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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets.	)	Case No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	Case No. 08-918-EL-SSO

APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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APPLICATION FOR REHEARING BY
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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential electric customers of the Columbus Southern Power Company ("CSP") and the Ohio Power Company ("OP") (collectively "Companies" or "AEP" or "AEP Ohio") applies for rehearing of the March 18, 2009 Opinion and Order (" ESP Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding and its two March 30, 2009 Orders – (the Entry Nunc Pro Tunc and Stay Order).[1] OCC asserts that the Commission Orders were unjust, unreasonable, and unlawful and the Commission erred in the following particulars:

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[1]The application for rehearing is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

Assignment of Error 1

The Commission erred by adopting a baseline for the fuel clause that was not based on actual data, on the grounds that the data was not in the record. Because the Company bears the burden of proof in this proceeding, under Section 4928.143(C)(1) of the Revised Code, the Commission should have required the Company to submit such data as the baseline for recovering fuel costs under Section 4928.143(B)(2)(a) of the Revised Code.

Assignment of Error 2

The Commission erred by not requiring deferrals and carrying costs to be calculated on a net of tax basis thereby failing to follow its own precedent, all in violation of Cleveland Electric Illumination Co. v. Pub. Util. Comm., 42 Ohio St.2d 403, 431 (1975) and other Authority.

Assignment of Error 3

The Commission erred by not crediting customers for revenues from off-system sales thereby failing to follow its own precedent all in violation of *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975) and other authority.

Assignment of Error 4

The Commission erred by permitting the Companies to apply their amended tariff schedules to services rendered prior to the Entry of the Commission approving such schedules, in violation of Sections 4905.22 and 4905.32 of the Revised Code.

Assignment of Error 5

The Commission erred by establishing the term of the ESP beginning January 1, 2009, thereby permitting the Companies to collect retroactive rates for the period of January 2009 through March 2009, in violation of Sections 4905.30, 4905.32, and 4928.141(A) of the Revised Code, Ohio Supreme Court precedent including *Keco,* and the Ohio and U.S. constitutions.

Assignment of Error 6

The Commission erred by denying the motion for stay in its March 30, 2009 Finding and Order and in So Doing rendered an Opinion and Order that failed to meet the sufficiency requirements of Section 4903.09 of the Revised Code, causing prejudice to OCC. The Commission also erred by failing to grant the motion to make the Companies' collection of rates subject to refund. The Commission further erred by failing to provide an opportunity or means for customers to be made whole in the event that Commission rulings in these cases are reversed on appeal.

Assignment of Error 7

The Commission Erred by Approving a Provider of Last Resort Charge That Is Calculated Incorrectly and Unreasonably High, Thus Placing an Unreasonable Cost onto Customers in Violation of R.C. 4905.22.

Assignment of Error 8

The Commission violated R.C. 4905.22 and Ohio Supreme Court prohibitions against retroactive ratemaking by allowing the Companies to collect POLR charge revenues for January through March 2009 at the higher rates authorized in the Order, even though the new SSO rates were not in effect at that time and customers were already paying a POLR charge.

Assignment of Error 9

The Commission erred when it required residential customers of governmental aggregators to pay a stand-by charge in violation of R.C. 4928.20(J), a statute that permits government aggregators to elect not to receive standby service on behalf of their residential customers and to instead elect to pay the market price for power if their residential customers return to the utility for competitive retail service.

Assignment of Error 10

The Commission erred by requiring customers to pay carrying charges for an environmental investment that was made from 2001 through 2008 even though R.C. 4928.143(B)(2)(a) and (b) do not permit the Companies to recover these costs in their ESP.

Assignment of Error 11

The Commission erred when it unreasonably discontinued its established regulatory policy of dividing the recovery of foregone revenue subsidies (delta revenues) equally between utility shareholders and customers, and failed to order conditions for collecting delta revenues from customers.

Assignment of Error 12

The Commission erred when it determined that FAC deferrals provide just and reasonable electric utility rates under R.C. 4928.144.

Assignment of Error 13

The Commission erred when it determined that carrying costs should be based on the weighted average cost of capital.

Assignment of Error 14

The Commission erred by unlawfully and unreasonably requiring Ohio's customers to pay for the companies' gridSMART Phase 1 deployment as proposed, in violation of R.C. 4903.09 and R.C. 4903.10.

Assignment of Error 15

The Commission violated Ohio law in approving an Enhanced Service Reliability Plan Rider for Ohio Power Company and Columbus Southern Power Company.

Assignment of Error 16

Ohio Law provides that the Companies have the burden of proof in ensuring that its vegetation management plan, proposed as part of the Enhanced Service Reliability Plan, is in the public interest and complies with R.C. 4928.143(B)(2)(h).

Assignment of Error 17

The Commission erred in characterizing AEP-Ohio's proposed vegetation initiative as "cycle-based."

Assignment of Error 18

The Commission erred by not ensuring that the Ohio Power Company's and Columbus Southern Power Company's ESP Application is amended to comply with various provisions of Ohio Administrative Code 4901:1-35-03.

Assignment of Error 19

The Commission Erred by approving the Economic Development Cost Recovery Rider 82 which is anti-competitive and unfair, lacks accountability, and does not evaluate whether the Companies receiving the special rate met their economic development obligations to Ohio.

Assignment of Error 20

The Commission Erred by Removing Deferrals from the Statutory Test For Significantly Excessive Earnings.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On July 31, 2008, the Companies filed in this case their application ("Application") for approval of an initial electric security plan ("ESP"). Under the three year plan proposed by the Companies, customers of CSP would be asked to pay increases in the amount of $1.6 billion and customers of OP would pay increases in the amount of $1.5 billion.[2]

Under Section V.E of the ESP application the Companies presented a plan to implement rates in the event the Respondents failed to meet the 150-day requirement of Section 4928.143(C)(1) of the Revised Code. The Companies' plan proposed that the ultimate PUCO order would be made effective back to January 2009. The Companies'

[2]See OCEA Initial brief at 4-5 (December 30, 2008).

plan also proposed to reconcile the Commission's order back to the beginning of 2009 billings through a one-time rider that would remain in effect for the remainder of the billing cycles in 2009.

In this proceeding, OCEA made proposals to protect consumers and opposed many aspects of the Companies' proposed ESP applications. Among other things, OCEA opposed adopting the plan on the basis of the following:

- The Companies' comparison of the Electric Security Plan ("ESP") and the Market Rate Offer ("MRO") was flawed because it significantly overstated the cost of market-priced power.[3]

- The Fuel Adjustment Clause ("FAC") proposed by the Companies to collect millions of dollars from customers was unjust and unreasonable and would result in unjustified increases.[4]

- The non-FAC and non-cost-based annual rate increases of 3% and 7% during the ESP period were unwarranted.[5]

- The Companies did not justify the Provider of Last Resort ("POLR") charge, the amounts they proposed for environmental carrying charges, or the proposed increases in line extension charges.[6]

- There should be no long-term deferrals under the FAC, but any deferrals approved by the Commission should be financed in part by the tax savings generated by the Companies' deferred tax obligation and the carrying charges on the deferrals should reflect the actual cost of short-term debt, excluding equity.[7]

- AEP Ohio's "enhanced" service reliability plan was deficient for ensuring reliability under Ohio law and the Commission's rules.[8]

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[3]Id. at 20.

[4]Id at 47-60.

[5]Id. at 29-31.

[6] Id. at 24-29.

[7]Id. at 62-66.

[8] Id. at 31-47.

- The Companies' DSM/energy efficiency proposals do not meet the requirements of S.B. 221.[9]

- The Companies' gridSMART Phase 1 program and its overall gridSMART program as proposed were deficient because they failed to demonstrate that they were cost effective or beneficial to the Companies' customers or society, and failed to provide sufficient information for the Commission to determine if they would be successful.[10]

- The proposed low income/economic development fund should be for new programs, not just for continuation of existing programs that may already be funded through customers' rates.[11]

- The Commission should not grant the proposed modified corporate separation plan and should not authorize the sale or transfer of generating assets.[12]

- The Commission should not make any determinations regarding deferring the costs of early plant closures.[13]

- The Companies should not be allowed to count potential interruptible load toward the requirements of S.B. 221.[14]

- The statutory test for significantly excessive earnings should not be determined in this proceeding.[15]

The Commission took evidence at five local public hearings throughout the state between October 14, 2008 and October 27, 2008.[16] The hearing at the PUCO's offices commenced on November 21, 2008 and began with testimony focusing on what the PUCO should do if it could not decide the Companies' application by January 1, 2009.

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[9] Id. at 94-97.

[10] Id. at 76-85.

[11] Id. at 93-94.

[12] Id. at 99-100.

[13] Id. at 101-102.

[14] Id. at 102-103.

[15] Id. at 109-114.

[16] See Entry (Sept. 24, 2008) at 1-2.

On December 15, 2008, CP and OP filed applications, docketed as Case No. 08-1302-EL-ATA, requesting the Commission's authority to continue their existing rate plan.[17] On December 23, 2008 the PUCO approved the application.[18] On December 23, 2008, the Companies filed tariffs to continue their current standard service offer until the PUCO first approved their ESP application or the last billing cycle of February 2009, whichever date occurred first.

Initial briefs were filed on December 30, 2008, and reply briefs were filed on January 14, 2009. On February 25, 2009, the PUCO issued *sua sponte* a Finding and Order to further extend the Companies' current standard service offer tariffs until the last billing cycle of March 2009 or until the PUCO first approved the Companies' ESP application.[19]

On March 18, 2009, the PUCO issued an Opinion and Order that approved a modified ESP for CSP and OP.[20] The ESP Order permitted CSP and OP to collect millions of dollars from its customers for new generation, distribution, and transmission rates. While the exact amount of the increase granted is not presented in the ESP Order

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[17] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders*, Case No. 08-1302-EL-ATA, Application (December 15, 2008).

[18] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders*, Case No. 08-1302-EL-ATA, Finding and Order at 2-3 (December 19, 2008)("Continuation Order I").

[19] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders*, Case No. 08-1302-EL-ATA, Order at 2 (February 25, 2009)("Continuation Order II").

[20] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, PUCO Case No. 08-917-EL-SSO,and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, ESP Order at 74 (March 18, 2009).

in a transparent manner, and OCC has struggled to understand the full magnitude of the increases granted, what is discernable is presented below.

In the Order, the Commission adopted a fuel clause for the recovery of generation fuel expenses but imposed caps on the fuel increases at less than the 15% cap requested. The Commission reduced the cap finding that "given the current economic climate, we believe that the 15% cap proposed by the Company is too high."[21] For CSP, the Commission adopted a 7% cap for 2009, 6% for 2010, and 6% for 2011. For OP, the Commission adopted an 8% cap in 2009, a 7% cap in 2010 and an 8% cap for 2011. All generation fuel costs increases that may cause the total customer bill to increase above the caps are to be deferred, with carrying costs at the overall cost of capital, for the seven-year 2012-2018 period, with a generous 11.15% carrying charge (before taxes).

For CSP, the deferred balance that is expected[22] due to the imposition of the cap is $178,777,050 (expected as of December 31, 2011). Based on the approved carrying charge, the carrying cost for this deferral for seven years is $75,356,796, bringing the total cost that customers will be charged for CSP deferrals to $254,133,846 for seven years. For OP, the deferred balance that is expected due to the imposition of the cap is $462,536,494 (expected as of December 31, 2011). Based on the approved carrying charge, the cost to customers for this deferral for seven years is $193,851,897, bringing the total cost that customers will be charged for OP deferrals to $656,388,391 for seven

[21] Order at 22.

[22] The amount of the deferrals will depend upon the actual costs of fuel. The costs used in the deferral figures are estimates based on the Companies' best estimate of cost of fuel for 2009. The deferrals assume that the cost of fuel for 2009 is the same cost that will be incurred during 2010 and 2011. Additionally the 11.15% carrying charge is an example used by Company Witness Assante. The actual carrying charge may change. Based on the AEP's filing, and Nelson and Assante's testimonies, the carrying charge is likely to be 10.84%, based on a 50/50 capital structure, cost of debt 5.73%, ROE 10.50%, and a federal income tax rate of 35%.

years.[23] Combined, this is a total of $910,522,237 of which $269,208,693 or 30 percent is strictly carrying costs.

In the ESP Order, the Commission denied the Companies' proposal to price power for Ormet at market rates and pass the costs onto other customers. The Commission found no rational basis for the proposal: "[T]he Companies have been able to prepare and plan for the additions to its (sic) system under the current regulatory scheme and have been compensated during the transitional period."[24] The Commission also denied the annual non-fuel generation increases proposed by the Companies. The Commission found the "record is void of sufficient support to rationalize automatic, annual generation increases that are not cost-based, but are significant, equaling approximately $87 million for CSP and $262 million for OP."[25]

The Commission approved gridSMART, but through a rider and subject to updates and audits. Because the recent federal funding makes matching funds available for gridSMART projects, the Commission cut the AEP Ohio proposal in half ($54.5 million). The Commission established the initial gridSMART rider at $33.6 million.

The Commission also granted 90% of the POLR charge that AEP Ohio requested. For CSP customers the annual POLR charge will be $97.4 million and for OP, the POLR charge will be $54.8 million. These charges will be collected through a bypassable rider. This is an increase of 567 percent over the current POLR rider.

