Supreme Court of Ohio Clerk of Court - Filed June 20, 2023 - Case No. 2023-0464

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates	**Case No. 2023-0464**
In the Matter of the Application of Ohio Power Company for Tariff Approval	**Appeal from the Public Utilities Commission of Ohio**
In the Matter of the Application of Ohio Power Company for Approval to Change Accounting Methods	**Public Utilities Commission Case Nos. 20-585-EL-AIR, 20-586-EL-ATA, and 20-587-EL-AAM**

Interstate Gas Supply, LLC,
Appellant,

v.

Public Utilities Commission of Ohio,
Appellee

BRIEF OF

APPELLANT

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Introduction

Ohio law declares generation service is a competitive electric service. When generation service is offered by an electric distribution utility such as that of Ohio Power Company ("Ohio Power"), the law also requires that the service be free of market distorting subsidies from regulated services. In this case, the Public Utilities Commission of Ohio ("Commission) authorized Ohio Power to recover costs to provide generation service in distribution rates. *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-AIR, *et al*., Opinion and Order (Nov. 11, 2021). Because authorization of these rates violates the requirements of Ohio law designed to promote free and fair competition in the retail electric generation market, the Court should reverse and remand the Commission's orders (collectively "Rate Orders").

Statement of Facts

This case presents the latest step of the delayed process of introducing competition into the sale of electricity that the General Assembly approved in 1999. As the Court is well aware, this Commission has repeatedly stalled that process by permitting electric distribution utilities to recover generation-related costs in distribution rates. In this installment, which presents a case of first impression to this Court, the Commission continued that pattern because it authorized the recovery in distribution rates of known and measurable costs that Ohio Power incurs to provide default generation service.

In 1999, Senate Bill 3 began a process to unbundle electric generation service from distribution and transmission service. (Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962 ("SB

3"). As the Court has explained to the Commission each time it has issued orders that unlawfully ignored the requirements of SB 3, the law "restructured Ohio's electric-utility industry to foster competition in the generation component of electric service. *As we have repeatedly recognized,* S.B. 3 altered the traditional rate-based regulation of electric utilities by requiring the three components of electric service—generation, transmission, and distribution—to be separated." *Industrial Energy Users-Ohio v. Pub. Utils. Comm'n of Ohio,* 117 Ohio St. 3d 486, ¶ 5 (2008) (emphasis added). Under this new regulatory paradigm, the generation component was not subject to the traditional form of rate regulation. *Id.* at ¶ 20. Specifically, R.C. 4928.03 declared generation service competitive, and R.C. 4928.05 "expressly remove[d] competitive retail electric services from commission regulation." *Id.*[1]

SB 3 provided for a detailed process for unbundling generation and other services, see *Migden-Ostrander v. Pub. Utils. Comm'n of Ohio,* 102 Ohio St. 3d 451 (2004), but the initial move to competitive generation service proved more difficult than the General Assembly, the industry, or the Commission anticipated. In response to these difficulties, the Commission engaged through the 2000s in questionable efforts to smooth the transition to a fully unbundled competitive product. Ohio Consumers' Counsel v. Pub. Utils. Comm'n of Ohio, 109 Ohio St. 3d 328 (2006).

In response to the Court's questioning of the Commission's delays, *In re Columbus. S. Power Co.,* 128 Ohio St. 3d 512, ¶ 2-4 (2011), the General Assembly adopted in 2008 changes to the way the Commission regulated the price an electric distribution utility charged for default

[1] Although generation service was declared competitive, electric distribution utilities retained an obligation to serve as the provider of last resort for those customers that did not shop or whose competitive service provider failed. R.C. 4928.14. That default service, however, was to be provided at competitive rates.

electric service. That law, Amended Substitute Senate Bill 221 (2008 Am.Sub.S.B. No. 221 ("SB 221")), introduced alternative forms of default service for which an electric distribution utility could seek authorization. One alterative, the market rate offer, would be priced through a Commission-monitored competitive bidding process and generally could not contain any other provisions. R.C. 4928.142. The other, an electric security plan, permitted the electric distribution utility to provide a default service product with its own generation resources and permitted it to seek other terms and conditions so long as the plan, in the aggregate, was more favorable than a market rate offer. R.C. 4928.143.

Although SB 221 revised the lawful terms and conditions for default service, it did not alter any of the requirements regarding the unbundling of electric service into generation, distribution, and transmission components. Generation service remains competitive. R.C. 4928.03. Except as provided in a market rate offer or an electric security plan, the Commission does not have authority to regulate the price, terms, or conditions of generation service. R.C. 4928.05(A). Unbundling the generation, transmission, and distribution functions of an electric distribution utility is the law. R.C. 4928.31(A). The unbundling process, however, remains a work in progress.

One aspect of that continuing process is the identification and removal of costs associated with the provision of default service that are still embedded in base distribution rates. In two cases leading to the one before the Court, the Commission approved settlements requiring Ohio Power to conduct a cost study to identify generation-related costs that it continued to recover in distribution rates and two riders that would remove those costs from the rates of customers that shopped for generation service and reassign them to customers taking default generation service.

Under the first settlement, the Commission approved a recommendation that Ohio Power conduct a study to determine the remaining costs to provide generation service to default service customers, i.e., those customers that continued to purchase competitive generation service from Ohio Power. *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al., Opinion and Order at 29-30 (Mar. 31, 2016) (Appx at 172-73).

In the second settlement, the Commission authorized two riders, the Retail Reconciliation Rider (under the settlement, this rider was called the Competition Incentive Rider, but the Commission renamed it in the order approving the stipulation among the parties) and the SSO Credit Rider. The first, the Retail Reconciliation Rider, was applicable to default service customers and would have added a charge to default service for the costs incurred by Ohio Power to provide default service that it collected in distribution rates. The second rider, the SSO Credit Rider, would return to all customers the revenue collected through the Retail Reconciliation Rider. The combined effects of the riders were two-fold. First, the riders would be revenue neutral for Ohio Power, but would increase or lower the total prices customers would pay based on whether they were receiving generation service from Ohio Power as default generation service customers or purchasing their generation service from competitive suppliers. Second, the riders would ensure that Ohio Power did not subsidize the provision of default generation service for default service customers. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 16-1852-EL-SSO, Opinion and Order at 97 (Apr. 25, 2018) (ESP IV Case) (Appx at 364).

The settlement also recommended interim rates for the two riders until Ohio Power provided a more detailed cost study in its next rate case. After the Ohio Consumers' Counsel opposed this portion of the settlement, the Commission rejected the proposed interim rates and set the riders at zero. "Following a thorough analysis of AEP Ohio's distribution rates in the rate case, the Commission [would] determine whether it is necessary to reallocate costs between shopping and non-shopping customers, in order to ensure that the Company's rates are fair and reasonable for all customers." *Id.* at 99 (Appx at 366).

Setting distribution rates that would remove the costs associated with generation-related default service thus fell to distribution rate case that is now before the Court. Ohio Power initiated this case on June 8, 2020, when it filed an application to increase its distribution rates. As part of its application, Ohio Power filed written supporting testimony by David M. Roush that included the long-awaited study of the generation-related costs Ohio Power recovered in distribution rates.[2] The study consisted of two pages of Mr. Roush's testimony and one exhibit. IGS Exhibit 3 at 11-12 and DMR Exhibit 2 (Supp. at 239-41). In the testimony, Mr. Roush identified $4.7 million in costs associated with the provision of default service. But for inclusion in the Retail Reconciliation Rider, these costs would be recovered from all distribution customers. Mr. Roush also identified $1.2 million in costs to support the facilitation of the retail choice market for shopping customers. *Id*. Further, he identified other "qualitative costs" including call center, general plant, administrative and legal costs associated with the provision of these services. *Id*. The testimony also provided proposed rates that would assign the costs of providing default service to those customers. In calculating those rates, he took one additional step: he subtracted the costs Ohio Power incurred to facilitate the retail choice market, costs for

[2] Ohio Power filed the supporting testimony on June 15, 2020.

which it was already receiving fees from suppliers, from the costs it was incurring for the provision of default service. *Id*., DMR Exhibit 2 (Supp. at 241); IGS/Direct Exhibit 2 at 44 (Supp. at 140).

