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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF THE INTEREST OF THE AMICUS..... 1

II. INTRODUCTION 2

III. STATEMENT OF FACTS..... 4

IV. ARGUMENT..... 4

A. The Commission generally lacks statutory *and* constitutional power to issue retroactive orders..... 4

1. The Ohio Constitution prohibits retroactive laws. 5

2. Under these principles, the Commission generally lacks authority to issue retroactive orders..... 7

3. The Commission’s modification powers only operate prospectively. 9

B. In the order below, the Commission exceeded its statutory and constitutional authority..... 10

1. The Commission conceded that it was revisiting an issue settled in its prior order..... 10

2. The modification was retroactive. 11

3. No law authorized the Commission to retroactively modify Ohio Power’s phase-in plan. 13

4. Finally, even had the retroactive order been statutorily authorized, the order affected substantive rights and thus would have been unconstitutional..... 15

C. The Commission’s avowed test for allowing retroactive modification is overbroad. 16

V. CONCLUSION..... 18

PROOF OF SERVICE 19

APPENDIX

 Ohio Const., Art. II, Sec. 28 1

TABLE OF AUTHORITIES

CASES

<i>Bielat v. Bielat</i> , 87 Ohio St.3d 350, 721 N.E.2d 28 (2000).....	passim
<i>Cincinnati v. Seasingood</i> , 46 Ohio St. 296, 21 N.E. 630 (1889).....	5
<i>Coca-Cola Bottling Corp. v. Lindley</i> , 54 Ohio St.2d 1, 374 N.E.2d 400 (1978).....	7, 17
<i>Discount Cellular, Inc. v. Pub. Util. Comm.</i> , 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957	passim
<i>Hearing v. Wylie</i> , 173 Ohio St. 221, 180 N.E.2d 921 (1962)	7, 17
<i>In re Application of Columbus S. Power Co.</i> , Slip Opinion No. 2012-Ohio-5690.....	3
<i>In re Application of Columbus S. Power Co.</i> , 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655	10, 18
<i>In re Application of Columbus S. Power Co.</i> , 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183	10
<i>Kiser v. Coleman</i> , 28 Ohio St.3d 259, 503 N.E.2d 753 (1986).....	6
<i>Lakengren, Inc. v. Kosydar</i> , 44 Ohio St.2d 199, 339 N.E.2d 814 (1975).....	14
<i>Miller v. Hixson</i> , 64 Ohio St. 39, 59 N.E.2d 749 (1901)	8
<i>Ohio Consumers' Counsel v. Pub. Util. Comm.</i> , 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153	19
<i>Ohio Consumers' Counsel v. Pub. Util. Comm.</i> , 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269	18
<i>Osai v. A&D Furniture Co.</i> , 68 Ohio St.2d 99, 428 N.E.2d 857 (1981).....	7, 17
<i>State ex rel. Bd. of Educ. v. State Bd. of Educ.</i> , 174 Ohio St. 257, 189 N.E.2d 72 (1963)	7, 17
<i>State ex rel. Jeffrey v. Indus. Comm.</i> , 164 Ohio St. 366, 131 N.E.2d 215 (1955).....	7, 17
<i>State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bureau of Workers' Comp.</i> , 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335	19
<i>State v. White</i> , 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534.....	8, 12, 13
<i>Tongren v. Pub. Util. Comm.</i> , 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999)	5
<i>Van Fossen v. Babcock & Wilcox Co.</i> , 36 Ohio St.3d 100, 522 N.E.2d 489 (1988)	passim

Village v. General Motors Corp., 15 Ohio St.3d 129, 472 N.E.2d 1079 (1984) 7, 17

CONSTITUTIONAL PROVISIONS

Ohio Const., Art. II, Sec. 28 5

STATUTES

R.C. 1.48 6, 15

R.C. 4905.06 16

R.C. 4905.54 3

R.C. 4905.99(B)..... 3

R.C. 4928.141 14

R.C. 4928.143 12, 15

R.C. 4928.143(C)(2)(a)..... 13, 14

R.C. 4928.144 12, 13, 15, 16

I. STATEMENT OF THE INTEREST OF THE AMICUS

The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) is one of the state’s largest providers of natural gas service in Ohio, serving over 1.2 million customers predominantly in northeastern Ohio. As such, DEO regularly appears before the Commission, and legal issues that are decided in cases (and appeals) involving other public utilities may be applied to it. DEO does not regularly appear before this Court as an appellant from Commission orders, however; it has filed only three such appeals since 1985. *See* Case Nos. 1987-1125, 2010-0563, & 2012-2217. The last of those appeals is currently pending, and that appeal leads to why DEO has a strong interest in *this* case.

