

IN THE SUPREME COURT OF OHIO

OHIO POWER COMPANY,)	Supreme Court Case No. 2012-2008
)	
Appellant/Cross-Appellee)	Appeal from the Public Utilities
)	Commission of Ohio
v.)	
)	
THE PUBLIC UTILITIES COMMISSION)	
OF OHIO,)	
)	PUCO Case Nos. 11-4920-EL-RDR and
Appellee)	11-4921-EL-RDR

**INDUSTRIAL ENERGY USERS-OHIO'S
MOTION FOR RECONSIDERATION
AND MEMORANDUM IN SUPPORT**

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**INDUSTRIAL ENERGY USERS-OHIO’S
MOTION FOR RECONSIDERATION**

Pursuant to Supreme Court Rule of Practice 18.2, Industrial Energy Users-Ohio (“IEU-Ohio”) moves the Court for reconsideration of its Opinion of June 2, 2015 (“Opinion”), in the above-captioned case with regard to the following:

The Opinion appears to have assumed incorrectly that Ohio Power Company (“AEP-Ohio”) was actually injured in some fashion by an order of the Public Utilities Commission of Ohio (“Commission”) that, according to the Court, infringed upon AEP-Ohio’s right to withdraw from a modified electric security plan (“ESP”). Relative to AEP-Ohio’s prior compensation, the Commission’s decisions regarding AEP-Ohio’s first ESP (“First ESP”) substantially and, in some cases, significantly excessively, retroactively, or illegally increased AEP-Ohio’s compensation and the electric bills actually paid by AEP-Ohio’s customers during the term of the First ESP. Had AEP-Ohio withdrawn from the First ESP in response to a Commission modification of that ESP, its compensation and electric bills would have been restored, by operation of law, to the lower level of the previously-approved standard service offer (“SSO”) that existed at the time the First ESP was submitted to the Commission for approval. Accordingly, withdrawal by AEP-Ohio would have left AEP-Ohio with less compensation (worse off) and customers with much lower electric bills (better off). Upon such a withdrawal, the First ESP, including its deferral, phase-in and interest factor provisions, would have been terminated. The Court’s Opinion essentially and incorrectly holds that AEP-Ohio’s right to withdraw and terminate the First ESP also provided AEP-Ohio with the right to

implement, through yet another rate increase, provisions of the withdrawn and terminated First ESP.

The Opinion incorrectly concludes that the Commission's modification came at a time that deprived AEP-Ohio of the ability to withdraw from its First ESP. The Commission's modification was ordered on August 1, 2012, and the First ESP's rates remained effective until August 31, 2012.

Because AEP-Ohio did not allege, show, or suffer any actual injury and was not prevented from withdrawing from the First ESP, AEP-Ohio was not entitled to relief that, upon remand, might allow AEP-Ohio to collect even more compensation from customers. Therefore, IEU-Ohio requests that the Court grant this Motion for Reconsideration, modify its Opinion so as to deny AEP-Ohio's proposition of law regarding R.C. 4928.143(C)(2)(a), and vacate the portion of the Opinion remanding the case back to the Commission with instructions to increase the interest factor that applies to the deferred rate increase. Alternatively, and mindful of the larger context that already leaves AEP-Ohio's customers hundreds of millions of dollars worse off as a result of illegally authorized rate increases, IEU-Ohio urges the Court to grant reconsideration and revise its remand instructions contained in the Opinion. More specifically, IEU-Ohio alternatively urges the Court to revise the remand instructions so that the Commission need not make AEP-Ohio's customers worse off (more rate increases) if the Commission finds that the amount of compensation that AEP-Ohio has actually received and will yet receive (through the phase-in deferral) as a result of the First ESP is greater than the compensation that AEP-Ohio would have received had AEP-Ohio exercised a right to withdraw and terminate the First ESP.

A copy of the Opinion is attached.

A memorandum in support of this Motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In its Opinion, the Court found that the Commission modified a term of AEP-Ohio’s First ESP following the expiration of the First ESP, which deprived AEP-Ohio of the ability to exercise its right under R.C. 4928.143(C)(2)(a) to withdraw from the First ESP. Opinion at ¶ 3. However, any infringement upon AEP-Ohio’s right to withdraw from the First ESP did not result in an actual injury to AEP-Ohio. As the Commission noted in its brief, AEP-Ohio’s claim regarding any infringement upon its withdrawal right was a “red herring” because withdrawing from the First ESP would have resulted in AEP-Ohio “unilaterally reduc[ing] its own income.” Commission Merit Brief at 11. The “red herring” character of AEP-Ohio’s withdrawal right claim was not addressed by the Court.

Upon a withdrawal from the First ESP, its deferral, phase-in, and interest factor provisions would have been terminated by operation of law. R.C. 4928.143(C)(2)(b) (IEU-Ohio Appx. Part II, at 488); *see also infra*, at 15-17 (when the Commission withdrew its approval for AEP-Ohio’s second ESP on rehearing, the Commission directed AEP-Ohio to file tariffs

eliminating all the provisions authorized under the second ESP and reinstating the provisions of the First ESP). AEP-Ohio would have been much worse off with its substantially reduced compensation and customers would have been much better off with lower electric bills that did not contain the substantial, and sometimes, significantly excessive, retroactive, and illegal increases contained in the First ESP.

Because it did not allege, demonstrate, or suffer an actual injury from any infringement upon its right to withdraw from the First ESP, AEP-Ohio was not entitled to a reversal of the Commission's Order under the Court's longstanding precedent. In any event, AEP-Ohio is not factually or legally entitled to an increase in its compensation on remand based upon a claim that it was deprived of the ability to unilaterally reduce its own income.

Furthermore, AEP-Ohio was not deprived of the right to withdraw from the First ESP's rates. Although the First ESP was initially scheduled to end December 31, 2011, it was ultimately extended, by operation of law, through August 31, 2012, pursuant to R.C. 4928.143(C)(2)(b). Accordingly, when the Commission issued the Order below on August 1, 2012, AEP-Ohio could have withdrawn and terminated the First ESP and significantly reduced its compensation and electric bills thereafter.

As things stand, the Court's Opinion is in error as it assumes that AEP-Ohio suffered an actual injury and that AEP-Ohio could not have withdrawn from the First ESP's rates. In a larger legal context that includes no relief from provisions in the First ESP that illegally increased AEP-Ohio's electric bills by hundreds of millions of dollars and rulings that wall off refunds of the illegally authorized compensation, the Court's Opinion strains to reward AEP-Ohio and disadvantage consumers further based on a provision of the First ESP that would not exist had AEP-Ohio exercised the right of which it claims to have been deprived. Therefore,

IEU-Ohio requests that the Court grant this Motion for Reconsideration, modify its Opinion so as to deny AEP-Ohio's proposition of law regarding R.C. 4928.143(C)(2)(a), and vacate the portion of the Opinion remanding the case back to the Commission with instructions to increase the interest factor that applies to the deferred rate increase. Alternatively, and mindful of the larger context that already leaves AEP-Ohio's customers hundreds of millions of dollars worse off as a result of illegally authorized rate increases, IEU-Ohio urges the Court to grant reconsideration and revise its remand instructions contained in the Opinion. More specifically, IEU-Ohio alternatively urges the Court to revise the remand instructions so that the Commission need not make AEP-Ohio's customers worse off (more rate increases) if the Commission finds that the amount of compensation that AEP-Ohio has actually received, and will yet receive (through the phase-in deferral) as a result of the First ESP, is greater than the compensation that AEP-Ohio would have received had AEP-Ohio exercised a right to withdraw and terminate the First ESP.