As required by R.C. 4909.19, the Commission staff issued a report of its investigation on November 18, 2020, and a corrected report on November 25, 2020. Staff Report (Nov. 18, 2020) (Supp. 612).[3] After noting that the Commission had directed Ohio Power to "differentiate" costs to provide generation service in distribution rates, the Staff Report recommended "rejection of the riders." Staff Report at 31 (Supp. at 644). Because Ohio Power "did not examine all cost causation factors," "Staff [concluded that it] cannot determine if or how cost should be allocated between shopping and non-shopping customers." *Id.* Additionally, the Staff Report asserted that "Staff maintains that SSO is a default service, available to all customers and required by electric distribution companies to provide." *Id.*

IGS filed timely objections contesting the Staff Recommendation to "reject the riders" on December 18, 2020. Objections to Staff report of Investigation and Summary of Major Issues of Interstate Gas Supply, Inc. at 7-15 (Dec. 18, 2020) (Supp. at 7-15).

Ohio Power and several parties other than IGS entered into a stipulation on March 12, 2020. Stipulation and Recommendation (Mar. 12, 2021) (Supp. at 27) ("Stipulation"). The Stipulation provided that the riders intended to remove the costs of default generation service from distribution rates remain at zero. *Id*. at 9 (Supp. at 35).

In a hearing on the lawfulness and reasonableness of the Stipulation, IGS contested the recommendation that the riders remain at zero. The hearing demonstrated that there was no

[3] The schedules attached to the Staff Report are not included in the Supplement. The changes found in the corrected Staff Report did not alter the discussion related to the default service costs at issue in this case since the report did not attempt to calculate those costs.

disagreement that the Stipulation proposed that Ohio Power recover in distribution rates costs associated with the provision of generation service to its customers. *Every witness addressing the issue confirmed this conclusion.*

In support of its view that the term of the Stipulation setting the Retail Reconciliation Rider and the SSO Credit Rider at zero was not lawful or reasonable, IGS presented testimony showing that Ohio Power was recovering approximately $64 million in generation-related costs in distribution rates to support the standard service offer. IGS/Direct Exhibit 2 at 5-16 (Supp. at 101-12) The IGS testimony also demonstrated that the proposed settlement rates would over-collect costs from shopping customers and under-collect those costs from non-shopping customers. Because the rates would not be set correctly, shopping customers would be subsidizing non-shopping customers. This subsidy would frustrate meaningful attempts to compare rates between competitive suppliers and Ohio Power for competitive retail generation service. *Id*.(summarizing testimony). The IGS testimony concluded, "This result is harmful to customers, to [competitive retail electric service] suppliers and to the long-term success of Ohio's competitive energy policy and environmental goal, which will be met most efficiently if the competitive landscape is not biased in the utilities' favor." *Id*. at 10 (Supp. at 106).

Unlike the approach offered by Ohio Power, the IGS analysis did not offset the costs to support default service with costs related to support of competitive supply. On this part of the problem, the IGS witness noted that those costs were properly functionalized as distribution costs *and were paid for by competitive suppliers* and thus should not be offset against the amounts Ohio Power recovered to support default generation service. *Id*. at 41-44 (Supp. at 137-40).

As noted previously, Ohio Power's application demonstrated that at least $4.7 million of costs directly assignable to the provision of default service and another $1.2 million directly

assignable to the provision of generation service provided by competitors are recovered in distribution rates. IGS Exhibit 3 at 11-12 and DMR Exhibit 2 (Supp. at 239-41). Nonetheless, Ohio Power supported a provision of the Stipulation setting the Retail Reconciliation and SSO Credit Riders at zero. During Mr. Roush's examination in support of the Stipulation, however, he confirmed that the costs identified in his study constituted some of the costs that Ohio Power recovers in distribution rates for the provision of generation service to retail customers. For example, he identified PUCO and OCC assessments and bad debt expenses that are assignable to the default generation supply that were proposed for collection in distribution rates. Tr. at 34-35 (Supp. at 263-64). Additionally, he explained that there were other costs to support both default and competitive supply that Ohio Power proposed to recover in distribution rates. See, e.g., Tr. at 35-50 (Supp. at 264-79). Another Ohio Power witness also testified that it was proposing to recover in distribution rates costs supporting the provision of default service. Tr. at 158-60 (Supp. at 381-83).

The Commission Staff also supported the provision of the Stipulation setting the rates for the Retail Reconciliation Rider and the SSO Credit Rider at zero even though the Staff Report concluded that the study provided by Ohio Power was not complete. Staff Exhibit 3 and Staff Exhibit 1 at 31 (Supp. at 671 and 644). Although the Staff Report was critical of Ohio Power's study, it did little to fill the information gap left by Ohio Power's application to increase rates. When presented with an incomplete response to the Commission order to identify costs associated with the supply of generation service, the Commission Staff testified that it did not meet with Ohio Power to address the deficiency. Tr. at 356 (Supp. at 452). Instead, it issued some data requests and then concluded that "the Company attempted to comply with the order as best they could." Tr. at 362. See, also, Tr. at 356-62; IGS Exhibits 3, 13,14, and 15 (Supp. at

452-58 and 243-56). Accepting Ohio Power's excuses for not completing the study ordered by the Commission, the Commission Staff did nothing further to determine the amount of costs associated with the provision of generation service that would be collected in distribution rates. Tr. at 362 (Supp. at 458).

Despite the dearth of investigation, a Staff witness provided testimony opposing IGS's objections to the Staff Report's failure to propose removal of generation-related costs from distribution rates. Staff Exhibit 3 (Supp. at 671). Although Ohio Power had identified direct costs of PUCO and OCC assessments and bad debt expense and identified other indirect costs such as call center and other administrative support costs, the Staff once again excused the lack of identification of costs and further opined that the costs should be "socialized" to all customers. *Id*. at 8 and 10 (Supp. at 678 and 680).

Underlying the Staff testimony was a concession that Ohio Power has not properly functionalized its generation costs to remove them from distribution rates. Under cross examination, the Staff witness repeatedly conceded that Ohio Power recovers in distribution rates allocable costs for the provision of generation service to its customers. For example, the Commission Staff witness agreed that distribution rates recovered costs related to the Ohio Power call center:

> Q: I would like to start out with a common understanding with you about the costs that you believe are related to the Standard Service Offer that are collected in distribution rates. You believe that there are embedded distribution costs needed to interact with the Standard Service Offer customers, correct?
>
> A: Correct.
>
> Q: And one of those embedded costs related to the provision of the Standard Service Offer that is recovered in distribution rates is associated with the call center, correct?
>
> A: Yes. It could be.
>
> …

> Q: If the PUCO approves the recommendation to set the Retail Reconciliation Rider at zero, the embedded costs of the call center to support the Standard Service Offer would be collected in distribution rates, correct?
>
> A: Yes, as would the embedded CRES costs embedded in the call center, too.

Tr. at 346 (Supp. at 442). In addition to call center costs, the Staff witness also agreed that Ohio Power proposed to recover in distribution rates information technology costs, legal costs, regulatory costs, accounting costs, administrative costs, and costs associated with physical plant used by support personnel, all used to provide generation-related services. Tr. at 346-49 (Supp. at 442-45).[4]

An OCC witness supported the Stipulation in part because it recommended leaving the Retail Reconciliation and SSO Credit Riders at zero. OCC Exhibit 1 at 9 (Supp. at 704). As was the case with the Staff witness, the OCC witness conceded on cross-examination that the Stipulation recommended that Ohio Power recover in distribution rates costs that are directly assignable to the provision of generation service.

> Q. … Mr. Willis, you would agree a certain portion or percentage of the PUCO and OCC assessment fees are costs associated with servicing SSO that will be collected through distribution rates, the proposed distribution rates?
>
> A. Yes.
>
> Q. And you would agree that the bad debt associated with the SSO's generation receivables will be collected through the distribution rates, correct?
>
> A. Yes.

