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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 Generating 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 OF ORDER ON REMAND AND MEMORANDUM IN SUPPORT OF INDUSTRIAL ENERGY USERS-OHIO

Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Oliker
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

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Attorneys for Industrial Energy Users-Ohio

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APPLICATION FOR REHEARING OF ORDER ON REMAND OF INDUSTRIAL ENERGY USERS-OHIO

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Order on Remand issued by the Public Utilities Commission of Ohio ("Commission") on October 3, 2011 concerning the electric security plans ("ESP") of Columbus Southern Power Company and Ohio Power Company (individually "CSP" and "OP," respectively, and collectively "Companies" or "AEP-Ohio"). The Commission's Order on Remand is unlawful and unreasonable in the following respects:

1. The Commission's finding that the Companies may collect revenues for the carrying costs of 2001-2008 incremental environmental investments ("pre-2009 Component") pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that granting such collection would have the effect of providing certainty regarding retail electric service.

2. The Commission's finding that the Companies may collect revenues for the pre-2009 Component pursuant to Section 4928.143(B)(2)(d), Revised

Code, is unlawful and unreasonable because the Companies failed to demonstrate that their other revenues did not provide adequate compensation.

3. The Commission's authorization of the pre-2009 Component pursuant to Section 4928.143(B)(1), Revised Code, was unlawful and unreasonable in that it is based on a statutory provision that was not advanced by any party to the proceeding and was beyond the scope of the Supreme Court's remand directing the Commission to determine if a provision of Section 4928.143(B)(2), Revised Code, supports collection of these revenues.

4. The Commission unlawfully and unreasonably permitted collection of the pre-2009 Component during a period in which there was no legal authority to permit collection of those revenues.

5. The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of phase-in deferral balances of OP caused by the ESP rate caps on the theory that the proposed adjustment "would be tantamount to retroactive ratemaking."

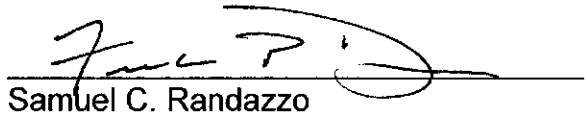
6. The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of the phase-in deferral balances of OP based on a finding not supported in the record that the "past rates ... have already been collected from customers."

7. The Commission's Order on Remand is unlawful and unreasonable in that it extended the prohibition of retroactive ratemaking to prevent the adjustment of phase-in deferral balances that had not been collected from customers and which were subject to further adjustment by the Commission's order establishing the basis for those deferral balances.

8. The Commission's Order on Remand is unlawful and unreasonable in that it failed to address the flow-through effects of Supreme Court's finding that the Commission's original Opinion and Order on deferral balances, recovery of delta revenues, and the earnings of the Companies.

As discussed in greater detail in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing, immediately provide consumers relief from the unreasonable and unlawful rates, or, alternatively, condition receipt of any revenues from such rates on a refund obligation through the reconciliation associated with any deferral amortization.

Respectfully submitted,



Samuel C. Randazzo
Frank P. Darr
Joseph E. Oliker
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On October 3, 2011, the Commission issued its Order on Remand in these matters. IEU-Ohio seeks rehearing regarding three significant areas addressed by the Order on Remand. Initially, IEU-Ohio seeks rehearing on the Commission's decision to permit the recovery of carrying charges on incremental 2001-2008 environmental investments (pre-2009 Component). Second, IEU-Ohio seeks rehearing of the Commission's order permitting the Companies to retain revenues due to the pre-2009 Component between the time when the Commission made collection subject to refund and the date of the Order on Remand. Third, IEU-Ohio seeks rehearing on the Commission's refusal to flow-through the effects of the findings that the charges at issue in these cases were not properly authorized.

II. ARGUMENT

1. The Commission's finding that the Companies may collect revenues for the carrying costs of 2001-2008 incremental environmental investments ("pre-2009 Component") pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that granting such collection would have the effect of providing certainty regarding retail electric service.

In the October 3, 2011 Order on Remand, the Commission found that the requirements of Section 4928.143(B)(2)(d), Revised Code, were satisfied and allowed collection of the pre-2009 Component.[1] In support of its decision, the Commission relied on testimony in the initial 2008 hearings indicating that a carrying cost is related to long-term investment and that pre-2009 Component investments are necessary to keep coal-fired facilities running.[2] The Commission resorted to reliance on the prior record because the Companies offered no new testimony in support of the pre-2009 Component during the remand hearing.[3] Given the lack of evidence to support a finding that the pre-2009 Component would have "the effect of stabilizing or providing certainty regarding retail electric service,"[4] the Commission's decision to authorize recovery of the pre-2009 Component because it had the effect of making retail electric service more certain was unlawful and unreasonable.

Section 4928.143(B)(2)(d), Revised Code, provides in relevant part that an ESP may include provisions including "charges relating to ... carrying costs ... as would have

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[1] Order on Remand at 14.

[2] *Id.* citing the direct and rebuttal testimony of Philip Nelson.

