unjust and unreasonable result.

D. There Is No Evidence that The Capacity Provided To Marketers Is Different From The Capacity that Standard Service Offer Customers Pay for In Generation Rates.

Ohio Power alleges in its Merit Brief that that the capacity it provides to its generation customers is distinct from the unbundled capacity service it provides to Marketers. (Ohio Power Br. at 33). Thus, Ohio Power is arguing that these are two distinct services, and there is no double payment. (Ohio Power Br. at 33). Ohio Power is wrong.

First, and foremost, Ohio Power provides no support for its claim. Ohio Power can provide no support because the record is devoid of any evidence that capacity service provided to non-shopping customers is a different service than capacity service provided to Marketers.

Second, Ohio Power fails to explain what the “two different services” are. Ohio Power merely makes conclusory allegations that wholesale capacity supports shopping customers and retail standard service offer capacity supports non-shopping customers. (Ohio Power Br. at 33). Essentially, Ohio Power is arguing that there is retail capacity and wholesale capacity. But Ohio Power fails to explain why customers need both. An explanation is lacking because these are not two different “services” and it is unlawful for customers to pay twice for the same service.

Standard Service Offer (non-shopping) customers are already paying Ohio Power for its capacity through standard service offer generation rates. (OCC Supp. 33). Those generation rates are designed to cover both Ohio Power’s energy and capacity charges for serving standard service offer customers. Unfortunately, these same non-shopping customers will pay a second time for “wholesale” capacity for the discount given to Marketers. But non-shopping customers will not be provided a further benefit by paying for capacity twice. So under the PUCO approved capacity deferral plan, Ohio Power’s non-shopping customers will be required to pay twice for capacity -- once, through the standard service offer rate they pay, and the second time as they pay Ohio Power for the discount given to Marketers (with interest). Ohio Power was unable to distinguish these two payments as two distinct services.

Capacity is capacity whether it is supplied (on a wholesale basis) to Marketers or supplied (on a retail basis) to non-shopping standard service offer customers. Charging customers twice for the same service is unjust and unreasonable.

III. RESPONSE TO OHIO POWER’S CROSS APPEAL

A. Ohio Power’s Takings Clause Argument Should Be Rejected.

Ohio Power contends that precluding it from recovering the difference between its cost of capacity and the auction rate would constitute a regulatory taking. (Ohio Power Br. at 47).

Specifically, Ohio Power disputes OCC's argument that the Commission 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. (Ohio Power Br. at 47). Ohio Power states "even if OCC were correct, precluding [Ohio Power] from recovering the difference would violate the U.S. Constitution's Takings Clause." (Ohio Power Br. at 48). This Court however should not be persuaded by such arguments.

First, Ohio Power overlooks the fact that OCC has consistently argued that *customers* should not have to pay the capacity deferrals because customers paying twice for capacity violates R.C. 4928.02(A) and R.C. 4928.141. However, OCC has argued that if Ohio Power is permitted to collect its costs, the cost-causers (Marketers) should pay. (See OCC Br. at 26-28). Under the principle of cost causation, costs are to be attributed to the groups or entities who cause the cost (i.e., the costs exist as a direct result of providing the service to the group or entity). The purpose of the case below was to determine the price Marketers should pay for capacity. Thus, the capacity cost deferrals were created as a direct result of providing capacity to Marketers. If the PUCO followed this cost-causation principle in its decision below, it would have eliminated the unlawful result of double-payments and subsidies by customers. It would also eliminate Ohio Power's Takings Clause argument.

Second, Ohio Power's argument fails under a Takings Clause analysis because it has failed to show that there is an unconstitutional taking if it is precluded from recovering the capacity deferrals from the Marketers, rather than customers. In addition, Ohio Power has failed to prove that being denied a portion of its costs (versus total denial) constitutes a regulatory taking.

Where a regulation deprives property of less than 100 percent of its economically viable use, a court must consider: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment backed expectations, and (3) the character of the governmental action. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978). Even by the *Penn Central* standard, there is no unconstitutional taking in this case. There cannot be a “taking” of property if Ohio Power is receiving just compensation for this property.

In its argument, Ohio Power ignores the compensation it receives for capacity. Ohio Power receives compensation for its capacity service under the rates it charges to non-shopping customers. (OCC Supp. 33). That rate, according to Ohio Power, is significantly above the compensation it would obtain at market based pricing and the \$188.88/per megawatt day price in the July 2 Order. (OCC Supp. 33). As explained *supra*, capacity charges are embedded in the rates that non-shopping, Standard Service Offer customers pay. In addition, under the Commission’s Order in the Ohio Power Capacity Case, Marketers will pay market-based prices for capacity. (OCC Appx. 31). Thus, Ohio Power will be compensated for capacity from retail non-shopping customers and Marketers even if it does not collect the capacity deferrals.

