

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 : Case No. 2012-0187
 Corporate Separation Plan; and Sale or :
 Transfer of Certain Generating Assets. : Appeal from the Public
 : Utilities Commission of Ohio

In the Matter of the Application of Ohio Power :
 Company for Approval of its Electric Security : PUCO Case Nos. 08-917-EL-
 Plan; and an Amendment to its Corporate : SSO; 08-918-EL-SSO
 Separation Plan. :

MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION OF INTERVENING APPELLEE OHIO POWER COMPANY*

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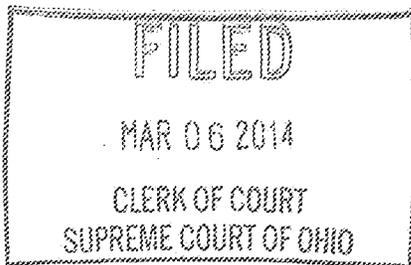
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MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION

The Motion for Reconsideration filed by Industrial Energy Users-Ohio (“IEU”) has no merit and should be denied. The motion merely reargues IEU’s position that the Court should order the Commission to claw back what IEU has wrongly contended throughout this case are the “unlawful” provider-of-last-resort (“POLR”) charges Ohio Power Company (“OPCo”, AEP “Ohio”, or “the Company”) previously collected in 2009 through 2011 by deducting the amount of POLR revenue collected from the balance of approved deferred fuel costs presently being collected by AEP pursuant to its Fuel Adjustment Clause (“FAC”) mechanism. The grounds IEU asserts warrant reconsideration are simply a ruse. This Court expressly considered IEU’s argument that the “just and reasonable” component of R.C. 4928.144 required the fuel cost balance deferred through the FAC to be reduced by an amount equivalent to the POLR revenue received by AEP in prior years. The Court rejected that argument because it was based on the faulty premise that “the POLR charges that were collected from April 2009 to May 2011 were ‘unlawful.’” *In re Application of Columbus S. Power*, 2014-Ohio-462, ¶ 50-52. The Court also fully addressed IEU’s argument that a reduction in the balance of the deferred fuel costs would not constitute retroactive ratemaking. The Court soundly rejected IEU’s position, citing the Court’s consistent precedents that “present rates may not make up for excessive rate charges due to regulatory delay, which is exactly what the Office of Consumers’ Counsel (“OCC”) and IEU are seeking here.” *Id.* at ¶ 49. The Court expressly found IEU’s argument that using the fuel adjustment clause to recoup the POLR charges avoided the retroactive ratemaking prohibition was “of no avail.” *Id.* at ¶ 53

The Court made no error in this case. It fully considered the parties' position and applied well-established law to find that refunding the previously collected POLR revenues by reducing the balance of the fuel costs deferred and phased-in under R.C. 4928.144 was not warranted and would constitute retroactive ratemaking. The opinion of the Court is well-reasoned, well-supported and demonstrates that the Court fully understood, and fairly considered, the issues before it. The Court was unanimous in the conclusion that the relief sought by IEU was foreclosed by the existing law. And, IEU is not asking the Court to overturn prior precedent; it is merely rearguing its theory that the prohibition on retroactive ratemaking can be creatively side-stepped if the Court would only accept the fiction that the balance of the deferred fuel costs is an undifferentiated pot of revenue that includes uncollected and unlawful POLR charges. No member of the Court thought it would be appropriate to negate the law by winking at the facts as IEU suggests.

A. The Standard of Review.

S.Ct.Prac.R. 18.02(B) makes it clear that a motion for reconsideration that merely reargues the case is improper. The purpose of a motion for reconsideration is to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Rust v. Lucas Cty. Bd. of Elections*, 101 Ohio St.3d 63, 2004-Ohio-9, 800 N.E.2d 1162 (citing *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St.3d 539, 541, 697 N.E.2d 181 (1998), quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995) (applying former S.Ct.Prac.R. XI)).