[3] Cos. Remand Ex. 2. Mr. Nelson summarized his prior testimony and testified that he had been advised by counsel that various provisions of Section 4928.143(B)(2), Revised Code, authorized recovery of the revenues.

[4] Section 4928.143(B)(2)(d), Revised Code.

the effect of ... providing certainty regarding retail electric service." "Certainty" denotes that the retail electric service is made probable of occurrence. "Retail electric service" is statutorily defined to mean "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption."[5] The burden of demonstrating that the charge makes more certain the provision of retail electric service rests with the Companies.[6] Thus, Section 4928.143(B)(2)(d), Revised Code, requires the Companies to provide evidence to demonstrate a basis on which the Commission can find that the pre-2009 Component is necessary to make retail electric service probable.

In authorizing collection of the pre-2009 Component, however, the Commission did not the factual basis necessary to show that the statutory requirements were met. As noted above, the first reference to the 2008 hearing testimony merely describes the nature of a carrying charge and states that it is the annual cost associated with a capital investment.[7] The second reference is to testimony regarding the use of investments in environmental plant to keep low-cost coal-fired generation running.[8] The Commission then supports its finding by reference to Commission Staff's ("Staff") testimony from the 2008 hearings that investment supporting compliance with environmental requirements is in the public interest.[9] The testimony relied upon by the Commission does not

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[5] Section 4928.01(A)(27), Revised Code.

[6] Section 4928.143(C), Revised Code.

[7] Order on Remand at 13-14.

[8] *Id.* at 14.

[9] *Id.*

connect the outcome required by Section 4928.143(B)(2)(d), Revised Code, to the pre-2009 Component.

Although it lacked a record to support a finding that the authorization of the pre-2009 Component was authorized by Section 4928.143(B)(2)(d), Revised Code, the Commission attempted to legitimize its decision by offering that the investments allow the continued operation of coal-fired generation plants. As a result, the Commission concluded customers benefit because the costs of these investments would be lower than if purchased power was used to satisfy customer demand.[10] However, this discussion comes with no quantification and does not address whether there is a need to fund incremental environmental investments so as to provide certainty regarding retail electric service. Thus, the Commission buttressed its decision with a discussion that has nothing to do with the statutory finding the Commission was required to make under Section 4928.143(B)(2)(d), Revised Code. The discussion that the pre-2009 Component might produce a lower cost than the purchase of power says nothing regarding whether that investment was necessary to make retail electric service more certain.

Further the Commission's "finding" regarding the benefits of company generation is not consistent with the manner in which generation resources are dispatched to service CSP and OP customers. CSP and OP are members of PJM Interconnection, Inc. ("PJM"). "PJM dispatches resources based upon the least cost set of offer prices to meet actual load that materializes within the PJM footprint and without regard to things like retail service areas. Thus, the dispatching of generation to meet the load of the

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[10] *Id.*

Companies' customers is managed by PJM."[11] The assertion that CSP and OP customers benefited from lower cost coal fired generation, therefore, finds no support in the manner power is actually dispatched to those customers.

OP and CSP did not provide any evidence that the pre-2009 Component is necessary to provide certainty in the provision of retail electric service, and the two references to the record used by the Commission to support authorization of the pre-2009 Component fail to demonstrate that the statutory requirements of Section 4928.143(B)(2)(d), Revised Code, are satisfied. Moreover, the Commission's suggestion that customers benefited from environmental investments is inconsistent with the unrefuted testimony of both the Companies and IEU-Ohio regarding the manner in which electric service is dispatched by PJM. Because there is no record to support a finding authorizing the pre-2009 Component under Section 4928.143(B)(2)(d), Revised Code, the Commission's decision is unlawful and unreasonable.

2. The Commission's finding that the Companies may collect revenues for the pre-2009 Component pursuant to Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable because the Companies failed to demonstrate that their other revenues did not provide adequate compensation.

The Companies, through the entirety of these proceedings, have made no claim that the revenue from the rates and charges other than those found illegal by the Supreme Court's April 19, 2011 decision is inadequate to compensate the Companies for standard service offer ("SSO") service. IEU-Ohio noted that there was not an economic basis for authorizing recovery, but the Commission rejected IEU-Ohio's

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[11] Direct Testimony of Kevin M. Murray on Behalf of Industrial Energy Users-Ohio (June 30, 2011) at 6-7. The Companies' testimony in the 2008 hearings is consistent with Mr. Murray's description. Vol. XI at 58-60.

position, stating that there was no support "that AEP-Ohio is required to make such a showing or pass an earnings test as a condition of recovery."[12] In this regard, the Commission has violated its own policy regarding the legal basis for authorizing rate increases under Section 4928.143(B)(2), Revised Code, and the resulting decision is unlawful and unreasonable.