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 Court's order is filed with the Clerk of the Supreme Court. The Court has "invoked the reconsideration procedures set forth in [its rules] to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. West Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339, 341 (1995) (citing *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections*, 67 Ohio St.3d 597, 622 N.E.2d 329 (1993); and *State ex rel. Eaton Corp. v. Lancaster*, 44 Ohio St.3d 106, 541 N.E.2d 64 (1989)); see also *DeRolph v. State*, 93 Ohio St.3d 628, 2001-Ohio-1896; *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278, syllabus (10th Dist.1981) (The test generally applied upon the filing of a motion for reconsideration is whether the motion "calls to the attention of the court an

obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by [the court] when it should have been.”).

III. ARGUMENT

A. **AEP-Ohio did not allege, demonstrate, or suffer an actual injury from any deprivation of its right to withdraw from the First ESP pursuant to R.C. 4928.143(C)(2)(a)**

In the Commission’s August 1, 2012 Opinion and Order in the case below (“Order”), the Commission prospectively reduced the interest rate AEP-Ohio could apply to a deferral balance from 11.15% to 5.34% because it determined that the higher rate was not reasonable. Order at 18-19 (AEP-Ohio Appx. at 26-27). AEP-Ohio appealed the Commission’s Order claiming that the Order unlawfully infringed its right to withdraw from the First ESP. To secure a reversal of a Commission decision, AEP-Ohio was required to demonstrate that the Commission’s unreasonable or unlawful actions caused an actual injury to AEP-Ohio. *Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St.3d 284, 287, 2014-Ohio-1532, ¶¶ 19, 22-24 (party seeking reversal must demonstrate an actual injury and may not rely on a claim of an inherent harm or generalized harm); *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 31 (“we will not reverse a commission order unless the party seeking reversal demonstrates the prejudicial effect of the order.”); *see also Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), paragraph six of the syllabus; *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St. 2d 335 (1980), syllabus; *Myers v. Pub. Util. Comm.*, 64 Ohio St. 3d 299, 302, 1992 Ohio 135 (1992); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, ¶ 12. AEP-Ohio, however, did not, allege, demonstrate, or suffer an actual injury tied to the Commission’s alleged violation of R.C. 4928.143(C)(2)(a).

The Court’s Opinion appears to assume, however, that the Commission’s alleged violation of R.C. 4928.143(C)(2)(a) resulted in an actual injury to AEP-Ohio amounting to some

\$130 million. *See* Opinion at ¶ 2. As discussed in more detail below, AEP-Ohio would not have been able to bill and collect this extra \$130 million if it had withdrawn the First ESP. Instead and by operation of law, AEP-Ohio’s compensation would have been restored to the significantly lower level authorized by the prior SSO.

R.C. 4928.143(C)(2)(a) provides an electric distribution utility (“EDU”) the right to withdraw from an ESP if the Commission approves an ESP proposal that is different than the ESP proposed by the EDU. (IEU-Ohio Appx. Part II, at 488); *see also* Opinion at ¶¶ 24-26, 29-30. But, upon such withdrawal, R.C. 4928.143(C)(2)(b) also specifies the SSO compensation that the withdrawing EDU may collect once the ESP is withdrawn and terminated. It requires the Commission to:

issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

Ohio law does not provide an EDU with a line item veto opportunity with regard to the modified and approved ESP. A withdrawal terminates all of the provisions in the modified and approved ESP. Thus, an assessment of actual harm to AEP-Ohio that might be attributed to an infringed right of withdrawal requires a consideration of the benefits that AEP-Ohio was nonetheless able to secure from the modified ESP that worked to significantly and in some cases illegally increase AEP-Ohio’s compensation during the term of the First ESP.

AEP-Ohio’s rates prior to the First ESP were established under Amended Substitute Senate Bill 3 (“SB 3”) before the passage of Amended Substitute Senate Bill 221 (“SB 221”). AEP-Ohio’s rate plan prior to the First ESP was known as a Rate Stabilization Plan (“RSP”).

See ESP I Order at 19 (AEP-Ohio Appx. at 101).¹ The prior RSP rate plan provided for fixed generation charges and annual electric bill increases that had been fully implemented by the end of 2008. *See id.*; see also *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order (Jan. 26, 2005).²

With the passage of SB 221, AEP-Ohio filed an application to establish a SSO in the form of an ESP. The Commission authorized AEP-Ohio's First ESP in March 2009. *See* Order at 1 (AEP-Ohio Appx. at 9). (There were multiple appeals taken from AEP-Ohio's First ESP.³)

The First ESP was initially authorized for the three year period beginning 2009 and continuing through 2011 (as discussed herein, the First ESP was later extended through August 31, 2012). ESP I Order at 13 (AEP-Ohio Appx. at 95). In addition to adding, at AEP-Ohio's request, a fuel adjustment clause that permitted AEP-Ohio to alter electric bills automatically as a function of changes in the cost of fuel burned to generate electricity, the First ESP authorized AEP-Ohio to increase its customers' electric bills by significantly more than half a billion dollars.

Under the First ESP, AEP-Ohio was authorized to increase its compensation and electric bills by at least \$407 million based on environmental-related costs.⁴ The Commission also

¹ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order (Mar. 9, 2009) (hereinafter "First ESP" or "ESP I Order").

² Available at:
[http://dis.puc.state.oh.us/ViewImage.aspx?CMID=KLHCU8\\$9OVLJO676](http://dis.puc.state.oh.us/ViewImage.aspx?CMID=KLHCU8$9OVLJO676).

³ *See* Case Nos. 2009-2022, 2009-2298, and 2012-187.

⁴ The collection of the \$407 million occurred through two components. AEP-Ohio was authorized to increase its rates by \$330 million to collect "the incremental capital carrying costs that will be incurred after January 1, 2009, on past environmental investments (2001-2008) that

authorized AEP-Ohio to increase its compensation and electric bills by an additional \$86 million attributed to a vegetation management program (e.g., trimming trees near power lines). ESP I Order at 32-33 (AEP-Ohio Appx. at 114-115).⁵ The First ESP further authorized AEP-Ohio to increase its provider of last resort (“POLR”) charge to collect \$152.2 million, annually between 2009 and 2011; **\$98 million more per year** than the POLR charge authorized under AEP-Ohio’s prior rates. ESP I Order at 40 (AEP-Ohio Appx. at 122).⁶ Although the authorization of the

are not presently reflected in [AEP-Ohio’s] existing rates.” ESP I Order at 24, 28 (AEP-Ohio Appx. at 106, 110). The First ESP further allowed AEP-Ohio to recover actual environmental investments that AEP-Ohio made during the term of the First ESP through individual rider filings submitted to the Commission throughout the term of the First ESP. ESP I Order at 29-30 (AEP-Ohio Appx. at 111-112). Through these filings during the term of the First ESP, the Commission authorized AEP-Ohio to further increase its rates to collect approximately \$77 million related to environmental investment made during the First ESP. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Costs Riders*, Case No. 10-155-EL-RDR, Finding and Order at 9-10 (Aug. 25, 2010), available at:

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A10H25B42557B07189>; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update the Environmental Investment Carrying Costs Riders*, Case No. 11-1337-EL-RDR, Finding and Order at 4-5 (June 29, 2011), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F29B45725J86374>.

⁵ The collection of the \$86 million between 2009 and 2011 was authorized by the Commission in the following cases. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company’s Enhanced Service Reliability Rider*, Case No. 10-163-EL-RDR, Compliance Tariffs of Columbus Southern Power Company (Aug. 27, 2010), available at:

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A10H27B65645G92710>; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Their Enhanced Service Reliability Riders*, Case No. 11-1361-EL-RDR, Application (Mar. 18, 2011), available at:

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11C18B70639I14062>; *In the Matter of the Application of Ohio Power Company to Update Its Enhanced Service Reliability Rider*, Case No. 12-3285-EL-RDR, Application (Dec. 21, 2012), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12L21B51844F87959>.

