

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets	: Case No. 2012-0187
	:
	: Appeal from the Public Utilities Commission of Ohio
	:
	: Public Utilities Commission of Ohio Case Nos. 08-917-EL-SSO and 08-918-EL-SSO
	:
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan	:
	:
	:
	:

---

MOTION FOR RECONSIDERATION BY APPELLANT  
INDUSTRIAL ENERGY USERS-OHIO

---

Samuel C. Randazzo (Reg. No. 0016386)  
(Counsel of Record)

Frank P. Darr (Reg. No. 0025469)

Joseph F. Olikier (Reg. No. 0086088)

McNees Wallace & Nurick LLC

21 East State Street, 17<sup>th</sup> Floor

Columbus, Ohio 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

**COUNSEL FOR APPELLANT,  
INDUSTRIAL ENERGY USERS-OHIO**

Mike DeWine (Reg. No. 0009181)  
Attorney General of Ohio

Werner L. Margard III

(Reg. No. 0024858)

(Counsel of Record)

William Wright (Reg. No. 0018010)

Section Chief, Public Utilities Section

John H. Jones (Reg. No. 0051913)

Assistant Attorney General

180 East Broad Street, 6<sup>th</sup> Floor

Columbus, Ohio 43215

Telephone: (614) 466-4397

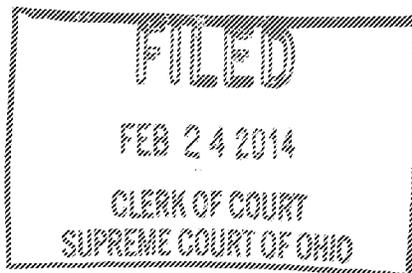
Facsimile: (614) 644-8764

werner.margard@puc.state.oh.us

william.wright@puc.state.oh.us

john.jones@puc.state.oh.us

**COUNSEL FOR APPELLEE, PUBLIC  
UTILITIES COMMISSION OF OHIO**



**Bruce Weston** (Reg. No. 0016973)  
Ohio Consumers' Counsel

**Maureen R. Grady** (Reg. No. 0020847)  
(Counsel of Record)

**Terry L. Etter** (Reg. No. 0067445)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone: (614) 466-8574  
Facsimile: (614) 466-9475  
grady@occ.state.oh.us  
etter@occ.state.oh.us

**COUNSEL FOR APPELLANT, OFFICE  
OF THE OHIO CONSUMERS'  
COUNSEL**

**Steven T. Nourse** (Reg. No. 0046705)  
(Counsel of Record)

**Matthew J. Satterwhite**  
(Reg. No. 0071972)

**Yazen Alami** (Reg. No. 0086371)  
American Electric Power Company  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215-2373  
Telephone: (614) 716-1608  
Facsimile: (614) 716-2950  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com

**Kathleen M. Trafford** (0021753)

**Daniel R. Conway** (0023058)  
Porter Wright Morris & Arthur, LLP  
41 South High Street  
Columbus, Ohio 43215  
Telephone: (614) 227-1015  
Facsimile: (614) 227-1000  
ktrafford@porterwright.com  
dconway@porterwright.com

**COUNSEL FOR INTERVENING  
APPELLEE, OHIO POWER  
COMPANY**

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	3
II. STANDARD OF REVIEW .....	4
III. FACTS .....	4
IV. GROUNDS FOR RECONSIDERATION .....	11
A. The Opinion incorrectly concludes that the sole remedy available to customers to prevent a \$368 million injury is a stay; the Opinion fails to address the provision of R.C. 4928.144 requiring that a phase-in of rates approved pursuant to R.C. 4928.143 be “just and reasonable.” .....	11
B. The Opinion’s holding that the proposed adjustment to the deferred balance is not permissible because such an adjustment would result in retroactive ratemaking does not fully address prior Court and Commission decisions finding that an adjustment to a deferred balance is permitted. Further, the Opinion rests on the incorrect finding that the Court lacks jurisdiction over IEU-Ohio’s ratemaking and accounting arguments. ....	18
V. CONCLUSION .....	24

TABLE OF AUTHORITIES

CASES

*Cleveland Elec. Ill. Co. v. Pub. Util. Comm'n of Ohio*, 42 Ohio St.2d 403, 431 (1975).....16

*Columbus v. Hodge*, 37 Ohio App.3d 68 (1987) .....4

*Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535 (1993).....20

*Consumers' Counsel v. Public Util. Comm'n of Ohio*, 70 Ohio St.3d 244 (1994).....22

*Discount Cellular, Inc. v. Pub. Util. Comm'n of Ohio*, 112 Ohio St.3d 360 (2007) .....22

*In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).....5, 6, 7, 8, 12, 14, 16

*Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254 (1957)..10,  
.....11, 12, 13, 14, 15, 16, 17, 18

*Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (1981) .....4

*River Gas Co. v. Pub. Util. Comm'n of Ohio*, 69 Ohio St.2d 509 (1982) .....14

*Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 402 (2011) .....21

STATUTES

R.C. 4903.10 .....21

R.C. 4903.16 .....13

R.C. 4905.32 .....13

R.C. 4928.03 .....14

R.C. 4928.141 .....14

R.C. 4928.142 .....14

R.C. 4928.143 .....1, 11, 14

R.C. 4928.143(B)(2) .....5

R.C. 4928.144 .....1, 4, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20, 22, 24

**OTHER PUBLIC UTILITIES COMMISSION OF OHIO ORDERS**

*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Order Under Section 4928.144, Revised Code,*  
Case Nos. 11-4920-EL-RDR, *et al.*, Entry  
(Mar. 7, 2012) .....9

*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Order Under Section 4928.144, Revised Code,*  
Case Nos. 11-4920-EL-RDR, *et al.*, Entry on Rehearing  
(Apr. 11, 2012).....9, 15, 23

*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Order Under Section 4928.144, Revised Code,*  
Case Nos. 11-4920-EL-RDR, *et al.*, Fifth Entry on Rehearing  
(Oct. 3, 2012) .....9, 10

*In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code,*  
Case Nos. 11-4920-EL-RDR, *et al.*, Finding and Order  
(Aug. 1, 2012) .....9

*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10,*  
Case No. 10-1261-EL-UNC, Opinion and Order  
(Jan. 11, 2011).....15, 23

*In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10,*  
Case No. 11-4571-EL-UNC, Opinion and Order  
(Oct. 23, 2013) .....15, 23

*In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company,*  
Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order  
(Jan. 23, 2012).....16, 23

*In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service,*  
Case No. 91-418-EL-AIR, Opinion and Order  
(May 12, 1992).....20

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets : Case No. 2012-0187  
: :  
: Appeal from the Public Utilities Commission of Ohio  
: :  
: Public Utilities Commission of Ohio Case Nos. 08-917-EL-SSO and 08-918-EL-SSO  
:  
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan :  
:  
:  
:

---

MOTION FOR RECONSIDERATION BY APPELLANT  
INDUSTRIAL ENERGY USERS-OHIO

---

Pursuant to Supreme Court Rule of Practice 18.2, Industrial Energy Users-Ohio ("IEU-Ohio") moves the Court for reconsideration of its Opinion, decided February 13, 2014, in the above captioned case with regard to the following:

The Opinion incorrectly concludes that the sole remedy available to customers to prevent a \$368 million injury is a stay; the Opinion fails to address the provision of R.C. 4928.144 requiring that a phase-in of rates approved pursuant to R.C. 4928.143 be "just and reasonable."

The Opinion's holding that the proposed adjustment to the deferred balance is not permissible because such an adjustment would result in retroactive ratemaking does not fully address prior Court and Commission decisions finding that an adjustment to a deferred balance is permitted. Further, the Opinion rests on the incorrect finding that the Court lacks jurisdiction over IEU-Ohio's ratemaking and accounting arguments.

Based on this Motion for Reconsideration, IEU-Ohio further requests that the Court reverse and remand the decision of the Commission below.

A copy of the Opinion is attached.

A memorandum in support of this Motion is attached.

Respectfully submitted,



Samuel C. Randazzo, Counsel of Record (0016386)

Frank P. Darr (0025469)

Joseph E. Olikier (0086088)

McNees Wallace & Nurick LLC

21 East State Street, 17<sup>th</sup> Floor

Columbus, Ohio 43215

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

**COUNSEL FOR APPELLANT,  
INDUSTRIAL ENERGY USERS-OHIO**

**MEMORANDUM IN SUPPORT**  
**OF THE MOTION FOR**  
**RECONSIDERATION OF INDUSTRIAL ENERGY USERS-OHIO**

**I. INTRODUCTION**

In the Opinion issued on February 13, 2014 in this proceeding, the Supreme Court of Ohio (“Court”) affirmed the refusal of the Public Utilities Commission of Ohio (“Commission”) to adjust a deferred balance the Commission authorized to account for the phase-in of rate increases authorized in the case below (“deferred balance”).<sup>1</sup> The deferred balance is overstated because the Commission did not reduce it to remove \$368 million after finding that the electric distribution utility (“EDU”), AEP-Ohio,<sup>2</sup> failed to submit evidence to support its actual Provider of Last Resort (“POLR”) costs.<sup>3</sup> Although the Court agreed that AEP-Ohio would receive a windfall recovery,<sup>4</sup> the Opinion concluded that the Commission had correctly refused to adjust the deferred balance because to do so would result in prohibited retroactive ratemaking.<sup>5</sup> The Court, however, did not address means by which the windfall could be avoided. For the reasons explained in this Motion, the Court should reconsider its Opinion and reverse and remand the order below in which the Commission failed to reduce the deferred balance to remove the effect of POLR charges.

---

<sup>1</sup> Slip Op. 2014-Ohio-462 (Feb. 13, 2014) (“Opinion”). A copy of the Opinion is attached.

<sup>2</sup> The original filing in this case was by Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”), former subsidiaries of American Electric Power. In 2011, CSP and OP merged. The surviving EDU is OP. Unless otherwise relevant, the EDUs are referred to collectively as AEP-Ohio.

<sup>3</sup> Opinion at ¶12.

<sup>4</sup> *Id.* at ¶56.

<sup>5</sup> *Id.* at ¶48.

## II. STANDARD OF REVIEW

Supreme Court Rule of Practice 18.2 provides that a party may file a motion for reconsideration within ten days after the Supreme Court's order is filed with the Clerk of the Supreme Court. A motion for reconsideration may call to the attention of the Court an obvious error in its decision or raise an issue for consideration that was either not considered at all or was not fully considered by the Court when it should have been.<sup>6</sup>

## III. FACTS

On July 31, 2008, AEP-Ohio filed an Application for an Electric Security Plan ("ESP"). Following hearings on the application in 2008, the Commission issued its Opinion and Order on March 18, 2009, modifying and approving an ESP. Two parts of that Opinion and Order remain relevant. First, the Commission authorized the collection of a POLR charge based on a formula that had nothing to do with the costs of providing POLR service.<sup>7</sup> Second, the Commission ordered that AEP-Ohio should phase-in any authorized increases so as not to exceed, on a total bill basis, certain percentage increase levels for each of the three years of the ESP.<sup>8</sup> "Any amount over the allowable total bill increase percentage levels [would] be deferred pursuant to Section 4928.144, Revised Code, with carrying costs."<sup>9</sup> Any deferred balance at the end of 2011

---

<sup>6</sup> *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (1981). See, also, *Columbus v. Hodge*, 37 Ohio App.3d 68 (1987).