[23] These figures were derived not from the ESP Order but on the basis of Staff workpapers made available to OCC after the ESP Order was issued.

[24] Order at 16.

[25] Id. at 30.

The Commission found the energy efficiency programs ($178 million) to be reasonable. The Commission ordered that the collaborative process be used to "contain" administrative costs of the programs, and ordered that the programs, excluding the low-income weatherization programs, comply with the Total Resource Cost Test. With respect to the $75 million low income/economic development commitment, the Commission determined that the Companies' shareholders should fund at a minimum $15 million over the three-year ESP period, with all of the funds going to low-income, at-risk customer programs. This reduction reflects the fact that the Commission, though finding the Partnership with Ohio fund to be a "key component," modified the ESP and, as a result, deemed it appropriate to reduce the shareholders' earlier commitment of $75 million over the term of the ESP.

In addition, the Commission found it has authority to determine whether Ohio's retail customers are permitted to participate in an RTO's demand response program, but concluded that it did not have sufficient information to consider the benefits to program participants and the costs to ratepayers to determine if this part of the ESP produces a significant net benefit to the Companies' customers.[26] The Commission deferred the issue to a subsequent entry, but directed AEP Ohio to modify its ESP by eliminating the portion prohibiting participation in the PJM demand response programs.

The Commission did not approve the Enhanced Service Reliability Plan (ESRP), with the exception of the vegetation management program, at this time. The Commission found that further investigation was needed and should be done in a distribution rate case where all components of distribution rates are subject to review.

[26] Id. at 58.

The Commission also denied the Companies' request to collect early plant closure costs. The Commission permitted the Companies to implement an accounting mechanism to separate the cost, but ruled that the Companies must file an application to collect the costs in the future. The Commission also determined that the methodology for the significantly in excess earnings test ("SEET") should be explored within a workshop. The ESP Order ruled that the Short Term Implementation Plan presented under Section V.E of the Companies' applications was "moot"[27] and thus declined to address any of the issues raised by OCC and others including that the Companies were prohibited by law from reconciling existing rates with newly approved rates for January through March 2009.

The Commission approved the Companies' ESP as modified and made its approval *effective January 1, 2009*. Thus, the Companies were to file revised tariffs to be effective with bills rendered January 1, 2009, and the revised tariffs "shall be approved upon filing, *effective January 1, 2009*, as set forth herein, and contingent upon final review by the Commission."[28]

In the ESP Order, the PUCO approved the term for the ESP as *beginning January 1, 2009* and continuing through December 31, 2011.[29] Additionally, the Commission authorized "the approval of AEP's ESP, as modified herein, *effective January 1, 2009*."[30] The ESP Order further stated that "any revenues collected from customers during the interim period [January through March 2009] must be recognized and offset by the new rates and charges approved by this opinion and order."[31] The "interim period" revenues

[27] Id. at 64.

[28] Id. at 72 (Emphasis added).

[29] Id. at 64.

[30] Id. at 64 (emphasis added).

[31] Id. at 64, PUCO Case Nos. 08-917-EL-SSO and 08-918-EL-SSO.

referred to revenues collected from customers under the Continuation Order I and II. The ESP Order directed both Companies to file revised tariffs consistent with the ESP Order, subject to final review and approval by the Commission.

On March 23, 2009, the Companies filed revised tariffs. The cover letter accompanying the tariff filing stated that the tariffs reflected the "rate increases authorized for the first year of the Companies' Electric Security Plans (ESP), as modified by the Commission, including the ESP rates being effective as January 1, 2009, on a bills rendered basis."

On March 25, 2009, OCC and the Appalachian People's Action Coalition ("APAC") filed a Motion for Stay of the Retroactive Collection of AEP's New Rates From Customers or, In the Alternative, Motion to Make Rates Subject to Refund ("Motion to Stay ESP Order").[32] The Industrial Energy Users-Ohio filed a Memorandum in Support of the motion later that day.[33] The Companies opposed the motion in a Memorandum Contra filed on March 27, 2009.[34] OCC filed a Reply to the Companies' Memorandum Contra on March 30, 2009.[35]

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[32] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, PUCO Case No. 08-917-EL-SSO, and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, Motion to Stay ESP Order (March 25, 2009).

[33] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, PUCO Case No. 08-917-EL-SSO, and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, Industrial Energy Users-Ohio Memorandum in Support (March 25, 2009).

[34] Id., PUCO Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, AEP Memorandum Contra (March 27, 2009).

[35] Id., PUCO Case No. 08-917-EL-SSO and 08-918-EL-SSO, Memorandum in Reply (March 30, 2009).

On March 30, 2009, the Commission issued two Entries —an Entry Nunc Pro Tunc[36] and an Entry addressing OCC's Motion for Stay. In its March 30, 2009 Entry Nunc Pro Tunc, the PUCO found, after reviewing its ESP Order, "inadvertent inconsistencies exist and must be corrected."[37] The Commission stated that the reference to "January 1, 2009" as the "effective date of the tariffs" was incorrect. Rather, the reference to "January 1, 2009" should have been to the "ESP term" and not to the "effective date of the tariffs." The Commission then amended the ESP Order to instead state, at page 72, the following: "Furthermore, the Commission finds that the Companies should file revised tariffs consistent with this order, to be effective on a date not earlier than both the commencement of the Companies' April 2009 billing cycle and the date upon which the final tariffs are filed with the Commission. In light of the timing of the effective date of the new tariffs, the Commission finds that the tariffs shall be effective for bills rendered on or after the effective date, and contingent upon final review by the Commission." The Commission made a similar change to the language in the second ordering paragraph on page 74 of its ESP Order.

In the other March 30, 2009 Entry ("Stay Entry"), the PUCO denied the Motion for Stay filed by OCC and APAC, finding that neither OCC nor IEU had demonstrated that the "four-factor test" governing a stay had been met. Additionally the Commission found that it was not allowing the Companies to retroactively collect rates. In coming to

[36] It is not the province of a nunc pro tunc order to correct a mistake in judgment, the sole function being that of correcting a clerical error See Helle v. Pub. Util. Comm. (1928), 118 Ohio St. 434, 161 N.E. 282.. OCC questions whether the Commission's order was truly meant to correct a clerical error, or rather was an attempt to obscure its findings making it more difficult to argue that the Commission is engaging in retroactive ratemaking.

[37] The Commission also corrected a typographical error as well, finding that its reference to "Section IE" should have been a reference to "Section VE."

this conclusion, the Commission placed great emphasis on the fact that new rates would not become effective until the first billing cycle of April, a change that the Respondents made in their Entry Nunc Pro Tunc. The Commission did not address OCC's Motion to collect rates subject to refund.

As discussed herein, the ESP Order, the Entry Nunc Pro Tunc and the Stay Order are unlawful and unreasonable in many respects. The Commission should abrogate or modify the Orders as recommended by OCC, for the reasons discussed in detail below.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[38]

In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."[39] Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***."[40]

[38] R.C. 4903.10.

[39] Id.

[40] Id.

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

Assignment of Error 1

The Commission erred by adopting a baseline for the fuel clause that was not based on actual data, on the grounds that the data was not in the record. Because the Company bears the burden of proof in this proceeding, under Section 4928.143(C)(1) of the Revised Code, the Commission should have required the Company to submit such data as the baseline for recovering fuel costs under Section 4928.143(B)(2)(a) of the Revised Code.

As advocated by OCC, the latest known actual fuel costs for 2008 should establish the baseline fuel adjustment clause ("FAC"). OCC's recommendation was consistent with how the Electric Fuel Component Rate ("EFC") functioned in the era preceding S.B. 3. Additionally the use of actual usage and costs as a baseline is consistent with the standards of S.B. 221. Under S.B. 221, a fuel clause may be part of an ESP and may recover the costs of fuel used to generate the electricity supplied under the SSO, along with other costs.[41] S.B. 221 requires, however, that these costs be "prudently incurred."[42] The clear language must be read to include recovery of only actual costs as anything more would not be prudent to recover from customers.

It is important to set an appropriate baseline for the FAC because, once set, it determines the non-base portion of FAC. If the Companies' artificially created FAC is too low, the base portion of the generation rates will be too high, and customers will

[41] R.C. 4928.143(B)(2)(a).

[42] Id.

pay more for the standard offer service than is reasonable.[43] Thus, understating the baseline FAC permits the Companies to seek more of a rate increase in the base non-FAC portion, which would then be escalated under the Companies' proposed ESP.

Although the actual fuel costs were not known at the time of the hearing, OCC recommended that the Commission order the Company to produce that data to enable the Commission to develop an appropriate baseline FAC. The actual 2009 data is surely available now, almost four months after the close of 2009. The Commission should order its production.

In its ESP Order the Commission concluded that in the absence of known actual costs, a proxy is appropriate to establish a baseline. The Commission then chose the Staff's proxy for the baseline FAC. The Commission's Order disregards the fact that the reason there is no actual cost data is that the Companies deliberately chose not to produce it. It is the Companies, not OCC or other parties, who have the burden of proof in this proceeding under Section 4928.143(C)(1) of the Revised Code. By accepting the lack of evidence as rationale for adopting an inferior approach to establish the FAC, the Commission is permitting the Companies to manipulate the process. This happens because the PUCO disregards the burden of proof on this issue.

Because the Companies here did not meet their burden of proof in showing how the proxy produced a reasonable fuel clause that complies with Section 4928.143(B)(2)(a), this Commission should grant rehearing on this issue. In its rehearing the Commission should require the Companies to produce the actual 2008 fuel costs so that an appropriate baseline FAC, consistent with the provisions of Section

[43] OCC Ex. 10 at 13.

4928.143(B)(2)(a), can be implemented. Absent such a course of action, the Companies will be unjustly enriched at the expense of its customers.

Assignment of Error 2

The Commission erred by not requiring deferrals and carrying costs to be calculated on a net of tax basis thereby failing to follow its own precedent, all in violation of Cleveland Electric Illumination Co. v. Pub. Util. Comm., 42 Ohio St.2d 403, 431 (1975) and other Authority.

In its Order, the Commission found that the tax deductibility for the debt rate should not be reflected on a net of tax basis because the Companies would not recover the full carrying charges on the authorized deferrals.[44] The Commission went on to state that such an outcome would be inconsistent with the "explicit directive" of Section 4928.144 of the Revised Code which addresses a phase-in : "If the commission's order includes such a phase-in, the order also shall 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." Given that this is a deferral and not a phase-in of rates, the Commission's reliance on Section 4928.144 is misplaced.

OCC had argued that carrying charges on the deferrals created for fuel costs in excess of the caps should be on a net of tax basis. Since the FAC operates as a traditional fuel clause, traditional cost of service principles should apply. One of the principles of traditional cost of service is that actual federal tax expenses should be on a net of tax

[44] Opinion and Order 1t 23.

basis, consistent with the established Commission precedent on this issue.[45] Indeed in the very recent *FirstEnergy SSO* case, the Commission found that calculation of carrying charges on a net of tax basis was "sound ratemaking theory."[46] By failing to calculate carrying charges on a net of tax basis, the Commission has once again provided more revenues to the Companies than they are entitled to and at the expense of customers.

The Commission's failure to respect its own precedent violates *Cleveland Electric Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975) (*Cleveland Electric Illuminating*). *Cleveland Electric Illuminating* and its progeny[47] hold that the Commission should "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law including administrative law."[48] This it did not do.

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[45] See for example, *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service,* Case No. 81-1378-EL-AIR, Opinion and Order at 42 (Jan. 5, 1983), (establishing Quarto coal cost deferrals on a net of tax basis); *In the Matter of the Application of the Monongahela Power Company for Authority to Modify Current Accounting Procedures to Defer Expenditures and Net Lost Revenues Associated with the Implementation of Various cost-Effective Demand Side Management Options*, Case No. 93-2043-EL-AAM, Entry at 4 (Nov. 3, 1994), 1994 Ohio PUC LEXIS 907(deferred taxes should be provided for carrying charges on a net of tax basis); *In the Matter of the Application of the Cincinnati Gas and Electric Company and Columbus Southern Power Company for Authority to Capitalize and Defer Interest Expense on Certain Capitalized and Deferred costs Related to the Wm. H. Zimmer Generating Station Investment and Operating Costs,* Case No. 90-2017-EL-AAM, Entry at 6 (Jan. 10, 1992), 1992 Ohio PUC LEXIS 48 (permitting the accrual of carrying charges on deferred expenses using an uncompounded embedded interest cost net of tax); *In the Matter of the East Ohio Gas Company Application for Authority to Modify its Accounting Procedures to Accumulate Post In-Service Carrying Charges and to Defer and Subsequently Amortize Depreciation and Other Expenses Associated with the Protection of Gas Pipelines*, Case No. 92-555-GA-AAM, Entry at 2 (Apr. 30, 1992), 1992 Ohio PUC LEXIS 329 (permitting deferred taxes on depreciation and other deferred expenses at net of tax rates).