⁶ See First ESP, Direct Testimony of David M. Roush at Exhibit DMR-5 (July 31, 2008), available at:

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A08G31A90730J62309> (AEP-Ohio’s witness testified that its POLR charge under its prior RSP rates collected approximately \$54.2 million annually).

POLR charge was ultimately overturned, AEP-Ohio was able to retain \$368 million in POLR charges that the Commission and Court concluded were already collected from customers. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶¶ 53-54. Had AEP-Ohio withdrawn the First ESP, AEP-Ohio and its shareholder would not have enjoyed all of the compensation and electric bill increases that AEP-Ohio actually obtained during the term of the First ESP.

Because of the magnitude of the compensation and electric bill increases, which AEP-Ohio actually received from the modified and approved First ESP, “the Commission believed a phase-in, and the attendant deferrals that are at issue here, was necessitated to protect the public.” Commission Merit Brief at 11. Accordingly, to address the magnitude of the electric bill increases authorized under the First ESP, the Commission established annual total bill rate increase caps for AEP-Ohio’s customers between 6 and 8 percent for the period of 2009 through 2011. ESP I Order at 22 (AEP-Ohio Appx at 104). As part of the modified and approved First ESP, the Commission also authorized AEP-Ohio to defer “[a]ny amount [of the rate increase] over the allowable total bill increase percentage levels” plus interest at an interest factor based upon AEP-Ohio’s weighted average cost of capital (“WACC”) which was 11.15%. *Id.* at 22-24 (AEP-Ohio Appx. at 104-106).⁷

The significant magnitude of the compensation and electric bill increases made available to AEP-Ohio by the modified and approved First ESP is also reflected in the annual earnings review, which R.C. 4928.143(F) requires the Commission to conduct during the term of an ESP to make sure that the ESP is not too rich for the EDU. During the term of the First ESP, this

⁷ The difference between the WACC interest factor initially authorized by the Commission, and the interest factor based upon AEP-Ohio’s long-term debt that was subsequently authorized by the Commission in the Order on appeal, is that the WACC interest factor includes an earnings component.

earnings review was conducted separately for the two AEP-Ohio utilities, Columbus Southern Power Company (“CSP”) and Ohio Power Company (“OP”), as the companies had not yet merged. In reviewing CSP’s earning under the First ESP for 2009, the Commission found that CSP’s return on equity was approximately 20%, which the Commission found was significantly excessive when compared to the average 10 to 11% returns of comparable companies. *2009 SEET Order* at 21, 34-35.⁸ In the 2010 earnings review, the Commission found that CSP’s return on equity of approximately 17% was again significantly excessive when compared to the average return of comparable companies which ranged between 11 to 11.5%. *2010 SEET Order* at 27-29.⁹ Although CSP was found to have significantly excessive earnings in 2009 and 2010, it was allowed to retain the portion of its earnings above the comparable group’s average but below the significantly excessive threshold established by the Commission.¹⁰ In effect, CSP was allowed to retain the portion of its First ESP’s earnings that were excessive but not significantly excessive. The benefit of the First ESP’s rather generous earnings opportunity which AEP-Ohio actually obtained during the term of the First ESP would not have been available had AEP-Ohio withdrawn the First ESP.

⁸ *In the Matter of the Application Columbus Southern Power Company and Ohio Power Company for Application of the Significantly Excessive Earnings Test Under Section 4928.143(F) of the Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order (Jan. 11, 2011), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11A12A80651E62108>.

⁹ *In the Matter of the Application Columbus Southern Power Company for Application of the Significantly Excessive Earnings Test Under Section 4928.143(F) of the 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/ViewImage.aspx?CMID=A1001001A13J23B40243A38071>.

¹⁰ CSP’s significantly excessive earnings threshold was set at 17.6% and 17.56% for 2009 and 2010, respectively. Thus, CSP’s effective earnings under the First ESP were 17.6% for 2009 and 17.56% for 2010.

On August 1, 2012, the Commission issued the Order from which this appeal stems. In this Order, the Commission reviewed the impact on customers from continuing to apply an interest factor of 11.15% to the total deferral balance (which included the principal of the rate increase that exceeded the rate increase caps, plus the interest at 11.15% that had already accrued on the principal). Order at 18-19 (AEP-Ohio Appx. at 26-27). The Commission indicated that if the total deferral balance (the portion of the rate increase above the rate caps plus already accumulated interest) were to continue accumulating interest at 11.15%, the total deferred amount to collect from customers would be \$772,603,180. Order at 7 (AEP-Ohio Appx. at 15). The Commission concluded that continuing interest at a rate of 11.15% was excessive and improper in view of the fact, among others, that there was no longer any collection risk for AEP-Ohio and directed AEP-Ohio to reduce, on a prospective basis, the interest factor applied to the deferred balance (the portion of the rate increase that exceeded the rate caps plus the interest that had already accumulated at 11.15%) to an interest factor based upon AEP-Ohio's long-term cost of debt, which was 5.34%. *Id.* at 17-20 (AEP-Ohio Appx. at 25-28).¹¹ The Commission's prospective modification to the interest factor was projected to reduce the total amount to be collected from customers to \$642,417,274, a difference of approximately \$130 million. *Id.* at 7 (AEP-Ohio Appx. at 15).

While the Commission's decision did reduce the total amount of revenue that AEP-Ohio could collect during the phase-in period following the term of the First ESP, it did not reduce the

¹¹ The Commission's decision provided the substantive basis to support the interest rate reduction identifying that its precedent supported prospective interest rate reductions on deferrals once collections began. Order at 18-19 (AEP-Ohio Appx. at 26-27). The Commission further claimed that the reduction was warranted due to the lingering effects that the economic recession was having on customers, the fact that AEP-Ohio's risk of non-collection significantly reduced when it began collections, and recent statutory changes that would allow AEP-Ohio to securitize the deferral and receive immediate cash proceeds. *Id.*

principal amount of the rate increase that exceeded the annual rate increase caps and it did not disallow any collection of the interest that had already accrued at the 11.15% rate.

Although AEP-Ohio failed to supply the Court with an analysis of any injury that might properly be attributed to an asserted deprivation of right to withdraw from and thereby terminate the First ESP, the Commission correctly identified that AEP-Ohio did not suffer any actual injury. Commission Merit Brief at 11. If AEP-Ohio exercised the right to withdraw from the First ESP when the Commission issued its Order on August 1, 2012, AEP-Ohio would have terminated its ability to collect the \$642 million deferral balance (that is subject to the interest factor at issue in this appeal) which the Commission authorized as part of that Order.¹² Viewed from another angle, had the Commission's modification to the interest rate been ordered in March 2009, an election to withdraw from the First ESP would have required AEP-Ohio to forgo \$786 million in extra compensation authorized under the First ESP, and an additional \$730 million which it actually collected as a result of the First ESP.¹³ Accordingly, AEP-Ohio would never have exercised a right to withdraw from the First ESP and had it done so, there would have

¹² AEP-Ohio would have also had to forgo collection the \$9.1 million per month rate increase associated with the pre-2009 environmental investment, plus the monthly revenue collections AEP-Ohio received associated with environmental investment made during the term of the First ESP and its incremental vegetation management. As of August 1, 2012, the POLR charge under the First ESP had been eliminated. Accordingly, had AEP-Ohio elected to withdraw from the First ESP on August 1, 2012, it would have been able to collect approximately \$4.5 million in additional POLR revenue (1/12 of \$54.2 million) during the month of August 2012 until AEP-Ohio's successor SSO rates became effective on September 1, 2012.