IEU wrongly relies on the intermediate appellate standard for motions for reconsideration (Motion at 4), presumably in order to justify its criticism of the Court for not fully addressing its "ratemaking and accounting arguments" (Motion at 18). An intermediate appellate court is

required “to decide each and every assignment of error and give reasons in writing for the decision,” unless the assigned error is moot or the party fails to identify or argue the error in its brief. App.R. 12(A)(1)(c). Thus, a motion for reconsideration at the intermediate appellate level may be appropriate if an “issue was not considered at all or was not fully considered by the Court when it should have been.” *See* Motion at 4 (citing *Matthews v Mathews*, 5 Ohio App.3d 140, 140 (1982); *Columbus v. Hodge*, 37 Ohio App.3d 68 (1987)). But there is no similar requirement in this Court’s rules or practice. Reconsideration is not warranted just because IEU is unhappy with the level of detail the Court provided in rejecting its arguments, and thus questions whether the Court “fully considered” its argument.

B. The Court fully addressed and properly rejected IEU’s argument that R.C. 4928.144 permits or requires the reduction of the deferred fuel costs balance to offset POLR revenues.

IEU’s first attack on the Court’s opinion is that it “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.’” (Motion at 11.) In essence, IEU argues that R.C. 4928.144 creates an exception to *Keco Industries, Inc. v. Cincinnati & Suburban Telephone Co.*, 166 Ohio St. 254 (1957) that allows the Commission to refund the “unlawful” POLR charges through a reduction in the FAC deferral balance. IEU seeks to restrict the holding in *Keco* to only private restitution actions, and to have it declared superceded by the new ratemaking regime effected by S.B. 221. (*Id.* at 12.) IEU criticizes the Court for merely noting its R.C. 4928.144 argument and getting side-tracked into “an extended discussion on the lawfulness of the ‘collection’ of POLR charges.” (*Id.* at 17.) None of IEU’s criticism of the Court’s Opinion is fair or warrants reconsideration.

The Court should not grant reconsideration on this issue because the R.C. 4928.144 argument made by IEU and OCC was addressed. The Court properly found it to have no merit

because the Court rightfully disagreed with their underlying premise that the collection of the POLR charges was “unlawful.” *In re Application of Columbus S. Power*, 2014-Ohio-462 at ¶ 50-51. The Court’s rejection of the argument is fully consistent with R.C. 4905.32 and with the Court’s prior holding in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E. 778 (1976). The result IEU seeks plainly violates the prohibition against retroactive ratemaking and R.C. 4928.144 does not create an exception to that prohibition.

1. *Keco* is but one application of the prohibition against retroactive ratemaking firmly embedded in public utility ratemaking law.

IEU’s effort to confine *Keco* to only cases in which a party overtly seeks restitution by means of a civil action ignores the fact that *Keco* is but one application of the prohibition against retroactive ratemaking and ignores the fact that the prohibition is firmly embedded in both federal and state law and supported in Ohio by statute. *Keco* is not some outdated outlier to be ignored.

At the federal level, the rule against retroactive ratemaking is viewed as a “corollary” of the filed rate doctrine. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007). *See also PUC of California v. FERC*, 988 F.2d 154, 161 (D.C. Cir. 1993) (noting that the rule against retroactive ratemaking “derives from the filed rate doctrine”). “Originating in the Supreme Court’s cases interpreting the Interstate Commerce Act and subsequently extended ‘across the spectrum’ of regulated utilities, the doctrine ‘forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.’” *NSTAR Elec. & Gas*, 481 F.3d at 800 (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)). The companion rule against retroactive ratemaking “prevents utilities from collecting revenues to compensate for [prior over-or] underrecoveries....” *PUC of California*, 988 F.3d at 161 (citing *Public Serv. Co. of New*

Hampshire v. FERC, 195 U.S. App. D.C. 130, 600 F.2d 944, 956-61 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979)). In the energy context, the filed rate doctrine and the corollary prohibition against retroactive ratemaking derive from Section 205 of the Federal Power Act. The two rules work together and serve the dual purposes of "ensur[ing] rate predictability" for purchasers of regulated electricity and promoting equity among customers by "preventing discriminatory pricing." *NSTAR*, 481 F.3d at 800 (quoting *Consolidated Edison Co. of New York v. FERC*, 358 U.S. App. D.C. 239, 347 F.3d 964, 969-70 (D.C. Cir. 2003)).

