ORIGINAL

IN THE SUPREME COURT OF OHIO

The Kroger Co., et al.,	:	Ohio Supreme Court Case No. 13-0521
Appellants,	:	Appeal from the Public Utilities Commission of Ohio
v.	:	
The Public Utilities Commission of Ohio,	:	Public Utilities Commission of Ohio Case Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, 11-350-EL-AAM
Appellee,	:	
And Ohio Power Company,	:	
Cross-Appellant.	:	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

REQUEST FOR RELIEF 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Akron & Barberton Belt Rd. Co. et al. v. Pub. Util. Comm. 165 Ohio St. 316, 319, 135 N.E.2d 400, 402 (1956) 1

In re Columbus Southern Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788 8

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, PUCO Case No. 11-346-EL-SSO. ..... *passim*

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, PUCO Case No. 10-2929-EL-UNC.... 1, 3, 4

Keco Indus. Inc. v. Cincinnati & Suburban Bell Tel. Co. (1957), 166 Ohio St. 254, 141 N.E.2d 465 10

Penn Central Transportation Co. v. Pub. Util. Comm. 35 Ohio St. 2d 97, 298 N.E. 2d 587 (1973) 1

Entries and Orders of the Public Utilities Commission of Ohio

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, PUCO Case No. 11-346-EL-SSO, Opinion & Order (August 8, 2012) 1, 2, 11

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, PUCO Case No. 11-346-EL-SSO, Entry on Rehearing (January 30, 2013) 11

In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, PUCO Case No. 10-2929-EL-UNC, Opinion & Order (July 2, 2012) 1, 3, 4

Ohio Revised Code

R.C. 4928 ..... 3, 8, 9, 10
R.C. 4928.141 8
R.C. 4928.143 ..... *passim*
R.C. 4928.144 8

INTRODUCTION

Although Appellees, the Public Utilities Commission of Ohio ("Commission" or "PUCO") and Ohio Power Company ("AEP Ohio"), attempt to obscure the big picture, the fact remains that the PUCO is now forcing retail customers in AEP Ohio's service territory to pay $144 million to fund a 35-month discount to power marketers (aka "CRES providers") on a product that those power marketers purchase from AEP Ohio at the wholesale level.[1] And the PUCO is doing so even though it lacks statutory authority to approve such a charge to retail customers. The Court should correct this error.

In order for power marketers to sell electricity to shopping customers in AEP Ohio's service territory, those power marketers must buy wholesale capacity (i.e. power plant bricks and mortar) from AEP Ohio at a PUCO-determined price. The PUCO set that price at $188.88/MW-day.[2] But to artificially "promote competition" in AEP Ohio's territory, the PUCO decreed that AEP Ohio should only charge the power marketers a discounted price for capacity for 35 months.[3] Who should ultimately pay the costs to fund that temporary discount - the power marketers or the shopping and non-shopping customers of AEP Ohio - is the question presented in this appeal.

The PUCO "is solely a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute."[4] But the Commission did just that in AEP Ohio's most recent Electric Security Plan ("ESP") case when it set aside $144 million of the newly-established Retail

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[1] Appellant Ohio Energy Group Appx. ("OEG Appx.") at 49 and 88, fn 32 (PUCO Case No. 11-346-EL-SSO *et al* ("AEP Ohio ESP Case"), Opinion & Order (August 8, 2012) at 36 and 75, fn. 32).

[2] OEG Appx. 204.

[3] OEG Appx. 194.

[4] *Akron & Barberton Belt Rd. Co. et al. v. Pub. Util. Comm.* 165 Ohio St. 316, 319, 135 N.E.2d 400, 402 (1956); *See also Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St. 2d 97, 298 N.E. 2d 587 (1973)("The Public Utilities Commission of Ohio is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.").

Stability Rider ("RSR") charge in order to fund the 35-month wholesale discount to power marketers.[5] While Appellees claim that the entire RSR charge, which will collect a total of $508 million from retail customers through May 31, 2015, is lawful pursuant to R.C. 4928.143(B)(2)(d),[6] the $144 million of the RSR charge that was set aside to fund the discount to the power marketers fails to satisfy the requirements of that statute. Specifically, that $144 million portion of the RSR charge fails to "have the effect of stabilizing or providing certainty regarding retail electric service" as required by R.C. 4928.143(B)(2)(d).

From the perspective of the utility, the $144 million portion of the RSR charge does not "have the effect of stabilizing or providing certainty regarding retail electric service" consistent with the requirements for a charge authorized pursuant to R.C. 4928.143(B)(2)(d). AEP Ohio's service would remain just as stable and certain regardless of whether the power marketers or retail customers ultimately paid the deferred costs resulting from the 35-month power marketer wholesale discount. In either case, AEP Ohio would still collect the same amount.