<sup>7</sup> Opinion and Order at 40 (March 18, 2009) (Appendix at 110). (Appendix citations are abbreviated Appx. hereafter).

<sup>8</sup> *Id.* at 22 (Appx. at 92).

<sup>9</sup> *Id.* This amount is referred to as the "deferred balance."

was to be recovered by a nonavoidable surcharge.<sup>10</sup> IEU-Ohio and the Office of the Ohio Consumers' Counsel ("OCC") sought rehearing and appealed the Commission's Opinion and Order.

In a decision issued on April 19, 2011, the Court reversed the Commission's Opinion and Order on three issues and remanded the case for further review on two of those issues.<sup>11</sup> Initially, the Court found that the Commission had authorized an illegal retroactive rate increase, but found that there was no basis for a refund of the amounts illegally collected by AEP-Ohio.<sup>12</sup> Second, the Court held that the Commission had improperly authorized the POLR charge because "the manifest weight of the evidence contradict[ed] the commission's conclusion that the POLR charge [was] based on cost."<sup>13</sup> The Court remanded the issue concerning POLR charges to the Commission.<sup>14</sup> Third, the Court held that the Commission had illegally authorized the inclusion of carrying charges for additions to generation facilities to accommodate environmental requirements between 2001 and 2008 that had not been previously included in rates, the Pre-2009 Component, because the Commission had authorized recovery on the "determination that R.C. 4928.143(B)(2) permit[ted] ESPs to include unlisted items."<sup>15</sup> This matter also was remanded to the Commission.<sup>16</sup>

---

<sup>10</sup> *Id.* at 22-23 (Appx. at 92-93).

<sup>11</sup> *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011) (Appx. at 259) ("*Remand Decision*").

<sup>12</sup> *Id.* at 514-17 (Appx. at 266-69).

<sup>13</sup> *Id.* at 519 (Appx. at 269-70).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 520 (Appx. at 270-71).

<sup>16</sup> *Id.*

In the remand hearing, the parties addressed three issues: the Pre-2009 Component; POLR charges; and the flow-through effects of the *Remand Decision*. In regard to the POLR charges, AEP-Ohio sought to demonstrate that a formula-based methodology properly valued POLR service.<sup>17</sup> IEU-Ohio presented substantial and credible testimony indicating that the formula-based approach failed to measure costs of POLR service.<sup>18</sup>

IEU-Ohio also provided testimony supporting a Commission order addressing the flow-through effects of the Court's *Remand Decision*.<sup>19</sup> IEU-Ohio witness Joseph Bowser testified that the Commission authorized AEP-Ohio to collect a total ESP revenue requirement, but then limited the amount of the total authorized revenue that could be collected during the ESP period ending December 31, 2011.<sup>20</sup> The residual amount of the total authorized revenue not collected during the ESP period accumulated in the deferred balance, which was subject to further review by the Commission and amortization through customer charges imposed after the ESP period.

Mr. Bowser further explained that the deferred balance should be adjusted to remove improperly booked amounts. "To the extent the amount of revenue collected by the Companies during the ESP period was based on items that [were] not properly includable in an ESP, the amount of revenue deferred for future collection has been overstated."<sup>21</sup> To address the overstatement of the deferred balance, Mr. Bowser recommended that the Commission "reduce the total authorized revenue by the amounts not properly collectible as part of an ESP, and

---

<sup>17</sup> AEP-Ohio Remand Ex. 1 & 3 (Supp. at 9 & 20).

<sup>18</sup> IEU-Ohio Remand Ex. 1 at 34; IEU-Ohio Remand Ex. 2 at 4-5 (Supp. at 48 & 56-57).

<sup>19</sup> IEU-Ohio Remand Ex. 3 at 9-11 (Supp. at 99-101).

<sup>20</sup> *Id.* at 10 (Supp. at 100).

<sup>21</sup> *Id.*

subtract the amount actually collected from the adjusted ESP total to determine how much, if any, of the authorized revenue is properly deferred for future collection.”<sup>22</sup> He testified further that the reduction to the deferred balance needed to account for POLR charges was \$235.3 million and \$132.4 million for CSP and OP, respectively.<sup>23</sup>

In rebuttal testimony addressing the IEU-Ohio’s proposed remedy to address the flow through effects of the *Remand Decision*, AEP-Ohio offered testimony on generally accepted accounting principles.<sup>24</sup> On brief, it argued that it would be improper for the Commission to address the flow-through effects to reduce future charges because it would constitute retroactive ratemaking.<sup>25</sup>

Following the hearing, the Commission issued an Order on Remand. In the Order on Remand, the Commission rejected AEP-Ohio’s attempt to justify the POLR charges based on the same formula-based methodology the Court had previously determined did not reflect the cost of providing POLR service.<sup>26</sup>

Although the Commission found that AEP-Ohio had not demonstrated a lawful basis for authorization to collect POLR charges, the Commission refused to flow-through the effects of its

---

<sup>22</sup> *Id.* At the time this matter was heard by the Commission, OP had a substantial outstanding deferred balance resulting from the bill limiters the Commission ordered, but CSP did not. *Id.* at 15 (Supp. at 105). CSP, however, had other substantial deferred balances in the form of regulatory assets that could have been reduced because of the flow-through effects of the Court’s *Remand Decision*. *Id.*

<sup>23</sup> *Id.* at 10-11 & 14 (Supp. at 100-01 & 104).

<sup>24</sup> AEP-Ohio Remand Ex. 7 at 3-4 (Supp. at 40-41).

<sup>25</sup> AEP-Ohio’s arguments are summarized in the Order on Remand. Order on Remand at 35 (Oct. 3, 2011) (Appx. at 193) (“Order on Remand”).

<sup>26</sup> *Id.* at 15-34 (Appx. at 173-92).

findings to the deferred balance.<sup>27</sup> In refusing to reduce the deferred balance, the Commission determined that the flow-through recommendations of IEU-Ohio “would be tantamount to unlawful retroactive ratemaking.”<sup>28</sup> The Commission continued, “[W]e cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be unjustified.”<sup>29</sup>

Following the Commission’s Order on Remand, IEU-Ohio filed an Application for Rehearing requesting that the Commission reverse its findings on the flow-through effects of the *Remand Decision*.<sup>30</sup> In its Application for Rehearing, IEU-Ohio identified four grounds for rehearing. In support of those four assignments of error, IEU-Ohio specifically stated that the refusal to adjust the deferred balance to account for the effects of the Commission’s determination that AEP-Ohio had failed to justify the POLR charge was inconsistent with the Commission’s precedent regarding deferral accounting and this Court’s decisions affirming the Commission’s authority to adjust deferred balances so that the resulting rates conformed to Ohio law.<sup>31</sup> The Commission denied rehearing on the four issues identified by IEU-Ohio.<sup>32</sup> IEU-Ohio then filed its Notice of Appeal, again identifying the four errors the Commission committed

---

<sup>27</sup> *Id.* at 34-36 (Appx. at 192-94).

<sup>28</sup> *Id.* at 35-36 (Appx. at 193-94).

<sup>29</sup> *Id.* at 36 (Appx. at 194).

<sup>30</sup> Application for Rehearing of Order on Remand and Memorandum in Support of Industrial Energy Users-Ohio (Nov. 2, 2011) (Appx. at 201) (“Application for Rehearing”).

<sup>31</sup> Application for Rehearing, Memorandum in Support at 21 (Nov. 2, 2011) (Appx. at 224).

<sup>32</sup> Entry on Rehearing at 18 (Dec. 14, 2011) (Appx. at 256).

when it refused to adjust the deferred balance and other matters for the flow-through effects of its finding that the POLR charges could not be authorized as a term of the ESP.<sup>33</sup>

While the proceedings concerning the remand of the ESP Order were pending, AEP-Ohio filed tariffs that would permit it to amortize the deferred balance without further Commission review of the amount to be collected.<sup>34</sup> The Commission rejected the tariffs, pointing to R.C. 4928.144 and stating that “the Commission would conduct an additional analysis to determine the appropriate recovery of fuel cost expenses incurred plus carrying costs.”<sup>35</sup> After conducting a review of the PIRR application filed by AEP-Ohio, the Commission authorized AEP-Ohio to begin amortizing the deferred balance through the Phase-in Recovery Rider (“PIRR”) in August 2012.<sup>36</sup> (Again, the Commission refused to adjust the deferred balance to remove the effect of the POLR charges from the amount to be collected.<sup>37</sup>) Pursuant to the PIRR, OP-zone customers will be billed for the amortization of the deferred balance until 2018.<sup>38</sup>

---

<sup>33</sup> Notice of Appeal of Appellant Industrial Energy Users-Ohio (Feb. 1, 2012) (Appx. at 1).

<sup>34</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Order Under Section 4928.144, Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Entry at 4 (Mar. 7, 2012) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12C07B41401H07282.pdf>).

<sup>35</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Order Under Section 4928.144, Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Entry on Rehearing at 4 (Apr. 11, 2012) (Reply Appx. at 4) (also available at: <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12D11B41130H55507.pdf>).

<sup>36</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Finding and Order (Aug. 1, 2012) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12H01B35727H55869.pdf>).

<sup>37</sup> *Id.*, Fifth Entry on Rehearing at 4-5 (Oct. 3, 2012) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12J03B35119J52401.pdf>). The Commission’s decision refusing to adjust the deferred balance in establishing the PIRR is pending in an appeal to this Court. *In the Matter of the Application of Columbus Southern Power Company for*

In its Opinion issued on February 13, 2014 addressing the Commission's Order on Remand, the Court affirmed the Commission's decision refusing to adjust the deferred balance on the basis that such an adjustment would constitute retroactive ratemaking. The Opinion states that the "appellants seek to recover charges that were already collected in rates on the theory that the charges were not lawful based on this court's rejection of the POLR charge in the first ESP appeal and on the commission's similar rejection of the POLR charge on remand."<sup>39</sup> From this assumption that the POLR charges had already been collected from customers, the Opinion rejects IEU-Ohio's argument that the existence of the deferred balance creates a mechanism that allows prospective rate adjustments to remove the effect of POLR charges because the rule preventing retroactive ratemaking prohibits return of the POLR charges that have already been collected.<sup>40</sup> Although the Opinion notes that the refusal to adjust the deferred balance is unfair and results in a windfall to AEP-Ohio, the Opinion finds that the only remedy available to an injured party is to seek a stay.<sup>41</sup> To support this conclusion, the Opinion relies on *Keco*

---

*Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Supreme Ct. Case No. 2012-2008, Notice of Appeal of Appellant Industrial Energy Users-Ohio (Nov. 30, 2012) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12L03A84116B09649.pdf>).