The filed rate doctrine and the prohibition against retroactive ratemaking are also firmly embedded in the law of other states. *See, e.g., State ex rel. AG Processing v. PSC*, 340 S.W.3d 146, 153 (Mo.App. 2011) (upholding use of fuel adjustment mechanism but noting "any adjustment to the cost of electricity based on electricity that has already been consumed by . . . customers prior to the effective date of the [Fuel Adjustment Clause] clearly constitutes retroactive ratemaking"); *Penpac, Inc. v. Passaic Cty. Utilities Auth.*, 367 N.J.Super. 487, 500-01, 843 A.2d 1153 (2004) ("Unless there is specific statutory authorization, retroactive ratemaking occurs when rates are established that permit a utility to recover past losses or that require the utility to refund excess profits."); *Wisconsin Power & Light Co. v. Pub. Serv. Comm.*, 181 Wis.2d 385, 401, 511 N.W.2d 291 (1994) (holding that the state commission's order that electric utility pay a penalty for "imprudent management" of its coal costs constituted impermissible retroactive ratemaking); *Citizens Utilities Co. v. Ill. Commerce Comm.*, 124 Ill.2d 195, 209, 529 N.E.2d 510 (1988) (noting that Court had refused to limit retroactive ratemaking prohibition to cases seeking restitutionary awards and had rejected the argument that "the legislature could not have intended that stay orders . . . would constitute the only means of avoiding the costs of rate increases that ultimately are set aside"); *Maine Public Advocate v. Pub.*

Utilities Comm., 476 A.2d 178 (1984) (holding that the state commission “cannot amend, via the fuel cost adjustment provisions . . . what it perceived to have been an error in the calculation of the utility’s base rates” because “implementation of the offset proposal, no matter how ingeniously it might be characterized, would necessarily involve a reconsideration of the calculations made in the base rate proceeding”).

The prohibition against retroactive ratemaking has long been recognized and applied in Ohio. It is not an anachronistic judge-made law; it is firmly rooted in the statutory law that continues to govern ratemaking in Ohio. Under R.C. 4905.32 the rates established by the Commission are the only rates a public utility may lawfully charge. R.C. 4905.32 expressly prohibits the utility from charging any rate different than the rate established in its tariff or from refunding any part of the charge except pursuant to its tariff. A Commission order establishing rates becomes immediately effective and remains in effect pending appeal unless stayed. R.C. 4903.15 and R.C. 4903.16. These statutes are the codification of the filed rate doctrine in Ohio and the foundation for the prohibition against retroactive ratemaking. *Keco*, 166 Ohio St. 256-57. As this Court recognized in its Opinion, the retroactive ratemaking prohibition has been applied numerous times under different facts since *Keco* and since the enactment of S.B. 221. *In re Application of Columbus S. Power*, 2014-Ohio-462 at ¶ 49; see also *In re Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 653, ¶ 16.

The statutes that comprise the foundation for the rule against retroactive ratemaking survived S.B. 221 and are as much a part of Ohio law as they were when *Keco* was decided. Had the General Assembly intended to abandon either the filed rate doctrine or the prohibition against retroactive ratemaking, it surely would have done so expressly. Instead, it made one narrow exception to the prohibition against retroactive ratemaking in R.C. 4928.143(F), which imposes

the “significantly excessive earnings test” and authorizes the Commission to require an electric distribution utility to refund to customers by way of prospective adjustments any amount determined to be excessive. There is nothing in S.B. 221 to suggest an intention to negate the prohibition against retroactive ratemaking in any other respect.

2. R.C. 4928.144 does not create an exception to the prohibition against retroactive ratemaking.

IEU argues that the requirement in R.C. 4928.144 that any phase-in be “just and reasonable” creates an exception to the prohibition against retroactive ratemaking and allows the Commission to adjust the phase-in mechanism in order to refund to customers charges approved in an electric security plan, and already collected, but found to be unjustified after appeal. IEU’s argument has no merit and was properly rejected by the Court already.¹

While R.C. 4928.144 allows the Commission to authorize any “just and reasonable phase-in” of an electric distribution utility’s (“EDU’s”) rates as established in an electric security plan (“ESP”) that is necessary to ensure rate or price stability, the “just and reasonable” requirement is neither new nor transformational. It has always been the case that ratemaking provisions must be “just and reasonable.” *See, e.g.*, R.C. 4909.15 (noting the factors the Commission must consider in “fixing and determining just and reasonable rates”); R.C. 4905.26 (giving Commission authority to initiate or investigate complaints that a utility’s rates or charges