[46] *FirstEnergy SSO*, Opinion and Order at 58, citing *FirstEnergy Distribution Rate Case* Staff Ex. 16 at 8, 12, *In re Cleveland Electric Illuminating Co.*, Case No. 88-205-EL-AAM, Entry (Feb. 17, 1988); *In re Cleveland Electric Illuminating Co.*, Case No. 92-713-EL-AAM, Entry (Dec. 17, 1992).

[47] See for example *Office of Consumers; Counsel v. Pub. Util. Comm.*(1984), 10 Ohio St.3d 49, 461 N.E.2d 303.

[48] *Cleveland Electric Illuminating,* 42 Ohio St.2d at 431.

Additionally, *Cleveland Electric Illuminating* requires that while the Commission may change its position, it must justify the change by showing there is a clear need for change and must show that the prior decisions are in error. The Commission does not show there is a clear need to change its policy in this regard. Moreover, the Commission does not claim that its prior decisions are in error. Consequently, the Commission has violated *Cleveland Electric Illuminating* and in doing so ended up with an unreasonable and unlawful result. Rehearing should be granted on this issue.

Assignment of Error 3

The Commission erred by not crediting customers for revenues from off-system sales thereby failing to follow its own precedent all in violation of *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 431 (1975) and other authority.

In the Commission's Order it found that it was not persuaded by the intervenors' arguments to modify the Companies' proposed ESP to offset costs by profits from off-system sales. In reaching its decision, the Commission determined that the law does not require such an offset.[49] Additionally, it concluded that it did not find arguments from other jurisdictions to be persuasive. Finally the Commission noted that intervenors could not have it both ways—receive offsets of expenses from profits and count the profits in the significantly excessive earnings test (SEET).

Recognizing off-system sales profits is consistent with Commission precedent upholding a sharing of the profits of off-system sales between customers and utilities. The Commission has in the past required electric utilities to share the revenue received from off-system sales of electricity with jurisdictional customers and to account for this

[49] Opinion and Order at 17.

revenue in the rates charged to jurisdictional customers.[50] The Commission has recognized that if plant has been constructed for the benefit of jurisdictional customers and ultimately paid for by those customers, in fairness there should be some sharing of revenues realized by the utility utilizing that plant when it makes non-jurisdictional or off-system sales.[51] Moreover, the Commission has determined that providing off-system sales revenue to jurisdictional customers can assist in achieving the goal of providing reliable and safe service to customers at the lowest reasonable cost[52] which is consistent with the mandates of R.C. 4928.02(A) of S.B. 221. Just because the law does not explicitly require an allocation to customers of the profits from off-system sales to customers, the law also does not prohibit it. In fact, equity and fairness would dictate that customers receive some of the benefits from the generating plants they paid for.

The Commission's failure to respect its own precedents violates *Cleveland Electric Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403 (1975). *Cleveland Electric Illuminating* holds that the Commission should "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law including administrative law."[53] This it did not do.

Additionally, *Cleveland Electric Illuminating* requires that while the Commission may change its position, it must justify the change by showing there is a clear need for change and must show that the prior decisions are in error. The Commission does not

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[50] See, *In the Matter of the Application of the Cleveland Electric Illuminating Company for an Increase in Rates*, Case No. 84-188-EL-AIR, Opinion and Order at 21 (March 7, 1985).

[51] Id at 21.

[52] See, *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Rates for Gas Service to All Jurisdictional Customers*, Case Nos. 95-656-GA-GCR, Entry on Rehearing (Feb. 12, 1997).

[53] *Cleveland Electric Illuminating*, 42 Ohio St.2d at 431.

show there is a clear need to change its policy in this regard. Moreover, the Commission does not show that its prior decisions are in error. Consequently, the Commission has violated *Cleveland Electric Illuminating* and in doing so ended up with an unreasonable and unlawful result.

If the Commission did require a sharing of the proceeds from offsystem sales, it would be entirely appropriate to only count that portion of the off-system sales that are retained by the utility in the calculation of the SEET. Doing so would be a fair outcome and does not result in the customers "having it both ways." Rehearing should be granted on this issue.

Assignment of Error 4

The Commission erred by permitting the Companies to apply their amended tariff schedules to services rendered prior to the Entry of the Commission approving such schedules, in violation of Sections 4905.22 and 4905.32 of the Revised Code.

The Commission in its ESP Order approved the Companies' ESP as modified and directed the Companies to file tariffs consistent with its Order "to be effective with bills rendered January 1, 2009." In a subsequent Entry Nunc Pro Tunc the Commission noted that the effective date of the tariffs was in error and revised the Order changing the effective date of the tariffs to "not earlier than both the commencement of the Companies' April 2009 billing cycle and the date upon which the final tariffs are filed with the Commission." The Commission then held that, "[i]n light of the timing of the effective date of the new tariffs, the Commission finds that the tariffs shall be effective for bills rendered on or after the effective date, and contingent upon review by the Commission."[54]

[54] Entry Nunc Pro Tunc at 2.

In permitting the increased rates to be effective on a "bills rendered" basis instead of a "service rendered" basis, the Commission allowed the Companies to include service rendered prior to April 1, 2009 in its next billing cycle (beginning April 1, 2009) utilizing the new tariffs with increased rates. The Order thus authorized increased rates in the next billing to include charges for electric energy already consumed.

A utility's application of amended tariff schedules to services rendered prior to the Commission's entry that approves such schedules violates Sections 4905.22 and 4905.32 of the Revised Code.[55] Under those sections of the Revised Code, a public utility may not collect a different rate than that specified in schedules which were in effect (by Commission approval) at the time the service was rendered.

The tariff rates that Respondents permitted the Companies to charge in the ESP Order for services rendered prior to April 1, 2009 were a different tariff rate than that on file with the Commission and in effect during the service period. There is no statutory authority that permits the Commission to authorize rate increases that have a retroactive effect. [56] The Commission erred in this regard, and should grant rehearing on this issue.

[55] The Commission presented this argument in *Ohio Edison v. Public. Util. Comm*,. 56 Ohio St.2d 419; 384 N.E.2d 283 (1978). See Brief of Appellee PUCO (May 8, 1978). The Court did not reach a determination on that issue. However, the Commission's Order in the underlying case supports OCC's argument. *In re Complaint of R.C.A. Rubber Co. Against the Ohio Edison Co.*, Case No. 76-72-EL-CSS, Opinion and Order at 3-5 (October 5, 1977) (where the Commission ruled that permitting tariffs to be effective on a bills rendered basis was retroactive ratemaking prohibited by Sections 4905.30 and 4905.32).

[56] See Keco *Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 257, 141 N.E.2d 465.

Assignment of Error 5

The Commission erred by establishing the term of the ESP beginning January 1, 2009, thereby permitting the Companies to collect retroactive rates for the period of January 2009 through March 2009, in violation of Sections 4905.30, 4905.32, and 4928.141(A) of the Revised Code, Ohio Supreme Court precedent including *Keco*, and the Ohio and U.S. constitutions.

While the Entry Nunc Pro Tunc sets April 2009 as the "effective" date of the new ESP approved rates, other portions of the ESP Order remain unchanged by the Entry Nunc Pro Tunc. It is these other provisions that demonstrate, notwithstanding the Commission's newly established effective tariff date that the Commission-approved rates for CSP and OP are retroactive in their effect.

Under the Commission's ESP Order, the term of the ESP begins January 1, 2009. By establishing the beginning of the ESP on January 1, 2009, the Commission has guaranteed that the Companies can collect twelve months of 2009 revenue in the remaining nine months of 2009. The Companies have confirmed that the March 18, 2009 ESP Order allows this to happen.[57] The twelve-month period the Companies refer to includes the entire year of 2009—including January through March, during which existing rates were being charged and collected pursuant to filed and approved tariffs.

Additionally, the Commission's Order directs the Companies to balance the past rates in effect from January through March 2009 with new rates set under the ESP plan—"under the new approved ESP rates any revenues collected from customers during the

[57] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, PUCO Case No. 08-917-EL-SSO, and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, AEP Memorandum Contra at 4 (March 27, 2009). "In accordance with the order, AEP . . . filed tariffs that include rates for 2009 that are designed to collect twelve months of revenue in the remaining nine months of 2009, net of the required offset for the interim rates that were previously in effect during 2009."

interim period [January through March 2009] must be recognized and offset by the new rates and charges approved by this opinion and order."[58] The fact that the reconciliation must occur between the new and old rates can only mean one thing—that the new rate increases are being implemented in a manner that allows the Companies' increased rates as if the newly announced increases were effective during the first three months of 2009, consistent with the term of the ESP beginning January 1, 2009.

The Supreme Court of Ohio has repeatedly held that the Commission is a creature of the General Assembly and may exercise only the powers and jurisdiction conferred by statute.[59] Thus, the PUCO may only act if authorized by statute. The authority for the Respondents actions must flow, if at all, from the Ohio Revised Code, Title 49, which enumerates the PUCO's authority in regulating public utilities.

The Commission moreover cannot legislate in its own right, and is prohibited from engrafting upon the statutory ratemaking scheme[60] an exception which would allow the Companies to collect increased rates because the Commission failed to first approve their SSO. This is however, just what the PUCO has done in the case at bar. As the Ohio Supreme Court has recognized whether a given regulatory mechanism, based upon these or

[58] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, PUCO Case No. 08-917-EL-SSO, and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, ESP Order at 64 (March 18, 2009).

[59] See, e.g., *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 429 N.E. 2d 444 .

[60] The Court has restricted the Commission from legislating and making changes to the statutory scheme in the past. *See e.g. Consumers' Counsel v. Public Util. Comm.* (1981), 67 Ohio St. 2d 153, 164, 423 N.E.2d 820; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 429 N.E. 2d 444 (no authority for the Respondents to enact an excise tax adjustment clause); *Montgomery County Board of Commissioners v. Pub. Util. Comm.* (1986),28 Ohio St.3d 171, 503 N.E.2d 167(no authority for PUCO to authorize PIP plan arrearages to be collected through the EFC rate).

other factors, should be adopted "is not a question for the commission, or for this court; rather, its resolution lies with the General Assembly."[61]

A. This Commission Has No Power To Authorize Retroactive Rates As Determined In A Number Of Ohio Supreme Court Holdings.

It is a fundamental principle of rate regulation that rates are set on a prospective basis. Public utility regulation in Ohio, which began with the implementation of the Ohio General Code,[62] was based on this very concept wherein the Commission would "fix and determine the just and reasonable rate, fare, charge, toll, rents, or service to be *thereafter* rendered, charged, demanded, exacted or collected."[63] Indeed the United States Supreme Court held that the PUCO had no power to establish rates retroactively.[64]

This prohibition on retroactive ratemaking has been recognized through a number of Ohio Supreme Court decisions, but perhaps the most famous, and the decision synonymous with retroactive ratemaking, is *Keco*. In *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.,* the Ohio Supreme Court ruled that it cannot order refunds or credits to utility customers for past rates approved by the PUCO, even where those later rates are later found to be excessive.[65] The Court found a statutory basis for this effect in Sections 4903.12, 4903.16, and 4905.32 of the Revised Code, as these provisions taken together "clearly show[]that it was the intention of the General Assembly to provide that utility rates are solely a matter for consideration by the Public Utilities Commission and

[61] *Pike County v. Public Utility Comm.*, 68 Ohio St.2d at 186.

[62] G. C. 64-21 and 614-23.

[63] Id.

[64] *Public Utilities Com. v. United Fuel Gas Co.* (1943), 317 U.S. 456, 464, 63 S. Ct. 369, 87 L. Ed. 396. 401.

[65] *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 257, 141 N.E.2d 465.

the Supreme Court. The utility must collect the rates set by the commission, unless some one by affirmative act secures a stay of such order."[66]

In a more recent case, *Lucas County v. Public Util. Comm.*(1997), 80 Ohio St.3d 344, the Ohio Supreme Court concluded that there was no statutory authority under which refund or service credits to consumers could be made for rates collected by the utility during an experimental rate program that had expired under its own terms. "[W]ere the commission to order either a refund or a credit the commission would be ordering Columbia Gas to balance a past rate with a different future rate, and would thereby be engaging in retroactive ratemaking, prohibited by *Keco*."[67]

The Commission here however did authorize retroactive ratemaking. The Commission authorized an offsetting of past rates collected from January 1, 2009 through March 2009 with newly approved future rates that are to become effective starting in April, 2009. The words of the Commission, which remain unchanged by the Entry Nunc Pro Tunc, are clear in this respect: "[A]ny revenues collected from customers during the interim period [January through March 2009] must be recognized and offset by the new rates and charges approved by this opinion and order." [68]

The fact that the Commission chose to prospectively apply a twelve-month rate increase to customers in nine months does not cure the retroactivity. The PUCO's decision reaches back to the months of January through March 2009, when existing rates

[66] Id. at 257, 141 N.E.2d 465 at 468.

[67] *Lucas County v. Public Util. Comm.* (1997), 80 Ohio St.3d 344, 348-349, 686 N.E.2d 501.

[68] *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets*, PUCO Case No. 08-917-EL-SSO, and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, ESP Order at 64 (March 18, 2009).

were in effect and being collected as ordered by the PUCO, and adjusts future rates (billed starting the April 2009 billing cycle) on the basis of the revenues collected in past rates. The ESP Order and Entry Nunc Pro Tunc together attempt retroactive ratemaking, contradicting the Ohio Supreme Court's holdings in *Keco* and *Lucas County,* and the fundamental tenet that Ohio regulation provides for prospective, not retroactive, ratemaking.