<sup>38</sup> *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Fifth Entry on Rehearing at 2 (Oct. 3, 2012) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12J03B35119J52401.pdf>).

<sup>39</sup> Opinion at ¶50.

<sup>40</sup> *Id.* at ¶54.

<sup>41</sup> *Id.* at ¶¶56-57.

*Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*<sup>42</sup> and its prior decision remanding this case to the Commission.<sup>43</sup>

IEU-Ohio, however, raised grounds in its appeal that require additional consideration. Although the Opinion notes that IEU-Ohio argued that R.C. 4928.144 provides the Commission authority to reduce the deferred balance to meet the requirement that the phase-in is just and reasonable, the Opinion does not address IEU-Ohio's argument.<sup>44</sup> Additionally, the Opinion does not address the Commission's authority to supervise what is recovered from customers regardless of the accounting treatment the EDU has used to book accumulated dollar amounts for accounting purposes on the belief that IEU-Ohio forfeited this argument by failing to present it in its Application for Rehearing.<sup>45</sup> Because proper resolution of these issues requires reversal of the Commission's decision, the Court should grant the Motion for Reconsideration and reverse and remand the Order on Remand.

#### **IV. GROUNDS FOR RECONSIDERATION**

- A. The Opinion incorrectly concludes that the sole remedy available to customers to prevent a \$368 million injury is a stay; the Opinion fails to address the provision of R.C. 4928.144 requiring that a phase-in of rates approved pursuant to R.C. 4928.143 be "just and reasonable."**

The Opinion concludes that the only remedy to protect customers from paying charges eventually determined to be unsupported by the applicable law or facts is to seek a stay, resting

---

<sup>42</sup> 166 Ohio St. 254 (1957) ("*Keco Industries*").

<sup>43</sup> Opinion at ¶56.

<sup>44</sup> *Id.* at ¶50.

<sup>45</sup> *Id.* at ¶55.

this conclusion on the *Remand Decision* and the *Keco Industries* decision.<sup>46</sup> The *Remand Decision* is premised on *Keco Industries* and subsequent cases that do not consider the function of R.C. 4928.144 to assure that a phase-in is “just and reasonable.”<sup>47</sup> The holding of *Keco Industries*, moreover, addresses the jurisdiction of a common pleas court to provide restitution of rates found to be illegal and is premised on a legal structure for setting utility rates that has been substantially altered by the General Assembly. Despite the differences in the requested relief and the material change in the regulatory structure, the Opinion nonetheless relies on *Keco Industries* and the subsequent decisions based on it to affirm the Commission’s refusal to adjust the deferred balance. Further, by failing to address the requirement of R.C. 4928.144 that the Commission find that the phase-in is just and reasonable, the Opinion incorrectly extends the prohibition on retroactive ratemaking approved in *Keco Industries* (and the *Remand Decision*), affording AEP-Ohio an unfair windfall of \$368 million to be collected from customers.

In *Keco Industries*, the question before the Court was whether a private right of action for restitution could be brought against a public utility after this Court reversed an order of the Commission on the ground that the order was unreasonable and unlawful.<sup>48</sup> Based on a review of the statutory scheme then applicable to public utilities, the Court concluded that the action would not lie. In its opinion, the Court reasoned that it was clear that only the Supreme Court had authority to review a decision of the Commission; an action in restitution would vest a court other than the Supreme Court with jurisdiction.<sup>49</sup> Additionally, the Court noted that R.C.

---

<sup>46</sup> *Id.* at ¶56.

<sup>47</sup> *Remand Decision*, 128 Ohio St.3d at 516.

<sup>48</sup> *Keco Industries*, 166 Ohio St. at 255-56.

<sup>49</sup> *Id.* at 256.

4903.16 provided a means of suspending rates through a request for a stay.<sup>50</sup> The Court then noted that R.C. 4905.32 directed the public utility to charge the rates on file with the Commission.<sup>51</sup> Based on these provisions, the Court concluded that utility rates are solely a matter for consideration of the Commission and the Court.<sup>52</sup> Accordingly, the Court held that the statutory scheme abrogated the common law remedy of restitution to recover amounts paid by customers to the utility based on rates later determined to be unlawful.<sup>53</sup> In further support of its decision, the Court also noted that the apparent injustice in not permitting an action in restitution “must sometimes give way to the greater overall good,” and pointed to the fact that the public utility could not collect higher rates and the customer was not entitled to a refund of excessive rates collected while the case was pending.<sup>54</sup> For several reasons, *Keco Industries* has no applicability to this matter.

Initially, IEU-Ohio is not seeking “restitution” in a private action or through a Commission order. It has sought a proper accounting of the deferred balance so that the phase-in of the ESP rates is just and reasonable as required by R.C. 4928.144.<sup>55</sup> As a result of the Commission’s order refusing to adjust the deferred balance, however, customers *will pay* \$368 million more in PIRR charges than is required to make AEP-Ohio whole for the services it provided. Not only is this unfair (in the words of the Opinion), it is not just and reasonable.

---

<sup>50</sup> *Id.* at 256-57.

<sup>51</sup> *Id.* at 257.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 259.

<sup>54</sup> *Id.*

<sup>55</sup> Initial Brief of Appellant Industrial Energy User-Ohio at 27-28 (Apr. 10, 2012).

Additionally, there is no attempt to disturb the jurisdiction of the Commission or Court. IEU-Ohio has asked the Commission to exercise the same authority it has exercised with regard to the deferred balance on four separate occasions to assure that the deferred balance is set at a lawful, just, and reasonable rate.<sup>56</sup> When requested to remove the effect of POLR charges embedded in the deferred balance, however, the Commission has refused to act. If the Court does not correct this unlawful and unreasonable refusal, AEP-Ohio will secure revenue that the Court itself has described as a windfall.

This windfall can be avoided because the regulatory structure for phasing in ESP rate increases is materially different from the rate structure on which *Keco Industries* was decided in 1957. In 1957, all rates were fixed by Commission order and did not vary until the Commission completed a subsequent comprehensive rate review.<sup>57</sup> In 1999 and 2008, the General Assembly fundamentally restructured the regulation of the EDUs by declaring that the provision of retail electric generation service is a competitive service,<sup>58</sup> establishing a default service requirement in the form of an ESP or Market Rate Offer,<sup>59</sup> and permitting the Commission to phase-in rate increases so as to assure that the phase-in is just and reasonable.<sup>60</sup> As the Commission has recognized, the Commission could not violate R.C. 4928.144 by approving whatever claim AEP-

---

<sup>56</sup> See discussion below of the Commission's order requiring a review of the deferred balance and the Commission-ordered adjustments to the deferred balance.

<sup>57</sup> Under the pre-2001 regulatory regime, rates were generally fixed; subsequently, the General Assembly authorized the Commission to adjust fuel charges. *River Gas Co. v. Pub. Util. Comm'n of Ohio*, 69 Ohio St.2d 509 (1982).

<sup>58</sup> R.C. 4928.03. The Court has summarized the fits and starts of that process in its first decision in this case. *Remand Decision*, 128 Ohio St.3d at 513-14.

<sup>59</sup> R.C. 4928.141 to 4928.143.

<sup>60</sup> R.C. 4928.144.

Ohio presented to it based on its accounting books; accordingly, “the Commission would conduct an additional analysis to determine the appropriate recovery of fuel cost expenses incurred plus carrying costs.”<sup>61</sup> As the Commission has recognized, R.C. 4928.144 provides the Commission with continuing authority to address the justness and reasonableness of the phase-in of the deferred balance in rates charged customers.

The Commission’s implementation of the phase-in likewise recognizes that *Keco Industries* does not prevent the Commission from reducing the deferred balance. Under R.C. 4928.144, the Commission approved a phase-in of AEP-Ohio’s rate increase in 2009, providing AEP-Ohio with only the accounting authority to book the deferred balance. After approving the accounting changes that authorized the creation of the deferred balance, the Commission (over the objection of AEP-Ohio in a fuel case that such action was retroactive ratemaking<sup>62</sup>) has adjusted the deferred balance based on findings that AEP-Ohio must return revenue to customers. When the Commission determined that authorized rates resulted in significantly excessive earnings in 2009 and 2010, the Commission directed CSP to reduce its deferred balance to zero.<sup>63</sup> The Opinion and Order finding that CSP had significantly excessive earnings

---

<sup>61</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Order Under Section 4928.144, Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Entry on Rehearing at 4 (Apr. 11, 2012) (Reply Appx. at 4) (available at: <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12D11B41130H55507.pdf>).

<sup>62</sup> *See Ohio Power Company v. Pub. Util. Comm’n of Ohio*, Supreme Court Case No. 2012-1484, Notice of Appeal of Ohio Power Company at 2-3 (Aug. 30, 2012) (assigning as error the Commission’s adjustment to the deferred balance resulting from the assignment of a benefit to customers from the renegotiation of fuel contract).

<sup>63</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011) (IEU-Ohio Appx. at 341); *In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under*

in 2010, moreover, ordered the adjustment *after* AEP-Ohio was authorized to begin collection of the PIRR. When the Commission determined that OP illegally collected too much ESP revenue in 2009 for fuel-related costs, the Commission also ordered that the deferred balance be reduced by the amount OP illegally collected.<sup>64</sup> After the Commission concluded that AEP-Ohio had not demonstrated a lawful basis for POLR charges, however, the Commission refused to adjust the deferred balance.<sup>65</sup> In contrast to the repeated instances in which the Commission correctly adjusted the deferred balance, the Commission's refusal below is an inexplicable application of *Keco Industries* that exposes customers to unfair, unjust, and unreasonable phase-in recovery rates.

There can be no question at this point that AEP-Ohio failed to demonstrate a lawful basis to overstate the deferred balance by including POLR charges. This Court held in 2011 that the Commission's decision authorizing a POLR charge as part of the ESP was not supported by the record and remanded the issue to the Commission.<sup>66</sup> In the Order on Remand, the Commission concluded that AEP-Ohio had failed to present evidence to support the POLR "cost."<sup>67</sup> Yet, the Commission failed to reduce AEP-Ohio's prospective recovery of revenue for the amounts this Court and the Commission found were not properly includable in the total revenue recovery

---

*Section 4928.143(F), Revised Code, and Rule 4901:1-35-10*, Case No. 11-4571-EL-UNC, Opinion and Order at 29 (Oct. 23, 2013) (also available at: <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13J23B40243A38071.pdf>).