Tr. at 291-92 (Supp. at 404-05).

Despite the undisputed evidence that the recommended distribution rates would recover generation-related costs, the Commission approved the Stipulation with the Retail Reconciliation Rider and SSO Credit Rider set at zero. Opinion and Order, ¶ 174-86 (Appx at 74-80). In support

[4] Despite knowledge that these costs were embedded in distribution rates, the Staff witness did not know the amounts that would be recovered in rates. Tr. at 349-50 (Supp. at 445-46).

of that decision, the Commission found, "[T]here is no basis upon which to conclude that AEP Ohio's distribution rates include known, quantifiable costs that should be allocated to the [Retail Reconciliation Rider]." *Id*., at ¶ 184 (Appx at 79). In making this finding, the Commission addressed only the testimony of the IGS witness while ignoring the testimony of Ohio Power, OCC, and its own Staff that setting the riders at zero would permit Ohio Power to recover generation costs in distribution rates. *Id*. Regarding the testimony of costs presented by IGS, the Commission rejected it because it found that the witness did not follow the approach that required an analysis of the costs recovered by Ohio Power to support both default and competitive supply of generation. *Id*. The Commission also gave Ohio Power a pass on its failure to identify generation-related costs. *Id*. at ¶ 185 (Appx at 80). Finally, the Commission offered IGS the option to try again later so long as IGS or another interested party used the Commission's approved cost analysis. *Id*. at ¶ 186 (Appx at 80).

IGS filed a timely application for rehearing setting out the four assignments of error in this appeal on December 17, 2021. Application for Rehearing and Memorandum in Support of Interstate Gas Supply, Inc. (Dec. 17, 2021) (Appx at 418).

The Commission granted rehearing for the purpose of further consideration on January 12, 2022. Entry on Rehearing (Jan. 12, 2022) (Appx at 95).

Thirteen months later, the Commission denied IGS's application for rehearing. Second Entry on Rehearing (Feb. 8, 2023). (Appx at 99). In the second entry on rehearing, the Commission rejected a challenge to its finding that there was no record support for populating the riders, stating that the Opinion and Order fully set forth the basis of its decision. *Id*. at ¶ 48 (Appx at 120). In Second Entry on Rehearing, however, the Commission recast its general finding that there was no record support for setting the riders at a rate other than zero as a

rejection of only the IGS testimony, not the wholesale finding that the Commission made in the Opinion and Order. *Id*. at ¶ 49 (Appx at 121). Despite the attempt to recast its prior general finding to a narrower one, the Commission nonetheless stated again that "there is no evidentiary support for IGS's alleged statutory violations" when it responded to another assignment of error alleging that Ohio Power will recover generation-related costs in distribution rates in violation of Ohio law *Id*. at ¶ 59 (Appx at 127). The Commission also rejected two assignments of error regarding the record. In the first, the Commission refused to set the rates at a minimal amount that was plainly established by Ohio Power itself because the admission was in an exhibit not sponsored by Ohio Power and was subject to criticism by Commission staff. *Id*. at ¶ 50 (Appx at 121-22). In the second, the Commission rejected testimony offered by IGS because it did not comply with the requirements of a prior Commission order that were applicable to only Ohio Power. Finally, the Commission concluded that it had not erred by pushing the determination of the reasonableness of rates to a future case because of the limited information available in the application and the lack of "granular data on costs." *Id*. at ¶ 64-65 (Appx at 128-29).

When the second entry on rehearing became final, IGS filed a timely notice of appeal. Notice of Appeal (Apr. 7, 2022).

Standard of Review

R.C. 4903.13 provides, in relevant part, that "[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable."

On questions of law, the Court has complete and independent power of review. *Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio*, 78 Ohio St. 3d 466, ¶8 (1997). Under this authority,

"it is the role of the judiciary, not administrative agencies, to make the ultimate determination about what the law means." *TWISM Enterprises, L.L.C. v. State Bd. of Registration for Professional Engineers and Surveyors*, Slip Op. No. 2022-Ohio-4677 (2022). Accordingly, "an administrative interpretation should never be used to alter the meaning of clear text." *Id*. at ¶ 44. If the Court finds that the statutory text is ambiguous and determines that it should consider an administrative interpretation with other tools of interpretation, the Court then should be guided not by "the mere fact that it is being offered by an administrative agency. A court may find agency input informative, or the court may find the agency position unconvincing." *Id*. at ¶45. In assessing the persuasiveness of an agency's interpretation of common words, there is no strong basis for deference to the agency interpretation. *Id*. at ¶ 47. Even in technical areas, "it remains the judiciary's role to independently interpret the law." *Id*.

The role of the Court in policing the Commission's interpretation of law is particularly relevant when the Commission seeks to treat generation services of electric distribution utilities as something they are not. For example, the Court found that the generation component under SB 3 (see discussion below) was not subject to Commission regulation and that the Commission's attempt to authorize recovery of the costs to plan and develop a generation facility as "ancillary costs" that remained subject to Commission regulation "blurs the legislative distinctions between electric transmission, generation, and distribution." *Industrial Energy Users-Ohio v. Pub. Utils. Comm'n of Ohio*, 117 Ohio St. 3d 486, ¶ 23 (2008). Given "[t]he existing legislation sufficiently segregates generation of electricity from distribution," the Court reversed the Commission's finding. *Id*.

On questions of fact, the Court will reverse a decision of the Commission if its findings are manifestly against the weight of the evidence or are so clearly unsupported by the record as

to show misapprehension, mistake, or willful disregard of duty. *Cleveland Elec. Illuminating Co. v. Pub. Utils. Comm'n of Ohio*, 42 Ohio St. 2d 403, ¶48 (1975).

Although this standard is deferential to Commission fact finding, it does serve as a check on the Commission's failure to properly read its own record, make findings of fact, and apply the law to those findings. R.C. 4903.09. "Although strict compliance with the terms of R.C. 4903.09, which requires the commission to file a written opinion setting forth its reasons for its decision, is not required, a legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Industrial Energy-Users-Ohio v. Pub. Utils. Comm'n of Ohio*, 117 Ohio St. 3d 486, ¶ 30 (2008) (internal quotation marks omitted).

For example, the Court applied this standard to reverse an order permitting Ohio Power to recover provider of last resort charges when the Commission mischaracterized the evidence to find that a charge was cost based. *In re Application of Columbus S. Power Co*., 128 Ohio St. 3d 512, ¶ 22-30 (2011). In that case, Ohio Power was providing generation service as the default provider to nearly all of its customers, but claimed that potential customer migration to other providers placed it at risk of losses in addition to its cost to provide that generation service. To justify a charge to cover that risk, Ohio Power presented evidence of the value of an option that it claimed customers benefited from because Ohio Power was the default service provider. Other parties in the case contested the claims about the use of the model or the migration risk that Ohio Power faced, and even the Commission staff noted that Ohio Power was not then at risk for customer migration. Despite these objections, the Commission nonetheless approved a charge, which it mischaracterized as cost-based. The Court found that evidence concerning the pricing model did not provide any support for determining the cost to provide the service, and that the finding that the charge was costs based was inconsistent with the balance of the evidence in the

record, including the Staff testimony. *Id*. at ¶ 28. Finding that no evidence supported the Commission's characterization of the charge as cost-based, the Court concluded that the Commission's ruling approving the charge was an abuse of discretion and reversible error. *Id*. at ¶ 29.

As discussed in the next section, this appeal presents questions of law and fact. In the decision below, the Commission has committed errors in both regards.

Argument

First Assignment of Error: In violation of R.C. 4909.15, 4928.02, and 4928.05, the Rate Case Orders unlawfully and unreasonably authorized Ohio Power to recover in distribution rates costs that Ohio Power incurs to supply a competitive product or service.