B. The Commission's Order Violates Sections 4905.30 And 4905.32 Of The Revised Code.

Permitting retroactive ratemaking violates more than Ohio Supreme Court precedent. It also violates Sections 4905.30 and 4905.32 of the Revised Code, under which utilities may only collect rates under approved and filed schedules. The Companies' existing SSO rates that were charged and collected from customers in the first three months of 2009 were Commission's approved rates in Continuation Order I and II.[69] These are the only lawful rates that can be applied to services provided by the Companies during the first three months of 2009. These rates are the lawful rates until they are set aside as being unreasonable and unlawful by the Ohio Supreme Court.

By permitting CSP and OP to collect twelve months of 2009 increased rates over the remaining nine months of 2009, the PUCO is enabling the Companies to deviate from their pre-existing, filed, and approved rates that apply to the first three months. The PUCO is permitting the Companies to adjust future 2009 rates to make up for the fact that lower rates than those recently approved existed in the first three months of 2009. "Recognizing" and "offsetting" the revenues collected from customers during a prior

[69] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders,* Case No. 08-1302-EL-ATA, Finding and Order at 3 (December 19, 2008) also *id.*, Finding and Order at 2 (February 25, 2009).

period against new rates is evidence that the rates during January through March 2009 are being recalculated, something that is not permissible under Sections 4905.30 and 4905.32 of the Revised Code.

C. The Commission's Order Violates Constitutional Provisions Of The Ohio And The U.S. Constitution

This retroactive ratemaking also violates Article I, Section 10 of the United Constitution and Article II, Section 28 of the Ohio Constitution by re-charging customers who had settled expectations regarding the rates they were to be charged for electrical service.[70] Article I, Section 10 of the U.S. Constitution provides "No State shall . . . pass any . . . ex post facto law, or law impairing the obligation of contracts…." Article II, Section 28 of the Ohio Constitution provides "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contract…." These constitutional provisions establish that the Commission may not retroactively change one of its own ratemaking orders (the Continuation Orders) that have the effect of law. Given that the Commission is a creature of statute, it cannot do what the General Assembly chose not to do.[71]

D. The Commission's Order Does Not Permit The Companies Existing Rate Plan To Continue And Thus Violates Section 4928.141 Of The Revised Code

The PUCO's ESP Order also established new rates for the Companies' customers that are in effect starting January 1, 2009, due to the effective term of the ESP plan.

[70] *Ohio Edison v. Public Util. Comm.* (1978), 56 Ohio St.2d 419, 424, 384 N.E.2d 283. "Such result would necessarily be violative of the provisions of Section 10, Article I of the United States Constitution, and Section 28, Article II of the Ohio Constitution, in that it would be an attempt to retroactively charge a regulatory order of the commission, having the effect of existing law." Cited with approval in *Columbus Southern Power Co. v. Public Util. Comm.* (1993), 67 Ohio St.3d 535, 541, 620 N.E.2d 835.

[71] See for example *Akron & Barberton Belt Rd. et al. v. Public Util. Comm.* (1956), 165 Ohio St. 316, 319, 135 N.E.2d 400, citing *City of Toledo v. Public Util. Comm.* (1939), 135 Ohio St. 57, 19 N.E.2d 162.

These new, increased rates are not a continuation of the Companies' existing rate plan. Under Section 4928.141(A) of the Revised Code, only the rates from an existing rate plan may be placed in effect on January 1, 2009 if a utility's SSO rates are not "first authorized" under Sections 4928.142 or 4928.143 of the Revised Code.

The PUCO determined in its Continuation Orders on December 19, 2008, and again on February 25, 2009 (i.e. before the ESP Order), that it had not yet "first authorized" the Companies' SSO, under Sections 4928.142 or 4928.143.[72] The Commission also determined that because there was no "first authorized" SSO for the Companies, the Companies' existing SSOs should continue until there is a first approved SSO.[73] The rates in effect from January 1, 2009 through March 31, 2009, as a result of the Continuation Orders I and II, are not the same rates as those contained in the new SSO rate first approved by the Commission on March 18, 2009. Thus the Commission's ESP Order also violates Section 4928.141(A) of the Revised Code.

For these numerous reasons, the Commission erred in its ESP Order and its Entry Nunc Pro Tunc. The Commission should grant rehearing on this issue.

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[72] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify the Expiration Dates on Certain Rate Schedules and Riders*, Case No. 08-1302-EL-ATA, Finding and Order at 1 (December 19, 2008); also *id.*, Finding and Order at 1 (February 25, 2009).

[73] Id. at 2 (December 19, 2008); also *id.*, Finding and Order at 1-2 (February 25, 2009).

Assignment of Error 6

The Commission erred by denying the motion for stay in its March 30, 2009 Finding and Order and in So Doing rendered an Opinion and Order that failed to meet the sufficiency requirements of Section 4903.09 of the Revised Code, causing prejudice to OCC. The Commission also erred by failing to grant the motion to make the Companies' collection of rates subject to refund. The Commission further erred by failing to provide an opportunity or means for customers to be made whole in the event that Commission rulings in these cases are reversed on appeal.

In the Stay Entry issued by this Commission, the Commission denied the Motion for Stay filed by OCC and APAC. The PUCO's denial was based upon a singular statement that neither OCC (and APAC) nor IEU had demonstrated that the "four factor test" governing a stay had been met. Additionally the Respondents found that they were not allowing the Companies to retroactively collect rates. In coming to this conclusion, the Respondents noted that new rates would not become effective until the first billing cycle of April, a change that the Respondents made in their Entry Nunc Pro Tunc. The PUCO entirely failed to address OCC's motion to require the rates be collected subject to refund.

Under Section 4903.09 of the Revised Code, the PUCO must make findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings. The purpose of Section 4903.09 of the Revised Code is to provide sufficient details to enable the Court to determine how the PUCO reached its decision.[74] The Court has determined that merely filing an opinion which summarizes the testimony of each witness and a statement of the conclusion reached is insufficient to comply with Section 4903.09 of the Revised Code.[75]

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[74] *Cleveland Electric Illum. v. Pub. Util. Comm.*, (1983),4 Ohio St.3d 107, 447 N.E.2d 746.

[75] *Commercial Motor Freight, Inc. v. Pub. Util. Comm.*, (1951), 156 Ohio State 360, 102 N.E.2d 842...

The PUCO did not even rule upon the motion to make the rates subject to refund, which was all the more a violation of Section 4903.09 of the Revised Code. Moreover, the Commission failed to protect consumers by providing them with no opportunity or means to be made whole if the Commission rulings are reversed on appeal.

The Commission's Order in this respect failed to meet the requirements of Section 4903.09 of the Revised Code. The summary conclusion that OCC and IEU failed to meet the "four-prong test" for a stay does not permit the Court nor OCC to determine how the PUCO reached its decision. Merely summarizing the arguments of the OCC, IEU, and the Companies, with no legal analysis thereafter, falls short of the statutory requirements of Section 4903.09 of the Revised Code.

Moreover, the Order was prejudicial to OCC because it denied OCC an opportunity to obtain a stay of the underlying Order in immediate fashion. Instead OCC was restricted to pursuing very limited remedies—remedies only available on an extraordinary basis from the Ohio Supreme Court. The few remedies then available to OCC to protect consumers consist solely of special writs and a stay of the Commission Order.

Customers have begun to pay illegal and retroactive rates. They will continue to pay the retroactive portion of the rates over the next nine months. Once any of the retroactive rates are collected, it is unlikely that the PUCO will determine that customers can be provided to a refund if OCC (or others) prevail on appeal.

The appeals process requires OCC to wait for the Commission's entry on rehearing and prosecute an appeal. Waiting for an entry on rehearing can be endless, and is not prevented by the provision in R.C. 4903.10 that the PUCO has 30 days to issue an entry on rehearing. As provided in *State ex rel. Consumers' Counsel v. Public Utilities Comm. of Ohio*, 102 Ohio St.3d 301, 2004-Ohio-2894, R.C. 4903.10 does not prevent "grant[ing] the applications . . . for the limited purpose of allowing additional time to consider them."[76] This additional time has been lengthy in many instances.[77]

Thus for the reasons mentioned herein, the PUCO should grant rehearing in this matter, and upon rehearing the Commission should reverse its decision and grant OCC's Motion for Stay or in the alternative require the companies to collect rates subject to refund.

Assignment of Error 7

The Commission Erred by Approving a Provider of Last Resort Charge That Is Calculated Incorrectly and Unreasonably High, Thus Placing an Unreasonable Cost onto Customers in Violation of R.C. 4905.22.

The Companies sought a POLR charge that would have required customers to pay $508 million over the three-year ESP.[78] The Companies claimed this charge is necessary to compensate them for the future financial risk associated with customers who purchase their generation from a competitive retails electric service ("CRES") supplier but later return to the Companies for generation service.[79] This risk is said to be related to the relationship between the SSO price and the market. As OCC Witness Smith noted, however, that risk is practically nonexistent.[80]

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[76] *Consumers' Counsel 2004*, 2004-Ohio-2894, ¶19.

[77] For instance, in Case No. 05-144-GA-UNC the Commission granted rehearing to permit itself time to review the issues, and then took an additional year-and-a-half before it finally issued the Entry on Rehearing.

[78] AEP Ohio Ex. 2A, Ex. JCB-2 (Baker).

[79] AEP Ohio Ex. 2A at (Baker).

[80] See OCC Ex. 10 at 33.

Nevertheless, the Commission allowed the Companies to collect from customers 90% of the total costs associated with POLR that the Companies proposed in their ESP.[81] Thus under the Order, and the compliance tariffs filed by the Companies, the POLR charge for CSP's residential customers will increase from 0.08192 cents per kWh to 0.56955 cents per kWh, an increase of 595 percent if the POLR charge is to be collected over a twelve-month period starting January 2010. However, in 2009, when the POLR revenue is collected over a nine-month period, the POLR charge rate increases 847 percent, from 0.08192 cents per kWh to 0.077546 cents per kWh.

For OP's residential customers, the POLR charge increases from 0.16241 cents per kWh to 0.23366 cents per kWh, an increase of 43.8 percent, if the POLR revenue is collected over twelve months. In 2009, when the POLR revenue is to be collected in nine months, the increase is 95.6 percent, from 0.16241 cents per kWh to 0.31771 cents per kWh.

In addition, the approved POLR revenue requirements to be collected from <u>all</u> customers represent unprecedented increases over the POLR charge in effect under the RSP – a 567 percent increase (from $14.6 million to $97.4 million) in the case of CSP and a 38 percent increase (from $39.7 million to $54.8 million) in the case of OP[82]. There is no record evidence to demonstrate that the current POLR charge already being collected in rates is insufficient and requires such a dramatic increase. It is extremely unlikely, if not impossible, that within one year (from 2008 to 2009) AEP will experience

[81] Order at 40.

[82] AEP Exhibit DMR-1.

such drastic increases in either the actual costs of the POLR or even the perceived risk for assuming the responsibility of the POLR.

The sole basis for the Commission's decision was the estimation of the POLR risk to AEP by the Companies' witness.[83] In relying solely on the Companies' view of the POLR risk, however, the Commission ignored the overwhelming weight of the evidence against the Companies' position.

First, there is no correlation between the POLR revenues approved by the Commission and the actual costs of electricity generation and distribution. The charge was not based on the results of any cost-based analytical study relating to whether customers are likely to shop.[84] The dollar value of the POLR was estimated as a "financial risk" using a method developed for hedging equities.[85] The Companies did not use the inputs required by the Black-Sholes model ("BSM"), but instead used inputs selected by the Companies in their sole and unsupported judgment.[86] The inputs are unverified and untested as producing accurate results. They have not been used in any other proceeding in this or any other state.

Second, the BSM is not designed to, and is incapable of, accounting for any customer behavior or market development progress.[87] Staff Witness Cahaan testified that "there are many reasons to think that substantial migration will not quickly occur, even if

[83] Order at 40.

[84] Tr. XI at 214 (Baker): Q. In the final analysis, Mr. Baker, aren't you effectively taking the position that Senate Bill 221 creates a right for customers for which AEP has the right to impose a charge, regardless of whether or not the customer wants that right, exercises it, or will exercise that right? And by "customer" I mean customers plural, your customer base. A. Subject to all of the caveats I gave you before, I'd say yes.

[85] The Black Scholes Model; OCC Ex. 11 at (Medine).

[86] OCC Ex. 11 at 15 (Medine).

[87] Tr. XI at 214 (Baker).

the market price falls below the SSO price."[88] Thus, the POLR charge adopted by the Commission is the same no matter what the level of shopping may be,[89] or whether the market rate is higher than the ESP (which would provide an economic disincentive to customers to shop) or lower than the ESP (which would provide the customers an economic incentive to shop). The POLR charge is the same, regardless of the circumstances of the markets or customers or shopping.