Likewise, from the perspective of retail customers, the $144 million portion of the RSR charge does not stabilize or provide certainty regarding their retail electric service. For non-shopping customers (some of whom are prohibited from shopping by contract or by statute, such as low-income customers taking service under the "Percentage of Income Payment Plan"), the charge merely results in an unnecessary rate increase. Non-shopping customers receive no benefit from the wholesale capacity product purchased by power marketers since it is in no way used to serve them. Nor does that charge provide certainty or stability for retail customers who do choose to shop. Rather, it merely introduces the possibility that power marketers *may* offer lower rates to

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[5] OEG Appx. 49 and 88, fn. 32.

[6] Second Merit Brief Submitted on Behalf of Appellee, The Public Utilities Commission of Ohio (October 21, 2013) ("PUCO Brief") at 38; Merit Brief and Appendix of Appellee/Cross-Appellant Ohio Power Company (October 21, 2013) ("AEP Ohio Brief") at 13.

shopping customers than they otherwise would if the power marketers were required to pay the full non-discounted $188.88/MW-day rate for the wholesale product they buy from AEP Ohio. Conversely, it is also possible that the 35-month wholesale discount will merely increase the profits of the unregulated power marketers.

The $144 million portion of the RSR charge cannot lawfully be adopted pursuant to R.C. 4928.143(B)(2)(d). Nor can it be lawfully adopted under any provision of R.C. Chapter 4928. Accordingly, the Court should eliminate that portion of the RSR charge and order a refund by AEP Ohio of the unlawful RSR charges that retail customers have already paid. The Court should also find that the Commission does not have legal authority under R.C. Chapter 4928 to allow AEP Ohio to collect any of the deferred wholesale capacity costs resulting from the power marketer discount from retail customers in the future.

ARGUMENT

I. APPELLEES FAILED TO ESTABLISH THAT THE COMMISSION HAS AUTHORITY TO REQUIRE RETAIL CUSTOMERS TO FUND A DISCOUNT ON A PRODUCT THAT POWER MARKETERS PURCHASE FROM AEP OHIO AT THE WHOLESALE LEVEL.

a. R.C. 4928.143(B)(2)(d) does not provide the Commission authority to approve a charge that forces retail customers to fund a wholesale discount on a product purchased by power marketers.

In the AEP Ohio Capacity Case,[7] the Commission determined that power marketers should be paying AEP Ohio $188.88/MW-day for the wholesale capacity product they purchase from AEP Ohio (called "FRR capacity").[8] However, the PUCO decided to grant power marketers a 35-month discount on that wholesale product and ordered AEP Ohio to charge the power marketers

[7] PUCO Case No. 10-2929-EL-UNC.
[8] OEG Appx. 204.

lower market-based rates for the FRR capacity product instead of $188.88/MW-day.[9] To protect AEP Ohio from losing money, the Commission directed AEP Ohio to defer the difference between that $188.88/MW-day rate and the discounted market rates they would charge power marketers over the 35-month period.[10] The total amount of money deferred as a result of the 35-month discount would be collected by AEP Ohio at a later date.[11] After only the first six months of the discount period, AEP Ohio had already deferred $66 million in costs necessary to provide its FRR capacity product to the power marketers.[12]

Although the Commission may have had authority to set the $188.88/MW-day price for the wholesale capacity product bought by power marketers and to order a 35-month discount on that product, the Commission does not have authority to force retail customers to fund any portion of that discount to power marketers. In particular, such a decision is far beyond the scope of the Commission's statutory authority under R.C. 4928.143 (the ESP statute).

In response to Appellant's argument that the Commission has no authority to approve a charge that forces retail customers to subsidize a wholesale discount on a product purchased by power marketers in an ESP case, both the Commission and AEP Ohio claim that the authority to do so stems from R.C. 4928.143(B)(2)(d).[13] That statute provides that an ESP may include:

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[9] OEG Appx. 194.
[10] OEG Appx. 194-95.
[11] OEG Appx. 194.
[12] AEP Ohio Securities and Exchange Commission Form 10-K for 2012 at 174.
[13] PUCO Brief at 38 ("...the inclusion of the deferral, which is justified by R.C. 4905.13, within the RSR is permissible by R.C. 4928.143 as it has the effect of providing certainty for retail electric service by allowing CRES suppliers to purchase capacity at market prices while allowing AEP Ohio to continue to offer reasonably priced electric service to customers who choose not to shop."); AEP Ohio Brief at 13 ("R.C. 4928.143(B)(2)(d) permits establishment of 'accounting or deferrals' that stabilize or provide certainty for retail electric service...It was thus appropriate for the Commission to invoke that provision when it required AEP Ohio to dedicate a portion of the RSR toward recovery of capacity cost deferrals.").