¹³ The difference between the \$786 million and the \$730 million takes into account the fact that AEP-Ohio was authorized to increase its POLR charge by \$98 million annually (to a total of \$152.2 million, annually) for the 36-month initial period of the First ESP, but the POLR charge was effectively eliminated 7 months before the end of the 36 months. The \$786 million is calculated as the total of the following: \$293 million in incremental POLR revenue; \$330 million in pre-2009 environmental investment costs; \$77 million in environmental costs incurred during the term of the First ESP; and \$86 million in incremental vegetation management cost recovery.

been, by operation of law, no phase-in or any question about the amount of interest that might be includable as part of the phase-in recovery amount.

In sum, AEP-Ohio experienced no injury and this is made clear by a comparison of the actual compensation, which AEP-Ohio collected during the term of the First ESP as compared to the compensation that AEP-Ohio would have obtained had it exercised a right to withdraw the First ESP. Had AEP-Ohio elected to withdraw from the First ESP, R.C. 4928.143(B)(2)(b) would have required AEP-Ohio to return to SSO compensation at a significantly lower level than the compensation which AEP-Ohio actually collected and is still collecting as a result of the First ESP. AEP-Ohio did not present the Court with any arguments or analysis for the Court to conclude that by not withdrawing from the First ESP AEP-Ohio suffered an actual injury. As explained by the Commission in its brief AEP-Ohio would never have made the election to withdraw from the First ESP because it would have caused AEP-Ohio to “unilaterally reduce its own income.” Commission Merit Brief at 11. Without a demonstration of an actual injury, AEP-Ohio was not entitled to a reversal of the Commission’s decision on the grounds asserted by AEP-Ohio.

B. The Commission’s modification occurred before the expiration of the rates under the First ESP and therefore AEP-Ohio was not deprived of its right to withdraw from the First ESP’s rates

The Court rested its decision to reverse the Commission’s Order on the conclusion that the Commission deprived AEP-Ohio of the right to withdraw from its First ESP because the Commission modified a term of the First ESP after the First ESP had expired. *See* Opinion at ¶¶ 24-26. The First ESP, however, continued by operation of law through August 31, 2012. If AEP-Ohio had a right to withdraw at any time during the First ESP following a modification to the ESP by the Commission, then AEP-Ohio was not deprived of this right as the First ESP’s

rates were still in effect when the Commission issued its Order prospectively modifying the interest rate that applies to the phase-in deferral balance.

The term of the First ESP extended beyond December 31, 2011, by operation of law, when AEP-Ohio failed to successfully prosecute its initial application to establish a second ESP (“Second ESP”). In 2011, AEP-Ohio filed an application to establish its Second ESP effective January 1, 2012. Order at 2 (AEP-Ohio Appx. at 10). On September 7, 2011, AEP-Ohio submitted a Stipulation and Recommendation (“Stipulation”) that recommended approval of AEP-Ohio’s Second ESP, as modified by the Stipulation. *Id.* at 4 (AEP-Ohio Appx. at 12). The Stipulation was contested by many parties, but the Commission initially approved the Stipulation on December 14, 2011 (thereby significantly increasing electric bills once again and creating a huge backlash from customers and public officials). Order at 5 (AEP-Ohio Appx. at 5). On rehearing, the Commission reversed its approval of the Stipulation and the Second ESP. *Id.* at 6. (AEP-Ohio Appx. at 14). As required by R.C. 4928.143(C)(2)(b), in its Entry on Rehearing reversing its prior approval of the Second ESP, “[t]he Commission directed AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its first ESP.” *Id.*; *see also* OCC Second Merit Brief at 8 (On February 23, 2012, the Commission issued an Entry on Rehearing reversing its prior authorization for AEP-Ohio’s Second ESP and “order[ing] AEP to replace the ESP 2 rates . . . with rates from its previous electric security plan, ESP 1.”). AEP-Ohio complied with this directive and its First ESP was restored effective March 9, 2012. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish a Standard Service Offer Pursuant to Section*

4928.143, Revised Code, in the Form of an Electric Security Plan, Case Nos. 11-346-EL-SSO, et al., Entry at 6 (Mar. 7, 2012) (hereinafter “AEP-Ohio Second ESP Case”).¹⁴

AEP-Ohio submitted a second application to establish its Second ESP, and while review of this second application remained pending, the First ESP continued. On August 1, 2012, the Commission issued the Order on appeal in this matter, which, as viewed by the Court, modified a term of the First ESP. On August 8, 2012, the Commission approved AEP-Ohio’s Second ESP, with additional electric bill increases effective September 1, 2012. *AEP-Ohio Second ESP Case*, Opinion and Order (Aug. 8, 2012) (IEU-Ohio Appx. at 83-168);¹⁵ *AEP-Ohio Second ESP Case*, Entry at 2 (Aug. 22, 2012) (finding that the Second ESP rates “should be implemented with the first billing cycle of September” 2012).¹⁶ Thus, when the Commission issued the Order on appeal prospectively modifying the interest rate to be applied by AEP-Ohio during the deferral collection period, the First ESP was still in effect. Accordingly, AEP-Ohio could have exercised its statutory right to withdraw from the First ESP’s rates following the Commission’s interest rate modification on August 1, 2012. For the reasons explained above, it would have been foolish for AEP-Ohio to have done so, but the withdrawal right existed at the time of the modification.

Because the Court’s June 2, 2015 Opinion erroneously assumes that the term of the First ESP had ended so that AEP-Ohio could not have withdrawn from the First ESP, the Court should grant this Motion for Reconsideration.

¹⁴ Available at:
<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12C07B41401H07282>.

¹⁵ Available at:
<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138>.

¹⁶ Available at:
<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H22B41514A36904>.

C. The practical effect of the Court’s decision is that customers will be paying an excessive interest rate on a deferral balance that is inflated due to the effects of significantly excessive, retroactive, and unlawful rate increases authorized under the First ESP

The effect of the Court’s Opinion is to provide another customer-funded windfall to AEP-Ohio. This Court determined that a portion of the total rate increase AEP-Ohio secured under the First ESP was unlawful because the Commission retroactively increased AEP-Ohio’s rates by \$63 million in 2009. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 8-14. The Court concluded, however, that it was barred from ordering a refund of the \$63 million *Id.* at ¶ 9-21 (citing *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957)). The Court also found that a separate charge, the provider of last resort or POLR charge, that was designed to collect \$456.6 million (\$152.2 million annually) between 2009 and 2011, was against the manifest weight of the evidence and remanded the case back to the Commission for further proceedings. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 22-30.

Following the remand, the Commission determined that AEP-Ohio failed to justify the continuance of the charge, but refused to reduce the deferral balance by \$368 million, the amount that the Commission found had already been collected under the POLR charge. *See* IEU-Ohio Second Merit Brief at 34; OCC Second Merit Brief at 3, 15. A second appeal came before this Court, where the Court found that its aged decision in *Keco* barred an adjustment to the deferral balance. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 53-54.

Due to the nature of how the portion of total rate increase that exceeded the annual total bill rate increase caps was calculated, the \$63 million retroactive rate increase and the \$368 million of unsupported POLR charges caused the deferred rate increase to be at least \$431

million greater than it otherwise would have been had these unlawful and unreasonable charges not been authorized in the first instance. During the First ESP, the deferral balance ballooned largely in part due to the effects of the \$431 million in unlawful and unreasonable charges and the authorized interest rate of 11.15%. The Commission determined that, on a prospective basis, the continuation of the 11.15% interest rate was excessive and a reasonable interest rate to be used prospectively was 5.34%. The Commission's prospective modification reduced, for reasons well explained by the Commission, the impact on customers by \$130 million relative to the extra compensation that AEP-Ohio would have received during the phase-in deferral recovery period (which itself extends beyond the term of the First ESP). This reduction in compensation is substantially smaller than the increase in compensation that AEP-Ohio actually collected and is still collecting as a result of the First ESP, all of which would have been prohibited by operation of law had AEP-Ohio withdrew and terminated the First ESP.