This failure is no small defect, given the Commission's prior rulings on the Companies' proposed charges which the Commission rejected because the Companies failed to make such a demonstration. For example, the Commission refused to approve a separate rider for various elements of the Companies' proposed Enhanced Service Reliability Plan without addressing those costs in the context of a full rate review.[13] Thus, the Commission's approval of additional compensation for the pre-2009 Component without a demonstration that the Companies were not properly compensated for their incremental environmental investments violates Commission policy without explanation and is a separate basis for finding that the recovery of revenues under Section 4928.143(B)(2)(d), Revised Code, is unlawful and unreasonable.

3. The Commission's authorization of the pre-2009 Component pursuant to Section 4928.143(B)(1), Revised Code, was unlawful and unreasonable in that it is based on a statutory provision that was not advanced by any party to the proceeding and was beyond the scope of the Supreme Court's remand directing the Commission to determine if a provision of Section 4928.143(B)(2), Revised Code, supports collection of these revenues.

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[12] Order on Remand at 13.

[13] See, e.g., Opinion and Order at 34 (Mar. 18, 2009) (enhanced service reliability).

In remanding the pre-2009 Component for the Commission's further review, the Supreme Court was specific as to the scope of the review the Commission could undertake. After rejecting the Commission's argument that it had the authority to approve the pre-2009 Component without reference to a specific provision of Section 4928.143(B)(2), Revised Code, the Court went on to state "the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges."[14] As dictated by the Supreme Court's decision, the scope of the remand was limited to whether a provision of Section 4928.143(B)(2), Revised Code, provided a basis for authorization of the pre-2009 Component.

Despite the express limitation contained in the Court's remand, the Commission concluded "that our decision in this case is consistent with the broad authority granted to the Commission by Section 4928.143(B)(1), Revised Code."[15] The Commission then added that "[t]he carrying charges are a specific component of the Companies' standard service offer generation rates and are directly related to environmental investments made at generating facilities which are used to serve standard service offer customers."[16]

The alternative theory the Commission offered for authorizing the pre-2009 Component was not supported by any party, including the Companies, as a basis for these revenues. A review of the Companies' testimony and post-hearing initial and reply briefs demonstrates that the only grounds on which the Companies sought

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[14] *In re Columbus S. Power* Co, 128 Ohio St. 3d 512, 520 (2011) (Remand Decision).

[15] Order on Remand at 15.

[16] *Id.*

recovery of the pre-2009 Component were various subdivisions of Section 4928.143(B)(2), Revised Code.[17] The intervenors opposing the Companies did not support any recovery, but their attention also was properly directed at the application of Section 4928.143(B)(2), Revised Code. As the Commission notes in the Order on Remand, the Staff similarly premised its support for authorization on Section 4928.143(B)(2)(d), Revised Code.[18] Thus, the Commission reached well-beyond the basis on which any of the parties argued to find some justification for allowing the Companies to continue to recover the pre-2009 Component in their rates.

In reaching beyond Section 4928.143(B)(2), Revised Code, to justify authorization for the pre-2009 Component, the Commission not only unfairly injected an alternative theory of recovery but also violated the law of the case established by the Supreme Court's remand. Applicable to both judicial and administrative proceedings,[19] the doctrine of the law of the case provides "that the decision of a reviewing court in a case remains the law of that case on legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels."[20] As the Supreme Court has found, "the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and

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[17] Columbus Southern Power Company's and Ohio Power Company's Initial Post-Hearing Brief on Remand at 13-15 (Aug. 5, 2011); Columbus Southern Power Company's and Ohio Power Company's Reply Brief on Remand at 35-37 (Aug. 12, 2011).

[18] Order on Remand at 12.

[19] *Worthington City Schools Board of Education v. Franklin County Board of Revision*, 129 Ohio St. 3d 3, 949 N.E.2d 986, 990 n.2 (2011); *Colonial Village, Ltd., v. Washington County Board of Revision,* 123 Ohio St. 3d 268, 272-73 (2009).

[20] *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984).

inferior courts as designed by the Ohio Constitution."[21] The effect of applying the law of the case to a remand results in a narrowing of the legal arguments that may be further litigated: "Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law."[22]

The Supreme Court's order regarding the pre-2009 Component was specific: the Commission was to determine if the pre-2009 Component was supported by a provision of Section 4928.143(B)(2), Revised Code. The parties understood the Court's directive and followed it. Nonetheless, the Commission went beyond the law of the case and found that authorizing the pre-2009 Component was consistent with 4928.143(B)(1), Revised Code.

The failure to follow the law of the case renders the decision unlawful and unreasonable. "[A]bsent extraordinary circumstances, such as an intervening decision by [the Supreme Court], an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case."[23] Failure to follow the law of case is a ground for reversal.[24]

In this instance, the Commission's failure to follow the law of case requires the Commission to grant rehearing to remove any reliance on Section 4928.143(B)(1), Revised Code, from its consideration of the issues remanded to the Commission. As discussed above, the Commission's findings authorizing recovery under Section

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[21] *Id.*

[22] *Id.*

[23] *Nolan v. Nolan*, 11 Ohio St. 3d at 5.

[24] *Id.*

4928.143(B)(2)(d), Revised Code, do not find support in the record. Thus, the Commission's resort to an alternative basis for authorizing the pre-2009 Component under Section 4928.143(B)(1), Revised Code, is unlawful and highly prejudicial.