The Staff, Ohio Power, and OCC agreed with IGS that the Stipulation recommended that Ohio Power collect costs to support its default generation service in distribution rates. At hearing, the Staff attempted to relabel these costs as distribution costs. Staff Exhibit 3 at 9 (Supp. at 679). They clearly are not, and the Commission correctly did not fall for this relabeling.[5] Alternatively, the Staff and, belatedly, Ohio Power stated that these costs should be socialized, and OCC joined the argument by noting that the Stipulation would protect non-shopping customers from paying more for generation service. Staff Exhibit 1 at 31 and Staff Exhibit 3 at 9-11; Ohio Power Exhibit 4 at 3-4 (Supp. at 644, 679-81, and 53-54); Initial Post-Hearing Brief of Ohio Power in Support of the Joint Stipulation and Recommendation at 31 (June 14, 2021)

[5] That decision was correct because a finding relabeling generation costs as distribution costs would constitute reversible error. *Industrial Energy Users-Ohio v. Pub. Utils. Comm'n of Ohio*, 117 Ohio St. 3d 486, 490-91 (2008).

("Ohio Power Initial Brief");[6] Initial Brief by Office of the Ohio Consumers' Counsel at 9 (June 14, 2021) ("OCC Initial Brief").[7] Although the Commission did not adopt expressly either the recharacterization of the costs as "distribution" costs or the policy claims of Ohio Power, OCC, or the Commission Staff, the Opinion and Order permitted Ohio Power to continue to collect these costs in distribution rates. That authorization is unlawful.

As discussed in the Statement of Facts previously, Ohio law regarding the recovery of generation-related costs fundamentally changed in 1999. By enacting SB 3, the General Assembly "restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service." *Industrial Energy Users-Ohio,* 117 Ohio St.3d 486, 487 (2008). The foundation for competition was established by requiring "the three components of electric service—generation, transmission, and distribution—to be separated." *Id*. Initially in a transition step, SB 3 required the monopoly electric utilities to separate their business lines by function, i.e., distribution, transmission, and generation, and adopt corporate separation plans to prevent cross-subsidies across those functions. R.C. 4928.31(A). "In short, each service component was required to stand on its own." *Migden-Ostrander v. Pub. Utils. Comm'n of Ohio,* 102 Ohio St.3d 451, 452-53 (2004).

The purpose of unbundling was to separate the competitive and non-competitive functions so that customers could "shop" for their competitive retail electric service. As the Supreme Court has noted, the General Assembly "restructured Ohio's electric-utility industry to foster retail competition in the generation component of electric service*." Industrial Energy*

[6] Available at https://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=c7c335e4-635b-4553-906c-854d8212f11d.

[7] Available at https://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=e737a5c5-161b-46ae-8238-1db30d83c586.

Users-Ohio, 117 Ohio St.3d 486, 487 (2008). As a starting point, SB 3 declared retail electric generation service to be a competitive electric service. To that end, R.C. 4928.03(A) states, "Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers."

In contrast to distribution services offered as a monopoly service by the electric utility, the standard service offer, by law, is a utility offering of competitive retail electric services. RC. 4928.141 ("a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers"). This legal treatment follows from the initial underpinnings of restructuring of the electric utility industry beginning in 1999. In SB 3, the General Assembly provided that the electric distribution utility would be authorized to serve as the default generation service provider. R.C. 4928.14(B) (superseded in 2007). As noted previously, however, the transition to retail competition did not go smoothly, in part leading to the enactment of SB 221.

In SB 221, the General Assembly permitted electric utilities to continue to self-source generation supply for the default service offer, but that option has been supplanted by a Commission-encouraged switch to competitively sourced generation supply.

What did not change with the adoption of SB 221, however, was the limit on the Commission's authority to authorize recovery of competitive retail electric service costs in distribution rates. Under R.C. 4928.05(A), the Commission does not have any authority to regulate competitive retail electric services under Chapter 4909 of the Revised Code. That section provides in relevant part:

> On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

Under R.C. 4928.05(A)(2), noncompetitive retail electric service, i.e., distribution service, remains under Commission jurisdiction under Chapter 4909. That subdivision provides:

> On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law.

Thus, Ohio law declares generation service as a competitive retail electric service and removes that service from regulation by the Commission under the Commission's general rate making authority under Chapter 4909. Distribution rates remain under Commission jurisdiction and are established under the rate formula required by R.C. 4909.15. Ohio law is clear in its prohibition against regulation of competitive retail electric services in a distribution rate cases.

Often ignored but particularly important in this case, the General Assembly also sought to assure that electric customers would have nondiscriminatory access to monopoly services. This policy is expressed in R.C. 4928.03:

> Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section 4928.02 of the Revised Code.

This requirement is rooted in the state electric policy that seeks to "[e]nsure the availability of unbundled and comparable retail electric service" and "nondiscriminatory, and reasonably priced retail electric service." R.C. 4928.02(A) and (B). It also rests on the Commission's role in assuring that the competitive market is not frustrated by cross-subsidies. To that end, the Commission must "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, *including by prohibiting the recovery of any generation-related costs through distribution or transmission rates*." R.C. 4928.02(H) (emphasis added).

While Ohio law requires the unbundling of generation, distribution, and transmission costs and their recovery in rates, the electric utilities have, with Commission support, often attempted to collect generation-related costs through distribution charges. For example, in *Elyria Foundry v. Pub. Utils. Comm'n of Ohio*, 114 Ohio St.3d 305 (2007), the Commission authorized FirstEnergy to recover fuel costs to serve default generation service through distribution rates. Following an appeal, the Court held that "[f]uel is an incremental cost component of generation service. Thus, by allowing that generation-cost component to be deferred and subsequently recovered in a distribution rate case, or alternatively allowing FirstEnergy to apply generation

revenues to reduce distribution expenses, the commission violated R.C. 4928.02(G)." *Id.* at 315.[8]

Thus, Ohio law and the state energy policy require the Commission to unbundle costs used to supply the standard service offer from distribution rates. The statutes ordering the transition to competitively sourced generation and the sections governing the Commission's rate making authority prohibit the Commission from authorizing the recovery of generation-related costs through distribution rates. Likewise, state policy precludes the Commission from authorizing distribution rates that subsidize a generation service.

In this case, the record demonstrates another instance in which the Commission has authorized the collection of generation-related costs in distribution rates. As the uncontroverted evidence demonstrates, Ohio Power identified that it collects at least $4.7 million in known and quantified costs and other assignable and allocable costs to provide default service.[9] IGS Exhibits 3, 13, and 14; Tr. at 36, 49-53, 158-59; Tr. at 290-92; and Tr. at 346-49 (Supp. at 238, 243, 245, 265, 278-82, 382-83, 403-05, 442-45). The $4.7 million includes assessments for the PUCO and OCC, charges required by Ohio law to fund the Commission and OCC, that are directly proportional to the amount of default generation service sold by Ohio Power to its default generation service customers. It also includes bad debt expense directly assignable to the provision of generation service. (Notably, competitive retail electric suppliers like IGS must incur these same costs and recover them through market-based prices.) Two riders to properly assign those costs to generation-related services exist, but remain unused because of the

[8] Division (G) of R.C. 4928.02 was changed to Division (H) with the adoption of SB 221. The text of the two divisions is identical.

[9] IGS witness Lacey presented testimony demonstrating that Ohio Power was recovering approximately $64 million in generation-related costs in distribution rates to support the standard generation service offer. IGS/Direct Exhibit 2 at 5-16 (Supp. at 101-12)

Commission's authorization of Ohio Power's decision to bargain a resolution of this case on a term that leaves the riders set at zero. Because the Commission lacks authority to authorize recovery for competitive generation service in a distribution case, the authorization is unlawful under R.C. 4928.05(A)(1). and 4909.15.