This Court's decision to reinstate the 11.15% interest rate deemed excessive by the Commission, and which will be applied to the deferral balance that is calculated based upon AEP-Ohio's retention of the \$431 million specified above, results in another windfall to AEP-Ohio. However, as discussed in the prior sections, a reversal of the Commission's Order in ways that subjects AEP-Ohio customers to an extra burden of some \$130 million is not reasonable or required based on the law or facts.

IV. CONCLUSION

Customers served by AEP-Ohio have suffered significant harm from the authorization of AEP-Ohio's First ESP, which has resulted in significantly excessive earnings for AEP-Ohio. The First ESP included an unlawful \$63 million retroactive rate increase, and the \$368 million "windfall" associated with a charge that was not supported by the evidence before the Commission. This \$431 million is reflected in the total rate increase that exceeded the annual

rate increase caps under the First ESP, and which has been deferred with interest for future collection. If AEP-Ohio would have elected to withdraw from the First ESP pursuant to R.C. 4928.143(C)(2)(a), as it argues it was deprived of doing, these excessive rate increases would not have fallen on customers. Effectively, AEP-Ohio has urged the Court to reverse the Commission because it was deprived of the ability to reduce its rates by many hundreds of millions of dollars. It is obvious that this is not an actual injury to AEP-Ohio.

Furthermore, the factual basis that AEP-Ohio's argument hinges upon is incorrect. When the Commission prospectively modified the interest rate at issue in this appeal, the First ESP rates remained effective. Nothing prevented AEP-Ohio from seeking to withdraw from the First ESP's rates. Of course, even with the Commission's prospective modification to the interest rate that applies to the deferral balance, AEP-Ohio elected to continue collecting the First ESP's rates which were significantly greater than the rates AEP-Ohio would have had to implement upon withdrawing pursuant to R.C. 4928.143(C)(2)(b).

In sum, AEP-Ohio was not harmed from continuing under the First ESP and was not prevented from withdrawing from the First ESP's rates following the Commission's prospective interest rate modification. Therefore, IEU-Ohio requests that the Court grant this Motion for Reconsideration, modify its Opinion so as to deny AEP-Ohio's proposition of law regarding R.C. 4928.143(C)(2)(a), and vacate the portion of the Opinion remanding the case back to the Commission with instructions to increase the interest factor that applies to the deferred rate increase. Alternatively, and mindful of the larger context that already leaves AEP-Ohio's customers hundreds of millions of dollars worse off as a result of illegally authorized rate increases, IEU-Ohio urges the Court to grant reconsideration and revise its remand instructions contained in the Opinion. More specifically, IEU-Ohio alternatively urges the Court to revise the

remand instructions so that the Commission need not make AEP-Ohio's customers worse off (more rate increases) if the Commission finds that the amount of compensation that AEP-Ohio has actually received and will yet receive (through the phase-in deferral) as a result of the First ESP is greater than the compensation that AEP-Ohio would have received had AEP-Ohio exercised a right to withdraw and terminate the First ESP.

If this Court does not grant this Motion for Reconsideration, AEP-Ohio's customers will face raw injustice. As things presently stand, the Court has ordered the Commission to impose an interest rate deemed excessive by the Commission on a balance that includes an unlawful \$63 million increase and \$368 million of unsupported POLR charges that this Court has already described as a windfall to AEP-Ohio. This outcome is not required by the law or facts and should not be allowed to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Motion for Reconsideration and Memorandum in Support* was served upon the parties of record this 11th day of June 2015, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Application of Ohio Power Co.*, Slip Opinion No. 2015-Ohio-2056.]

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. 2015-OHIO-2056

IN RE APPLICATION OF OHIO POWER COMPANY FOR APPROVAL OF A MECHANISM TO RECOVER DEFERRED FUEL COSTS ORDERED UNDER R.C. 4928.144; OHIO POWER COMPANY, APPELLANT AND CROSS-APPELLEE; INDUSTRIAL ENERGY USERS-OHIO, APPELLEE AND CROSS-APPELLANT; PUBLIC UTILITIES COMMISSION, APPELLEE AND CROSS-APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Application of Ohio Power Co.*, Slip Opinion No. 2015-Ohio-2056.]

Public utilities—Commission’s order modifying electric-security plan after the plan expired violates R.C. 4928.143(C)(2)(a) by depriving the utility of its right to withdraw the modified electric-security plan—Orders affirmed in part and reversed in part.

(No. 2012-2008—Submitted February 3, 2015—Decided June 2, 2015.)

APPEAL and CROSS-APPEAL from the Public Utilities Commission, Nos. 11-4920-EL-RDR and 11-4921-EL-RDR.

KENNEDY, J.

I. SUMMARY

{¶ 1} In the orders on appeal, appellee and cross-appellee, Public Utilities Commission of Ohio (“PUCO” or “the commission”), approved a mechanism, called a phase-in recovery rider (“PIRR”), for appellant and cross-appellee, Ohio Power Company, to recover fuel costs that were incurred under the company’s first electric-security plan (“ESP”) but were deferred for future collection. *See In re Application of Columbus S. Power Co. & Ohio Power Co. for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under R.C. 4928.144*, Pub. Util. Comm. Nos. 11-4920-EL-RDR and 11-4921-EL-RDR (Aug. 1, 2012) (the “PIRR Order”), available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=c3ec26df-e5b8-4e2a-9e8c-f1825680fef8>, last accessed March 25, 2015. In the order approving Ohio Power’s first ESP, the commission (1) authorized the recovery of “carrying charges”—a type of finance charge—on the deferred fuel costs until the costs were fully recovered, (2) set the rate to calculate carrying charges on the deferred fuel costs, and (3) authorized Ohio Power to recover the deferred fuel costs plus carrying charges from 2012 to 2018. *See In re Application of Columbus S. Power Co. & Ohio Power Co. for Approval of an Elec. Sec. Plan*, Pub. Util. Comm. Nos. 08-917-EL-SSO and 08-918-EL-SSO (Mar. 18, 2009) (“ESP Order”), at 20-23, available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=b125aec6-ded7-4f5c-b908-6520f2e0cb3f>, last accessed March 25, 2015; PIRR Order at 17-20.

{¶ 2} The commission’s PIRR Order modified the carrying-charge rate established in the ESP Order, cutting it by more than half. This reduced Ohio Power’s recovery of carrying charges by over \$130 million. PIRR Order at 17-19; April 3, 2012 Revised Staff Comments and Recommendations (“Revised Staff Report”) at 5-6, available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?>

DocID=9203c7aa-348b-4d94-a961-efd24a568bb4 (last accessed March 25, 2015).

{¶ 3} On appeal, Ohio Power challenges the commission’s decision to reduce its carrying-charge recovery. Ohio Power’s appeal raises one argument that has merit: the commission’s order violates R.C. 4928.143(C)(2)(a) by depriving the company of its right to withdraw the modified ESP. Therefore, we reverse the commission’s order insofar as it reduces the carrying-charge rate.

{¶ 4} Appellee and cross-appellant, Industrial Energy Users-Ohio (“IEU”), filed a cross-appeal,¹ raising one issue for our consideration: the commission erred when it refused to reduce the PIRR to account for Ohio Power’s accumulated deferred income taxes.² We hold that IEU’s cross-appeal is barred by collateral estoppel.