Third, the use of the BSM to calculate a POLR charge is unreliable. As Ms. Medine testified, "I am not aware of any utilities that use the Black-Scholes model for this purpose (calculating a POLR charge). Also, Witness Baker is not aware of any other utilities that use the Black-Scholes model for this purpose."[90]

Fourth, the POLR charge proposed by AEP and approved by the PUCO uses the wrong market rate in the POLR calculation. AEP used a market rate of $85.32 for OP and $88.15 for CSP when it calculates its proposed POLR charge.[91] In its *Order*, the PUCO used and authorized the market rates calculated by Staff witness Hess, which are $73.59 for OP and $74.71 for CSP.[92] However, there was no recalculation of the POLR charge using the market rate adopted by the PUCO. This means the Commission erred by allowing AEP to collect from customers a POLR charge that is as much as 18% too

[88] Staff Ex. 10 at 7 (Cahaan).

[89] Tr. XI, at 210 (Baker).

[90] OCC Ex. 11 at 17, citing Baker Deposition, Page 29 and Response to OCC Interrogatory Request 5-111.

[91] AEP Ohio Ex. 2A, at 5, 13, and Ex. JCB-2 (Baker).

[92] Staff Ex. 1 at JEH-1 (Hess).

high based upon its own findings.[93] This failure to be consistent in the use of data the PUCO adopts in its *Order* is unlawful and unreasonable.

As OCC Witness Medine succinctly summarized the failings of the Companies' position:

> The Companies have not demonstrated a need for customers to make a payment related to the POLR obligation as part of the ESP. Nor have they demonstrated the appropriateness of using the Black-Scholes model for this application. As proposed, the Companies' proposal for customers to make a POLR payment should not be approved.[94]

The Commission's reliance on the Companies' unverified and unprecedented use of the BSM for POLR charge purposes is unlawful and unreasonable.

R.C. 4905.22 requires charges for utility service to be just and reasonable. The POLR approved in the Order is unjust and unreasonable. The Commission should abrogate the Order and remove the POLR charge. In the alternative, the Commission should modify the Order by approving a POLR charge no greater than the POLR charge that was in effect in the Companies' Rate Stabilization Plan, i.e., 0.08192 cents per kWh for CSP customers and 0.16241 cents per kWh for OP customers.

Furthermore, the practical risk of customers switching must be considered. As the PUCO has acknowledged in numerous forums, AEP has the lowest rates in the state. Therefore, its risk of customers shopping is the lowest. The Commission's data on its website confirms the lack of activity. The facts are plain. The Companies' risks are minimal and therefore the POLR charge should be minimal. There is no basis for such a tremendous cost increase which annihilates the entire concept of gradualism. If the

[93] Based upon the difference between AEP's proposed market rate and the market rate proposed by Staff Witness Hess that the PUCO adopted.

[94] OCC Ex. 11 at 2 (Medine).

Commission is determined to unjustly and unreasonably charge such a huge unsubstantiated POLR charge, it should at a minimum require that the funds associated with the POLR charge be placed in an escrow account to be used by the Companies if required or refunded to customers if not required due to low levels of switching. The charges collected should only compensate the Companies for its costs and nothing more. These phantom payments should not be a source of profits on the backs of customers.

Assignment of Error 8

The Commission violated R.C. 4905.22 and Ohio Supreme Court prohibitions against retroactive ratemaking by allowing the Companies to collect POLR charge revenues for January through March 2009 at the higher rates authorized in the Order, even though the new SSO rates were not in effect at that time and customers were already paying a POLR charge.

As discussed above, the Companies claimed that an increased POLR charge is necessary to compensate them for the **future** financial risk associated with customers who purchase their generation from a CRES supplier but who later return to the Companies for generation service. AEP asserted that the risk is related to the relationship between the SSO price and the market price.

In authorizing the POLR revenues in the Order, the Commission agreed that there was some risk associated with being a POLR, though not as great as the Companies' asserted.[95] The Commission modified the Companies' ESP "such that the POLR rider will be based on the cost to the Companies to be the POLR and carry the risks associated therewith, including the migration risk."[96] The Commission, however, allowed the

[95] Order at 40.

[96] Id.

Companies to collect from customers POLR revenues for the first three months of 2009,[97] even though the new SSO – upon which the future financial risk associated with POLR obligations – was not in effect until April 1, 2009. Thus, in the Order, the Commission allowed AEP to collect from customers revenues allegedly associated with a risk for a period when that risk, i.e., the difference between the SSO authorized in the Order and the market rate, did not exist.

In addition, customers were already paying a POLR charge that allegedly reflected the Companies' risk regarding the difference between the SSO that was in effect for the first three months of 2009 and the market rate during that time. Thus, customers are being charged twice for the POLR "risk": once through the existing rates that included a POLR rider that was approved through the continuation of the rate plan in Case No. 08-1302, and again, over the same period, through the new POLR – via applying the new rates effective through the term of ESP. Thus, for the first three months of 2009, CSP's residential customers paid a POLR charge equal to 0.56955 cents per kWh,[98] and OP's residential customers paid a POLR charge equal to 0.39607 cents per kWh.[99] This double collection of a POLR charge from customers is patently unfair and not supported by the record of this proceeding.

By requiring customers to pay for a "risk" that was nonexistent during the first three months of 2009, and to pay twice for the "risk," the Commission's action is unjust

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[97] See id. at 72.

[98] The 0.08192 cents per kWh POLR charge under the RSP plus the 0.56955 cents per kWh POLR charge under the ESP.

[99] The 0.16241 cents per kWh POLR charge under the RSP plus the 0.23366 cents per kWh POLR charge under the ESP.

and unreasonable, in violation of R.C. 4905.22, which requires that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just [and] reasonable..." In addition, by allowing the Companies to collect revenues retroactively from customers, the Commission has engaged in unlawful retroactive ratemaking.[100] The Commission should abrogate the Order and not allow the Companies to collect from customers the revenues associated with the POLR rider for the first three months of 2009.

Assignment of Error 9

The Commission erred when it required residential customers of governmental aggregators to pay a stand-by charge in violation of R.C. 4928.20(J), a statute that permits government aggregators to elect not to receive standby service on behalf of their residential customers and to instead elect to pay the market price for power if their residential customers return to the utility for competitive retail service.

The Commission must allow governmental aggregation customers to bypass "standby service" under R.C. 4928.20(J). R.C. 4928.20(J) states:

> The legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(d) of section 4928.143. . . .

The Commission approved a provider-of-last-resort (POLR) charge that is non-bypassable under all circumstances,[101] even as it applies to governmental aggregators who elect not to receive this standby service. The Commission states that the POLR Rider was designed to "cover[ ] the cost of allowing a customer to remain with the Companies, or to switch to a CRES provider and then return to the Companies' SSO after

[100] See *Keco*, supra.

[101] Order at 38.

shopping…."[102] Thus, this is the type of charge that is the subject of R.C. 4928.20(J). By Ohio law, the POLR Rider must be bypassable upon the election of governmental aggregators that elect against the charge, and the Commission erred in its decision otherwise

Assignment of Error 10

The Commission erred by requiring customers to pay carrying charges for an environmental investment that was made from 2001 through 2008 even though R.C. 4928.143(B)(2)(a) and (b) do not permit the Companies to recover these costs in their ESP.

The Companies proposed to charge customers for approximately $330 million in carrying charges from environmental-related investments for the years 2001 through 2008. During the three-year ESP, CSP customers would be charged $26 million per year and OP customers would be charged $84 million per year.[103] The Companies proposed to collect this carrying charge from customers via a non-FAC generation increase, subject to the 15% cap.[104]

The Companies claimed that R.C. 4928.143(B)(2)(a) provides a statutory basis for collecting environmental-related carrying charges.[105] That provision, however, allows only for recovery of "the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of

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[102] Id. at 38.

[103] See Companies' Ex. 7 at Exhibit PJN-8; Companies' Ex. 1 at Exhibit DMR-1.

[104] See Companies' Ex. 2A at 24.

[105] See Tr. V at 12 (Nelson). AEP Ohio witness Baker also asserted that S.B. 221 provided for such a collection, but cited no specific statutory basis other than the general policies of R.C. 4928.02 (A) and (C). See Companies' Ex. 2A at 25.

emission allowances; and the cost of federally mandated carbon or energy taxes," but only if they are "prudently incurred." Similarly, R.C. 4928.143(B)(2)(b) allows EDUs to recover "[a] reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, **provided the cost is incurred or the expenditure occurs on or after January 1, 2009.**"[106]

OCEA members noted that both provisions require after-the-fact determinations, and thus the expenditures should not be considered in this proceeding.[107] OCEA members also showed that attempting to recover costs for the period of the ESP would be unlawful retroactive ratemaking and would violate the RSP rate cap *and* the Stipulation and Commission order implementing the rate cap during the electric transition plan.[108]

In the Order in this case, the Commission allowed the Companies to collect from customers "the incremental capital carrying costs that will be incurred after January 1, 2009, on past environmental investments (2001-2008) that are not presently reflected in the Companies' existing rates, as contemplated in AEP Ohio's RSP Case."[109] The Commission applied the 50% equity/50% debt weighted average cost of capital ("WACC") used by the Companies.[110] The Order did not address whether it was proper under the statute to collect these carrying costs; the Order merely agreed with the PUCO

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[106] Emphasis added.

[107] OCEA Brief at 70.

[108] Id.

[109] Order at 28.

[110] Id.

Staff that the carrying costs should be collected.[111] But the PUCO Staff did not opine on whether the statute permits collection of the carrying charges from customers.[112]

Because the statute requires an after-the-fact examination of whether the costs were prudently incurred, it was unlawful for the Commission to allow AEP Ohio to collect the carrying charges from customers before conducting such an examination. The Commission should abrogate the Order and prohibit the Companies from collecting these carrying charges from customers immediately. The prudence of the environmental investments should be examined in a later proceeding.

Assignment of Error 11

The Commission erred when it unreasonably discontinued its established regulatory policy of dividing the recovery of foregone revenue subsidies (delta revenues) equally between utility shareholders and customers, and failed to order conditions for collecting delta revenues from customers.

R.C. 4905.31(E) provides that a "reasonable arrangement" filed with the PUCO may include provisions to recover costs incurred with economic development programs and revenue foregone due to those programs.[113] Also, R.C. 4928.143(B)(2)(i) provides that a utility may file an ESP with provisions to implement economic development programs and seek that program costs for economic development be recovered from, and be allocated to, all customer classes.[114] The amount and allocation of the costs to be recovered is up to the discretion of the Commission, which has had a long-standing

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[111] Id.

[112] See Staff Ex. 6; Post-Hearing Brief of the PUCO Staff (December 30, 2008) at 5-7.

[113] R.C. 4905.31(E).

[114] R.C. 4928.143(B)(2)(i); OCC Ex. 14 at 4 (Yankel).

policy of equally splitting the cost of the foregone revenue subsidy (a.k.a., "delta revenue") between shareholders and customers.[115]

In its Order, the Commission discusses OCC's concerns about AEP-Ohio's proposed Economic Development Cost Recovery Rider, and specifically notes OCC's proposal that the Commission continue its policy of dividing the recovery of forgone revenue subsidies equally from AEP Ohio's shareholders and customers. The Commission concludes:

> The Commission finds that OCC's concerns are unfounded and unnecessary at this stage. The Commission is vested with the authority to review and determine whether or not economic development arrangements are in the public interest. OCC's request is denied.[116]

The Commission's Order further states:

> To the extent that intervenors have proposed modifications to the Companies' ESP that have not been addressed by this opinion and order, the Commission concludes that the requests for such modifications are denied.[117]

The above language in the Order, together with the fact that the Order does not otherwise address OCC's recommendations and the established Commission policy regarding the delta revenue issue, indicate that the Commission has discontinued its established practice of equally splitting the cost of the foregone revenue subsidy between shareholders and customers. This constitutes an unreasonable shift in established regulatory policy at the prejudice of the residential customers of AEP-Ohio.

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[115] OCC Ex. 14 at 4.

[116] Order at 48.

[117] Order at 72.

The Commission's Order is also silent as to the frequency in which the Commission will review economic development arrangements, leading one to conclude that the Commission rejects OCC's recommendation of an annual review of each approved arrangement. An annual review is essential to ensure the customer-recipient is meeting its part of the bargain. With an annual review, if the Commission determines that the customer-recipient has not fulfilled its obligations, the arrangement could be cancelled. The delta revenue subsidy could be paid back by the customer-recipient and credited back to customers who funded it.[118] Pursuant to the Commission's Order, no such procedure is contemplated. Further, the Commission's Order provides no parties other than the Companies and the Commission an opportunity to review contracts initially or over time.

Assignment of Error 12

The Commission erred when it determined that FAC deferrals provide just and reasonable electric utility rates under R.C. 4928.144.

Under the Commission's Order, the Companies are to phase-in authorized increases so as not to exceed, an increase of 7 percent for CSP and 8 percent for OP for 2009, an increase of 6 percent for CSP and 7 percent for OP for 2010, and an increase of 6 percent for CSP and 8 percent for OP for 2011.[119] In addition, the Order authorizes that "[a]ny amount over the allowable total bill increase percentage levels will be deferred pursuant to Section 4928.144 Revised Code, with carrying costs" set at the weighted average cost of capital.[120] Further, the carrying charges on the FAC deferrals shall be

[118] Id. at 8.

[119] Order at 22.