<sup>64</sup> *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, *et al.*, Opinion and Order at 12, (Jan. 23, 2012) (Appx. at 356).

<sup>65</sup> The Commission must "respect its own precedents." *Cleveland Elec. Ill. Co. v. Pub. Util. Comm'n of Ohio*, 42 Ohio St. 2d 403, 431 (1975).

<sup>66</sup> *Remand Decision*, 128 Ohio St.3d at 517-19.

<sup>67</sup> Order on Remand at 33 (Appx. at 42).

under the ESP. As a result, it is undisputed that AEP-Ohio will bill and collect from customers \$368 million when the phase-in of the 2009 ESP Order rates is completed for a charge that had no lawful basis. As the Court noted in the Opinion, this result is unfair.<sup>68</sup>

This unfairness could have been avoided, but the Commission asserted that the requested adjustment would amount to retroactive ratemaking prohibited by *Keco Industries* and subsequent cases.<sup>69</sup> Having limited its review by misapplying *Keco Industries*, the Commission then failed to address the more fundamental question of whether the phase-in without an adjustment for POLR revenue embedded in the deferred balance was just and reasonable as required by R.C. 4928.144.<sup>70</sup> Based on that section, the Commission was not barred by the Court's holding in *Keco Industries* to conduct that analysis. In fact, the Commission has concluded that it must conduct that analysis before implementing a rider to amortize the deferred balance so as to meet the requirements of R.C. 4928.144. Accordingly, the Commission erred when it failed to adjust the deferred balance after it found that AEP-Ohio had not established a lawful basis for its proposed POLR charge.

In the Opinion, the Court notes that IEU-Ohio argued that R.C. 4928.144 required a Commission determination that the phase-in is just and reasonable,<sup>71</sup> but the Opinion fails to address that argument. Had the Court done so, it should have found that the Commission erred

---

<sup>68</sup> Opinion at ¶56.

<sup>69</sup> Order on Remand at 36 (Appx. at 45).

<sup>70</sup> Entry on Rehearing at 18 (Appx. at 68).

<sup>71</sup> Opinion at ¶50. The Opinion notes the issue and then begins an extended discussion on the lawfulness of the "collection" of POLR charges. As noted previously, the issue is not whether the charges were lawful; they clearly were not, based on both this Court's remand and the Commission Order on Remand. The issue instead is the restatement of the deferred balance.

by failing to reduce (or consider reducing) the deferred balance pursuant to R.C. 4928.144 to prevent the unjust and unreasonable result that is occurring.

The conclusion that *Keco Industries* allows AEP-Ohio to secure a windfall because the only remedy available to customers is a stay does not conform to the legislative authority the General Assembly provided the Commission in R.C. 4928.144 or Commission practice applying that section. Because the Opinion does not address the interplay of these legal requirements, the Opinion produces an outcome that the Court acknowledges is unfair. That outcome, however, is also unnecessary. Accordingly, the Court should grant the Motion for Reconsideration, reverse the Commission's Order on Remand, and direct the Commission to reduce the significantly excessive deferred balance.

- B. The Opinion's holding that the proposed adjustment to the deferred balance is not permissible because such an adjustment would result in retroactive ratemaking does not fully address prior Court and Commission decisions finding that an adjustment to a deferred balance is permitted. Further, the Opinion rests on the incorrect finding that the Court lacks jurisdiction over IEU-Ohio's ratemaking and accounting arguments.**

At the core of the Opinion is an assumption that AEP-Ohio has collected from customers POLR charges of \$368 million. For example, the Opinion states that IEU-Ohio "seek[s] to recover *charges that were already collected in rates* on the theory that the charges were not lawful based on this court's rejection of the POLR charge in the first ESP appeal and on the commission's similar rejection of the POLR charge on remand."<sup>72</sup> Similarly, it states that "IEU effectively ask[s] the court to direct the commission to order *a refund of the POLR revenues that AEP had already collected from customers* during the ESP term—specifically from April 2009 through May 2011."<sup>73</sup> Further, the Opinion rejects the appellant's demonstration that the

---

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> *Id.* at ¶48 (emphasis added).

adjustment is forward looking by again stating that “appellant[] [is] seeking to recover—through an adjustment to current rates—*POLR charges that already have been collected from customers and later were found to be unjustified.*”<sup>74</sup> The overstated deferred balance, however, was uncollected, and Commission precedent regarding deferral accounting and the Court’s approval of that treatment demonstrate that the Commission may adjust the deferred balance within its existing authority to eliminate the overstatement.

The deferred balance is an accounting entry that represents an amount AEP-Ohio is seeking to collect (and has begun to collect through the PIRR).<sup>75</sup> It is a residual calculation, the difference between the revenue collected during the ESP period subject to the bill increase limitations and the revenue increases that would have otherwise occurred without such limitations. That difference was overstated because embedded in the math that produced AEP-Ohio’s estimate is an allowance for POLR charges. But for the inclusion of those charges, the deferred balance subject to future collection would have been substantially less.<sup>76</sup>

<sup>74</sup> *Id.* at ¶54 (emphasis added).

<sup>75</sup> OCC Remand Ex. 2 at 24 (Supp. at 113).

<sup>76</sup> See IEU-Ohio Remand Ex. 3 at 10 (Supp. at 100):

[T]he Commission authorized the Companies to collect a pot of ESP dollars or a total authorized ESP revenue requirement. The Commission then limited that amount of the authorized revenue that the Companies could collect during the ESP period ending December 31, 2011. The balance of the total authorized revenue that would have been collected during the ESP period but for the Commission’s bill increase limitations was deferred for future collection. To the extent the amount of revenue collected by the Companies during the ESP period was based on items that are not properly includable in an ESP, the amount of revenue deferred for future collection has been overstated. To address this problem, the Commission must reduce the total authorized revenue by amounts not properly collectible as part of an ESP, and subtract the amount actually collected from the adjusted ESP total to determine how much, if any, of the authorized revenue is properly deferred for future collection. Otherwise, the improperly included ESP charges will be embedded in the revenue deferred for future collection.

The proper calculation of the deferred balance eligible for recovery has nothing to do with refunding money to customers. Customers will not see a single penny of the billions of dollars that they have paid for electric service during the term of the first AEP-Ohio ESP returned to them by an adjustment to the deferred balance. As a result of the Order on Remand, however, AEP-Ohio will bill and collect a windfall of \$368 million over the remaining term of the PIRR. The Commission's mistake in characterizing the relief sought as a request for a refund permits that windfall. It is a result that is not required by the facts of this case because the Commission has tools that can be and in the past were applied to reduce overstated deferred balances.

Prior to enactment of R.C. 4928.144 that a phase-in to be just and reasonable, the Commission recognized a duty to supervise what is recovered from customers regardless of the accounting treatment the EDU has used to book accumulated dollar amounts for accounting purposes. In a 1991 CSP rate case, the Commission applied the terms of the Zimmer Restatement Case settlement to reduce CSP's booked allowance for funds used during construction ("AFUDC") to restate the book amount because the amount that CSP had recorded for accounting purposes was inconsistent with proper regulatory accounting and the terms of the settlement.<sup>77</sup> This Court subsequently approved the Commission's authority to adjust the deferred balance.<sup>78</sup>

The deferred balance at issue in this case is an account to track the difference between the total authorized revenue and the amount collected by AEP-Ohio based on the rate caps. Under

---

<sup>77</sup> *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 15-18 (May 12, 1992) (Appx. at 279-82), *aff'd in part and rev'd in part*, *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d 535 (1993).

<sup>78</sup> *Columbus S. Power Co. v. Pub. Util. Comm'n of Ohio*, 67 Ohio St.3d at 543.

well-understood precedent, the Commission erred when it failed to adjust the deferred balance to assure that the recovery of the deferred balance conforms to Ohio ratemaking requirements.

Although this error in the Order on Remand was presented to the Court, the Opinion concluded that the Court does not have jurisdiction to address the issue because it was not presented in an application for rehearing.<sup>79</sup> That conclusion is incorrect.

In IEU-Ohio's Application for Rehearing, Assignment of Error VII states, "The Commission's Order on Remand is unlawful in that it extended the prohibition of retroactive ratemaking to prevent the adjustment of the phase-in deferral balances that had not been collected from customers and which were subject to further adjustment by the Commission's order establishing the basis for these deferral balances."<sup>80</sup> In support of that assignment of error, IEU-Ohio identified decisions of this Court and the Commission that permit the Commission to adjust the deferred balance in a manner to bring it into compliance with Ohio law.<sup>81</sup> IEU-Ohio then preserved Assignment of Error VII as its Proposition of Law VII in its Notice of Appeal.<sup>82</sup> As a result, IEU-Ohio has complied with the requirements of R.C. 4903.10 to preserve its argument that the Order on Remand failed to comply with the accounting treatment the Commission has previously applied to adjust deferred balances.<sup>83</sup> Unlike the situation in the

---

<sup>79</sup> Opinion at ¶55. R.C. 4903.10 requires that an application for rehearing "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."

<sup>80</sup> Application for Rehearing at 2 (Appx. at 205).

<sup>81</sup> Application for Rehearing, Memorandum in Support at 21 (Appx. at 224).

<sup>82</sup> Notice of Appeal of Appellant Energy Industrial Energy Users-Ohio at 2 (Feb. 1, 2012) (Appx. at 3).

<sup>83</sup> *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 402 (2011) (rehearing and notice of appeal containing identical language that referred to the matter at issue were sufficient to preserve the issue for appellate review).

various cases identified by the Opinion in which appellants did not identify the ground on which they were seeking a reversal,<sup>84</sup> IEU-Ohio did not “forfeit” this issue.

In addition, IEU-Ohio addressed the accounting issue in response to the Commission’s claim that it lacked the authority to adjust the deferred balance under R.C. 4928.144. According to the Commission, R.C. 4928.144 mandates collection of the deferred amounts.<sup>85</sup> In response, IEU-Ohio noted that the statute itself contained no such express requirement and that the Commission, with the Court’s approval, had long recognized that the authorization of deferral accounting does not constitute ratemaking and has consistently found that accounting deferrals are subject to further review and adjustment to reconcile the accounting with the amount legally and reasonably eligible for collection from customers.<sup>86</sup> Thus, the Commission’s attempt to justify an implied limitation on its authority to adjust the deferred balance also placed the Commission’s authority to address adjustments to the accounting treatment of the deferred balance before the Court.

An adjustment to the deferred balance is also supported by the Commission’s recent orders adjusting the deferred balance. Although it has not expressly relied on its accounting authority, the Commission on three separate occasions has adjusted the deferred balance so that customers will not pay excessive charges to AEP-Ohio.<sup>87</sup> (Even after the Commission

---

<sup>84</sup> Opinion at ¶55, citing *Consumers’ Counsel v. Public Util. Comm’n of Ohio*, 70 Ohio St.3d 244 (1994) (appellant failed to specify the alleged violation); *Discount Cellular, Inc. v. Pub. Util. Comm’n of Ohio*, 112 Ohio St.3d 360 (2007) (appellant stated general grounds that the Commission erred when it dismissed a complaint and did not specify the violation the Commission committed).