II. FACTS AND PROCEDURAL BACKGROUND

{¶ 5} On March 18, 2009, the commission issued an opinion and order approving Ohio Power’s first ESP, to be in effect from 2009 to 2011. The ESP Order established caps on how much Ohio Power could increase rates during each year of the plan in order to ensure rate stability and to mitigate the effect of rate increases on customers. ESP Order at 22. It did so under R.C. 4928.144, which 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.” To ensure that Ohio Power stayed under the rate caps, the commission directed it to phase in the rate increases approved in the ESP by deferring for future collection the portion of the fuel costs that exceeded the rate caps.

¹ The Office of the Ohio Consumers’ Counsel also filed a cross-appeal, but we granted its application for dismissal of its appeal on January 20, 2015. 141 Ohio St.3d 1432, 2015-Ohio-130, 23 N.E.3d 1177.

² IEU’s notice of cross-appeal raised three assignments of error. IEU, however, failed to brief its second assignment of error. And on December 18, 2014, we granted IEU’s motion to withdraw its third assignment of error. 141 Ohio St.3d 1414, 2014-Ohio-5543, 21 N.E.3d 1109.

{¶ 6} R.C. 4928.144 also authorized the commission to allow Ohio Power to recover carrying charges on the fuel costs earned but not collected in each year of the ESP. In its ESP application, Ohio Power proposed that carrying charges be calculated using the company's Weighted Average Cost of Capital ("WACC"). IEU did not object to using the WACC for the calculation during the ESP proceedings, but other parties did. Despite the objections, the commission accepted Ohio Power's proposal and set the carrying-charge rate at the WACC. ESP Order at 20-21, 23.

{¶ 7} As required by R.C. 4928.144, the ESP Order also provided that the deferred fuel costs would be collected through an unavoidable surcharge, meaning a charge imposed on both shopping and nonshopping customers. And the commission established a recovery period of 2012 through 2018 for Ohio Power to recover the deferred fuel costs and carrying charges by increasing its rates. ESP Order at 22-23.

{¶ 8} Various parties appealed from the ESP Order. Yet no party challenged the commission's decision to calculate carrying charges using the WACC. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655.

{¶ 9} This case began when Ohio Power filed an application with the commission to approve a mechanism to recover the accumulated deferred fuel costs from the first ESP period and the carrying charges. As noted earlier, consistent with the ESP Order, Ohio Power sought to implement a mechanism in the form of a nonbypassable PIRR to be in effect from January 2012 through December 2018. PIRR Order at 2; Application for Approval of Recovery Mechanism (Sept. 1, 2011) at ¶ 3-4, available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=fd450fd8-c987-4d1b-b56e-3efddb0c14d1> (last accessed March 25, 2015).

{¶ 10} The commission approved, in part, Ohio Power’s PIRR application. The commission, however, deemed it necessary to modify the part of the ESP Order that established the WACC as the carrying-charge rate. Specifically, the commission determined that the WACC rate would apply only during the ESP period (2009 to 2011). But once Ohio Power began to recover deferred fuel costs from customers in 2012, the commission ordered, the company was to calculate carrying charges at the company’s long-term-cost-of-debt rate. PIRR Order at 17-19. The commission’s decision to apply the long-term-cost-of-debt rate of 5.34 percent, which was less than half the commission-approved WACC rate of 11.15 percent, reduced Ohio Power’s recovery of carrying charges during the recovery period by over \$130 million. *Id.* at 7, 17; Revised Staff Report at 4-6. The commission also rejected IEU’s request to reduce the deferred-fuel-cost balance to account for savings to Ohio Power from accumulated deferred income taxes (“ADIT”) during the ESP period. PIRR Order at 19-20, 9-10.

{¶ 11} Ohio Power and IEU filed timely applications for rehearing at the commission. Each was denied. Fifth Entry on Rehearing (Oct. 3, 2012), available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=b100f2d4-6cc5-421c-ae9d-9075cc786a45> (last accessed March 25, 2015).

{¶ 12} Ohio Power then filed a notice of appeal, challenging the commission’s modification of the carrying-charge rate. IEU filed a notice of cross-appeal, arguing that the commission erred when it refused to reduce the deferred-fuel-cost balance to account for ADIT. As will be discussed in detail below, Ohio Power has demonstrated one instance of reversible error in the commission’s order. The issue raised by IEU’s cross-appeal, however, is barred by collateral estoppel.

III. STANDARD OF REVIEW

{¶ 13} “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 decision as to 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 commission’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*

{¶ 14} Although this 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 the expertise of a state agency 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

A. Ohio Power’s Appeal

{¶ 15} Ohio Power’s appeal challenges the commission’s authority to modify the ESP Order issued in 2009. According to Ohio Power, the commission has only limited authority to modify its prior orders and was prohibited from changing the carrying-charge rate established in the ESP Order in this case. Ohio Power attacks the commission’s order on five grounds, but only two were properly preserved by being set forth in the notice of appeal: (1) res judicata barred the commission from modifying the ESP Order in this case and (2) the

commission modified the ESP Order after the plan had expired, depriving the company of its right to withdraw a modified ESP in violation of R.C. 4928.143(C)(2)(a). We hold that Ohio Power’s res judicata argument lacks merit, but we agree with its argument that the commission’s order violates R.C. 4928.143(C)(2)(a).

1. The commission is entitled to modify a prior order, provided that it explains the change and the new regulatory course is permissible

{¶ 16} We have instructed the commission to “respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.” *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431, 330 N.E.2d 1 (1975), *superseded on other grounds by statute as recognized in Babbit v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979). This does not mean, however, that the commission may never revisit a particular decision, only that if the commission does change course, it must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52, citing, e.g., *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18. “When the commission has made a lawful order, it is bound by certain institutional constraints to justify that change before such order may be changed or modified.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 10 Ohio St.3d 49, 50-51, 461 N.E.2d 303 (1984). The court has not set the explanatory hurdle very high. In a case in which the commission did not follow its earlier precedent, we said that if the commission had put “[a] few simple sentences” in its order to explain why the earlier case was no longer controlling, it would have been sufficient. *Consumers’ Counsel*, 16 Ohio St.3d 21, 21-22, 475 N.E.2d 786 (1985).

{¶ 17} The commission’s modification power, however, is not without limits. “Modifying a regulatory scheme is not problematic in itself. Agencies

undoubtedly may change course, provided that the new regulatory course is permissible.” *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18. And if the commission does see fit to depart from a prior order, the commission “must explain why,” and “the new course also must be substantively reasonable and lawful.” *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52. *See also Fed. Communications Comm. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (an agency “need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates” [emphasis deleted]).

{¶ 18} In this case, the commission explained why it needed to modify the ESP Order. The issue, then, is whether the commission’s new course is lawful and reasonable.

2. Ohio Power has not shown that the doctrine of res judicata applies here to bar the commission from modifying the ESP Order

{¶ 19} Ohio Power’s first argument is that res judicata principles apply here to bar the commission from modifying the carrying-charge rate set in the ESP Order. Ohio Power, however, has failed to explain why res judicata applies in this case.

{¶ 20} In Ohio, the doctrine of res judicata includes both claim preclusion (historically known as estoppel by judgment) and issue preclusion (traditionally known as collateral estoppel). *See O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6, citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). “These doctrines operate to preclude the relitigation of a point of law or fact that was at issue in a former

action between the same parties and was passed upon by a court of competent jurisdiction.” *Consumers’ Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985). Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are of a judicial nature. *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 29; *Consumers’ Counsel* at 10.