Further, state policy directs the Commission to ensure that competitive electric services are not subsidized by noncompetitive electric services. R.C. 4928.02(H). The Opinion and Order, however, permits unlawful "socialization" of costs by spreading the costs of default generation service to all customers instead of those who purchase default service. The effect of "socializing" the cost of default service artificially lowers the price of that service. This artificially low-price leads to two unreasonable outcomes. First, the price signals provided by the standard service offer result in an opaque and misleading price comparison to customers considering retail choice offers. Second, the socialization of the costs of providing the standard service offer is a cross-subsidy that could reduce competition in Ohio Power's service territory and have long-term effects on the rollout of other competitive services by delaying or preventing entry and curtailing active presence in the market. IGS/Direct Exhibit 2 at 16-19 (Supp. at 112-15).

That the Commission approved this poor outcome in the context of a review of a stipulation does not alter its unlawfulness. The Commission cannot lawfully approve a settlement that violates Ohio law. *Monongahela Power Co. v. Pub. Utils. Comm'n of Ohio*, 104 Ohio St. 3d 517, ¶ 26 (2004) (Commission cannot approve terms of a settlement that are contrary to law). Under applicable Ohio law, the Commission is prohibited from authorizing the recovery of generation-related costs in a distribution rate case. R.C. 4928.05 and 4909.15. Further, Ohio law directs the Commission to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric

service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, *including by prohibiting the recovery of any generation-related costs through distribution or transmission rates*." R.C. 4928.02(H) (emphasis added). Despite these prohibitions, the Commission has unlawfully authorized distribution rates for Ohio Power that permit it to recover costs incurred to provide default generation service and permitted Ohio Power to subsidize its retail default generation service. Accordingly, the Court should reverse the Rate Orders.

Second Assignment of Error: In violation of R.C. 4903.09, the Rate Case Orders unlawfully and unreasonably found that there is no basis upon which to conclude that Ohio Power's distribution rates include known, quantifiable costs that should be allocated to a rider, identified as the Retail Reconciliation Rider, because this finding was not supported by the uncontroverted evidence that Ohio Power recovers known and quantifiable costs to provide default service in its distribution rates.

R.C. 4903.09 requires the Commission to make findings of fact and conclusions of law based upon record evidence. Specifically:

> 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.

R.C. 4903.09. This statutory requirement imposes on the Commission an obligation to "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence." *In re Columbus S. Power Co*., 128 Ohio St. 3d 512, ¶ 30 (2011). Although the Commission claims to have followed the record to approve the Stipulation, its failure to assign known and quantified costs to the Retail Reconciliation Rider and SSO Credit Rider is manifestly unsupported by the record.

As previously noted, the Commission approved the provision of the Stipulation recommending that the Retail Reconciliation Rider and SSO Credit Rider remain at zero based

on the Staff Report recommendation and supporting testimony provided by Ohio Power, the Staff, and OCC. Opinion and Order, ¶ 183 (Appx at 78-79). In support of that decision, it found that there was no basis on which to conclude that Ohio Power's distribution rates include known and quantifiable costs that should be allocated to the Retail Reconciliation Rider. *Id*. at ¶ 184 (Appx at 79-80). In that paragraph, the Commission rejected the analysis offered by IGS that a greater amount should be assigned and allocated to the riders. *Id*. However, the Commission said nothing regarding the other evidence showing that Ohio Power proposed to collect generation-related costs in distribution rates provided by Commission Staff, OCC, and Ohio Power in cross-examination testimony, including the $4.7 million identified by Ohio Power itself. *Id*. Additionally, the Commission concluded that Ohio Power had complied with its prior order in the ESP IV Case to provide a study of the costs Ohio Power was recovering to provide generation service that it was recovering in distribution rates. *Id*. at ¶ 185 (Appx at 80). It concluded its decision on the riders by noting that parties could seek to "populate" the riders in some future case. *Id*. at ¶ 186 (Appx at 80).

Because "kicking the can down the road to the next case" did not result in lawful rates in this case, IGS sought rehearing of the Commission's finding that there was no evidence that generation-related costs would be collected in distribution rates and pointed out that the uncontested record supported at least the assignment and allocation of the generation-related costs identified by Ohio Power. IGS Application for Rehearing at 4 and 10-13 (Appx at 421 and 427-30). In the Second Entry on Rehearing, the Commission recast and limited its finding that there was no basis to conclude that Ohio Power's distribution rates recovered generation-related costs in two ways. First, it asserted that the statement that there was no basis to conclude that generation-related costs were collected in rates "was rendered with respect to IGS/Direct Lacey's

testimony." Second Entry on Rehearing, ¶ 49 (Appx at 121). Second, it relied on the testimony of a Commission Staff witness that "rates remain at zero due to the limited identified costs in the application and the lack of granular costs and services between shopping and default customers." *Id*. at ¶ 50 (Appx at 121-22) (internal quotation marks omitted). It also pointed to the testimony of Ohio Power to the effect that parties had different perspectives on the potential quantification and allocation of costs. *Id*. It then accused IGS of "overhauling" its litigation position on rehearing. *Id*. Boiled down to its essentials, then, the Commission's response is to ignore the record that all parties agree that some generation-related costs are being recovered in distribution rates and to shift the blame to the messenger for pointing it out.

The finding that there is no basis to conclude that distribution rates include known and quantifiable costs that should be allocated to the riders in the Opinion and Order has no record support. Ohio Power itself demonstrated that there were known and quantifiable direct costs being collected and all interested parties agreed that the rates proposed in this case would recover costs associated with the provision of default generation service if the riders were not set at a rate other than zero. IGS Exhibits 3, 13, and 14; Tr. at 36, 49-53, 158-59; Tr. at 290-92; and Tr. at 346-49 (Supp. at 238, 243, 245, 265, 278-82, 382-83, 403-05, and 442-45). Ohio Power's own analysis, though incomplete, demonstrated that Ohio Power incurred at least $4.7 million in costs directly attributable to default service. Although the information was incomplete, the Commission nonetheless concluded that Ohio Power did not violate the Commission's order to conduct an analysis of the costs to support default and competitive supply services. Opinion and Order, ¶ 185 (Appx at 80). If that is so, it is unrefuted that the Rate Orders authorized Ohio Power to collect $4.7 million in in distribution rates that are directly assignable to the provision of default generation service.

Staff and OCC also agreed that the settlement proposed that Ohio Power collect the costs of providing generation-related services in distribution rates. On cross-examination, both the Staff and OCC conceded that costs to provide default generation service would be collected in distribution rates if the settlement is approved in this case. Tr. at 291-92 and 346-49 (Supp. at 403-05 and 442-45).

The only challenge raised by Staff and OCC regarding these costs does not go to whether the costs are generation-related or whether they are being collected in rates. Instead, both assert that the costs should be characterized as distribution costs on the theory that the relabeling of generation costs converts them into distribution costs. Tr. at 291-92 and 346-49 (Supp. at 403-05 and 442-45). This relabeling, however, does not change the fact that Ohio Power collects costs to provide competitive generation services in distribution rates.

Likewise, Mr. Lacey, on behalf of IGS and another intervenor, identified both direct and indirect costs that Ohio Power recovers in rates. IGS/Direct Exhibit 2 (Supp. at 94). See, also, IGS Exhibits 13 and 14 (Ohio Power admissions in response to Staff data requests) (Supp. at 243-48). Although the Commission did not accept the IGS analysis that would have assigned and allocated more costs to the riders,[10] this critique does not change the fact that Ohio Power is now recovering in distribution rates at least the direct costs identified by Ohio Power.

At a minimum, therefore, it is uncontested that Ohio Power incurs and recovers in distribution rates $4.7 million in costs directly attributable to the provision of default service.

[10] According to the Commission, Mr. Lacey did not follow the Commission's direction in the ESP IV Order because he did not factor choice program costs into his recommendation. Opinion and Order, ¶ 184 (Appx at 79-80). Mr. Lacey concluded the costs of supporting competitive suppliers are monopoly costs of the utility and a distribution service. IGS/Direct Ex. 2 at 44 (Supp. at 140). The reason is important: if these costs concern distribution service, netting them from the costs associated with the provision of competitive supply is improper. *Id*. Thus, Mr. Lacey did not fail to factor choice costs into his recommendation because there was nothing to factor.