[120] Id. at 22-23.

calculated on a gross-of-tax basis rather than a net-of-tax basis as proposed by OCC and other intervenors.[121]

A. Deferrals are incompatible with the policy set forth in R.C. 4928.143(B)(2)(d) because deferrals destabilize customer prices and introduce uncertainty regarding retail electric service.

R.C. 4928.02(A) provides, "It is the policy of this state to . . . (A) ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[122] When approving rates that are "reasonable," the Commission must consider the total cost of the electric service provided, in the context of the present economic situation facing the country and, in particular, Ohio and AEP Ohio's customers.

S.B. 221 permits a utility to include deferrals under an ESP plan, but it limits the deferrals to those that stabilize or provide certainty: "The plan may provide for or include, without limitation, any of the following . . . [t]erms, conditions or charges relating to . . . amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service."[123] Thus, a deferral must provide a stabilizing effect or provide certainty to AEP Ohio's customers.

The Commission's Order reasons that the deferral of FAC costs until after the three-year ESP period will keep current customer bill impacts down, thereby providing a stabilizing effect on current prices. However, deferrals will simply cause future rate increases and add carrying costs to the total that customers will pay for their electric

[121] Id. at 24.

[122] R.C. 4928.92(A).

[123] R.C. 4928.143(B)(2)(d).

service. The record contains no projection that electric rates will decrease following the ESP period. Thus, deferrals will have a de-stabilizing effect on customers' electric bills starting in 2012.

AEP-Ohio witness Assante testified at hearing that any under-recovery under the annual FAC true-up mechanism proposed by AEP-Ohio would increase the deferral amount.[124] Mr. Assante further admitted that such an under-recovery is not unlikely.[125] Therefore, the amount that would be deferred until after the three-year ESP period is impossible to predict, which introduces uncertainty regarding future customer electric rates and potentially destabilizes future prices. The longer the recovery period of deferrals, the greater the ultimate total cost to customers.[126] In addition, carrying costs will compound customers' electric service costs, causing further uncertainty regarding the rates customers will pay for electricity in the future.

Pushing these costs to future ratepayers will mean that customers will pay more even if all customers are then paying market prices, or it will likely be a reason proffered in the future to not move to a competitive market for generation. Also, it is unreasonable to charge these carrying costs to customers who are currently shopping and thus, will not receive the "benefit" of those deferrals.

Staff witness Cahaan recognized the inherent unreasonableness of the deferral of FAC costs: "Our experience with deferrals shows that they cause many problems and should be avoided whenever possible. . . . Staff would not be opposed to smoothing out rate shock problems by some kind of levelization process within the ESP period, but does

[124] Tr. IV at 110 (Assante).

[125] Id. at 111.

[126] Id. at 114.

not recommend a process that extends the collection through an unavoidable charge beyond the ESP period."[127] Staff witness Hess similarly argued against deferrals: "The Staff is recommending . . . [t]hat the AEP companies not be allowed to defer costs past the three-year ESP period, but if a phase-in of the first year increase is needed [,] . . . it [should be] . . . levelized over the three year ESP period and the carrying cost [should] be adjusted to a more reasonable level than the carrying cost recommended by the Applicant for its phase-in calculation."[128]

B. Deferrals are incompatible with the policy set forth in R.C. 4928.143(B)(2)(d) because intergenerational deferrals are unfair and unreasonable.

On cross-examination, AEP Ohio witness Assante admitted that deferrals of FAC costs to be paid by customers after the ESP period could result in AEP Ohio recovering revenues from certain customers that were not customers of AEP Ohio at the time the FAC costs were deferred.[129] OCC witness Smith testified that it is unreasonable to charge carrying costs to future AEP Ohio customers who are currently shopping and thus will not have received the "benefit" of the deferrals.[130] In either case, deferrals cause one set of customers to pay for the benefits received by another, which is unfair and unreasonable.

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[127] Staff Ex. 10 at 5 (Cahaan).

[128] Staff Ex. 1 at 3-4 (Hess).

[129] Tr. IV at 190.

[130] OCC Ex. 10 at 34 (Smith).

Assignment of Error 13

The Commission erred when it determined that carrying costs should be based on the weighted average cost of capital.

The Commission's Order authorizes that AEP Ohio be paid a carrying cost based on the weighted cost of capital. Setting the carrying cost at the weighted cost of capital is unreasonable and will result in excessive payments by customers.[131] Instead, carrying charges on deferrals should be based on the actual financing required to carry the deferrals during the short-term period.

It is well established precedent that utilities are allowed to earn a return on plant investment, but carrying costs are another matter, especially the carrying cost for any fuel cost deferral. OCC outlined several general objections to AEP Ohio's calculation of the carrying cost. These objections included (1) any deferred fuel expenses created under the FAC should be financed in part by the tax savings generated by the Companies' deferred tax obligation, (2) the component of Property Taxes and General and Administrative Expenses embedded in the carrying costs should be eliminated because the Companies provided no explanation or support on their calculation, and (3) carrying charges should reflect the actual short-term cost of debt, excluding equity.

Fuel cost deferral is basically an accounting cost recovery mechanism. It is used primarily to recover costs incurred in procuring fuel and fuel-related items, and not to yield a return for shareholders. The lead time between incurring fuel-related costs and recovery of those fuel-related costs under a traditional fuel clause is generally very limited, thus negating the need for deferrals. Also, the recovery of fuel-related costs under the FAC proposed by the Companies is guaranteed, further reducing risk of

[131] OCC Ex. 10 at 34.

recovery. Instead, as OCC witness Smith recommended, a more reasonable rate for any carrying costs approved by the Commission is the short-term cost of debt.[132]

Carrying charges based on the actual short-term cost of debt is consistent with practices used by other Ohio electric distribution utilities[133] and consistent with recent rulings by the Commission that have limited carrying charges on riders and deferrals to the interest rate of debt only.[134] Most recently, the Companies filed for accounting treatment that would create deferrals of their alleged storm damage expenses.[135] The Companies asked for carrying charges based on their weighted average cost of capital. The Commission rejected the Companies' request and instead held that carrying charges on the deferrals should be based on the actual cost of debt.[136] In this case, the Commission should have followed its precedents in cases addressing the issue of carrying costs, and authorized carrying costs based on the short term cost of debt.[137]

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[132] Id. at 35.

[133] See Staff Audit Finding at 3 (December 8, 2008) in *In the Matter of the Application of Columbus Southern Company and Ohio Power Company to Adjust Each Companies' Transmission Cost Recovery Rider*, Case No. 08-1202-EL-UNC.

[134] See for example, *In the Matter of the Application of Columbus Southern Company and Ohio Power Company to Adjust Each Companies' Transmission Cost Recovery Rider*, Case No. 08-1202-EL-UNC, Finding and Order at 4 (December 17, 2008) (Where the Commission adopted the Staff's Audit finding recommending carrying costs at interest only). See also, *In the Matter of the Application of the Dayton Power and Light company for Authority to Modify its Accounting Procedure for Storm-Related Services Restoration Costs,* Case No. 08-1332-EL-AAM, Entry on Rehearing at 2 (Jan. 14, 2009)(Where the Company proposed to defer O&M expenses, with carrying costs based on its actual cost of debt.)

[135] See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify Their Accounting Procedure for Certain Storm-Related Services Restoration* Costs, Case No. 08-1301-EL-AAM, Application (Dec. 15, 2008).

[136] Id, Finding and Order at 3 (Dec. 19, 2008).

[137] See *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403 at 431 (The Commission should "respect its own precedents in its prior to assure the predictability which is essential in all areas of the law, including administrative law.").

Assignment of Error 14

The Commission erred by unlawfully and unreasonably requiring Ohio's customers to pay for the companies' gridSMART Phase 1 deployment as proposed, in violation of R.C. 4903.09 and R.C. 4903.10.

As part of its Order regarding AEP Ohio's ESP, the Commission authorized the initiation of a program of technological infrastructure deployment and integration AEP Ohio calls "gridSMART." As proposed, gridSMART will be a multi-phase, 7–10 year endeavor. The three main technological components of gridSMART will be (1) Automated Meter Infrastructure ("AMI"), (2) Distribution Automation ("DA") and (3) Home Area Networks ("HAN"). AMI involves the use of so-called "smart" meters, DA involves control and monitoring components connected within the distribution system by a two-way wireless communication system to AEP Ohio's dispatch operations center, and HAN involves components such as a programmable connecting thermostat and a Load Control Switch.[138]

The Commission's Order only addresses gridSMART Phase 1, which is projected to take three years, cost $109.7 million, and affect 110,000 CSP customers (approximately 8% of AEP Ohio's total of 1.4 million customers[139]). AEP Ohio's ESP Application asked customers to initially pay for approximately $64.5 million in gridSMART Phase 1 costs. The Companies proposed that the remainder of the capital costs would be collected from customers over the expected lifetime of the capital investment, which AEP Ohio indicates may vary between five and thirty years. The total

[138] Companies' Ex. 4 at 9-12 (Sloneker).

[139] Companies' Ex. 4 at 14 (Sloneker).

gridSMART Phase 1 capital costs, including carrying charges collected from customers, is expected to be approximately $134.1 million.[140]

A. Neither the Commission's Order, nor the balance of the record of the proceedings in this case, contain Findings of Fact or Conclusions of Law that support the Commission's authorization of AEP Ohio's gridSMART Phase I proposal as required by R.C. 4903.09.

R.C. 4903.09, regarding "Written opinions filed by the commission in all contested cases," states

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.[141]

Page 73 of the Commission's Order lists a total of nine Findings of Fact and Conclusions of Law pertaining to this case. None of these Findings of Fact and Conclusions of Law mention AEP Ohio's proposed gridSMART program or address the gridSMART program with any specificity. Only Number 9 addresses the program indirectly, stating:

> The proposed ESP, as modified by this opinion and order, including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

This is a "catch-all" statement that really provides no insight into the Commission's thinking or findings. In all other respects, the official record in this case contains no findings of fact or conclusions of law. There is no entry or other filing with

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[140] Ex. DMR-4; Staff Ex. 3 at 4.

[141] R.C. 4903.09.

such. Thus, the record does not support the Commission's Order regarding AEP Ohio's gridSMART Phase I proposal.

B. The evidence presented at hearing does not support the Commission's authorization of AEP Ohio's gridSMART Phase I proposal.

The ESP Application and the evidence at hearing provided some details of the gridSMART components and listed some of the benefits of gridSMART, but they failed to provide a cost/benefit analysis of either gridSMART Phase I or full gridSMART deployment, and they failed to provide sufficient information regarding any risk sharing between the ratepayers and shareholders and any operational savings. In sum, AEP Ohio failed to provide sufficient detail to support the approval of Phase 1 of gridSMART and therefore failed to meet its burden of proof.

1. AEP Ohio's ESP filing and the evidence at hearing fail to demonstrate that gridSMART Phase I or full gridSMART deployment will be cost effective.

S.B. 221 provides justification for a utility to deploy an advanced metering infrastructure and information system as long as the programs are "cost effective." R.C. 4928.02(D) provides that it is the policy of the state to "[e]ncourage innovation and market access for **cost effective** supply and demand-side electric service including . . . demand-side management, time-differentiated pricing and implementation of advanced metering infrastructure." [Emphasis added.] R.C. 4928.64(E) encourages "**cost-effective** and efficient access to information regarding the operation of transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers . . . ." [Emphasis added.] AEP Ohio's ESP filing, however, fails to demonstrate that its gridSMART Phase I program is cost effective. As a result, AEP Ohio fails to meet its burden of proof.

While seeking to collect over $100 million from customers to implement gridSMART Phase 1, AEP Ohio has not designed a full implementation plan or attempted to calculate its total gridSMART cost.[142] Thus, AEP Ohio has not attempted to determine whether a fully implemented gridSMART system will break even, in terms of costs and benefits, or save AEP Ohio money.[143]

OCC witness Finamore, an expert in the field of Advanced Metering Infrastructure, expressed several concerns about AEP Ohio's gridSMART program: ". . . Ms. Sloneker has described a range of typical benefits that can be achieved through gridSMART without acknowledging that full system implementation would be required before many of these benefits could actually be realized."[144] Regarding AEP Ohio's failure to demonstrate cost-effectiveness, Mr. Finamore offered the following recommendation:

> Phase 1 should have its own set of performance measures upon which the Commission can assess overall performance. Before proceeding with the remainder of gridSMART, a more detailed project plan involving budget, resource allocations and life cycle operating cost projections for the full 7-10 year implementation period and beyond should be submitted for Commission approval, along with a specific set of performance measures and metrics that will apply to full system implementation.[145]

Similarly, PUCO Staff witness Scheck expressed concern that AEP Ohio's proposed gridSMART program was not cost-effective. Mr. Scheck noted that "the

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[142] Id. at 230, 223.

[143] Id. at 218.

[144] OCC Ex. 12 at 6 (Finamore).