4. The Commission unlawfully and unreasonably permitted collection of the pre-2009 Component during a period in which there was no legal authority to permit collection of those revenues.

By the terms of the Order on Remand, the Commission permitted the Companies to continue to collect the pre-2009 Component from the time of the Supreme Court's remand through the date the Commission issued the Order on Remand.[25] In permitting the Companies to retain the revenues from the time the Commission made the relevant tariffs subject to refund through the time that the Commission issued its Order on Remand, the Commission unlawfully and unreasonably permitted the Companies to collect revenues for which there was no legal authorization.

Under Section 4928.141, Revised Code, an electric distribution utility ("EDU") is authorized to establish a SSO in the form of either a Market Rate Offer under Section 4928.142, Revised Code, or an ESP under Section 4928.143, Revised Code. If the EDU selects an ESP, then the authorized ESP may contain only those provisions set out in Section 4928.143(B)(1) and (2), Revised Code. While (B)(1) states that the SSO shall include a provision for the supply and pricing of electric generation service, other provisions may be authorized under (B)(2), but only if those provisions fall within the

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[25] Order on Remand at 15.

terms of the list contained in (B)(2). "So if a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute."[26]

In its April 19, 2011 decision, the Supreme Court found that the Commission had failed to provide a legal justification supporting the collection of revenues for the pre-2009 Component. Following the Court's decision, the Commission did not issue any order or entry that found that the pre-2009 Component was properly recoverable under Section 4928.143(B)(2), Revised Code, until October 3, 2011. Notably, the Commission, in the May 4, 2011 Entry, recognized that the Companies had no claim to continue to collect these revenues and ordered revised tariffs reducing the Companies' rates by removing the pre-2009 Component.[27] The Commission subsequently permitted the Companies to continue to collect its then-current rates subject to refund on May 25, 2011 beginning with the June 2011 billing cycle,[28] but it did not make any finding that the pre-2009 Component was lawfully includable in rates. Only after the Commission issued the Order on Remand can it be claimed that collection of the the pre-2009 Component on October 3, 2011 was authorized. [29]

For the period of April 19, 2011 until October 3, 2011, therefore, the continued collection of the pre-2009 Component was without legal authority. The Supreme Court had found that the Commission's justification for allowing collection of the pre-2009

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[26] *Remand Decision*, 128 Ohio St. 3d at 520.

[27] Entry (May 4, 2011).

[28] Entry (May 25, 2011).

[29] The legality of the authorization to collect the pre-2009 Component remains at issue, as discussed above. Here the focus is on the unlawfulness of the collection of the pre-2009 Component following the Court's decision and the Commission's Order on Remand.

Component was unlawful. Tariffs recognizing the Court's decision became effective for the June 2011 billing cycle.[30] That situation remained unchanged until October 3, 2011. As a result, the pre-2009 Component was not lawfully authorized for the May 25, 2011-October 3, 2011 period. On rehearing, the Commission must modify the Order on Remand to assure that customers are properly compensated (as in a reduction of deferrals) for this portion of the pre-2009 Component that was improperly collected from them.

5. **The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of phase-in deferral balances of OP caused by the ESP rate caps on the theory that the proposed adjustment "would be tantamount to retroactive ratemaking."**

6. **The Commission's Order on Remand is unlawful and unreasonable because it failed to order the adjustment of the phase-in deferral balances of OP based on a finding not supported in the record that the "past rates ... have already been collected from customers."**

7. **The Commission's Order on Remand is unlawful and unreasonable in that it extended the prohibition of retroactive ratemaking to prevent the adjustment of phase-in deferral balances that had not been collected from customers and which were subject to further adjustment by the Commission's order establishing the basis for those deferral balances.**

8. **The Commission's Order on Remand is unlawful and unreasonable in that it failed to address the flow-through effects of Supreme Court's finding that the Commission's original Opinion and Order on deferral balances, recovery of delta revenues, and the earnings of the Companies.**

As part of the evidence presented in the remand hearing, IEU-Ohio and the Ohio Consumers' Counsel ("OCC") offered a reasonable and legally proper way to assure

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[30] In contrast to the situation presented by deferrals discussed below, revenues collected prior to the May 25, 2011 Entry could not be refunded to customers absent either a party entering into an appropriate bond or a Commission order making the collection subject to refund.

that phase-in deferral balances were properly restated so as to avoid charging customers for amounts that were not properly included in rates. IEU-Ohio further recommended that adjustments needed to be made in other areas directly impacted by the Court's decision. In its Order on Remand, however, the Commission refused to implement those recommendations on the basis that the proposed adjustment to deferrals "would be tantamount to unlawful retroactive ratemaking."[31] The Commission also asserted that the prohibition on retroactive ratemaking applied because the Commission could not "order a prospective adjustment to account for past rates that have already been collected from customers."[32] The Commission further rejected IEU-Ohio's recommendation that the Commission address other matters affected by the Supreme Court's remand.[33] Because the Commission improperly found that the prohibition of retroactive ratemaking applied, the Commission's decision to refuse to adjust the deferrals and other related issues was unlawful and unreasonable.