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

Appellees claim that all of AEP Ohio's recently-established $508 million RSR charge is lawful pursuant to that statutory provision. But the Court should first recognize that RSR charge collects two very different sets of costs from retail customers: 1) over $300 million in costs aimed at maintaining AEP Ohio's financial integrity so that it may continue to provide stable electric service; and 2) $144 million in deferred costs resulting from the Commission-established 35-month wholesale discount to power marketers.[14] These very different sets of costs should be considered separately for purposes of this case. While some parties to this case dispute the lawfulness of the first set of costs, Appellant takes no position on that issue. It is the latter set of costs that Appellant submits does not satisfy the requirements of R.C. 4928.143(B)(2)(d) and therefore cannot be recovered from retail customers.

As Appellees concede, a charge approved pursuant to R.C. 4928.143(B)(2)(d) must "have the effect of stabilizing or providing certainty regarding retail electric service."[15] While the portion of the RSR charge aimed at maintaining AEP Ohio's financial integrity may arguably help stabilize or provide certainty regarding retail electric service, the $144 million portion of the RSR charge set aside to fund a 35-month discount on a capacity product purchased by power marketers at the wholesale level does not satisfy this requirement. Instead, it merely increases the rates of retail electric customers in order to lower the wholesale cost of service for power marketers. The Commission itself concedes that the function of the $144 million set-aside in the RSR is to "provide [power marketers] access to capacity at market prices in order to provide competitive

[14] OEG Appx. 49 and 88, fn. 32.
[15] PUCO Brief at 19; AEP Ohio Brief at 8.

offers to AEP Ohio customers."[16] But a charge established under R.C. 4928.143(B)(2)(d) is meant to help stabilize and provide certainty regarding retail electric service. It is not meant to facilitate power marketers in making competitive offers to AEP Ohio's retail customers.

The $144 million portion of the RSR charge does nothing to stabilize or provide certainty regarding retail electric service. AEP Ohio's service would remain just as stable regardless of whether the power marketers or retail customers ultimately paid the deferred costs resulting from the 35-month power marketer discount. In either case, AEP Ohio would collect the costs it incurred in providing the FRR capacity product to power marketers. Moreover, the $144 million portion of the RSR charge does not offer stability or certainty to the rates of retail customers. Rather, it merely increases those retail rates $144 million above what they would otherwise be so that power marketers can receive a 35-month discount on a wholesale product they buy from AEP Ohio. And it forces retail customers to pay this amount even though those customers could not actually purchase the discounted wholesale FRR capacity product from AEP Ohio, even if they wanted to do so.

The $144 million portion of the RSR charge forces non-shopping customers to pay substantial sums of money to fund a wholesale discount from which they receive no benefit since they do not take service from power marketers. The non-shopping customers being forced to pay these costs include low-income customers taking service under the "Percentage of Income Payment Plan" who are prohibited from shopping for their electric service, as well as other customers prohibited from shopping by statute or contract. And even for the retail customers who can and do choose to shop for electric service, the $144 million charge does not provide stability and certainty regarding their retail service. It only provides an *opportunity* for power marketers to

[16] PUCO Brief 28.

reduce the price they offer to retail shopping customers by reducing the wholesale cost of service for those power marketers. It does not guarantee that power marketers will actually reduce their total retail price offers as a result of the 35-month discount nor does it guarantee that those marketers will provide stable electric service to shopping customers. Moreover, any reduction in the retail rates that power marketers charge to shopping customers as a result of the 35-month discount will be offset by the new $144 million portion of the RSR that all retail customers must now pay.

Appellees allege that it is reasonable for all retail customers to fund a discount on a wholesale product purchased by power marketers because customers could *conceivably* benefit if at some point they decide to take service from the power marketers.[17] While forcing retail customers to subsidize power marketers may enable those power marketers to offer lower retail rates than they otherwise would, that is not the purpose of a charge established pursuant to R.C. 4928.143(B)(2)(d). The Commission may prefer that customers shop and may sincerely believe that customers can benefit from artificially increased retail competition in AEP Ohio's territory. However, the Commission cannot exceed its statutory authority simply to achieve its desired policy objectives. Such policy-driven decision-making is far beyond the scope of R.C. 4928.143(B)(2)(d) and it is a misuse of that statute to stretch the language in the manner Appellees suggest that it should be read.