{¶ 21} Ohio Power presents a single theory of legal error: res judicata principles apply here to divest the commission of “jurisdiction to change or modify an adjudicatory determination made in a prior final order, especially one appealed to the Supreme Court of Ohio.”³ According to Ohio Power, the commission was estopped from modifying the carrying-charge rate in this case because it lost jurisdiction over the matter once it was finally adjudicated in the ESP case.

{¶ 22} This claim need not detain us long. Res judicata is an affirmative defense. While raising the defense may preclude the commission from reconsidering an issue decided in an earlier order, it does not divest the commission of jurisdiction over the second proceeding. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Dept.*, 82 Ohio St.3d 37, 40, 693 N.E.2d 789 (1998).

{¶ 23} Ohio Power’s reliance on *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1 (1975), and *Consumers’ Counsel*, 16 Ohio St.3d 9, 475 N.E.2d 782, in this context is equally misplaced. *Cleveland Elec.* did not involve res judicata or collateral estoppel. And while we held that res judicata/collateral estoppel did apply in *Consumers’ Counsel*, we did not hold

³ Ohio Power abandons its jurisdiction theory on rebuttal in favor of a new legal theory: collateral estoppel must be applied to commission proceedings—without exception—whenever the commission seeks to reconsider a finding of fact made in a prior order. Ohio Power is barred from raising new arguments for the first time in reply. See *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 54.

in that case that the commission lacked jurisdiction over the matters under review. *See id.* at 10-11.

**3. The commission's order deprived Ohio Power of its right to withdraw its
ESP application in violation of R.C. 4928.143(C)(2)(a)**

{¶ 24} Ohio Power argues that the commission's orders in this case deprived it of its right under R.C. 4928.143(C)(2)(a) to withdraw its application for approval of the ESP after the commission decided to approve only a modified version of the ESP. When considering an ESP application, R.C. 4928.143(C)(1) requires the commission to do one of three things: (1) approve, (2) modify and approve, or (3) disapprove the application. Under R.C. 4928.143(C)(2)(a), if the commission issues an order that modifies and approves an application, the utility "may withdraw the application, thereby terminating it, and may file a new standard service offer." Ohio Power asserts that the commission deprived the company of the statutory right to withdraw the modified ESP, because the plan was modified well after it had expired. We agree.

{¶ 25} In the ESP Order, the commission determined that carrying charges on the deferred fuel costs would be calculated using Ohio Power's WACC rate during the period when the fuel costs were deferred (2009 through 2011) and also during the period when Ohio Power would recover the deferred fuel costs (2012 through 2018). ESP Order at 20-21, 23. In this case, the commission found it necessary to depart from the WACC rate that had been approved in the ESP Order. The commission determined that the WACC rate would still apply during the deferral period, consistent with the ESP Order. But once the recovery period began in 2012, the commission determined, Ohio Power should no longer use the WACC, but instead should calculate carrying charges at its long-term-cost-of-debt rate until the costs were fully recovered. PIRR Order at 17-18.

{¶ 26} Despite arguments to the contrary, the commission's PIRR Order modified a previously approved term of Ohio Power's first ESP, and thereby

reduced the company's recovery of carrying charges by approximately \$130 million. If the commission makes a modification to a proposed ESP that the utility is unwilling to accept, R.C. 4928.143(C)(2)(a) allows the utility to withdraw the ESP application. The modification made below, however, occurred after the ESP had expired, making it impossible for Ohio Power to exercise its statutory right to withdraw the modified ESP. Therefore, we find that the commission's order violates R.C. 4928.143(C)(2)(a).

a. The commission's reading of R.C. 4928.143(C)(2)(a) is unreasonable

{¶ 27} The commission found that the statutory right to withdraw was not implicated in this case, because R.C. 4928.143(C)(2)(a) "specifically pertains to the Commission's approval and modification of an *application* for an ESP." (Emphasis added.) Fifth Entry on Rehearing at 15. Because this case does not involve approval of an ESP application, the commission determined that the statutory withdrawal provision "ha[d] no bearing on the outcome." *Id.*

{¶ 28} We generally defer to the commission's statutory interpretation, but only 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, ¶ 38. R.C. 4928.143(C)(2)(a) provides that "[i]f the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application * * * ." The commission determined that the withdrawal provision applies only when the commission modifies and approves an ESP *application* within the context of an ESP proceeding, but does not apply to later proceedings in which the commission modifies an *order* that had previously approved an ESP application. We find the commission's interpretation unreasonable.

{¶ 29} What the commission overlooks is that when it modified the ESP Order in this case, it effectively modified the *application* that was approved by that order. R.C. 4928.143(C)(1) requires the commission to issue an *order* when it modifies and approves an ESP application, which the commission did in the

first ESP proceeding. The commission’s ESP Order approved the use of the WACC rate during the collection period, as proposed by Ohio Power in its ESP application. Thus, when the commission modified the ESP Order in this case to prohibit the continued use of the WACC rate, it modified a term that was proposed in the company’s ESP application. And because the modification of that term occurred after the ESP had expired, Ohio Power was unable to withdraw its ESP.

{¶ 30} The commission’s interpretation nullifies the clear purpose of R.C. 4928.143(C)(2)(a), namely, to allow a utility to withdraw its proposed ESP if it dislikes the commission’s modifications. But broader problems exist with the commission’s reading. As read by the commission, R.C. 4928.143(C)(2)(a) applies only when the commission is deciding the fate of the ESP application. On this reading, the commission could modify an ESP at any time after the application has been approved—even while the ESP is still in effect—and the utility would have no recourse but to implement the change. This would hardly be a “just and reasonable result,” R.C. 1.47(C).

b. The commission’s “ongoing supervision and jurisdiction” does not allow it to violate other statutory provisions

{¶ 31} The commission also found that its “ongoing supervision and jurisdiction” over the rate phase-in allowed it to modify the ESP Order. PIRR Order at 18; Fifth Entry on Rehearing at 15. *See* R.C. 4905.04 et seq.; R.C. 4928.144. As discussed above, the commission does have authority to revisit and modify earlier regulatory decisions. *See generally Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18. The commission also has broad discretion under R.C. 4928.144 to authorize utilities to phase in rates. *See In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 10-11; *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, 20 N.E.3d 699, ¶ 27.

{¶ 32} This authority, however, is not unlimited; the new regulatory course must also be permissible under the statutory scheme. *See In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52. Fundamentally, “[t]he PUCO, as a creature of statute, has no authority to act beyond its statutory powers.” *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 51. So whatever authority the commission has to modify the structure of the phase-in must be exercised in compliance with other relevant statutory provisions.

c. The commission’s reliance on *In re Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, is misplaced

{¶ 33} On rehearing, the commission cited *In re Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, as authority for modifying the ESP Order. Fifth Entry on Rehearing at 14. In the order under review in that case, the commission had exempted a charge—known as the economic-development rider—from the rate caps established in the earlier ESP order. On appeal, we upheld the commission’s decision to modify the ESP order to exempt the rider from the rate caps, reasoning that the commission has (1) broad discretion to phase in rates under R.C. 4928.144 and (2) inherent authority to revisit and modify prior rate orders. *In re Columbus S. Power Co.* at ¶ 7-12.

{¶ 34} While we agree with the commission that similarities exist between the economic-development-rider case and this one, we nevertheless find this case distinguishable for two reasons. First, the statutory right to withdraw a modified ESP in R.C. 4928.143(C)(2)(a) was not at issue in the economic-development-rider case. Second, we stated in the economic-development-rider case that the commission has discretion to revisit earlier regulatory orders and modify them prospectively, provided the new regulatory course is permissible. *In re Columbus S. Power Co.* at ¶ 8. Indeed, we upheld the commission’s order in that case because IEU—the appellant in that case—failed to demonstrate that the decision

to modify the ESP order was unlawful or unreasonable. *Id.* In contrast, Ohio Power has shown here that the commission's modification was unlawful.