The rationale for adjusting deferrals for flow-through effects of the remanded issues is straight-forward. Prior to the Commission's May 4, 2011 Entry, OP estimated that the accumulated deferred revenue eligible for future collection would be $643 million by late 2011. However, OP's estimate of deferred revenue eligible for future collection is a residual calculation. It is the difference between the revenue collected during the ESP period subject to the bill increase limitations and the revenue increases that would have otherwise occurred without such limitations. OP's estimate of deferred

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[31] Order on Remand at 35-36.

[32] *Id.* at 36.

[33] *Id.*

revenue is significantly excessive because embedded in the math that produced OP's estimate is an allowance for revenues which cannot be lawfully recognized for purposes of establishing rates and charges.

The 2009 ESP Opinion and Order authorized OP and CSP to, individually, collect a total revenue amount, part of which was collectable during the term of the current ESP and part of which was deferred for collection in the future.[34] The portion of such total authorized revenue deferred for future collection (through a phase-in mechanism) is a subset of the total revenue collection that the Commission may lawfully authorize through the exercise of its authority in Section 4928.143, Revised Code. The amount of the revenue deferred for future collection through a phase-in mechanism must also be "just and reasonable."[35]

In keeping with this "just and reasonable" standard, the Commission must, in compliance with the Supreme Court's decision, reduce the total authorized revenue in the current ESP Opinion and Order by the amount of revenue that the Commission previously included in this total. Because the portion of the total authorized revenue that was deferred for collection is defined by a residual calculation, the deferred revenues must be reduced by an amount equal to that portion of the revenues authorized by the Commission in its ESP Opinion and Order that the Supreme Court determined were unlawful. If OP is permitted to collect deferred revenues calculated as though the revenue amounts the Commission authorized in the current ESP Opinion

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[34] Opinion and Order at 20-24 (Mar. 18, 2009).

[35] Section 4928.144, Revised Code.

and Order were lawful, the requirement that the phase-in rates are just and reasonable cannot be satisfied.

Thus, Section 4928.144, Revised Code, and the recent Supreme Court decision require a restatement of the amount of deferred revenue eligible for future collection to properly reflect the value associated with the Companies' unlawfully authorized revenue increases plus an appropriate allowance for carrying charges. Unless the deferred revenue balance is restated and substantially lowered, the amount of revenue increase which the Supreme Court has held to be unlawful will be embedded in the amount of revenue deferred for future collection. Unless the deferred revenue balance is restated, the injustice of the unlawfully authorized increases will be perpetuated for seven years through a phase-in rider that ignores reality and the law.

Commission action regarding the effect of the remand, however, is not limited to the deferred balances OP will be seeking to recover. The second illustrative area concerns the amount of revenue which OP and CSP may lawfully collect through mechanisms that allow, as permitted by the Commission, recovery of "delta revenue." Delta revenue is the revenue difference between rates and charges in a reasonable arrangement and the revenue produced by rates and charges in an otherwise applicable tariff schedule. For example, the Commission has authorized delta revenue recovery as a result of a reasonable arrangement for Ormet Primary Aluminum Corporation ("Ormet").[36] The unlawful revenue increases identified by the Supreme Court are embedded in the revenue produced by the otherwise applicable rate(s) for

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[36] *In the Matter of the Application of Ormet Primary Alum. Corp. for Approval of a Unique Arrangement with Ohio Power Co. and Columbus Southern Power Co.*, Case No. 09-119-EL-AEC, Opinion and Order (July 15, 2009).

Ormet. Thus, the amount of delta revenue eligible for collection as a result of the Ormet reasonable arrangement has been unlawfully overstated in the past and will be unlawfully overstated going forward unless the unlawfully authorized revenue is removed from the rates and charges in the otherwise applicable tariff schedule(s).

Similarly, the operation of the Universal Service Fund ("USF") generates revenue recovery that is overstated. This fund provides bill payment assistance to income eligible residential consumers, and other consumers pay USF charges to make OP and CSP whole for the difference in the amount collected from income eligible customers and the amount such customers would have paid on the otherwise applicable rate. As in the case of the delta revenue illustration above, the unlawfully authorized revenue caused the otherwise applicable rate to be higher than the lawful rate and, in turn, increased the magnitude of the USF charges that have been paid and will continue to be paid until the unlawfully authorized revenue and all of its implications are stripped from all rates and charges (including riders).

The third illustrative area involves the effect of the unlawfully authorized revenue increases and the operation of the retrospective significantly excessive earnings test ("SEET").[37] Revenues unlawfully authorized and collected must, for ratemaking and SEET purposes, be classified, dollar-for-dollar, as revenues the utility actually received as a result of the ESP (after taxes, the revenues become net income on the Companies' income statements). If the Commission properly jurisdictionalizes the income statement and the balance sheet values that drive the SEET determination (as IEU-Ohio has previously and unsuccessfully – to this point – argued is required by Ohio law), the

[37] Section 4928.143(F), Revised Code.