Ohio Power Company’s appeal goes to one of the most fundamental protections of the law: protection from government imposition of *new* obligations and liabilities on *past* conduct. Ohio Power suffered a *post hoc* revision of its rights and obligations before the Commission, and DEO did as well, as its notice of appeal explains. *See* Case No. 2012-2117, Notice of Appeal (Dec. 18, 2012) (alleging, among other things, that the Commission “unlawfully altered the legal significance of DEO’s past conduct and deprived DEO of due process” and “retroactively changed the requirements of past orders, which is barred by collateral estoppel”).

Whether the Commission may retroactively alter a person’s obligations and duties is an issue of grave importance to Ohio utilities. The Court should find it significant that two major companies, from different industries, in cases with no common facts, *both* faced retroactive alteration of orders on which those companies had relied. It suggests that the orders on review do not reflect isolated errors, but a fundamental and serious misunderstanding of the limitations on the Commission’s power.

DEO's research suggests that past Commissions did not commonly disregard past orders and apply new standards to past conduct. DEO is filing this brief to urge the Court to restore to the Commission a proper understanding of the limits on its power under the rule of law.

II. INTRODUCTION

Imagine that you are subject to supervision and regulation by a small group of people appointed by the government. You are told to obey these people on pain of serious financial and criminal penalties. Now imagine the following interactions.

In 2008, the appointees ask you to spend large sums of money and then wait several years to be paid back. If you will agree to do so, they tell you that you will get 11 percent interest on the money. Relying on this promise, you accept the proposal and spend the money. But several years later, when it comes time to pay the interest, they tell you that you can only have 5 percent.

Imagine a another scenario. It is 2009. The appointees tell you that you should attempt to complete a certain job by the end of 2011. You work until the end of 2011, in which time the deadline is never changed. In 2012, however, they review your work and fine you for failing to complete the job in August 2011.

Unless you had the ability to travel backward in time, your reaction to these turnabouts would likely involve astonishment and anger and a phone call to your lawyer. But it would not take any legal training to see that something was wrong with the appointees' actions. If the government can do *that*—if it can change the rules and apply them to what you have already done—then it can criminalize and penalize virtually anybody for virtually anything.

Unfortunately for Ohio Power and DEO, these are not hypothetical situations, but descriptions of what occurred in the cases below. The orders on review, and the Commission's

continued defense of those orders, show that the Commission finds no problem with either scenario.

Some appeals from the Commission involve highly specialized regulatory issues, “demanding substantial expertise in utility operations, accounting, and finance to answer,” *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2012-Ohio-5690, ¶ 48, and in such cases, the Court rightly and generally gives deferential review. These are not such appeals. It does not take any specialized training to understand that there is something fundamentally wrong with changing standards *after* a person has already acted and then applying the *new* standards to that person’s *past* conduct.

Yet here are Ohio Power and DEO on a pair of appeals that raise exactly these issues, depending on the Court to set things right. Ohio law makes clear that the government cannot retroactively harm its citizens and businesses in this way. In both cases, the companies repeatedly pointed this out to the Commission, but the Commission simply will not follow the law. It is critical that the Court uphold the finality of Commission orders in this case and restore an understanding of basic order and fairness to the Commission. Utilities are bound by law to obey Commission orders, *see* R.C. 4905.54, and threatened with criminal liability if they do not, *see* R.C. 4905.99(B). Billions of dollars a year are committed in reliance on them. If the Court allows such disregard for past orders to continue, severe financial and operational consequences for utilities, and the customers who depend on them, could follow.

DEO understands that utilities cannot win them all—but all parties are entitled to fair treatment by the government. Applying new standards to past conduct to cause financial harm is not fair. For these reasons, as explained below, the Commission lacked authority to issue the challenged portions of the order.

III. STATEMENT OF FACTS

DEO will rely on Ohio Power's presentation of the statement of the facts regarding the underlying proceedings before the Commission.

IV. ARGUMENT

DEO is limiting the scope of its amicus brief to rebuttal of the Commission's assertions below that its powers include the power to modify orders and then apply the modified standards and decisions to past conduct. The Commission relied on that conception of its power in issuing the order. *See, e.g.*, 4th Finding & Order at 19, Appendix to Ohio Power Merit Br. ("OP Appx.") 27 ("As the Ohio Supreme Court has often stated, the Commission may change or modify earlier orders as long as it justifies any changes"); 5th Entry on Rehg. at 14, OP Appx. 49 ("the Court has continually recognized the Commission's authority to revisit earlier orders as long as the Commission justifies its modifications"). As DEO will show, however, that conception is overbroad and incorrect.

For these reasons, as explained more fully below, DEO supports Ohio Power in its appeal, and urges the Court to hold that the Commission lacked power to issue the portions of the order challenged by Ohio Power.