Because the Commission had no authority under R.C. 4928.143(B)(2)(d) to authorize AEP Ohio to collect $144 million from customers through the RSR in order to fund a discount on a wholesale product purchased by power marketers, that portion of the RSR charge should be

[17] PUCO Brief at 26-27; AEP Ohio Brief at 16.

eliminated and the Court should order a refund of the unlawful charges paid by retail customers to date.

b. No other provision of R.C. Chapter 4928 provides the Commission authority to collect the costs of a discount on a wholesale product purchased by power marketers from retail customers.

This Court has held that an ESP provision is not authorized by statute if it does not fit within one of the categories listed in R.C. 4928.143(B)(2).[18] As discussed above, the $144 million portion of the RSR charge designed to fund the 35-month power marketer discount fails to satisfy the requirements of R.C. 4928.143(B)(2)(d). And Appellees fail to cite any other provision of R.C. 4928.143(B)(2) that would authorize such a charge to retail customers. Because the $144 million portion of the RSR charge funding the power marketer discount fails to fit into any of the categories listed in R.C. 4928.143(B)(2), that portion of the RSR charge cannot properly be authorized in the context of an ESP.

Further, because the $144 million portion of the RSR charge cannot be authorized under R.C. 4928.143, it cannot be passed in through retail rates pursuant to R.C. 4928.144. R.C. 4928.144 provides that the Commission may authorize a phase-in only of a "rate or price established under Sections 4928.141 to 4928.143 of the Revised Code." Appellees have failed to prove that the $144 million set-aside to fund a wholesale power marketer discount is authorized under any provision of R.C. 4928.141 or R.C. 4928.143. Accordingly, R.C. 4928.144 does not apply to the $144 million portion of the RSR charge. In other words, the Commission's phase-in authority only applies to lawful charges, and the power marketer discount is not lawful.

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[18] *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶32 ("By its terms, R.C. 4928.143(B)(2) allows [electric security] plans to include only 'any of the following' provisions. It does not allow plans to include 'any provision.' So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute.").

Appellees correctly note that wholesale costs are routinely recovered in retail rates and that Chapter 4928.143 can provide a mechanism to recover those costs.[19] But the types of wholesale costs that are routinely passed through to AEP Ohio's retail customers are costs incurred in providing service to them and from which they receive a benefit. These include transmission expenses or power purchases from affiliates at FERC-approved rates. Unlike those situations, the wholesale costs at issue in this case – the deferred costs resulting from a wholesale discount on a product purchased by power marketers – are not costs incurred in serving AEP Ohio's retail customers. They are costs owed by a third-party (the power marketers) to AEP Ohio. Such costs are not the type of wholesale costs authorized for recovery from retail customers through R.C. 4928.

It is the for-profit power marketers, not retail customers, who should pay the deferred costs resulting from the 35-month discount on the wholesale product they purchase from AEP Ohio. A deferral does not change the party ultimately responsible for payment. A deferral only changes the timing of repayment. It is a loan. And the PUCO cannot order consumers to repay the loan owed by the power marketers. Rather, the only entities that the PUCO can lawfully require to pay the deferred costs resulting from the 35-month wholesale discount to power marketers are the power marketers themselves.

REQUEST FOR RELIEF

The Commission acted outside the scope of its authority when it allowed AEP-Ohio to begin collecting from retail customers the deferred costs resulting from the 35-month power marketer discount. The Court should find that such collection from retail customers is prohibited

[19] PUCO Brief at 23; AEP Ohio Brief at 16-17.

and require the Commission to order a refund by AEP Ohio of the unlawful RSR charges that retail customers have already paid. Such a refund is authorized in this instance because this case is distinguishable from cases in which the prohibition against retroactive ratemaking applies.[20] Unlike the charges traditionally subject to the *Keco* prohibition against retroactive ratemaking - charges related to the service provided by a utility to retail customers - the charge at issue in this proceeding is a charge recovering the costs a utility incurs in providing a wholesale product to a third-party. Hence, a refund in this instance would not be controlled by *Keco*. In addition, the Court should find that the Commission does not have legal authority under R.C. Chapter 4928 to allow AEP Ohio to collect any of the deferred wholesale capacity costs resulting from the power marketer discount from retail customers in the future.

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[20] *See Keco Indus. Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 141 N.E.2d 465.

CONCLUSION

WHEREFORE, Appellant respectfully submits that Appellee's August 8, 2012 Opinion and Order and January 30, 2013 Entry on Rehearing in the Commission cases are unlawful, unjust, and unreasonable and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

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December 10, 2013

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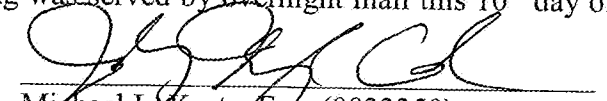
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight mail this 10th day of December, 2013 to the parties listed below.



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