<sup>85</sup> Commission Brief at 25.

<sup>86</sup> IEU-Ohio Reply Brief at 14.

<sup>87</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section*

authorized a charge to amortize the deferred balance, the Commission continued to assert its authority to adjust the balance.<sup>88</sup> In 2013, the Commission effectively reduced CSP's deferred balance to \$0 after it found that CSP has significantly excessive earnings.<sup>89</sup>) The Commission's argument that it lacks authority to adjust the deferred balance, therefore, does not conform to the Commission's long-standing authority to address the EDU's accounting treatment of deferred balances or its practice with regard to the deferred balance authorized in this case. Because the Court has not fully addressed the Commission's authority over the accounting of the deferred balance and the issue is properly before the Court, it should reconsider its Opinion and reverse the Commission's decision below to avoid an unfair and unlawful result.

---

4928.143(F), Revised Code, and Rule 4901:1-35-10, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011) (Appx. at 341); *In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company*, Case Nos. 09-872-EL-FAC, et al., Opinion and Order, (Jan. 23, 2012) (Appx. at 356); *In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case Nos. 11-4571-EL-UNC, et al., Opinion and Order (Oct. 23, 2013) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13J23B40243A38071.pdf>). See, also, *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Mechanisms to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Revised Code*, Case Nos. 11-4920-EL-RDR, et al., Entry on Rehearing at 4 (April 11, 2012) (Reply Appx. at 4) (also available at: <http://dis.puc.state.oh.us/TiffToPDF/A1001001A12D11B41130H55507.pdf>) (the Commission required a separate proceeding to determine the amount properly recoverable through the PIRR).

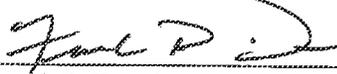
<sup>88</sup> *In the Matter of the Application of Columbus Southern Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case Nos. 11-4571-EL-UNC, et al., Opinion and Order at 29 (Oct. 23, 2013) (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13J23B40243A38071.pdf>).

<sup>89</sup> See Letter to the Honorable Greta See from Steven Nourse (Oct. 28, 2013) regarding the compliance tariffs (available at <http://dis.puc.state.oh.us/TiffToPDF/A1001001A13J28B61555F42957.pdf>).

V. CONCLUSION

This Motion requests the Court to reconsider its Opinion so that customers do not pay AEP-Ohio a \$368 million windfall. For the reasons discussed above, the Court should grant the Motion, and reverse and remand the decision of the Commission. In the absence of such action, AEP-Ohio's customers will suffer an unjust and unnecessary injury.

Respectfully submitted,



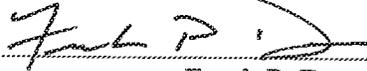
---

Samuel C. Randazzo, Counsel of Record (0016386)  
Frank P. Darr (0025469)  
Joseph E. Oliker (0086088)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
sam@mwncmh.com  
fdarr@mwncmh.com  
joliker@mwncmh.com

**COUNSEL FOR APPELLANT,  
INDUSTRIAL ENERGY USERS-OHIO**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Reconsideration, by Appellant, Industrial Energy Users-Ohio* was served upon the parties of record this 24th day of February 2014 via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.



Frank P. Darr

**Steven T. Nourse** (Reg. No. 0046705)  
(Counsel of Record)  
**Matthew J. Satterwhite** (Reg. No. 0071972)  
**Yazen Alami** (Reg. No. 0086371)  
American Electric Power Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215-2373  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com

**Kathleen M. Trafford** (0021753)  
**Daniel R. Conway** (0023058)  
Porter Wright Morris & Arthur, LLP  
41 South High Street  
Columbus, Ohio 43215  
ktrafford@porterwright.com  
dconway@porterwright.com

**COUNSEL FOR INTERVENING  
APPELLEE, OHIO POWER  
COMPANY**

**Bruce J. Weston**  
(Reg. No. 0016973)  
Consumers' Counsel

**Maureen R. Grady** (Reg. No. 0020847)  
(Counsel of Record)  
**Terry L. Etter** (Reg. No. 0067445)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
grady@occ.state.oh.us  
etter@occ.state.oh.us

**COUNSEL FOR APPELLANT, OFFICE  
OF THE OHIO CONSUMERS'  
COUNSEL**

**Mike DeWine** (Reg. No. 0009181)  
Attorney General of Ohio

**Werner L. Margard III**  
(Reg. No. 0024858)  
(Counsel of Record)

**William L. Wright** (Reg. No. 0018010)  
Section Chief, Public Utilities Section

**John H. Jones** (Reg. No. 0051913)  
Assistant Attorney General  
Public Utilities Commission of Ohio  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, Ohio 43215  
werner.margard@puc.state.oh.us  
william.wright@puc.state.oh.us  
john.jones@puc.state.oh.us

**COUNSEL FOR APPELLEE, PUBLIC  
UTILITIES COMMISSION OF OHIO**

# Attachment

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462.]

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

**SLIP OPINION NO. 2014-OHIO-462**

**IN RE APPLICATION OF COLUMBUS SOUTHERN POWER COMPANY ET AL.;  
INDUSTRIAL ENERGY USERS-OHIO ET AL., APPELLANTS;  
PUBLIC UTILITIES COMMISSION, APPELLEE;  
OHIO POWER COMPANY, INTERVENING APPELLEE.**

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Application of Columbus S. Power Co.*,

**Slip Opinion No. 2014-Ohio-462.]**

*Public utilities—Electric security plan—R.C. 4928.143—Commission’s decision to permit recovery of carrying charges under R.C. 4928.143(B)(2)(d) was lawful and reasonable—Utility not required to prove charges are “necessary” in order to recover costs under R.C. 4928.143(B)(1)(d)—Commission did not err in denying recovery of previously collected “provider of last resort” charges—Refund of POLR revenues already collected from customers by utility would violate prohibition against retroactive ratemaking—Orders affirmed.*

(No. 2012-0187—Submitted October 8, 2013—Decided February 13, 2014.)

APPEAL from the Public Utilities Commission of Ohio,

Nos. 08-917-EL-SSO and 08-918-EL-SSO.

.....

LANZINGER, J.

I. SUMMARY

{¶ 1} This second appeal stems from the approval by the Public Utilities Commission (“commission” or “PUCO”) of the first electric security plan of the American Electric Power operating companies, Columbus Southern Power Company and Ohio Power Company (collectively, “AEP”). We first reviewed the commission’s approval of the electric security plan in 2011. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. There, we held that the commission committed reversible error on three issues: (1) granting AEP a retroactive rate increase (but finding that no refund was available), (2) approving the recovery of carrying costs associated with environmental investments without proper statutory authority, and (3) authorizing the provider-of-last-resort (“POLR”) charge without sufficient evidence. We remanded the POLR-charge and carrying-costs issues for further consideration. *Id.* at ¶ 8-21, 31-35, 22-30.

{¶ 2} On remand, the commission determined that the environmental-investment carrying costs were lawful under R.C. 4928.143(B)(2)(d). *In re Application of Columbus S. Power Co.*, Pub. Util. Comm. Nos. 08-917-EL-SSO and 08-918-EL-SSO, at 14-15 (Oct. 3, 2011) (the “*Remand Order*”). But the commission found that AEP had not presented evidence of its actual POLR costs and directed the company to deduct that charge from its tariff schedules. *Id.* at 22-24. The commission also rejected a request to recover the amounts of the POLR charge and carrying costs that AEP had collected from April 2009 through May 2011. *Id.* at 34-36.

{¶ 3} Following rehearing, the Office of Consumers’ Counsel (“OCC”) and Industrial Energy Users-Ohio (“IEU”) filed this appeal, raising numerous challenges to the commission’s remand orders. None has merit. Therefore, we affirm the orders of the commission.

## II. FACTS AND PROCEDURAL BACKGROUND

{¶ 4} R.C. 4928.141(A) requires electric-distribution utilities to provide to consumers a “standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.” The utility may provide the offer in one of two ways: through a “market rate offer” under R.C. 4928.142 or through an “electric security plan” under R.C. 4928.143.

{¶ 5} AEP chose the second option and filed an application for approval of an electric security plan (“ESP”). The ESP statute permits numerous rate components, R.C. 4928.143(B)(2), but says very little about rate calculation. The only substantive requirement is that the plan must be “more favorable in the aggregate as compared to the expected results” of a market-rate offer. R.C. 4928.143(C)(1).

### A. ESP Approval and Court Remand

{¶ 6} On March 18, 2009, the commission issued an opinion and order approving AEP’s first ESP, to be in effect from 2009 to 2011. *In re Application of Columbus S. Power Co.*, Pub. Util. Comm. Nos. 08-917-EL-SSO and 08-918-EL-SSO (Mar. 18, 2009) (the “ESP Order”). Following two rounds of rehearings, OCC and IEU appealed. We eventually held that the commission had granted AEP a retroactive rate increase of \$63 million in violation of R.C. 4928.141(A), as well as the rule established in *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). Nevertheless, OCC had not established that it was entitled to its requested remedy of a refund, and that ruling was conclusive of the issue. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 8.

{¶ 7} We also held that the commission erred when it found that AEP could recover environmental-investment carrying costs under R.C. 4928.143(B)(2). We remanded the matter to allow the commission to specifically

determine whether any of the nine categories of cost recovery under R.C. 4928.143(B)(2)(a) through (i) authorized the recovery of carrying costs. *Id.* at ¶ 31-35.

{¶ 8} Finally, we determined that the commission approved more than \$500 million in POLR charges over the three years of the plan. *Id.* at ¶ 22. POLR costs are intended to compensate for the utility's risks in standing ready to serve customers who purchase generation service from a competitive supplier and then return to the utility for generation service. *See Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 39, fn. 5. AEP had calculated its POLR costs for the commission using a mathematical formula (called the "Black-Scholes model") that was created to price stock options. We held that contrary to the commission's finding, the formula did not reflect the costs to AEP to be the POLR. 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 25-30.

{¶ 9} The case was remanded to allow the commission the option to consider whether (1) "a non-cost-based POLR charge is reasonable and lawful" or (2) "it is appropriate to allow AEP to present evidence of its actual POLR costs." *Id.* at ¶ 30.

#### **B. Remand Proceedings**

{¶ 10} On remand, the commission issued its May 25, 2011 order, directing that AEP file revised tariffs making the recovery of environmental-investment carrying costs and the POLR charge subject to refund as of the first billing cycle of June 2011. The order provided that if the commission ultimately determines that these charges are to be refunded to customers, interest may be imposed on the amounts collected by AEP in the interim.