4. Ohio Power has forfeited its remaining propositions of law

{¶ 35} Ohio Power offers three other propositions of law: (1) the commission may not reverse factual findings made in a prior order, (2) the precedent and rationale relied on by the commission do not justify changing the ESP Order, and (3) the commission failed to consider the financial decisions made by Ohio Power in reliance on the ESP Order. Ohio Power has forfeited the ability to challenge these alleged errors.

{¶ 36} R.C. 4903.13 establishes that the procedure for seeking reversal of a commission order is through a notice of appeal "setting forth the order appealed from and the errors complained of." Ohio Power listed two assignments of error in its notice of appeal: (1) the commission's modification of the ESP Order was barred by res judicata and collateral estoppel and (2) the commission deprived the company of its right to withdraw the ESP under R.C. 4928.143(C)(2)(a). We therefore lack jurisdiction to consider Ohio Power's remaining arguments. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 21; *In re Complaint of Smith v. Ohio Edison Co.*, 137 Ohio St.3d 7, 2013-Ohio-4070, 996 N.E.2d 927, ¶ 25-28.

B. IEU's Cross-Appeal

{¶ 37} IEU argues on cross-appeal that the commission erred when it failed to require Ohio Power to account for accumulated deferred income taxes ("ADIT") when calculating the carrying charges. This argument is barred, but understanding the argument requires a brief explanation of ADIT.

1. Background on ADIT

{¶ 38} According to the Revised Staff Report, ADIT results when a fuel expense is incurred in a different period from the period in which a company collects revenue to pay the expense. If the revenue and expense occur in the same

period, there is no tax impact, as the components will be treated the same for financial-reporting and tax-reporting purposes. But where, as here, costs are incurred during one period and collected from ratepayers during another, federal tax laws allow the utility to deduct the fuel expense for income-tax purposes when it is incurred. The result here was that Ohio Power was able to lessen its income-tax burden during the deferral period. For purposes of regulatory accounting, a utility records the deferred fuel costs as an expense for future recovery. Thus, when the deferred fuel costs are recovered in rates, the company's taxable income will increase and taxes then become due. That is, ADIT represents taxes that are payable in the future. Until then, the company reports ADIT in a separate account on its books. Revised Staff Report at 7-11.

2. IEU's accumulated deferred-income-tax argument is barred by collateral estoppel

{¶ 39} IEU argues that ADIT reflects a temporary tax savings to the company and is a source of funds that the company can use until the taxes become payable. According to IEU, the ADIT is a source of cost-free capital that is funded by ratepayers and not investors and, thus, Ohio Power should be required to reduce the deferred-fuel-costs balance to reflect that capital and thereby reduce the carrying charges. The commission found that no ADIT adjustment was required for the purpose of calculating carrying charges. PIRR Order at 19; Fifth Entry on Rehearing at 7-8. On appeal, IEU argues that the commission's failure to adjust deferral balances for ADIT violated generally accepted accounting principles, state policy, sound regulatory practices and principles, and precedent.

{¶ 40} We hold that IEU's argument is barred by collateral estoppel. The doctrine of collateral estoppel serves to prevent the relitigation in a second action of an issue that was litigated and decided in a prior action involving the same parties. Issue preclusion applies even if the causes of action differ. *O'Nesti v. DeBartolo*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, at ¶ 7, citing

Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd., 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). *See also Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d at 10, 475 N.E.2d 782 (applying collateral estoppel to bar litigation of an issue in a second commission proceeding).

{¶ 41} The requisite identity of parties and issue exists here. This exact issue was litigated in Ohio Power's first ESP case, and the commission found that R.C. 4928.144 barred using ADIT to reduce the deferred-fuel-costs balance. ESP Order, at 21-24. IEU was a party to the ESP proceedings, and it also raised challenges to the ESP Order on appeal. Yet IEU never raised any objection to the commission's ADIT ruling at the commission or on appeal to this court. *See In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. And though there are exceptions to applying collateral estoppel to administrative proceedings, IEU offers no compelling reason why the doctrine should not be applied to this matter. *See Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 171, 529 N.E.2d 1255 (1988) (lead opinion); *Set Prods., Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263, 510 N.E.2d 373 (1987).

{¶ 42} Therefore, we hold that IEU lost its opportunity to challenge the commission's ADIT determination when it failed to object to that ruling in the first ESP case. *See Consumers' Counsel v. Pub. Util. Comm.* at 10. Based on our determination, we do not decide whether the commission properly refused to adjust the deferred-fuel-costs balance to account for ADIT.

V. CONCLUSION

{¶ 43} Ohio Power has shown that the commission violated R.C. 4928.143(C)(2)(a) when it modified the terms of its previously approved ESP. Therefore, we reverse the commission's orders on this issue and remand the cause to the commission for reinstatement of the WACC rate.

{¶ 44} As to the cross-appeal, we hold that collateral estoppel bars IEU’s challenge to the commission’s refusal to adjust the deferred-fuel-costs balance to account for ADIT. Therefore, the cross-appeal is dismissed.

Orders affirmed in part
and reversed in part,
and cause remanded.

O’CONNOR, C.J., and LANZINGER, and FRENCH, JJ., concur.

PFEIFER, O’DONNELL, and O’NEILL, JJ., dissent.

PFEIFER, J., dissenting.

{¶ 45} Ultimately, a majority of this court concludes that the commission cannot change the carrying-charge rate on the deferred fuel costs because “the plan was modified well after it had expired.” Majority opinion at ¶ 24. But at its core, the modification does not affect Ohio Power Company’s electric-security plan (“ESP”) in any way. The ESP has expired and cannot be changed. The commission merely, after considering all the factors, determined that the rate of return that American Electric Power (“AEP”), the owner of Ohio Power, stands to receive during the recovery period is excessive.

{¶ 46} When the commission approved the ESP, the economy was at its nadir and the commission was dealing with an economic environment riddled with uncertainty. Based on what it knew then, it determined that an 11.15 percent rate of return, AEP’s weighted average cost of capital, was reasonable. Several years later, after seeing the economy recover somewhat, but also seeing interest rates remain mired near zero, the commission has determined that that rate of return is excessive. It is, of course, correct in that assessment. At this time, it considers a rate of return of 5.34 percent, which corresponds with AEP’s historic cost-of-debt rate, to be reasonable. I agree.

{¶ 47} The commission is not changing the ESP; nothing in its order affects the rate of return that AEP has hitherto received. Instead, the commission has concluded that the rate of return should be adjusted going forward. AEP would not be harmed in any way by a change in the rate of return. It would continue to receive an excellent rate of return during the recovery period, even at the “mere” 5.34 percent ordered by the commission. (It is unlikely that many members of the public that AEP serves would be unhappy receiving a guaranteed rate of return of 5.34 percent.) Of course, a majority of this court has determined that AEP is entitled to the grossly excessive 11.15 percent, which is absurdly high given the current interest-rate environment.

{¶ 48} My incredulity at the decision of this court is magnified because of the windfall that AEP recently received when it was allowed by this court to retain \$368 million dollars of charges that the commission considered unjustified. *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 56. Today, it receives another unwarranted \$130 million. These munificent windfalls do not materialize from thin air; they are commandeered from hardworking Ohioans. How many Christmas gifts does this court believe AEP is entitled to?

{¶ 49} I dissent.

O'DONNELL and O'NEILL, JJ., concur in the foregoing opinion.

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