SEET can provide the Commission with an opportunity to rectify, at least in part, the effect of unlawfully authorized and collected revenue.

The fourth illustrative area concerns the relationship between the Companies' current ESPs (with the embedded unlawfully authorized revenue therein) and the plan filed in the 2011 ESP Application. The revenue produced by the current ESPs (including the embedded unlawfully authorized revenue) provides the revenue foundation for the 2011 ESP.[38] This foundation is excessive by the unlawfully authorized amount of revenue and is itself unlawful to that extent. Although the 2011 ESP is currently the subject of a partial stipulation, the Commission has not yet ruled on the stipulation and may be required to conduct hearing on the original applications if the Stipulation is rejected or withdrawn. Thus, the effects of the remand remain relevant to the 2011 ESP Application.

In summary, the Supreme Court has determined that the Commission authorized CSP and OP to unlawfully bill and collect increased revenue. More than two years have passed since the Companies implemented the unlawful authority to increase revenue, rates, and charges over the objections of every consumer group that participated in these proceedings. Hundreds of millions of dollars of consumers' wealth have already been unlawfully transferred to the Companies, and this unlawful wealth transfer will be perpetuated in numerous ways until the Commission strips away all the effects of the unlawfully authorized revenue increases.

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[38] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO, *et al.*, Testimony of David Roush, Exhibit DMR-2 (January 27, 2011) ("*2011 ESP Application*").

Requiring a proper restatement of amounts of deferrals that may be collected in rates is not novel. This Commission has recognized its duty to supervise what is recovered from customers regardless of the accounting treatment the Companies have used to state the values of assets. In the 1991 CSP rate case, for example, the Commission applied the terms of the Zimmer Restatement Case settlement to reduce a booked allowance for funds used during construction ("AFUDC") to restate the rate base for the Zimmer plant because the amounts booked were inconsistent with proper regulatory accounting and the terms of the settlement.[39] Thus, regulatory law drives accounting decisions, and not the other way around.

The Commission itself recognized in the Opinion and Order that the deferrals booked by the Companies were not sacrosanct. In setting the bill limiters, the Commission held: "[W]e exercise our authority pursuant to Section 4928.144, Revised Code, and find that the Companies should phase-in any authorized increases so as not to exceed, on a total bill basis, 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 are more appropriate levels."[40] The Commission continued that "[a]ny amount over the *allowable total bill increase* percentage levels will be deferred."[41] The resulting surcharge was to be based

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[39] *In the Matter of the Application of Columbus Southern Power Co. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 15-18 (May 12, 1992).

[40] Opinion and Order at 22 (March 18, 2009).

[41] *Id.* (emphasis added).

on the balance remaining at the end of 2011.[42] The Companies themselves recognize that the amounts that may be collected through the phase-in rider are subject to continuing review through fuel adjustment clause ("FAC") proceedings that are ongoing.

When the Supreme Court subsequently found the POLR charge and the pre-2009 Component to be illegal, the Commission was required to determine before collections started how much if any of the deferrals were properly collectable. Just as the Companies recognized when they filed tariffs in compliance with the May 4, 2011 Commission Entry and in the tariffs approved on October 26, 2011, the effect of the remand is to require an evaluation of what is allowed to be recovered. One obvious change is the effect of the Order on Remand on the current FAC rates and deferrals. Part of the process also includes recognition of any changes that result from the 2009 and 2010 FAC reviews that are on-going. Another part is the recognition that the deferrals on the Companies' books are improperly inflated because the POLR charges and incremental environmental investments were included in the revenue calculation subject to the bill limiters when they should not have been.

The Order on Remand, however, concludes that the Commission cannot adjust deferrals or address the related issues because it cannot engage in retroactive ratemaking. The Commission's reliance on prohibition on retroactive ratemaking to prevent it from addressing the flow-through effect, however, is misplaced.

Initially, the Commission relies on the Supreme Court's remand decision in this case.[43] The filed rate problem in this case arose when the Commission permitted the

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[42] *Id.* at 22-23. The Commission recognized that the deferrals could be adjusted throughout the ESP term if the FAC expense in a given period was less than the maximum phase-in FAC rate. *Id.* at 22.

Companies to recover three months of rate increases, $62 million, prior to the effective date of the tariffs authorized by the Opinion and Order. Finding that the Commission engaged in retroactive ratemaking, the Supreme Court stated that "present rates may not make up for dollars lost 'during the pendency of commission proceedings,'" and concluded that "the commission violated the law when it granted AEP additional rates to make up for regulatory delay."[44] The filed rate doctrine, however, prevented the Court from ordering a refund of the $62 million already collected from customers. In contrast, IEU-Ohio seeks to have the Commission address the revenues that OP (or the merged OP and CSP[45]) will be seeking through the phase-in rider from 2012 to 2018 as a result of the bill limits. Inasmuch as OP will be seeking additional revenues estimated at $642 million and inasmuch as the Commission has not determined whether any of the deferred revenues are allowable, the Court's holding concerning the filed rate doctrine does not prevent the Commission from requiring the Companies to restate the deferred revenues or take into account the remand in addressing other related issues such as delta revenue recovery.