¹ Of course, as the Court noted previously, the very premise of IEU’s argument fails at the start. The collection of POLR charges cannot be found to have failed any “just and reasonable” standard until such time as the Commission issued its order on remand, and found the charges to be unjustified. This Court expressly stated in its Remand Opinion that it was not ruling that the POLR charge was “per se unreasonable or unlawful,” *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 30, and the Commission allowed the POLR charges to be collected subject to refund during the remand period. This Court previously concluded, correctly, that there is “no basis. . . for appellants to claim that the POLR charges that were collected from April 2009 to May 2011 were ‘unlawful.’” 2014-Ohio-462 at ¶ 52. And for the same reason, there is no basis for the claim that the collection of the charges during this period was “unjust or unreasonable.”

are unjust or unreasonable). *See generally Ohio Edison v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 568, 589 N.E.2d 1292 (1992) (discussing the “just and reasonable” standard as a constitutional requirement); *Ohio Mining Co. v. Pub. Util. Comm.*, 106 Ohio St. 138, 142, 140 N.E. 143 (1922) (Commission has broad authority to remedy unjust and unreasonable charges). For decades, the “just and reasonable” standard has co-existed with the prohibition against retroactive ratemaking in both the statutory law and the case law.

R.C. 4928.144 is not some new wild card that trumps the prohibition against retroactive ratemaking. It is perverse to think that a statute that is intended to ensure “rate or price stability” could be used to claw back charges previously allowed and lawfully collected, and the language of the statute permits no such interpretation. The statute requires the Commission to make the determination that a phase-in is “just and reasonable” at the time it authorizes the phase-in as part of the ESP. As part of any phase-in order, the Commission must “provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount,” and must “authorize the collection of those deferrals through a nonbypassable surcharge.” R.C. 4928.144. IEU’s contention that a phase-in deferral under R.C. 4928.144 provides “only the accounting authority to book the deferred balance” (Motion at 15) is plainly wrong. The intent of the statute is clear – a phase-in of any rate or charge by means of a deferral mechanism fixes and establishes the charge and is final and irrevocable, unless stayed or modified on appeal. No party challenged the phase-in and deferral of fuel costs as established by

the Commission in the 2009 *ESP Order*.² *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.

C. There is no exception to the prohibition against retroactive ratemaking that allows the Commission to refund charges previously collected by means of reducing other authorized deferrals.

IEU's second ground for reconsideration reargues its theory that the deferral balance is not the result of deferring fuel costs but rather is an undifferentiated pot of deferred ESP rate adjustments that includes the POLR charges. IEU uses this theory to argue that the Court erred repeatedly in stating that the POLR charges were collected during the ESP period and not available for refund. (Motion at 18-20.) It uses this same mischaracterization of the nature of the fuel cost deferral balance to argue that there is no reason the Commission cannot make an accounting adjustment and extract the POLR charges from the deferral balance. IEU's theory, however, has no tie whatsoever to the reality of what the Commission ordered and how it structured the phase-in deferral. Moreover, there is no support in the prior decisions of the Commission or this Court for IEU's contention that customer refunds made through accounting adjustments do not violate the prohibition against retroactive ratemaking. The Court's rejection of IEU's refund-by-accounting argument was entirely correct and IEU's re-argument should not give the Court even a moment of pause. In fact, IEU filed a cross-appeal raising the very same challenge in a separate appeal currently pending before this Court – which should be dismissed or rejected by the Court based on its holding in this case. *See* Case No. 2012-2008 (involving review of the decision in Commission Case Nos. 11-4920-ELR-RDR and 11-4921-EL-RDR).

1. The phase-in deferral established by the Commission, pursuant to R.C. 4928.144, deferred the recovery of actual fuel costs over a capped

² *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 Sale and Transfer of Certain Generation Assets*, Case No. 08-917-EL-AIR, Opinion and Order (March 18, 2009).

amount and did not create an undifferentiated pot of deferred rate increases that now includes uncollected POLR charges.