[145] OCC Ex. 12 at 8.

estimated operational savings for the first three years is expected to be only about $2.7 million. From the Staff's perspective, the relative amount of operational savings is quite small compared to the amount of expenditures for the Smartgrid [sic] initiative over the ESP period."[146] In particular, Mr. Scheck noted the minimal risks being borne by the Companies and the minimal gain expected: "The main point the Staff is making with respect to the gridSMART Phase 1 costs relate[s] to the minimal risks the companies are undertaking with this investment relative to the minimal potential gain for ratepayers."[147]

2. AEP Ohio's ESP filing and the evidence at hearing fail to show that gridSMART Phase I or full gridSMART will benefit AEP Ohio's customers or society.

Rather than determining if gridSMART will ultimately benefit AEP Ohio's customers or society, AEP Ohio contends that such an analysis is unnecessary. AEP Ohio's witness Sloneker, stated:

> . . . AEP Ohio does not believe it is necessary for the Commission to make specific findings about the quantification of customer and societal benefits as part of approving gridSMART Phase 1 in this case. * * * the customer and societal benefits of smart metering are already sufficiently evident to support a decision to deploy the technology without imposing a requirement that all such quantified benefits be specifically monetized and mathematically shown to equal or exceed the net costs.[148]

On cross-examination, Ms. Sloneker offered little additional support or explanation of how gridSMART provides customer and societal benefits and admitted that AEP Ohio has not attempted to estimate customer bill savings in any way.[149] Ms. Sloneker further admitted that AEP Ohio has not attempted to estimate any impact

[146] Staff Ex. 3 at 16-21 (Scheck).

[147] Id. at 4.

[148] Companies' Ex. 4 at 17 (Sloneker); See also, Tr. III at 218 (Sloneker).

[149] Tr. III at 213 (Sloneker).

gridSMART would have on either the environment or job creation[150] and that no one from AEP Ohio has attempted to determine whether gridSMART will reduce customers' energy use.[151]

3. AEP Ohio's ESP filing and the evidence at hearing fail to provide additional information necessary to support gridSMART Phase I and full gridSMART deployment.

In addition to failing to demonstrate that gridSMART will be cost effective or provide benefits to AEP Ohio's customers or society, AEP Ohio's ESP filing fails to provide sufficient detail regarding nearly every element of its proposed gridSMART program. In fact, the Commission's Order specifically noted that "additional information is necessary to implement a successful Phase I program,"[152] Regardless, the Commission approved the development of a gridSMART rider. Noting "that recent federal legislation makes matching funds available to smart grid projects[,]"[153] the Commission's Order authorizes AEP Ohio to recover "$54.5 million, which is half of the Companies' requested amount."[154]

The Commissions' Order is contrary to the recommendation of PUCO Staff witness Scheck, who stated:

> I would recommend that the companies' proposed Phase 1 gridSMART investment be pulled out of the general distribution rates and be set aside in a separate rider, set at $0.00, until a further, more detailed investigation can be completed. Based on company witness Ms. Sloneker, the companies did not attempt to quantify any customer or societal benefits with respect to its smartGRID [sic] analysis. Without any customer or societal

[150] Id. at 217.

[151] Tr. III at 214 -.215, 253 (Sloneker).

[152] Order at 38.

[153] Id.

[154] Id.

> benefits associated with the companies' smartGRID analysis, it is not clear whether the companies truly want to assist customers in to make [sic] wiser energy choices. In the event that the Commission recommends the companies go forward with its Phase 1 gridSMART proposal, the Staff would recommend that there should be an annual cost and performance review of this initiative.[155]

Customers are being required to pay $109 million for Phase 1 when no future projections of capital and operating costs beyond the initial 3-year period have been submitted. In addition, AEP-Ohio has failed to offer any examples of actual operating experience within the utility industry for similar initiatives.[156]

Given the obvious ties between Phase 1 and the full gridSMART rollout, AEP Ohio should have been required to provide specific Phase 1 performance criteria and a detailed full system cost estimate and implementation plan before any Commission approval of Phase 1.[157] AEP Ohio has not provided any detail concerning vendors, the specific technologies it will employ, or the timing or manner in which the features will be provided.[158] No information has been provided that describes the type of HAN technologies needed for Phase 1 deployment, or shows that the planned technologies are presently commercially available and capable of supporting future Market Potential Study ("MPS") programs.[159] From the information provided, AEP-Ohio has not included any plans for a meter data management system to be implemented in its Phase 1 program, which suggests that the general availability of HAN features, including time-

[155] Staff Ex. 3 at 4-5 (Scheck).

[156] OCC Ex. 12 at 8 (Finamore).

[157] Id. at 10 (Finamore).

[158] Id. at 8.

[159] Id. at 13.

differentiated rates, is many years away.[160] Finally, many of the benefits of AEP Ohio's gridSMART initiative cannot be realized until a full system installation, with software systems not identified in Phase 1, has been substantially completed.[161]

Mr. Finamore expressed much dissatisfaction with the lack of detail in the gridSMART proposal: "No detailed equipment specifications have been provided, and there is no evidence that a rigorous analysis of potential operating savings, revenue enhancements and other benefits has been performed to identify what offsetting operating benefits, such as savings in manual meter reading costs, can be credited to these large capital expenditures."[162] ". . . AEP-Ohio seeks . . . to deploy DA equipment totaling $34.6 million of the $109 million Phase 1 cost without providing detail concerning the equipment that will be used or committing to achieve any specific performance measures or metrics from which the Commission can gauge Phase 1 success."[163] AEP Ohio does not know how many phases will be necessary for full implementation,[164] does not know the anticipated life cycle of the various components of gridSMART,[165] and has not devised a methodology by which it will evaluate gridSMART Phase 1.[166]

Despite the lack of sufficient detail about AEP Ohio's gridSMART program and the Commission's own recognition that "additional information is necessary to implement a successful Phase I program,"[167] the Commission approved the development

[160] Id. at 7.

[161] Id. at 18.

[162] Id. at 9.

[163] Id. at 6-19.

[164] Id. at 229-230.

[165] Id. at 226.

[166] Id. at 241-243.

[167] Order at 38.

of a gridSMART rider. In doing so, the Commission failed to require AEP Ohio to meet its burden of proof regarding cost-effectiveness under R.C. 4928.02(D) and 4928.64(E). Such action was both unlawful and unreasonable.

Assignment of Error 15

The Commission violated Ohio law in approving an Enhanced Service Reliability Plan Rider for Ohio Power Company and Columbus Southern Power Company.

Pursuant to R.C. 4903.09, the Commission's decision must be based on the record in the case and state "the reasons prompting the decisions arrived at, based upon . . . findings of fact." In approving an ESRP rider for both OP and CSP, however, the Commission has contravened the statute.[168] The specific rider amounts are not set forth in the Commission's Order but are reflected in the tariffs filed by OP and CSP on March 23, 2009.[169] The riders were not proposed by any of the forty-three parties to this proceeding and no testimony was provided on the need for such riders. As such, the Commission has considered no evidence regarding the need for a rider. The after-the-fact annual prudence review proposed by the Commission is an inadequate safeguard concerning the vegetation management expenditures and practices of the Companies.[170]

Particularly troubling regarding the Commission's implementation of the new riders is the statement that "The ESRP rider *initially* will include only the incremental costs associated with the Companies' proposed enhanced vegetation

[168] Order at 34.

[169] The Enhanced Service Reliability Rider for CSP is 3.83187% (Columbus Southern Power Company, P.U.C.O. No. 7, Original Sheet No. 83-1, Issued March 30, 2009.) [169] The Enhanced Service Reliability Rider for OP is 7.46876% (Ohio Power Company, P.U.C.O. No. 19, Original Sheet No. 83-1, Issued March 30,2009).

[170] Order at 34.

initiative (Cos. Ex. 11 at 31, Chart 7) as set forth herein."[171] Rate cases and the ESP are the only lawful means for increasing rates. The language used by the Commission suggests that the riders could be expanded to accommodate additional distribution infrastructure or operations and maintenance activities without the need for a rate case or the filing of a new ESP. R.C. 4928.143(B)(2)(h) only permits single-issue ratemaking in the context of an infrastructure modernization plan, but does not permit single-issue ratemaking for distribution infrastructure or operations and maintenance activities. The Commission should clarify that notwithstanding its ultimate decision regarding the ESRP rider, that it has no intention of expanding the rider to cover other distribution system improvement activities which must be decided in a rate case.

Finally, the Commission states that the ESRP rider will be subject to reconciliation and review on an annual basis.[172] Such a review does little to alleviate the concerns of OCEA relative to the vegetation management expenditures it is approving. There has been no proper review of the Companies' prior expenditures on vegetation management, as indicated by the PUCO Staff's testimony in this case.[173] The Commission has neither indicated what procedures will be followed to accomplish its reconciliation and review of the Companies' incremental vegetation management expenditures nor has the Commission provided guidance as to how it will determine the baseline vegetation management expenditures it considers to be

[171] Id.

[172] Id.

[173] Tr. Vol. VIII at 59 (Roberts)

currently embedded in rates. The Commission should reconsider its departure from the rationale it followed in postponing decisions on the other elements of the proposed ESRP, and decide the merits of a vegetation management-related rider or rate increase in a distribution rate case.

Assignment of Error 16

Ohio Law provides that the Companies have the burden of proof in ensuring that its vegetation management plan, proposed as part of the Enhanced Service Reliability Plan, is in the public interest and complies with R.C. 4928.143(B)(2)(h).

The Ohio General Assembly charged the PUCO with the responsibility to ensure that electric utilities provide "necessary and adequate" service to Ohio consumers and businesses.[174] The General Assembly also established the policy of Ohio that retail electric service must be "adequate, reliable, safe, efficient..."[175] Perhaps most importantly, Ohio law places the "burden of proof" on AEP Ohio in this proceeding that the service it provides is adequate and that its ESP Application should be approved.[176] The Commission properly finds that while R.C. 4928.143(B)(2)(h) permits the Companies to provided for infrastructure modernization as part of its ESP, there was no intention to provide a "blank check" to the utilities to carry out such provisions.[177] The Commission also correctly finds that the only proper proceeding for determining whether the various provisions of the Companies ESRP are truly incremental or enhanced is through a full

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[174] R.C. 4905.22.

[175] R.C. 4928.02(A).

[176] R.C. 4928.143(C)(1).

[177] Order at 32.

review of distribution rates in a distribution rate case.[178] The Commission, however, contradicts these findings when it comes to the Companies' *enhanced* vegetation management plan, claiming that the Companies have demonstrated that they face increased costs to perform vegetation management activities.[179] (Emphasis added).

The Commission should first determine how much Ohio Power Company and Columbus Southern Power Company have been spending on vegetation management programs before the Companies receive additional funds from its customers.[180] The Companies provide no detail on past expenditures and what factors led to the described deterioration in the Companies' distribution plant.[181] CSP's and OP's distribution system reliability has been criticized in several recent proceedings before the Commission.[182] These proceedings called into question AEP Ohio's "degradation in performance" on a number of reliability measures."[183]

R.C. 4828.143(B)(2)(h) provides that the Commission "shall examine the reliability of the electric distribution utility's distribution system" while ensuring that customers' expectations are aligned with that of the Companies. The statute also requires that the

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[178] Id.

[179] Id.

[180] OCC ex. 13 at 10-11 (Cleaver).

[181] R.C. 4928.143(B)(2)(h) requires that the Commission review the past and current practices of AEP Ohio related to distribution system reliability in considering whether to grant an infrastructure modernization plan.

[182] *In the Matter of the Commission Consideration of a Settlement Agreement between the Staff of the PUCO and Columbus Southern Power and Ohio Power Company*, Case No. 03-2570-EL-UNC, Stipulation (December 31, 2003) ("AEP Service Quality Case") and *In re AEP's Self-Complaint Regarding Service Reliability*, Case No. 06-222-EL-SLF, Complaint (January 31, 2006) ("Self-Complaint Case").

[183] AEP Service Quality Case, Commission Ordered Investigative Report by Commission Staff (April 17, 2006) at 2.

Companies dedicate sufficient resources to the reliability of the distribution system.[184] The only evidence that the Companies have provided regarding aligning their interests with those of its customers consists of survey results which indicate that some of the Companies customers will expect more reliable service in the future.[185] The Commission seemingly accepts these tenuous survey results as evidence of the Companies and customers' alignment of interests as a major justification for approving the ESRP rider: "[w]e believe that the record clearly reflects customers' expectations as to tree-caused outages, service interruptions, and reliability of customers' service.[186]" The Commission points to no other evidence of an "alignment" of customer expectations with those of the Companies.

PUCO Witness Roberts, in testifying about the Companies proposed ESRP costs as reflected in certain charts within his direct testimony was unsure of the costs of the Companies' existing vegetation management programs:

> Q. Would you agree, subject -- and by the way, all these figures in all these charts are figures that the company gave you, again.
>
> A. Exactly.
>
> Q. So that you are not necessarily standing behind and representing to the Commission –

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[184] R.C. 4928.143(B)(2)(h). "* * * As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall * * * ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."

[185] Companies' Ex. 11 at 13. The survey results, as provided by the Companies, indicate that 24% of its residential customers will have higher reliability expectations over the next five years.

[186] Order at 33.

> A. No, I have not audited these numbers to find out the substance of the numbers.
>
> Q. And that goes with respect to each of the numbers in each of the five charts contained in your testimony, correct?
>
> A. Yes.[187]

Earlier in his cross examination, Mr. Roberts testified that he did not know whether the cost figures provided by the Companies for various aspects of the ESRP were baseline or incremental.[188] It is apparent that the Commission Staff is not convinced that the Companies' proposed ESRP expenditures, including the expenditures for vegetation management, are incremental in nature.