The Commission's reliance on the *Lucas County* and *Ohio Consumers' Counsel* cases[46] is similarly misplaced. In the *Lucas County* case, the Supreme Court agreed that the Commission properly dismissed a complaint seeking a refund when the

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[43] Order on Remand at 36 n.40.

[44] Remand Decision, 128 Ohio St. 3d at 515.

[45] The Companies have a filed a partial stipulation with the Commission that is currently under review. By the terms of the partial stipulation, the Companies would be authorized to collect a recovery rider from both OP and CSP customers. *2011 ESP Application,* Stipulation at 26 (Sept. 7, 2011).

[46] *Id.*, citing *Lucas County Commissioners v. Pub. Util. Commission*, 80 Ohio St. 3d 344 (1997) and *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 121 Ohio St. 3d 362 (2009).

complaint was filed after the challenged rates had been collected. In affirming the Commission's decision, the Supreme Court stated, "The Public Utilities Commission of Ohio is not statutorily authorized to order a refund of, or credit for, charges previously collected by a public utility where those charges were calculated in accordance with an experimental rate program which was approved by the commission, but which has expired by its own terms."[47] In the *Ohio Consumer's Counsel* case, the Commission moved to dismiss an appeal on the basis that the underlying order had been superseded by the Commission's adoption of a new order, thus precluding any prospective relief for consumers. In contrast to the situations presented in each of these cases, IEU-Ohio is not seeking a Commission order for a refund. If the Commission takes the actions recommended by IEU-Ohio, it instead would be setting the just and reasonable level of the prospective recovery as required by Section 4928.144, Revised Code, and adjusting the recovery of other revenues in a manner consistent with the terms of the remand.

Indeed, the only way the Commission can reach a conclusion that it is prohibited from acting on the requested adjustments to phase-in deferral amounts is by asserting that IEU-Ohio's recommendations if adopted would be "tantamount" to unlawful retroactive remaking and concluding that rates have already been paid by customers. The factual assertion that the Companies have collected these funds is not correct. The deferrals created as a result of the March 18, 2009 Opinion and Order are for amounts that have not been collected from customers. Rather they are uncollected amounts that remain subject to adjustments that even the Companies concede can and will be made

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[47] *Lucas County Commissioners*, 80 Ohio St. 3d at 349.

in the recoverable totals, and only upon approval of a recovery mechanism by the Commission. Thus, when the Commission concluded in the Order on Remand that it "cannot order a prospective adjustment to account for past rates that have already been collected from customers and subsequently found to be justified,"[48] the decision is premised on a condition (that rates have already been collected from customers) that is not correct.

Because the premise for applying the prohibition of retroactive ratemaking is wrong, the Commission's decision is unlawful and unreasonable. In order to assure that consumers are not further burdened by rates that illegally generated deferrals and affected other matters such as delta revenues, the Commission must flow-through the effects of the Supreme Court's remand.

III. CONCLUSION

For the reasons outlined above, the Commission should grant rehearing to remove the pre-2009 Component from rates, refund amounts improperly collected for the pre-2009 Component from June to November 2011, and properly flow-through the effects of the Supreme Court's decision. Failure to do so would be unlawful and unreasonable and would shoulder consumers with additional revenue responsibility that cannot be legally justified.

Respectfully submitted,

Samuel C. Randazzo

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[48] Order on Remand at 36.

Frank P. Darr
Joseph E. Oliker
McNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
lmcalister@mwncmh.com
jclark@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing of Order on Remand and Memorandum in Support of Industrial Energy Users-Ohio* was served upon the following parties of record this 2nd day of November 2011, via electronic transmission, hand-delivery or first class mail, postage prepaid.

Frank P. Darr

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Selwyn J. R. Dias
Columbus Southern Power Company
Ohio Power Company
850 Tech Center Dr.
Gahanna, OH 43230

Daniel R. Conway
Porter Wright Morris & Arthur
Huntington Center
41 S. High Street
Columbus, OH 43215

ON BEHALF OF COLUMBUS SOUTHERN POWER AND OHIO POWER COMPANY

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

ON BEHALF OF OHIO ENERGY GROUP

John W. Bentine
Mark S. Yurick
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213

ON BEHALF OF THE KROGER CO.

Maureen R. Grady, Counsel of Record
Terry L. Etter
Jeffrey Small
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485

ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Barth E. Royer, Counsel of Record
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Nolan Moser
Air & Energy Program Manager
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449

Trent A. Dougherty
Staff Attorney
The Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449

ON BEHALF OF THE OHIO ENVIRONMENTAL COUNCIL

Richard L. Sites
Ohio Hospital Association
155 E. Broad Street, 15th Floor
Columbus, OH 43215-3620

Thomas O'Brien
Matthew Warnock
Bricker & Eckler
100 South Third Street
Columbus, OH 43215

ON BEHALF OF THE OHIO HOSPITAL ASSOCIATION

David I. Fein
Cynthia Fonner
Constellation Energy Group
550 W. Washington Street, Suite 300
Chicago, IL 60661

ON BEHALF OF CONSTELLATION ENERGY GROUP

Bobby Singh
Integrys Energy Services, Inc.
300 West Wilson Bridge Road, Suite 350
Worthington, OH 43085

ON BEHALF OF INTEGRYS ENERGY SERVICES, INC.