The phase-in deferral was established in the Commission's original March 18, 2009 *ESP Order*. The *ESP Order* makes it absolutely clear that the phase-in would occur through the deferral of a portion of the "annual incremental FAC costs during the ESP" and that "any deferred FAC expense balance remaining at the end of 2011 shall be recovered via an unavoidable surcharge." *ESP Order* at 20-23. IEU tried in the proceeding below to persuade the Commission to recast the deferred FAC expense balance to conform to its "undifferentiated pot" theory in the remand proceedings. The Commission soundly rejected that argument and re-affirmed that the deferral balance is limited to deferred fuel costs. (Remand Order at 35.) IEU and OCC then pushed this theory on appeal. The Court's opinion demonstrates that the Court fully considered the issue and correctly understood that the deferral balance includes, as intended, only unrecovered fuel costs. 2014-Ohio-462 at ¶ 44-46. IEU's Motion for Reconsideration adds nothing new for consideration. Its theory is based upon a faulty factual premise that no amount of argument will change.

2. There is no support in precedent for using "deferral accounting" to claw back rates already collected.

In its re-argument of its deferral accounting theory, IEU superficially cites to three Commission orders that have made adjustments to the FAC deferral balance implying that those situations are analogous to a refund of rates. IEU and OCC plowed this same ground, using the same orders as tools, in the earlier briefing on the merits (see Motion at 22, n. 87), but to no avail. The reason why is obvious – the orders IEU cites are not even remotely analogous to this case. Moreover, the case below was the Commission's first opportunity to interpret and apply R.C. 4928.144 so the prior case law would not govern this new situation in any event.

IEU relies on two Commission orders issued at the conclusion of proceedings brought under R.C. 4928.143(F) to determine if the ESP rate adjustments in the aggregated resulted in “significantly excess earnings” in either 2009 or 2010. (Motion at 22, n. 87.) In each of these instances the Commission determined that earnings exceeded the permissible level and ordered a refund. As noted previously, a refund under such circumstances is expressly authorized by the statute. R.C. 4928.143(F) provides that if the Commission determines that the ESP rate adjustments resulted in significantly excessive earnings, “it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments.” Because in this instance a refund is expressly authorized by statute, the prohibition against retroactive ratemaking does not apply, and the Commission could require a refund in the form of cash, a credit, a reduction in a deferral balance, or any other mechanism. However, there is no such analogous statute that allows for the refund of POLR charges already collected through *any* means.

The third case IEU relies upon is the order issued at the conclusion of the first annual audit of the FAC deferral balance – the audit for 2009.³ That decision is likewise is readily distinguishable. The Commission’s *ESP Order* required as a component of the phase-in deferral of fuel costs that there would be an annual prudence and accounting review of the deferral balance. In the 2009 FAC order, the Commission required a reduction in the actual 2009 fuel costs to reflect the unrealized value OPCo received from a settlement agreement it entered into with a coal supplier in 2008. The Commission concluded that OPCo should pass along to customers the value of that settlement to offset fuel costs in 2009, even though the transaction

³ *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), appeal pending *Ohio Power Company v. Pub. Util. Comm.*, Case No. 2012-1484.

had been booked and accounted for in 2008. The case is readily distinguishable from this case in that the annual prudency and accounting audit was an integral component of the FAC mechanism created in the *ESP Order* and the adjustment looked only at fuel costs and alleged offsetting fuel savings or credits. The Commission did not use the FAC adjustment to recoup charges already collected or to capture savings unrelated to fuel costs. The Commission ordered an adjustment to restate the fuel cost deferral balance to what it determined to be the actual fuel costs for 2009. Whether the Commission's adjustment is appropriate is now on appeal to this Court in Case No. 2012-1484, and one of the issues raised by OPCo on appeal is that the adjustment to the 2009 deferral balance to offset the value of a 2008 settlement agreement constitutes retroactive ratemaking. The Commission contends that what it did was not retroactive ratemaking, not that it was permitted retroactive ratemaking. Thus, the Commission's action in the FAC case offers no support in form or substance to IEU's theory that the deferral accounting in general or the FAC deferral mechanism in particular is available to refund POLR charges and denying OPCo the right to recover its actual fuel costs deferred under R.C. 4928.144.