{¶ 11} Following a five-day hearing, the commission issued its opinion and order on October 3, 2011. The commission determined that the environmental-investment carrying costs were lawful under R.C.

4928.143(B)(2)(d). *Remand Order* at 14-15. Because the commission approved the recovery of carrying costs, no refund was ordered of those that were collected during the remand proceedings.

{¶ 12} In addition, because the commission found that AEP had failed to submit any evidence of its actual POLR costs, it ordered AEP to remove the POLR charge from its tariffs. *Remand Order* at 22-24 and 33. And consistent with its May 25, 2011 order, it also directed AEP to refund to customers the amount of the POLR charges collected during the remand proceedings (i.e., from the first billing cycle in June 2011 until the October 3, 2011 remand order). *Id.* at 33-34. The ESP was set to expire at the end of 2011, which was two months after the commission's remand order and two weeks after the final rehearing entry. As a result, AEP was able to collect nearly all of its POLR costs during the term of the ESP, excepting from June 2011 to December 2011 (the end of the ESP).

{¶ 13} During the remand proceedings, OCC and IEU had also requested that the commission allow customers to recover the POLR and environmental-investment carrying charges that AEP had collected from April 2009 through May 2011 (when those charges became subject to refund by order of the commission on remand). In the initial ESP proceedings, the commission had allowed AEP to phase in its rate increase by deferring the recovery of a portion of annual fuel costs incurred during the ESP period. Under this part of the plan, the balance of the deferred fuel costs remaining at the end of the ESP would be recovered with carrying charges from 2012 to 2018. *ESP Order* at 20-23. On remand, OCC and IEU argued that the commission should reduce the balance of the deferred fuel costs to be collected from customers by the amount of POLR and environmental-investment carrying costs collected, on the theory that those charges were not lawfully collected based on this court's rejection of them in the first ESP appeal.

{¶ 14} The commission, however, refused, reasoning that any adjustment of the deferred fuel-cost balance to account for the collection of the past charges

would violate this court's prohibition against retroactive ratemaking. *Remand Order* at 35-36.

{¶ 15} OCC's and IEU's applications for rehearing were denied, and this appeal followed.

### III. STANDARD OF REVIEW

{¶ 16} "R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 50. We will not reverse or modify a PUCO order on questions of fact when the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*

{¶ 17} Although the court has "complete and independent power of review as to all questions of law" in appeals from the PUCO, *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997), we may rely on a state agency's expertise in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979).

### IV. DISCUSSION

{¶ 18} OCC and IEU challenge the commission's orders on two primary grounds: (1) the orders improperly authorized the recovery of carrying costs

associated with environmental investments under R.C. 4928.143(B)(2)(d) and (2) the orders improperly denied the recovery of the POLR charges and environmental-investment carrying costs collected by AEP from April 2009 through May 2011. None of appellants' supporting arguments justify reversal.

**A. The commission's decision to permit recovery of carrying charges under R.C. 4928.143(B)(2)(d) was lawful and reasonable**

{¶ 19} In its first three propositions of law, IEU argues that the commission erred when it found that AEP could recover certain carrying costs associated with environmental investments pursuant to R.C. 4928.143(B)(2)(d). The following background is pertinent to resolving these claims.

{¶ 20} In the initial ESP proceedings, the commission permitted AEP to recover the incremental capital carrying costs on past environmental investments after January 1, 2009 (the beginning of the ESP period). AEP itself had made the environmental investments between 2001 and 2008, but they were not included in rates before the *ESP Order*. See *ESP Order* at 28. The commission, however, found that the carrying costs were recoverable during the ESP period under the broad language of R.C. 4928.143(B)(2), which states, "The [electric security] plan may provide for or include, without limitation, any of the following," and then lists nine categories of cost recovery. See R.C. 4928.143(B)(2)(a) through (i). On appeal, we reversed the commission's order on that point and remanded the matter for the commission's specific determination whether any of the nine categories listed in R.C. 4928.143(B)(2)(a) through (i) authorized the recovery. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 31-35.

{¶ 21} On remand, the commission determined that R.C. 4928.143(B)(2)(d) permits AEP's recovery of carrying costs. *Remand Order* at 13-15. Subsection (d) provides that an ESP may include "[t]erms, conditions, or charges relating to \* \* \* carrying costs \* \* \* as would have the effect of

stabilizing or providing certainty regarding retail electric service.” In turn, R.C. 4928.01(A)(27) defines “retail electric service” as “any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption.” According to the commission, the record evidence demonstrated that the environmental-investment carrying costs “have the effect of providing certainty to both the Companies and their customers regarding retail electric service, specifically generation service.” *Remand Order* at 14. The commission confirmed this finding on rehearing and further found that the carrying costs contribute to “stabilizing prices,” which benefits AEP’s customers. Nos. 08-917-EL-SSO and 08-918-EL-SSO, at 5-6 (Dec. 14, 2011) (the “*Remand Rehearing Entry*”).

{¶ 22} On appeal, IEU devotes its first three propositions of law to arguing that the commission misstated the applicable law and the facts. We will address each claim in turn.

**1. The utility is not required to prove that charges are “necessary” in order to recover costs under R.C. 4928.143(B)(1)(d)**

{¶ 23} In proposition of law No. 1, IEU contends that the commission misconstrued R.C. 4928.143(B)(2)(d)’s requirement that carrying costs “have the effect of stabilizing or providing certainty regarding retail electric service.” IEU raises two challenges here: one legal (statutory interpretation) and one factual. We reject IEU’s arguments for the reasons that follow.

**a. IEU has not demonstrated that R.C. 4928.143(B)(2)(d) imposes a “necessary” requirement**

{¶ 24} IEU offers a single challenge to the commission’s interpretation of R.C. 4928.143(B)(2)(d), which allows an ESP to include “charges relating to \* \* \* carrying costs \* \* \* as would have the effect of stabilizing or providing certainty regarding retail electric service.” IEU argues that for carrying costs to

fit under the statute, AEP must demonstrate that the costs were necessary. IEU premises its argument entirely on the dictionary definition of “certainty,” citing *Webster’s Ninth New Collegiate Dictionary* 222-223 (1983). Relying on its preferred definition, IEU asserts that “certainty,” as used in the statute, “denotes that the retail electric service is made probable of occurrence, dependable, or reliable.” Based on this definition, IEU asserts that AEP had the burden of showing that the carrying costs were “*necessary* to make it *probable* that customers would receive retail electric service.” (Emphasis added.) Although it is not entirely clear, IEU appears to argue that AEP bears the burden of justifying the carrying charges, which required it to demonstrate that the provision of retail electric service would become less probable if the carrying costs were excluded from the ESP, i.e., that carrying costs are necessary. IEU has not demonstrated, however, that R.C. 4928.143(B)(2)(d) contains a necessity requirement.

{¶ 25} First, contrary to IEU’s representations, the Webster definition used by IEU does not define “certainty” in terms of “probability of occurrence.”

{¶ 26} Second, and most importantly, the statute does not expressly require a showing of necessity. When interpreting a statute, a court must first examine the plain language of the statute to determine legislative intent. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12. The court must give effect to the words used, making neither additions nor deletions from words chosen by the General Assembly. *Id.* See also *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19. Certainly, had the General Assembly intended to require that electric-distribution utilities prove that carrying costs were “necessary” before they could be recovered, it would have chosen words to that effect.

{¶ 27} Third, IEU’s argument otherwise finds no support in the statutory language. Although R.C. 4928.143(B)(2)(d) does not expressly require a showing

of necessity, it does expressly impose a standard for recovery. The statute authorizes cost recovery through such “[t]erms, conditions, or charges \* \* \* *as would have the effect of stabilizing or providing certainty regarding retail electric service.*” (Emphasis added.) The critical problem for IEU is that it attempts to prove its theory solely through the meaning of a single word in the statute—the word “certainty”—to the exclusion of all others. But the question is what R.C. 4928.143(B)(2)(d) means when read as a whole, and IEU never explains how the statute as a whole supports its position.

{¶ 28} In the context of IEU’s argument, the word “necessary” denotes something that is essential, indispensable, or absolutely required. *See Webster’s Third New International Dictionary* 1510-1511 (1986). Yet IEU never explains how the phrase “as would have the effect of stabilizing or providing certainty regarding retail electric service” imposes a necessity requirement. Indeed, it is anything but self-evident that this phrase requires the utility to show that carrying costs are necessary (absolutely required or indispensable) before they may be recovered. That is, nothing supports IEU’s assertion that the utility must prove that the provision of retail electric service would be less probable (or certain) in order to recover costs under the statute.

{¶ 29} In the end, the commission’s finding that R.C. 4928.143(B)(2)(d) does not require a showing of necessity is entitled to deference as an interpretation of a rate-related statutory provision if it is reasonable. *See In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276, ¶ 36-38. We find that it was. Therefore, we reject IEU’s argument.

**b. The record supported authorization of the carrying charges under the requirements of R.C. 4928.143(B)(2)(d)**

{¶ 30} IEU also contends in proposition of law No. I that the evidence before the commission did not support the legitimacy of the carrying costs under

R.C. 4928.143(B)(2)(d). After review, we hold that IEU's evidentiary claim lacks merit.

{¶ 31} The commission found that the record supported the authorization of the carrying costs under R.C. 4928.143(B)(2)(d) as having the effect of providing certainty to both AEP and its customers regarding retail electric service, specifically generation service. Citing the testimony of AEP witness Nelson, the commission found that the environmental-investment carrying costs allowed AEP to continue to provide low-cost generation power, which had the effect of lowering the price of retail electric service. Nelson did indeed testify to this. He testified that the environmental-investment carrying costs were necessary to allow AEP to keep its coal-fired generation plants running. Nelson explained that AEP had made significant capital investments in environmental improvements to its generating plants and that capital expenditures are typically long-lived assets that are recovered over the life of the asset. According to Nelson, the inclusion of carrying costs in the ESP compensated the company for the investment in its generating plants. He also testified that retail customers benefitted from the low-cost power generated from these plants because AEP passed those lower costs through to its customers.

{¶ 32} IEU, however, faults the commission for relying on Nelson's testimony, asserting that Nelson did not address the relevant question of whether the carrying charges would have the effect of making retail electric service more certain. According to IEU, "the availability of lower cost power does not support the finding" that the environmental investments (which gave rise to the carrying costs) "made the availability of the power more 'certain.'" But R.C. 4928.143(B)(2)(d) does not require a showing that the investment underlying the carrying costs makes "the availability of the power more certain." As already discussed, the statute requires only a showing that "[t]erms, conditions, or charges \* \* \* have the effect of stabilizing or providing certainty regarding retail electric

service.” Nelson testified that the environmental-investment carrying charges were important to AEP’s ability to provide generation power at a cost that was below the market rate for purchased power at that time, which in turn had the effect of lowering or stabilizing the price of retail electric service. Generation falls within the definition of “retail electric service.” *See* R.C. 4928.01(A)(27) (defining “retail electric service” as “any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption”). Thus, Nelson’s testimony explicitly confirms what the commission found: that the carrying charges had the effect of providing certainty regarding retail electric service, specifically by providing reasonably priced electric generation service.