These costs are both known and quantified. Likewise, Ohio Power incurs $1.2 million in direct costs directly attributable to the support of competitive supply. IGS Exhibit 3 at Exhibit DMR-2 (Supp. at 241). Again, these costs are both known and quantified. In the case of the latter, the only dispute is whether they should be netted against the amount to support default service. IGS/Direct Exhibit 2 at 44 (Supp. at 140) (arguing that it is improper to net costs to support competitive suppliers from the costs to support default service). Even if that offset is proper—which it is not—there remains $3.5 million of known and quantifiable costs that the Commission should have removed from distribution rates by setting the riders at a rate other than zero. Thus, the finding that "there is no basis upon which to conclude that [Ohio Power's] distribution rates include known, quantifiable costs that should be allocated to the [Retail Reconciliation Rider]" is not supported the uncontroverted record.

To avoid the incorrect conclusion the Commission made in the Opinion and Order that there was no basis on which to conclude that generation-related costs that are assignable to the riders, the Commission's Second Entry on Rehearing recasts its own finding into something it was not, dances around the fact that there are at least some known and quantifiable costs, and criticizes IGS's litigation position. Second Entry on Rehearing at ¶ 44-50 (Feb. 8, 2023) (Appx at 118-22).

The Commission's first claim that the finding that there is no record to support the assignment of generation-related costs is limited to a critique of IGS's witness in paragraph 49 simply does not address the fact that the Commission ignored the uncontested record that Ohio Power was recovering distribution related costs in distribution rates.

The Commission then seeks in the subsequent paragraph, 50, to buttress its position by noting there was a dispute as to the amount by relying on Staff testimony that Ohio Power's

study lacked sufficient "granularity" to base a decision. The Staff testimony touching on granularity, however, concerned a limit on the Ohio Power study, not whether there was direct generation-related service being collected in distribution rates. Tr. at 372 (Supp. at 468). In fact, the Commission Staff simply accepted Ohio Power's assertion that its record keeping was inadequate to "analyze" the costs, and Commission Staff did not make its own effort to determine what other costs might be assigned to the two riders. *Id*. Again, the Staff does not dispute that Ohio Power is collecting generation-related costs in distribution rates.

Finally, the Commission asserts in paragraph 50 that IGS's argument that at least some direct costs were undisputed was a shift in its litigation position. This criticism of IGS's litigation position however, ignores two obvious points. First, as demonstrated in its application for rehearing and this appeal, IGS urged the Commission to reverse its finding rejecting the use of the IGS testimony to determine the amount that should be assigned or allocated to the riders. Application for Rehearing of Interstate Gas Supply, Inc. at 4 (Appx at 421), see, also, third assignment of error discussed below. Thus, the Commission's suggestion that IGS shifted its litigation position is factually wrong. Second, the Commission's criticism ignores that the messenger was right. Ohio Power, the Commission Staff, OCC, and IGS *agree* that Ohio Power is recovering generation-related costs in distribution rates.[11]

Despite that agreement, the Commission nonetheless found in the Opinion and Order that there was no basis on which to conclude that Ohio Power's distribution rates include known and quantifiable costs that should be allocated to the Retail Reconciliation Rider. *Id*. at ¶ 184 (Appx at 79-80). That finding was in error, and the subsequent attempts to recharacterize or cover up

[11] It is also uncontroverted that Ohio Power will collect in distribution rates costs such as call center costs that should be allocated to the Retail Reconciliation Rider. IGS Ex. 3 at Ex.DMR-2 (Supp. at 241).

that error do not change the fact the Commission authorized Ohio Power to collect generation-related costs in its distribution rates. Because the Commission ignored its own record, therefore, the Opinion and Order violates the requirements of R.C. 4903.09.

Third Assignment of Error: In violation of R.C. 4903.09, the Rate Case Orders unreasonably found that an analysis of known and quantifiable costs to provide default service and the customer choice program was incomplete because the analysis provided by appellant did not factor choice program costs as to riders identified as the Retail Reconciliation Rider and the SSO Credit Rider when the record does not support that finding.

In the ESP IV Case, the Commission directed Ohio Power to analyze, as part of the rate case, its actual costs of providing SSO generation service. It also directed Ohio Power to analyze, in the rate case, its actual costs associated with the choice program. Following a thorough analysis of AEP Ohio's distribution rates in the rate case, the Commission would determine whether it is necessary to allocate costs between shopping and non-shopping customers, in order to ensure that the Company's rates are fair and reasonable for all customers. ESP IV Case, Opinion and Order ¶ 215 (Appx at 366). Notably, nothing in the Commission's order directed any other party to make such an analysis or concluded that the costs to provide default generation service or the costs to support competitive suppliers should be offset; the rate setting was explicitly left to another day.

In response to that order, Ohio Power provided a one-page spreadsheet identifying directly assignable costs related to the provision of default generation service that it was proposing to recover in distribution rates. IGS Exhibit 3 at DRM Exhibit 2 (Supp. at 241). That same sheet also identified costs that Ohio Power incurs to support the retail choice program. The Ohio Power witness proposed to net those costs when he calculated rates for the Retail Reconciliation Rider and the SSO Credit Rider. *Id.* He also identified indirect cost categories such as call center and legal expenses related to the provision of default generation service, but

failed to undertake any effort to quantify the amounts that were proposed for collection in distribution rates. *Id*.

In addition to the estimate of the costs to provide default generation service and choice service provided by Ohio Power, IGS presented the Commission a separate and more thorough estimate. IGS/Direct Exhibit 2 (Supp. at 94). Based on a review of Ohio Power's capital and expense accounts. The estimate included costs that Ohio Power directly and indirectly incurred to support the provision of default generation service proposed for recovery through distribution rates. Based on assignment and allocation of costs, the witness estimated that Ohio Power was recovering more than $64 million in generation-related costs to provide default generation service. The witness further recommended that the Commission not offset these costs with the costs that Ohio Power recovered to provide support to competitive suppliers because these costs are part of the monopoly service that only Ohio Power can provide. *Id*. at 41 (Supp. at 137). (Notably, some of these costs are recovered directly from competitive suppliers through charges Ohio Power directly assesses the suppliers. *Id*. at 44 (Supp. at 140).)

When the Commission determined that it was reasonable to set the riders at zero and permit Ohio Power to collect known and quantified costs to provide generation service in distribution rates, it rejected that recommendation of IGS on the ground that it was incomplete because the supporting witness did not offset choice program costs against the costs Ohio Power incurred to provide default generation service. Opinion and Order, ¶ 184 (Appx at 79-80). When IGS challenged this finding, the Commission again responded that it rejected the testimony because "it does not comply with the requirements set forth by the Commission in the ESP 4 Case" because he did not attempt to factor choice program costs into his recommendation on the rider rates. Second Entry on Rehearing, ¶ 54 (Appx at 123-24). Additionally, the Commission

concluded that IGS was attempting to improperly relitigate an issue resolved in a prior order. *Id*. at ¶ 55 (Appx at 124).

As discussed in the prior assignment of error, R.C. 4903.09 requires the Commission to base its findings on the record. The record does not support either reason the Commission has advanced in its Opinion and Order or Second Entry on Rehearing.

In fact, the IGS witness did provide a complete study that addressed the costs of Ohio Power to supply generation service that were proposed for recovery in distribution rates. Unlike Ohio Power, which identified only directly assignable costs of providing generation service , the IGS witness also attempted to allocate the indirect costs associated with plant and staffing that are necessary to provide that service. IGS/Direct Exhibit 2 at 36 (Supp. at 132). The witness also explained at length why the Commission should not offset those costs with the costs recovered in rates for the support of competitive suppliers. *Id*. at 41-48 (Supp. at 137-44). Thus, the IGS witness did make a "thorough analysis of AEP Ohio's distribution rates" as described in the ESP IV Case. ESP IV Case, Opinion and Order ¶ 215 (Appx at 366).