Rather than placing the burden on the Companies to demonstrate that the proposed vegetation management activities and costs are enhanced or incremental, the Commission improperly places the burden on the parties to the case to disprove the enhanced nature of the programs:

> Although OCC's witness questions the incremental nature of the costs proposed to be included in the enhanced vegetation initiative, OCC offered no evidence that the proposed initiative is already included in the current vegetation management program, and thus, is not incremental (OCC Ex. 13 at 30-36).[189]

The Commission places the intervenors in an untenable position by shifting the burden in this case away from the Companies. Ohio law requires that the burden be on the Companies to prove that their proposed vegetation management plan is "enhanced" or "incremental

[187] Tr. Vol. VIII at 60 (Roberts).

[188] Id. at 59.

[189] Order at 33.

The ESRP's lack of clear-cut measurements to determine the ESRP's success and the Company's compliance with the plan are reflected by an AEP Ohio response to OCC discovery: "The company has not deviated from the vegetation management plan because the plan is intended to change as circumstances warrant."[190]

While AEP Ohio Witness Boyd did provide assurances that all the funds allocated to the vegetation management program would be spent, he provided no such assurance that the ESRP's vegetation management program would be followed as proposed.[191] The Companies' view that the vegetation management plan and program guidelines are so flexible that the Commission's rules are rendered meaningless; this renders the vegetation management enhancements proposed by the Companies meaningless as well. [192] The Commission should not approve the Companies' vegetation management plan as proposed in its ESRP because the plan lacks sufficient support and detail as required by Ohio law.[193]

Assignment of Error 17

The Commission erred in characterizing AEP-Ohio's proposed vegetation initiative as "cycle-based."

As part of its rationale for implementing an ESRP rider for the Companies' vegetation management activities over the three-year period of the ESP, the

[190] OCC Ex. 9A. OCC Interrogatory 3-50.

[191] Tr. Vol. V at 179-181.

[192] Companies' Ex. 11 at 8 (Boyd).

[193] R.C. 4928.143(c)(1).

Commission states that "[i]t is imperative that AEP-Ohio implements a cycle-based approach to maintain the overall system.[194]" As noted by PUCO Staff Witness Roberts and in the testimony of the Companies' Witness Boyd, however, the Companies will not begin employing the much needed cycle-based approach to vegetation management until *after* an initial five-year implementation period.[195]

In fact, the Companies did employ cycle-based tree-trimming as part of their vegetation management program submitted to Commission Staff in the early 2000s.[196] The Company subsequently abandoned this approach, seemingly without PUCO Staff or Commission approval:

> According to AEP's tree trimming program (submitted to Staff for acceptance, as required by ESSS Rule 27), the Companies are to perform a complete tree trimming on each of their rural circuits every 4 to 6 years. During its investigation, however, Staff learned that the Companies utilize two other tree-trimming policies/procedures not included in their program. These include: (1) "hot spot" trimming * * * and (2) postponing tree trimming until a circuit rises to the top 15 percent of worst performers due to tree-caused outages. * * * the Companies are substituting these tree trimming policies/procedures for the Companies' program (for complete tree-trimming on each circuit every four to six years). Staff believes these substitutions are not only insufficient, but also constitute unauthorized modifications to the tree trimming program previously submitted and approved under Rule 27 of the ESSS.[197]

The PUCO Staff recommended nearly six years ago in the AEP Service Quality Case that the Companies be required to perform cycle-based tree-trimming on a four-year

[194] Id.

[195] Staff Ex. 2 at 11 (Roberts), Tr. Vol. V at 165-166 (Boyd).

[196] OCC Ex. 13 at 30-31, Tr. Vol. V at 221 (Boyd).

[197] Staff Concerns and Recommendations About Columbus Southern Power Company and Ohio Power Company's Provision of Electric Service, May 1, 2003. The report was filed in *In the Matter of the Commission Consideration of a Settlement Agreement between the Staff of the PUCO and Columbus Southern Power and Ohio Power Company*, Case No. 03-2570-EL-UNC, Motion for Acceptance (December 31, 2003) ("AEP Service Quality Case").

rotation, as their filed vegetation management plan indicated, in order to achieve greater distribution system reliability.[198] The failure to follow Commission rules and PUCO Staff recommendations accounts for decline in the Companies' vegetation management performance. The ESRP rider is an inappropriate and unlawful reward for the Companies inaction.

The Order states that OCC Witness Cleaver "seems to quibble with the definition of 'enhanced'."[199] What Mr. Cleaver stated in his testimony was merely that the Companies were claiming that certain vegetation management activities were "enhanced" when, in fact, such vegetation management proposals are just an attempt to play "catch-up" for tree-trimming programs abandoned contrary to the Commission's rules.[200]

The failure of the Companies to maintain cycle-based trimming over recent years is likely a significant factor in the Companies need to increase its vegetation management efforts at this time. The results of the Companies' declining tree trimming efforts throughout much of this decade is reflected in great detail in the testimony of OCC Witness Cleaver[201] The fact that the Companies qualify their proposed vegetation management efforts as "enhancements" is unfounded. The Commission should grant rehearing on this issue.

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[198] Id. at 10.

[199] Order at 33.

[200] OCC Ex. 13 at 35.

[201] Id. at 17-25.

Assignment of Error 18

The Commission erred by not ensuring that the Ohio Power Company's and Columbus Southern Power Company's ESP Application is amended to comply with various provisions of Ohio Administrative Code 4901:1-35-03.

Ohio Adm. Code 4901:1-35-03(A) provides, in pertinent part:

> The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

The Commission has failed to ensure that the Companies' ESP Application substantively complies with its rules.[202] The Companies' ESP Application does not contain sufficient detail to allow "appropriate evaluation" of its infrastructure modernization plans.[203] The Companies' ESRP as it relates to vegetation management is impossible to properly evaluate due to its lack of detail. Companies Witness Boyd does provide in Chart 7 on page 31 of his testimony the number of trees to be trimmed or removed over the initial 3 years of the ESP but fails to tie such trimming or removal of trees to an implementation schedule that is geographically targeted and does not reflect the number of its customers "directly impacted" by the ESRP.[204] AEP Ohio's proposed vegetation management "enhancement" consists merely of projecting its expenditures related to cutting or trimming trees for 2009-2011. The Application also lacks an appropriate description of the "benefits" of the ESRP because it does not address the number of customers affected;

[202] Ohio Adm. Code 4901:1-35-03 were ordered to be submitted to JCARR on March 18, 2003. In re the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14,4928.17, and 4905.31, Revised Code, as Amended by Amended, Case No. 08-777-EL-ORD, Entry (March 18, 2009).

[203] Ohio Adm. Code 4901:1-35-03(C)(9)(g).

[204] Ohio Adm. Code 4901:1-35-03(C)(9)(g)(i),

the number of circuits affected, and fails to account for any possible savings to the Companies.[205] Perhaps most importantly in terms of evaluating the ESRP, there are no "milestones" to measure the outcome of the incremental programs proposed in the ESRP.[206] The ESRP does not adequately align customer and utility expectations nor does it evaluate such expectations by customer class.[207] Finally, AEP Ohio provides no detail on past expenditures and what factors led to the described deterioration in the Company's distribution plant.[208] The Commission should give proper consideration of the factors that led to the need for any promised additional tree trimming by the Companies and ensure that ratepayers do not "pick up the tab" for the Companies past neglect of vegetation management.

Assignment of Error 19

The Commission Erred by approving the Economic Development Cost Recovery Rider 82 which is anti-competitive and unfair, lacks accountability, and does not evaluate whether the Companies receiving the special rate met their economic development obligations to Ohio.

R.C. 4905.31(E) provides that a "reasonable arrangement" filed with the PUCO may include provisions to recover costs incurred with economic development programs and revenue foregone due to those programs.[209] The Economic Development Rider approved by the PUCO does not require, that the recovery by AEP

[205] OCC Ex. 13 at 12 (Cleaver).

[206] Ohio Adm. Code 4901:1-35-03(C)(9)(g)(ii).

[207] Ohio Adm. Code 4901:1-35-03(C)(9)(g)(v).

[208] R.C. 4928.143(B)(2)(h) requires that the Commission review the past and current practices of AEP Ohio related to distribution system reliability in considering whether to grant an infrastructure modernization plan.

[209] R.C. 4905.31(E).

be limited to "costs."[210] AEP will estimate the "costs" which can only be measured net of benefits of the economic development program. Without any review or accountability of the party receiving the benefits of each approved arrangement to ensure the customer-recipient is meeting its part of the bargain, costs cannot be determined. An example of the kind of cost that requires review is the calculation of foregone revenues. Utilities are permitted to recover forgone revenues and the rate discount from other utility customers based upon the party to the economic development contract performing its obligations, as stated in the contract. The PUCO has made no provision for this. This complete absence of accountability of the customer-recipient is unreasonable because it allows anyone to receive an economic development discount with nothing more than representations that it will make investments in the State of Ohio. It seems too obvious to state, but the PUCO should be approving discounted economic development rates and recovery and riders only if, among other things, they actually result in investment in Ohio - not just mere promises of investment.

The non-bypassable Economic Development Rider is also unreasonable and unlawful because it is abusive, anticompetitive, and not proper.[211] AEP does not intend to offer economic development rates to *shopping* customers, but will impose the Economic Development Rider charges on shopping customers. This lack of symmetry regarding the availability of the benefit, and who pays for the benefit renders the Rider approved by the PUCO unlawful and unreasonable.

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[210] "...such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program;" R.C. 4909.31.(E).

[211] Id.

Assignment of Error 20

The Commission Erred by Removing Deferrals from the Statutory Test For Significantly Excessive Earnings.

R.C. 4928.143(F) sets-forth the statutory test for significantly excessive earnings. This statute requires the Commission to make a determination about whether the electric security plan results in significantly excessive earnings, and what facts it must consider in making such a determination. Specifically, in determining excessive earnings, the Commission must consider the electric security plan and all its provisions.[212] This includes whether the plan includes deferrals. To eliminate the deferrals from the Test is to make an unauthorized adjustment to the test. The only adjustments to the electric security plan for the purposes of the excessive earnings test are contained in the statute and are limited to: 1) comparable business and financial risk; 2) capital structure; and future committed capital requirements.[213] <u>There is no provision permitting accounting adjustments for deferrals.</u>

The PUCO's rationale in eliminating deferrals "and related expenses"[214] from the Significantly Excess Earnings Test ("SEET") was to avoid an impact on the SEET calculation because the deferrals had not actually been received. The Commission stated:

> The Commission believes that the deferrals should not have an impact on the SEET until the revenues associated with the deferrals are received.

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[212] R.C. 4928.143(F) states: With regard to the provisions that are included in an electric security plan under this section, the Commission shall consider…"

[213] Id.

[214] *Order* at 69.

This decision by the PUCO is unlawful for several reasons. First, it is not authorized by the above-referenced statute. Second, the accounting adjustment will completely misstate the Companies' earnings for the purpose of calculating the test. To explain, AEP will have to book the deferrals in the year the costs were incurred. This will lower AEP' earnings by an amount equal to the deferrals. Yet the revenues associated with the deferrals will not be recognized in the SEET until they are recovered in rates. This creates a complete mismatch between expenses and revenues that will artificially lower revenues when the SEET test is performed and artificially inflates AEP's revenues when deferrals are recovered. The SEET, as contemplated and passed by the General Assembly, does not permit the Commission to create such a distortion in earnings for the purpose of calculating the Test.

Staff acknowledged that eliminating deferrals would cause a distortive mismatch.[215] By failing to match AEP's greatest expense – fuel – with the revenues associated with recovering those expenses – deferrals – it is unlikely AEP could ever violate the SEET test as structured by the Commission. This result is in violation of the language of the statute which requires the Commission to apply the test to the electric security plan and all its provisions. The Commission did not do this, and it constitutes error.

The PUCO erred by allowing AEP to eliminate deferrals from the SEET, and in effect has provided AEP a margin (that does not exist in law) against ever violating the SEET test. This margin is exactly the dollars in the deferred fuel costs which are significant. The Commission should grant rehearing on these issues.

[215] Tr. XII at 263, 264 (Cahaan).

IV. CONCLUSION

Nearly 2.1 million residential customers of the Companies are impacted by the decision of the Commission in this proceeding—a decision which grants millions of dollars of increases to the Companies over the next three years, and beyond. The Commission in acting upon the application must make rulings consistent with the goal of ensuring reasonably priced electric service under Section 4928.02(A) of the Revised Code. OCC requests rehearing of the Commission's Orders so that the Companies' customers will only be required to pay what is necessary for adequate and reliable service. As explained in detail, OCC recommends that the Commission grant rehearing in a number of respects to correct errors in the Commission's Orders. These errors include permitting retroactive rates, setting POLR charges too high, and permitting huge increases to cover deferred costs.

For the reasons set forth above, OCC requests rehearing on the matters contained herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing the OCC's Application for Rehearing was served electronically to the persons listed below, on this 17th day of April, 2009.

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