{¶ 33} As a final matter, IEU contends that the commission ignored evidence that contradicted its finding that customers benefitted from the lower-cost power generated from AEP’s coal-fired plants. IEU refers here to testimony from its executive director, Kevin M. Murray, describing how regional transmission organization PJM Interconnection<sup>1</sup> dispatches power to meet demand. IEU states that PJM—rather than AEP—is charged with dispatching generation power to meet the load of AEP’s customers in AEP’s service territory. IEU’s point seems to be that AEP’s customers do not benefit from the lower-cost power because AEP does not provide power generated from its own plants directly to its own customers.

{¶ 34} The commission, however, did not ignore Murray’s testimony; it deemed his testimony irrelevant. According to the commission, the manner in which PJM dispatches power is not relevant, because AEP generally uses its own generating units to serve its customers and passes the benefit of the lower costs of

---

<sup>1</sup> PJM is a multiutility regional transmission organization designated by the Federal Energy Regulatory Commission to coordinate the movement of wholesale electricity in all or part of 13 states—including Ohio—and the District of Columbia. *See generally Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 5-6.

power to AEP customers through reductions in the fuel-adjustment clause. IEU's claim that Murray's testimony on this subject was "unrefuted" is unfounded. The commission did cite other testimony as a basis to reject Murray's testimony.

{¶ 35} In the end, IEU asks the court to reweigh the evidence. But that is not our function on appeal. *See, e.g., Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 39. As the commission's orders were amply supported by the record, we reject IEU's evidentiary claims.

**2. R.C. 4928.143(B)(2)(d) does not require an economic basis for recovery**

{¶ 36} In proposition of law No. II, IEU asserts that to recover environmental-investment carrying costs under R.C. 4928.143(B)(2)(d), AEP must first show that its other revenues were insufficient to compensate it for providing generation service. Conceding that R.C. 4928.143(B)(2)(d) does not expressly require an economic justification as a prerequisite for authorizing cost recovery, IEU nevertheless avers when the commission authorized the recovery of carrying costs on remand, it failed to abide by its "economic need" policy established in the *ESP Order*.

{¶ 37} IEU's position is premised on the part of the *ESP Order* that addressed two plans proposed by AEP to improve its distribution system. AEP had sought approval and cost recovery for a series of plans designed to modernize and improve its vegetation management, underground-cable maintenance, distribution automation,<sup>2</sup> and overhead-equipment inspection under R.C. 4928.143(B)(2)(h), which allows an ESP to include provisions regarding the utility's distribution service. *See ESP Order* at 30-34.

---

<sup>2</sup> Distribution automation is an advanced technology that improves service reliability by quickly identifying and isolating faulty distribution-line sections and remotely restoring service interruptions. *See generally* [http://www.eeweb.com/blog/nicholas\\_abisamra/distribution-systems-automation-optimization-part-1](http://www.eeweb.com/blog/nicholas_abisamra/distribution-systems-automation-optimization-part-1) (accessed Feb. 7, 2014).

{¶ 38} The commission found, consistent with its prior decisions, that a distribution rider established pursuant to R.C. 4928.143(B)(2)(h) should be based on the electric utility’s prudently incurred costs. *ESP Order* at 34. But contrary to IEU’s claim, nothing suggests that the commission intended this policy to also apply to R.C. 4928.143(B)(2)(d). IEU points to no language in the *ESP Order* that this policy extends beyond the provisions for distribution-cost recovery in R.C. 4928.143(B)(2)(h). The commission did not mention R.C. 4928.143(B)(2)(d), and we decline IEU’s invitation to read an economic-need policy into the language of that statute. Therefore, IEU’s second proposition of law is denied.

**3. IEU’s claim regarding R.C. 4928.143(B)(1) is moot**

{¶ 39} In proposition of law No. III, IEU maintains that the commission exceeded the scope of this court’s remand instructions when it relied on R.C. 4928.143(B)(1) as “an alternative theory” to justify recovery of the carrying costs. We find it unnecessary to determine whether the commission erroneously relied on R.C. 4928.143(B)(1), because the commission was clearly authorized under R.C. 4928.143(B)(2)(d) to approve the carrying costs. Accordingly, we dismiss IEU’s third proposition of law as moot. *See Armco, Inc. v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982) (this court does not indulge itself in advisory opinions).

**B. IEU has waived its challenge to the collection of carrying costs during the remand proceedings**

{¶ 40} In proposition of law No. IV, IEU challenges the commission’s decision to allow AEP to recover carrying costs during the remand proceedings. The commission had issued an order on May 25, 2011, allowing AEP to continue to collect these charges during the remand proceedings. The order made the collection of the charges subject to refund in the event that the commission found that they were not authorized by one of the categories of R.C. 4928.143(B)(2).

This meant, according to IEU, that the commission allowed recovery of carrying costs during the remand period, i.e., after this court struck down the basis for their recovery and before the commission authorized recovery on an alternate basis. Thus, recovery of those costs during the remand period was unauthorized by law.

{¶ 41} IEU failed to preserve this issue by not challenging the commission's May 25, 2011 order until November 2011, after the charges subject to refund had already been collected. By waiting six months to challenge the order, IEU deprived the commission of an opportunity to cure any error when it reasonably could have. The issue is therefore waived and will not be considered. *See, e.g., Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 712 N.E.2d 724 (1999) ("By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred").

**C. The appellants have failed to show error in the orders denying the recovery of previously collected POLR charges**

{¶ 42} In its first and only proposition of law, OCC argues that the commission erred when it allowed AEP to retain the "unlawful" POLR charges that AEP collected from customers during the term of the ESP. In the *ESP Order*, the commission authorized a phase-in of AEP's rates during the ESP period by allowing AEP to defer a portion of its annual incremental fuel costs for recovery after the ESP expired. OCC argues that the commission erred when it refused to reduce the deferred-fuel-costs balance by an amount equal to the "unjustified" POLR charge. Likewise, IEU argues in propositions of law Nos. V through VII that the commission was required to reduce the deferred-fuel-costs balance in an amount equal to the unauthorized POLR charge.<sup>3</sup>

---

<sup>3</sup> IEU also sought to reduce the deferred fuel costs by the amount of the environmental-investment carrying charges collected by AEP through May 2011, on the theory that those charges were unlawfully collected. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-

{¶ 43} To understand appellants’ arguments requires a review of the commission’s approval of AEP’s incurred fuel costs and deferred fuel costs in the *ESP Order*. Therefore, the following background is provided to place this issue in proper context.

1. **The commission’s approval of the Fuel Adjustment Clause and deferral of fuel costs**

{¶ 44} ESPs may provide for “[a]utomatic recovery” of “the cost of fuel used to generate the electricity supplied under the [standard service] offer,” “provided the cost is prudently incurred.” R.C. 4928.143(B)(2)(a). The Fuel Adjustment Clause (“FAC”) is a mechanism that provides for a separate charge from the base rate that will automatically adjust as the cost of fuel fluctuates. If fuel costs rise, the base rate will stay the same, but the FAC will rise automatically without a new rate case. *ESP Order* at 14-15, 18-19.

{¶ 45} It is important to remember that no matter how the baseline was calculated, only actual fuel costs will be recovered. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 66. The FAC mechanism includes quarterly adjustments to reconcile actual fuel costs incurred, which establishes the new charge for the following quarter. The FAC mechanism also requires an annual prudence and accounting review. These are designed to control for any over- or underrecoveries that may occur within a particular quarter. *ESP Order* at 14-15.

{¶ 46} In the *ESP Order*, the commission established caps on how much AEP could increase its rates each plan-year to ensure rate stability and to mitigate the impact on customers. *ESP Order* at 22. R.C. 4928.144 authorizes “any just and reasonable phase-in of any electric distribution utility rate \* \* \* as the commission considers necessary to ensure rate or price stability for consumers.”

---

Ohio-1788, 947 N.E.2d 655, ¶ 31-35. We have already held that AEP’s recovery of carrying charges was authorized under R.C. 4928.143(B)(2)(d), rendering this claim moot.

Under the rate caps, AEP could increase its bills only by a set percentage each year. During the term of the ESP, AEP deferred for future collection a portion of the annual incremental FAC costs (i.e., fuel costs) that exceeded the rate caps. In short, amounts earned during each year of the ESP but not collected would be placed into a “deferral” account and, as required by statute, accrue “carrying charges,” a type of financing charge added to them. *See* R.C. 4928.144; *ESP Order* at 22.

**2. The appellants’ proposed remedy violates the rule against retroactive ratemaking**

{¶ 47} On appeal, OCC and IEU challenge the commission’s decision to refuse to adjust the FAC deferral balance. OCC and IEU seek a reduction in the FAC deferral in the amount of \$368 million, the amount of POLR costs collected by AEP from April 2009 through May 2011. OCC and IEU both characterize their proposed adjustment of the FAC deferral balance as a prospective offset of revenues deferred for future collection.<sup>4</sup>

{¶ 48} OCC and IEU effectively ask the court to direct the commission to order a refund of the POLR revenues that AEP had already collected from customers during the ESP term—specifically from April 2009 through May 2011. Their theory is that the charges were not lawfully collected because this court rejected the POLR charge in the first ESP appeal, as did the commission on remand. We hold, however, that the law does not require recovery of the POLR charges. Granting appellants’ request would constitute retroactive ratemaking.

**a. R.C. Title 49 forbids retroactive ratemaking**

{¶ 49} Seeking to recover excessive rates charged during the appeal of a commission order is exactly the action this court found contrary to law in *Keco*

---

<sup>4</sup> The commission has approved a mechanism for AEP to collect the deferred fuel costs (the deferred FAC balance) with carrying charges, so the revenues at issue are currently being collected. *See In re Application of Columbus S. Power Co. for Approval of Mechanism to Recover Deferred Fuel Costs*, Pub. Util. Comm. No. 11-4920-EL-RDR (Aug. 1, 2012).

*Industries*, 166 Ohio St. 254, 141 N.E.2d 465, paragraph two of the syllabus (R.C. Title 49 “affords no right of action for restitution of the increase in charges collected during the pendency of the appeal”). Likewise, in *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997), the court ruled that “utility ratemaking \* \* \* is prospective only” and that R.C. Title 49 “prohibit[s] customers from obtaining refunds of excessive rates that may be reversed on appeal.” Moreover, the court has consistently applied *Keco* and refused to grant refunds in appeals from commission orders. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21, citing *Keco* (“any refund order would be contrary to our precedent declining to engage in retroactive ratemaking”); *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 (“Neither the commission nor this court can order a refund of previously approved rates, \* \* \* based on the doctrine set forth in *Keco* \* \* \*”). These cases teach that present rates may not make up for excessive rate charges due to regulatory delay, which is exactly what OCC and IEU are seeking here.