In sum, the decisions relied upon by IEU are distinguished as noted above – none of the three cases violated the filed rate doctrine (*Keco* and progeny) because the two excessive earnings cases were based on a statute which creates a refund obligation and the third case involved rate adjustment mechanism that was approved up front to be collected subject to refund (not unlike the POLR charge was implemented on remand in the case below from May through December 2011, which already resulted in a large refund to customers). In reality, the case below was the Commission's first opportunity to interpret and apply R.C. 4928.144, a statute which itself reinforces the underpinning of *Keco*, and the Commission was simply not bound by a controlling precedent as IEU suggests.

3. **There was no need for the Court to specifically address IEU's claim that the FAC deferral was only an accounting mechanism because the Court correctly determined that the FAC deferral was a deferral of fuel costs only.**

At pages 20-22 of its Motion for Reconsideration, IEU contends that the Court erred when it concluded IEU (and OCC) forfeited the claim that the FAC deferral component was only an accounting mechanism, and reducing/adjusting it downward is not ratemaking and, thus, would not constitute retroactive ratemaking, because neither of them raised that argument on rehearing. 2014-Ohio-462 at ¶ 55. IEU contends that it did raise that argument in Assignment of Error VII of its Application for Rehearing. However, nowhere in its Motion for Reconsideration does IEU specifically explain where that argument appears in its rehearing Assignment of Error VII. An examination shows that the argument does not appear in the text of its Assignment of Error VII. Nor does the argument appear in the text of IEU's Memorandum in Support of Assignment of Error VII. The best that IEU can do in its Motion for Reconsideration, at 22, is a contention that it raised the argument in its Reply Brief in this appeal. But, of course, at that point, it was too late.

The Court correctly recognized this. But, in any event, this Court, unlike a court of appeals, has no obligation to specifically address and write on every theory of error mentioned on appeal. And, because the Court thoroughly analyzed the premise of IEU's theory – that the POLR charges are still in the deferral pot for collection – and found it fallacious, any failure on the Court's part to belabor the point by analyzing the next steps in IEU's argument after it had lost its foundation was harmless error at worst.

IEU's belated claim is, in any event, without merit. The Court correctly found that IEU's argument in this appeal, however it is formulated, is an argument that the POLR charges collected, which, under R.C. 4905.32 were the lawful rates when they were collected, should

now be refunded. The Court correctly concluded, at ¶ 54 of its Opinion, that that would be impermissible retroactive ratemaking:

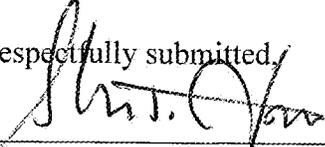
The fact that the deferred fuel costs may provide a mechanism to adjust the rates prospectively does not alter the nature of appellants' requested remedy the appellants are seeking to recover – through an adjustment to current rates – POLR charges that already have been collected from customers and later 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.

In sum, IEU's argument that it did not forfeit the claim by failing to raise it in its Application for Rehearing is meritless.

CONCLUSION

For the foregoing reasons, OPCo asks that the reconsideration request be denied.⁴

Respectfully submitted,


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⁴ At page 9 of its Motion for Reconsideration, IEU notes that it has raised the same claim that it makes in this appeal and its motion, i.e., previously collected POLR charges should be offset against deferred fuel costs, in its cross-appeal of the commission's decision approving a Phase-In Recovery Rider (PIRR) for Ohio Power Company. *In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Under Section 4928.144, Ohio Revised Code*, Supreme Ct. Case No. 2012-2008 (*PIRR Appeal*). Consequently, the Court's decision in this appeal not only has resolved a significant issue raised in this appeal by IEU regarding the amount of deferred fuel costs that may be recovered by OPCo, it also effectively has resolved one of IEU's cross-appeal issues in the *PIRR Appeal*. As a result, the Court's Opinion has significantly narrowed the issues still being litigated regarding the deferred fuel costs, bringing the day closer when the amount of deferred fuel costs that may be recovered becomes certain. Once that certainty is achieved, additional cost reductions available through securitization of the deferred costs, made possible due to the extremely low interest rates that are available through securitization, may be obtained, which will benefit both customers and OPCo.

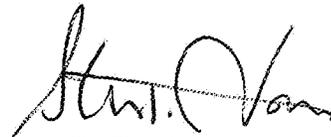
CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of this Memorandum in Opposition to Motion for Reconsideration was served upon the following counsel of record by regular U.S. Mail, postage pre-paid, the 6th day of March, 2014.

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