Further, the claim that IGS failed to acknowledge costs to serve choice customers is patently wrong: IGS recognized that there were such costs, but they should not offset costs recovered through the Retail Reconciliation Rider. The reason is equally obvious: The services, which competitive suppliers pay for through multiple fees, are instances in which Ohio Power is acting as the sole provider of those services. For instance, competitive suppliers can receive metering information from only Ohio Power. Similarly, only Ohio Power can effectuate a change in generation supplier. In contrast, Commission rules require competitors to supply their own call centers, competitive suppliers must provide their own legal and administrative support, and they pay their own OCC and PUCO assessments. Unlike the costs associated with the standard

service offer, which are declared a competitive service by Ohio law, therefore, the services for supporting choice remain non-competitive monopoly services regulated by Chapter 4909 of the Revised Code and paid for by competitive suppliers. IGS/Direct Exhibit 2 at 42-43 (Supp. at 138-39).

The mistake embedded in the Commission's decision, however, is compounded because it misstates its own order in the ESP IV Case. That order directs *Ohio Power* to conduct a study of its costs to provide generation service. ESP IV Case, Opinion and Order ¶ 214-15 (Appx at 366). It said nothing about whether the costs of providing generation service to default customers and to support competitive suppliers should be netted. Instead, the Commission left to the rate case "whether it is necessary to reallocate costs between shopping and non-shopping customers." ESP IV Case, Opinion and Order ¶ 215 (Appx at 366). Thus, the conclusion in the Second Entry on Rehearing that the IGS testimony should be rejected because it "does not comply with the requirements set forth by the Commission in the ESP 4 Case" is belied by the fact that the ESP IV order applied only to Ohio Power. Second Entry on Rehearing, ¶ 54 (Appx at 123-24).

Moreover, the Orders' reasoning presumes that any failure of IGS to "net" costs justifies the Commission's unlawful application of its traditional regulatory authority to provide Ohio Power with compensation for the cost of competitive services in a distribution rate case. Of course, as a creature of statute, the Commission acks the authority to expand its jurisdiction on its own initiative. *Monongahela Power Co. v. Pub. Utils. Comm'n of Ohio*, 104 Ohio St. 3d 517, ¶ 26 (2004).

Further, the second ground for denying rehearing, the claim that IGS is seeking to relitigate an issue addressed in the ESP IV case, does not withstand a reading of the prior order. For there to be issue preclusion by either collateral estoppel or res adjudicata, the prior case must

have reached a conclusion on the particular fact or issue. *Office of Consumers' Counsel v. Pub. Utils. Comm'n of Ohio*, 16 Ohio St. 3d 9, 10 (1985) ("These doctrines operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."). In the ESP IV Order, the Commission directed only Ohio Power to conduct a study and expressly left the determination of the reasonableness of rates to the rate case. ESP IV Case, Opinion and Order ¶ 214-15 (Appx at 366). Thus, the Commission's conclusion that IGS, or any other party, was required to follow a particular approach to determine the costs Ohio Power is recovering in distribution rates to provide generation service is wrong: the finding and order in the ESP IV case cannot be stretched to support the Commission's conclusion in this proceeding that IGS is relitigating a settled issue.

In conclusion, the Commission revised the express terms of the ESP IV Case and then used that revised history to reject testimony that Ohio Power is recovering $64.4 million in assignable and allocable costs to provide default service. The reasons for rejecting the study are premised on the incorrect assertion that IGS failed to comply with an order that did not apply to it. It also ignores that IGS went further than Ohio Power in identifying and explaining what costs should be recovered and credited through the riders. Moreover, the Commission's assertion that IGS was attempting to relitigate an issue that had been previously resolved is belied by the fact that the Commission expressly reserved in the ESP IV Case the determination of the amounts that should be removed from distribution rates to the next distribution rate case. As a result, the grounds upon which the Commission rejected the IGS testimony are not supported by the record and should be reversed under R.C. 4903.09.

Assignment of Error 4: In violation of R.C. 4903.09, the Rate Case Orders unlawfully and unreasonably deferred population of riders identified as the Retail Reconciliation Rider and the SSO Credit Rider to a future case.

As discussed below, the Court is familiar with instances in which the Commission fails to reach a material issue presented for decision and then kicks resolution of the issue down the road to some undefined proceeding. The result of this "kick the can" approach to ratemaking is an unlawful decision and subsequently unreasonable and unlawful rates. This case provides the Court another instance of the Commission unlawfully deferring the duties assigned to it by Ohio law.

The Opinion and Order found that the provision leaving the Retail Reconciliation Rider and SSO Credit Rider at zero does not violate any important regulatory principle or practice based on the Staff Report recommendation and testimony supporting the Stipulation. Opinion and Order, ¶ 183 (Appx at 78-79). The remainder of the discussion of this provision of the Stipulation consisted of only three paragraphs. In the first paragraph the Commission found that there were no known and quantifiable costs of default service collected in distribution rates. The Commission also rejected the results of Mr. Lacey's analysis that Ohio Power is collecting $64 million in known and quantifiable costs of providing the standard service offer in distribution rates. The other two paragraphs excuse Ohio Power's effort to measure those costs. *Id.* at ¶ 184 and 185 (Appx at 79-80). The Opinion and Order then concludes its decision to set the riders at zero with a recommendation that interested parties can try again in another rate proceeding or file a complaint. *Id*. at ¶ 186 (Appx at 80).

As an additional reason for granting rehearing of the Opinion and Order, IGS argued that the Commission had not addressed an issue regarding the reasonableness of rates that it was required to address under R.C. 4903.09, citing the Court's decision in *In re Suvon, LLC,* 2021-Ohio-3630 (Ohio Sup. Ct. Oct. 14, 2021) for support. In the Second Entry on Rehearing, the Commission denied rehearing on this issue because it concluded that setting the riders at zero

was a reasonable outcome and that a party could seek to reset the riders at something other than zero if it complied with the Commission's ESP IV order or filed a complaint. Second Entry on Rehearing, ¶¶ 64 and 65 (Appx at 128-30).

The Commission's order approving the provision of the Stipulation setting the Retail Reconciliation Rider and SSO Credit Rider at zero and kicking the determination of the reasonableness of distribution rates to another proceeding presents a variation on a theme that the Ohio Supreme Court has already rejected. *In re Suvon, LLC*, 2021-Ohio-3630 (Ohio Sup. Ct. Oct. 14, 2021). In the *Suvon* case, the Commission issued an order providing FirstEnergy Advisors with a competitive supplier certificate. It based that decision on a Staff report, which summarized the assertions of applicant, but failed to address the detailed objections concerning corporate separation presented by OCC and competitive suppliers. On appeal, the Court reversed the Commission's order because it violated R.C. 4903.09.

In reversing the Commission order, the Court explained that R.C 4903.09 requires the Commission to issue findings of fact and a written opinion setting forth the reasons for its decisions based on the findings of fact. In performing this duty, the Commission must make "independent findings" that satisfy the applicable statutory requirements. *Id*. at ¶ 25. "Of course, PUCO can adopt reports prepared by its staff and incorporate them into its order, but these reports must satisfy the requirements of the statute; that is, they must contain sufficient factual findings and conclusions of law." *Id*. at ¶ 22. Separately, the Court also found that deferring the issues that were required to be addressed in the certification proceeding to another proceeding violated the Commission's duty to make the statutory determination required to approve an application for a certificate to provide competitive energy services. *Id*. at ¶ 33.

As it did in *Suvon*, the Commission relies on a Staff Report and Ohio Power testimony that is far from complete. The Staff Report presented two findings. The first finding was that Ohio Power did not examine all cost factors and therefore "Staff cannot recommend a charge that is not just and reasonable." Staff Exhibit 1 at 31 (Supp. at 644). The second had nothing to do with the Staff investigation of Ohio Power's application; instead, the Staff inserted a policy conclusion that the standard service offer is a default service available to all customers. *Id*. This statement apparently served as the basis for the Staff position that these costs should be socialized. Staff Exhibit 3 at 9 (Supp. at 679).