Under Schedule 8.1, Section D.8 of the Reliability Assurance Agreement a utility is not *entitled* to recover its costs. The Reliability Assurance Agreement states that a Fixed Resource Requirement Entity¹³ (like Ohio Power) may seek FERC approval of a price

¹³ 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). Fixed Resource Requirement entities (like Ohio Power) are required to submit a Capacity Plan that covers all load, whether the load is being supplied by Ohio Power or a Marketer. *Id.*

based on costs, only in the absence of a state compensation mechanism. However, it should be noted that the default price for capacity under the Reliability Assurance Agreement is a market-based price (not a cost-based price). And the PUCO found that “RPM-based capacity pricing will stimulate true competition among suppliers in AEP-Ohio’s service territory.” (OCC Appx. 31). The PUCO also determined that market-based pricing puts Marketers on a level playing field. (OCC Appx. 31). Thus, an argument where Ohio Power contends that a market-based price (that the PUCO has acknowledged complies with Ohio’s state policies) would result in a regulatory taking should fail.

Finally, the question of whether a rate is confiscatory depends on whether the rate is just and reasonable. In *Dayton Power & Light Co. v. Pub. Utilities Commission of Ohio et al.*, the Ohio Supreme Court defined the requirements of a confiscation claim to include:

The first is that * * * he who would upset the rate order * * * carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. The second precept is that a challenged rate order must be viewed in its entirety to determine whether the rates set pursuant to the order fall within “the broad zone of reasonableness.” *Dayton Power & Light Co. v. Pub. Utilities Commission of Ohio et al.*, 4 Ohio St.3d 91 at 97 (April 13, 1983).

Thus, a determination of whether a rate is just and reasonable is not dependent on the financial consequences to a utility that is authorized to charge a specific rate. In *Fed. Power Com’n. v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 88 L. Ed. 333 (1944), the U.S. Supreme Court held “It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end.” The *Hope* decision requires balancing investor and consumer interests. Rates that balance these interests are not confiscatory as long as they fall within the broad zone of reasonableness established in *Dayton*.

The Court in *Dayton* also provided that, absent explicit statutory authorization, “the Commission may not benefit the investors by guaranteeing the full return of their capital at the expense of the ratepayers.” *Id.* at 102. The Commission has also provided that simply because an Electric Distribution Utility will not receive as much revenue as it prefers does not mean confiscation exists.¹⁴ Ohio Power’s argument should be rejected.

IV. 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 below, to give Ohio customers the protection of the law against these charges. The PUCO’s rulings are unlawful and unreasonable as discussed in OCC’s First Brief and above.

The PUCO had no jurisdiction to establish a wholesale capacity rate that the Utility could charge Marketers. And, the PUCO had no jurisdiction to allow the Utility to defer the wholesale capacity discount given to the Marketers for future collection from its retail customers. The PUCO never found that Ohio Power’s existing PJM market-based capacity prices are unjust or unreasonable, nor did the PUCO find, *before going forward with the evidentiary hearing*, that reasonable grounds existed for a complaint.

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. The PUCO’s Capacity Order will cause customers to be charged twice for the same service. And these double payments are an unlawful

¹⁴ See generally *In the Matter of the Continuation of the Rate, Freeze and Extension of the Market, Development period for the Monongahela Power Company*, PUCO Case No. 04-880, Opinion and Order (December 8, 2004).

subsidy to Marketers. As a result of that PUCO decision, Ohio customers will be charged between \$725 and \$800 million dollars. This is unreasonable and defies the purpose of Senate Bill 221. The PUCO and Ohio Power failed to provide any evidence or precedent that would establish that customers should be charged twice for the same service. In addition, the PUCO and Ohio Power failed to demonstrate that customers are being charged for two separate services.

Ohio customers should not be required to subsidize the competitive capacity market. Intervention in the market, as noted by Commissioner Roberto, has not been shown to be needed. The Court should give Ohio Power's 1.2 million customers the protection of the law, as intended by the Ohio General Assembly, with the benefit of lower electric bills. Accordingly, the Court should find that the PUCO's Opinion and Order and Rehearing Entries implementing and upholding the Opinion and Order in Case No. 10-2929-EL-SSO are unlawful and unreasonable.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Merit Brief by the Office of the Ohio Consumers' Counsel was served upon the below parties via electronic transmission this 23rd day of October 2013.



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