**b. Appellants’ theory that the POLR charge was unlawfully collected is wrong**

{¶ 50} As noted, appellants seek to recover charges that were already collected in rates on the theory that the charges were not lawful based on this court’s rejection of the POLR charge in the first ESP appeal and on the commission’s similar rejection of the POLR charge on remand. More specifically, OCC and IEU argue that the phase-in of rates in the ESP was not “just and reasonable,” as required by R.C. 4928.144, because the deferred FAC balance was calculated in part on the unlawful POLR revenues collected by AEP. See R.C. 4928.144 (authorizing the commission to order “any just and reasonable phase-in of any electric distribution utility rate \* \* \* as the commission considers necessary to ensure rate or price stability for consumers”). And the remedy,

according to appellants, is to deduct the unlawful POLR revenues from the deferred FAC balance that would otherwise be charged to customers.

{¶ 51} There is no basis, however, for appellants to claim that the POLR charges that were collected from April 2009 to May 2011 were “unlawful.” *Keco* holds that rates set by the commission are lawful until such time as this court later finds that the commission erred in setting that particular rate. *Keco*, 166 Ohio St. at 259, 141 N.E.2d 465. *See also Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d at 347, 686 N.E.2d 501 (“while a rate is in effect, a public utility must charge its consumers in accordance with the commission-approved rate schedule”). Moreover, a remand order of this court does not automatically render the existing rates unlawful, as “the rate schedule filed with the commission remains in effect until the commission executes this court’s mandate by an appropriate order.” *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976), paragraph two of the syllabus (holding that a decision of this court to reverse and remand an order of the commission “does not reinstate the rates in effect before the commission’s order or replace that rate schedule as a matter of law, but is a mandate to the commission to issue a new order”).

{¶ 52} We reversed the POLR charge on April 19, 2011. *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. On remand, the commission ordered that POLR charges not yet collected would be subject to refund as of the first billing cycle of June 2011. *Remand Order* at 39. When the commission issued its remand order, it directed AEP to refund the POLR charges collected during the remand proceedings. *Id.* at 34. Thus, the deferred FAC balance—which was calculated during the ESP term (2009-2011)—was not derived from “unlawful” POLR charges, as the appellants contend.

**c. The existence of the FAC deferral balance is of no avail to appellants in this case**

{¶ 53} Appellants contend that the existence of the deferred FAC balance creates a mechanism that allows for prospective rate adjustments to fully remedy the POLR overcharges, without running afoul of the prohibition against retroactive ratemaking. We disagree.

{¶ 54} The fact that the deferred fuel costs may provide a mechanism to adjust rates prospectively does not alter the nature of appellants' requested remedy. The appellants are seeking to recover—through an adjustment to current rates—POLR charges that already have been collected from customers and later were found to be unjustified. The rule against retroactive ratemaking, however, is clear: present rates may not make up for revenues lost due to regulatory delay. *In re Application of Columbus S. Power Co.*, at ¶ 10-11.

**d. The court lacks jurisdiction over the appellants' ratemaking and accounting arguments**

{¶ 55} OCC claims that any adjustment to the deferred fuel costs does not result in retroactive ratemaking because the commission was not engaged in ratemaking when it established the FAC mechanism and FAC deferral balance. In a similar vein, OCC and IEU maintain that the commission was not engaged in ratemaking because the FAC deferral component was only an accounting mechanism. The appellants have forfeited these claims by failing to present them to the commission on rehearing. That failure jurisdictionally bars the court from considering them. *See* R.C. 4903.10; *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994) (citing cases). *See also Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59 (“when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met”).

- e. **The appellants failed to avail themselves of the only remedy available to them: a stay under R.C. 4903.16**

{¶ 56} AEP collected \$368 million in POLR charges during the ESP, without any evidence that would justify the cost recovery. But under *Keco's* no-refund rule, AEP is permitted to keep it, resulting in a windfall for AEP. While we recognize that this particular outcome is unfair, as we noted in *Columbus S. Power*, any unfairness must be viewed in the context of the larger legislative scheme:

As *Keco* and other cases have noted, the statutes protect against unlawfully high rates by allowing stays. R.C. 4903.16 authorizes the court to stay execution of commission orders. \* \* \* This section makes “clear that the General Assembly intended that a public utility shall collect the rates set by the commission’s order, giving, however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond.” *Keco*, 166 Ohio St. at 257, 2 O.O.2d 85, 141 N.E.2d 465. The stay remedy “completely abrogated” the form of refund (a restitution order) sought in that case. *Id.* at 259.

*Columbus S. Power*, 128 Ohio St. 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 17.

{¶ 57} Critical for both OCC and IEU is that they failed to obtain such a stay from this court in the first ESP appeal, at a time when the POLR charges were being collected.<sup>5</sup> OCC and IEU do not address R.C. 4903.16, let alone offer an argument against its application.

---

<sup>5</sup> Before filing the instant appeal, OCC attempted to stay the collection of the ESP rates, filing an action in prohibition, an action in procedendo, a premature appeal, and a motion to suspend the

**D. The rule against retroactive ratemaking bars adjustments in this case to delta revenues, the Universal Service Fund rates, and the significantly-excessive-earnings test**

{¶ 58} In proposition of law No. VIII, IEU claims that in addition to reducing the deferred-fuel-costs balance by the POLR, the commission was required to make downward adjustments in other areas due to AEP's unlawful recovery of POLR revenues. IEU identifies delta revenues, Universal Service Fund ("USF") amounts, and the significantly-excessive-earnings test ("SEET"), as areas that it believes warrant additional adjustments.<sup>6</sup>

{¶ 59} IEU's theory is that the unlawful POLR charges are "embedded" in AEP's collection of delta revenues, USF charges, and annual ESP earnings, causing these revenues to be overstated. We have already rejected IEU's theory that the POLR charges were unlawful. Therefore, we dismiss IEU's proposition of law No. VIII.

## V. CONCLUSION

---

ESP order. The difficulty for OCC is that it failed to seek a bond, as required by R.C. 4903.16. See *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 18-19.

<sup>6</sup> Delta revenues are derived from discounted rate arrangements under R.C. 4905.31. Delta revenue refers to the amount of the discount: it is the difference between what the utility would have collected under its tariffs and what it actually collected under the discounted rate. See Ohio Adm.Code 4901:1-38-01(C). Delta revenue may be recovered (in whole or in part) from all other customers. See R.C. 4905.31(E) (allowing utility to recover costs, including "revenue foregone," as a result of a discounted rate arrangement). Somewhat similarly, the USF provides bill-payment assistance to low-income residential consumers, and other consumers pay USF charges to make the utility whole. R.C. 4928.51; *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 28, fn. 4.

As to the SEET, under R.C. 4928.143(F), electric distribution utilities are required to undergo an annual earnings review. If their ESP resulted in "significantly excessive earnings" compared to similar companies, the utility must return the excess to customers. See, e.g., *In re Application of Columbus S. Power Co.*, 134 Ohio St.3d 392, 2012-Ohio-5690, 983 N.E.2d 276 (the court's review of AEP's SEET for 2009).

{¶ 60} In summary, we hold that OCC and IEU have not carried their burden of showing reversible error in the commission's remand orders. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 125 Ohio St.3d 57, 2010-Ohio-134, 926 N.E.2d 261, ¶ 42 and ¶ 73. Therefore, we affirm the commission's orders.

Orders affirmed.

O'CONNOR, C.J., and O'DONNELL, KENNEDY, and FRENCH, JJ., concur.

PFEIFER and O'NBILL, JJ., dissent.

.....  
**PFEIFER, J., dissenting.**

{¶ 61} On remand, the PUCO has determined that AEP did not present evidence of its Provider of Last Resort ("POLR") costs. The PUCO stated that the \$368 million in POLR revenues that AEP had collected from customers was "unjustified." Nevertheless, the PUCO asserted that a refund under the circumstances would be tantamount to retroactive ratemaking, something it is not authorized to engage in. *See Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997).

{¶ 62} It is unconscionable that a public utility should be able to retain \$368 million that it collected from consumers based on assumptions that are unjustified. The problem stems from this court's 1957 decision, which determined that "[w]here the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal." *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), paragraph two of the syllabus. Clearly the time has come to overturn this case.

{¶ 63} R.C. 4905.32, the statute on which the *Keco* decision is based, does not state that there is “no right of action for restitution of the increase in charges collected during the pendency of the appeal.” In my view, that part of the opinion is mere dicta, foolhardy, erroneous, and not binding on this court. Indeed, it boggles the mind that this court would ever countenance such a proposition: that a public utility should be allowed to fatten itself on the backs of Ohio residents by collecting unjustified charges.

{¶ 64} In this case, we are talking about \$368 million in unjustified charges that, instead of redounding to the people who paid them, reside in the coffers of a *public* utility without the justification of actual costs. This illusory charge will become pure unwarranted profit based on this court’s decision today. And it does not have to be this way.

{¶ 65} *Keco* should be overturned. Charges that are approved by the PUCO but that do not withstand challenge in this court ought to be subject to restitution.

{¶ 66} A public utility ought not to receive unjust enrichment based on charges that in the context of this case as determined by the PUCO, clearly should not have been approved. R.C. 4905.32 states that utilities cannot refund a rate that has been charged pursuant to the rate schedule filed with the PUCO. It does not say that this court cannot compel a utility to provide restitution for charges that it has unjustifiably collected. A practical way to unwind this case so that it does not shock the utility and its investors is to set off the unjustifiable collections against future charges. The Ohio Consumers’ Counsel has suggested that a direct setoff against the deferred fuel cost rider is an appropriate way for Columbus Southern to provide restitution.

{¶ 67} Allowing AEP to retain the \$368 million that it collected based on charges that were not justified is unconscionable. Doing so because of a 50-year

old case that is not supported by the statute on which it is based is ridiculous. The ratepayers of Ohio deserve better. I dissent.

O'NEILL, J. concurs in the foregoing opinion.

-----  
Bruce J. Weston, Consumers' Counsel, and Maureen R. Grady and Terry L. Etter, Assistant Consumers' Counsel, for appellant Ohio Consumers' Counsel.

McNees, Wallace & Nurick, L.L.C., Samuel C. Randazzo, Frank P. Darr, and Joseph E. Olikier, for appellant Industrial Energy Users-Ohio.

Michael DeWine, Attorney General, and William L. Wright, Werner L. Margard III, and John H. Jones, Assistant Attorneys General, for appellee Public Utilities Commission of Ohio.

Steven T. Nourse and Matthew J. Satterwhite; and Porter, Wright, Morris & Arthur, Kathleen M. Trafford, and Daniel R. Conway, for intervening appellee, Ohio Power Company.

-----