The hearing explored the investigation that went into the Staff Report. At hearing, the Staff witness who described the Staff's investigation of Ohio Power's response to the Commission order in the ESP IV Case stated that the investigation consisted of three interrogatories that indicated that Ohio Power's efforts were incomplete. Tr. at 356-57 and 416-17; IGS Exhibits 13, 14, 15, and 16 (Supp. at 452-53 and 243-256). Upon receipt of those responses, the Staff undertook no further investigation even though it is common for the Staff to issue additional data requests when it determines they are necessary. *Id*. Staff also assumed that the costs Ohio Power incurred to provide default service should be socialized through distribution rates but did not address the legal requirements governing distribution rates. Staff Exhibit 3 at 9 (Supp. at 679).

The testimony provided by OCC and Ohio Power does not fill in the missing pieces left by the Staff Report. OCC supported setting the riders at zero because it would keep the default service rate low. OCC Exhibit 1 at 9-10 (Supp. at 704-05). It does not provide insight into what costs Ohio Power recovers and whether those costs are recovered legally in distribution rates, and it ignores the fact that residential customers receiving generation service from competitive

suppliers are paying too much. The testimony offered by Ohio Power likewise offers little in the way of substantive support for the provision setting the riders at zero. In defending the provision, the witness for Ohio Power in support of the Stipulation offered that it was a negotiated position and that there might be some basis for socializing the generation-related costs. Ohio Power Exhibit 4 at 4 (Supp. at 54). This less-than-rousing endorsement—from the same witness who identified both directly assignable and other "qualitative" costs to provide generation service that are recovered in Ohio Power's distribution rates—does not negate the fact that there are known and quantifiable costs that Ohio Power is recovering for the provision of generation service or provide any basis to find that the recovery is consistent with the requirements of Ohio law.

Although Ohio Power was ordered to identify the costs it recovered in distribution rates for the provision of generation service, the burden fell to competitive suppliers to complete this mission. Based on the suppliers' efforts, the record shows agreement from Staff, Ohio Power, and OCC that known and quantifiable costs are being incurred to support default generation service and that the Rate Order authorized these costs to be recovered in distribution rates. IGS Exhibits 3, 13, and 14; Tr. at 36, 49-53, 158-59; Tr. at 290-92; and Tr. at 346-49 (Supp. at 238, 243, 245, 265, 278-82, 382-83, 403-05, and 442-45).

Besides showing that Ohio Power is collecting generation-related service costs in distribution rates, IGS also showed that authorization of the recovery of those costs in distribution rates was beyond the legal authority of the Commission and that such recovery promoted adverse economic effects on consumers, competitors, and competition in the generation service market by permitting a utility to collect generation costs in monopoly

distribution rates. See Initial Brief of Interstate Gas Supply, Inc. at 12-22 (June 14, 2021)[12] and Joint Reply Brief of Interstate Gas Supply, Inc. and Direct Energy Business, LLC and Direct Energy Services, LLC at 3-19 (July 6, 2021) ("IGS/Direct Reply Brief"),;[13] IGS/Direct Exhibit 2 passim (Supp. at 94). Although IGS raised these issues through its testimony and briefs, the Commission does not address any of the legal or economic consequences of approval of the provision setting the riders at zero in either of its decisions on the merits of setting the riders at zero.

In substance, then, the Commission's decisions in the Rate Orders to leave the riders at zero is based on (1) finding that the record does not support a determination of known and quantifiable costs; (2) agreeing with a Staff Report that effectively excuses Ohio Power's indifference to the Commission's prior order and advances a policy claim wholly at odds with the requirements of Ohio law, (3) ignoring the legal and economic problems that the provision setting the riders at zero presents, and (4) kicking the determination that distribution rates are just and reasonable that is required to be made in this case to some future case or switching the burden of proof to the competitors to show that distribution rates are unreasonable. This "reasoning" cannot stand for the same reasons the Court rejected the Commission's inaction in *Suvon*.

First, the Rate Orders fail to address many of the material issues the Commission must decide. The Commission must decide if the resulting distribution rates are just and reasonable. R.C. 4909.15(E). However, the Staff Report on which the Rate Orders rely states that it cannot

[12] https://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=42955a7f-d6b7-4339-8469-3675fddaf7d8

[13] https://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=d235e743-726d-4454-8329-3ab61c4d40f3

determine reasonable rates based on the study provided by Ohio Power in response to the Commission order in the ESP IV Case. Staff Exhibit 1 at 31 (Supp. at 644). The other testimony demonstrates that all parties agree that the Rate Orders permitted Ohio Power to collect generation-related costs in distribution rates, a result that Ohio law does not permit. Accordingly, reliance on the Staff Report or the testimony of parties supporting the Stipulation cannot result in rates that are just and reasonable.

Second, the Staff Report on which the Commission relies falls short of showing why costs that the parties agree are incurred to support default service should be recovered in distribution rates. The Staff Report did not proceed beyond the fact that Ohio Power's efforts to address the prior Commission order were incomplete. The proper question, however, is not whether Ohio Power proposed to collect these costs, but the degree to which they are proposed for recovery in distribution rates. On that question, the Staff investigation stopped short. If Ohio Power's response was incomplete, then the efforts of the Commission and its Staff should be directed at reversing that failure, not excusing it. Yet, the Rate Orders failed to allocate costs to the riders on the basis that the report was incomplete, even though certain costs related to the provision of default generation service were clearly known and quantifiable. Effectively, the Rate Orders determined that perfect was indeed the enemy of good. As a result, the Rate Orders authorized Ohio Power to collect millions of dollars in generation-related costs in distribution rates paid for in part by shopping customers.

Third, any reliance on the Staff's characterization (and the other parties' reliance on Staff's characterization) that these costs are distribution related or should be socialized is misdirected. A Staff recommendation cannot alter the law that requires functionalization of distribution, transmission, and generation costs and prohibits the recovery of generation costs in

distribution rates. *Industrial Energy Users-Ohio v. Pub. Utils. Comm'n of Ohio*, 117 Ohio St. 3d 486, 490-91 (2008) and *Wingo v. Nationwide Energy Partners*, 2020-Ohio-5583 (Ohio Sup. Ct. 2020) (Commission cannot impose policy determination that would violate Ohio law).

Finally, the suggestion that this wrong can be righted by a future case or by complaint confirms the error of the Opinion and Order because the Commission, under R.C. 4909.15(E), must determine that the approved rates are just and reasonable in this case.[14] *Suvon*, at ¶ 33.

In summary, the decision to leave the riders at zero follows the same path that the Court rejected in *Suvon*. By relying on a Staff Report that is contradicted by a record showing that known and quantifiable costs of a competitive service are recovered in distribution rates, failing to address the detailed legal and economic problems with the recommendation to leave the riders at zero, and kicking a determination of the reasonableness of rates to another proceeding, the Commission violates the requirements of R.C. 4903.09.

Conclusion

The Commission cannot bypass the requirements of Ohio law when it approves a stipulation. *Monongahela Power Co. v. Pub. Utils. Comm'n of Ohio*, 104 Ohio St. 3d, 517 ¶ 26 (2004). Nonetheless, the Rate Orders authorized Ohio Power to collect known and quantified costs to provide default generation service in distribution rates. Because that decision is unlawful and unreasonable under R.C. 4903.09, 4928.05, and 4909.15, the Court should reverse and remand the decision to the Commission with the direction that it should conduct a timely hearing to correct its error.

[14] Additionally, the recommendation that parties seek reasonable rates through a complaint case unfairly shifts the burden of demonstrating that rates are reasonable from Ohio Power to the complainant. Compare R.C. 4928.18 (burden to show that rates are reasonable is on the applicant) and R.C. 4905.26 (burden to show that rate or practice is unreasonable is on the complainant).

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief of Appellant Interstate Gas Supply, LLC, was served on the following parties via electronic transmission, hand-delivery, or first-class United States Mail on June 20, 2023.

/s/ Evan Betterton

Evan Betterton

Appendix

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