M. Howard Petricoff
Lija Kaleps-Clark
Vorys, Sater, Seymour & Pease LLP
52 E. Gay Street
Columbus, OH 43215

ON BEHALF OF EXELON GENERATION COMPANY LLC

M. Howard Petricoff
Stephen M. Howard
Michael J. Setterini
Vorys, Sater, Seymour & Pease LLP
52 E. Gay Street
Columbus, OH 43215

ON BEHALF OF CONSTELLATION NEW ENERGY AND CONSTELLATION NEW ENERGY COMMODITIES GROUP, DIRECT ENERGY SERVICES, LLC, INTEGRYS ENERGY SERVICES, INC., NATIONAL ENERGY MARKETERS ASSOCIATION, OHIO SCHOOL OF BUSINESS OFFICIALS, OHIO SCHOOL BOARDS ASSOCIATION, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, AND ENERNOC, INC.

Craig G. Goodman
National Energy Marketers Association
3333 K. Street, N.W., Suite 110
Washington, D.C. 20007

ON BEHALF OF NATIONAL ENERGY MARKETERS ASSOCIATION

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839

ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE ENERGY

Barth Royer
Bell & Royer Co. LPA
33 South Grant Avenue
Columbus, OH 43215-3927

Gary Jeffries
Dominion Resources Services
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817

ON BEHALF OF DOMINION RETAIL, INC.

Henry W. Eckhart
1200 Chambers Road, Suite 106
Columbus, OH 43212
henryeckhart@aol.com

ON BEHALF OF THE SIERRA CLUB, OHIO CHAPTER, AND THE NATURAL RESOURCES DEFENSE COUNCIL

Matthew Warnock
Bricker & Eckler
100 South Third Street
Columbus, OH 43215

Kevin Schmidt
The Ohio Manufacturers' Association
33 North High Street
Columbus, OH 43215

ON BEHALF OF THE OHIO MANUFACTURERS' ASSOCIATION

Larry Gearhardt
Ohio Farm Bureau Federation
280 North High Street, P.O. Box 182383
Columbus, OH 43218

ON BEHALF OF THE OHIO FARM BUREAU FEDERATION

Keith C. Nusbaum
Sonnenschein, Nath & Rosenthal
1221 Avenue of the Americas
New York, NY 10020-1089

Clinton A. Vince
Emma F. Hand
Ethan Rii
Presley Reed
Sonnenschein, Nath & Rosenthal
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005

ON BEHALF OF ORMET PRIMARY ALUMINUM CORPORATION

Benjamin Edwards
Law Offices of John L. Alden
One East Livingston Ave.
Columbus, OH 43215

ON BEHALF OF CONSUMERPOWERLINE

Grace C. Wung
McDermott Will & Emery LLP
600 Thirteenth Street, NW
Washington, DC 20005

Douglas M. Mancino
McDermott Will & Emery LLP
2049 Century Park East
Suite 300
Los Angeles, CA 90067

Steve W. Chriss
Manager, State Rate Proceedings
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, AR 72716

ON BEHALF OF THE WAL-MART STORES EAST LP, MACY'S INC., AND SAM'S CLUB EAST, LP

Sally W. Bloomfield
Terrence O'Donnell
Bricker & Eckler
100 South Third Street
Columbus, OH 43215

ON BEHALF OF AMERICAN WIND ENERGY ASSOCIATION, WIND ON THE WIRES AND OHIO ADVANCED ENERGY

C. Todd Jones
Christopher Miller
Gregory Dunn
Schottenstein, Zox and Dunn Co., LPA
250 West Street
Columbus, OH 43215

ON BEHALF OF THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO

Douglas M. Mancino
McDermott Will & Emery LLP
2049 Century Park East
Suite 3800
Los Angeles, CA 90067

Gregory K. Lawrence
McDermott Will & Emery LLC
28 State Street
Boston, MA 02109

Steven Huhman
Vice President
MSCG
200 Westchester Ave.
Purchase, NY 10577

ON BEHALF OF MORGAN STANLEY CAPITAL GROUP, INC.

Mark A. Hayden
Managing Counsel
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114

ON BEHALF OF FIRSTENERGY SOLUTIONS CORP

Michael Smalz
Joseph Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215

ON BEHALF OF OHIO POVERTY LAW CENTER AND APPALACHIAN PEACE & JUSTICE NETWORK

Cheryl Maxfield
John Jones
Thomas Lindgren
Werner Margard
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215

ON BEHALF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Greta See
Sarah Parrot
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215

ATTORNEY EXAMINER