A. **The Commission generally lacks statutory *and* constitutional power to issue retroactive orders.**

This case is ultimately not about rates and charges, but about the powers and limits applicable to the Commission. "The commission, as a creature of statute, has and can exercise only the authority conferred upon it by the General Assembly." *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 88, 706 N.E.2d 1255 (1999). It follows, then, that if the legislature lacks a particular power, the Commission cannot have that power either. What one does not have, one cannot give.

1. The Ohio Constitution prohibits retroactive laws.

One power that the General Assembly lacks is the power to make retroactive laws. The Ohio Constitution says it plainly: “The general assembly shall have no power to pass retroactive laws” Ohio Const., Art. II, Sec. 28. A retroactive law is one “made to affect acts or facts occurring, or rights accruing, before it came into force.” *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000), quoting Black’s Law Dictionary 1317 (6th ed. 1990); *Cincinnati v. Seasongood*, 46 Ohio St. 296, 303, 21 N.E. 630 (1889) (a law that “creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions already past, must be deemed retrospective or retroactive”); see *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 45.

This means that “the General Assembly may not constitutionally impose a new standard upon past conduct.” *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 104, 522 N.E.2d 489 (1988). The possibility for mischief under such laws led this Court to note that “[r]etroactive laws and retrospective application of laws have received the universal distrust of civilizations.” *Id.* And the “laws of all the states and the federal government” go further than merely “distrust” retroactive laws. *Id.* They “disdain” them. *Id.*

For this reason, laws are “presumed to be prospective in operation unless expressly made retrospective.” R.C. 1.48. (The terms “retrospective” and “retroactive” are interchangeable. *Bielat*, 87 Ohio St.3d at 353.) Nevertheless, despite the constitutional prohibition, not all laws “expressly made retrospective” are unconstitutional. There are two kinds of retroactive laws: remedial and substantive.

a. Retroactive laws pertaining only to remedial issues do not offend the Constitution.

If a law is only remedial, it may be retroactive without offending the Constitution. “Remedial” refers to laws that “affect[] only the remedy provided” to enforce one’s rights, *i.e.*, that “relate to procedures” or “rules of practice, courses of procedure, and methods of review.” *Van Fossen*, 36 Ohio St.3d at 108; *see Kiser v. Coleman*, 28 Ohio St.3d 259, 262, 503 N.E.2d 753 (1986) (“Substantive law . . . creates duties, rights, and obligations, while procedural or remedial law prescribes the methods of enforcement of rights or obtaining redress”) (internal citations and quotations omitted).

b. Retroactive laws that affect substantive rights do offend the Constitution.

But retroactive laws that are *substantive* violate the Constitution. This Court has described several types of law that affect substantive rights: one that “impairs or takes away vested rights,” “imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction,” “creates a new right out of an act which gave no right and imposed no obligation when it occurred,” or “gives rise to or takes away the right to sue or defend actions at law.” *Van Fossen*, 36 Ohio St.3d at 107.

As one might expect, laws that impose direct financial consequences on affected parties qualify as substantive. *State ex rel. Bd. of Educ. v. State Bd. of Educ.*, 174 Ohio St. 257, 261, 189 N.E.2d 72 (1963) (“To be guaranteed a minimum amount of money would be a substantive right”); *see also, e.g., Osai v. A&D Furniture Co.*, 68 Ohio St.2d 99, 100, 428 N.E.2d 857 (1981) (retroactive imposition of a “treble-damages provision affects a substantive right”); *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St.2d 1, 5, 374 N.E.2d 400 (1978), fn.2 (“the right to a refund” is “a substantive right”); *Hearing v. Wylie*, 173 Ohio St. 221, 180 N.E.2d 921 (1962), paragraph two of the syllabus (“The right of a workman to compensation for an injury is a

substantive right”), *overruled on other grounds by Village v. General Motors Corp.*, 15 Ohio St.3d 129, 131, 472 N.E.2d 1079 (1984); *State ex rel. Jeffrey v. Indus. Comm.*, 164 Ohio St. 366, 367, 131 N.E.2d 215 (1955) (“The right to payment for medical and hospital expenses is a substantive right, measured by the provisions of the act in force at the time the cause of action accrues, which is the time the injury is received”).

In short, a law is *not* substantive if it would *not* “impair any . . . vested or accrued rights, violate any reliance interest or reasonable expectation of finality, or impose any new burdens.” *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 48. But “[t]he retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time the statute becomes effective.’” *Bielat*, 87 Ohio St.3d at 352–53 (brackets omitted), quoting *Miller v. Hixson*, 64 Ohio St. 39, 51, 59 N.E.2d 749 (1901).

2. Under these principles, the Commission generally lacks authority to issue retroactive orders.

As the Commission is a creature of the legislature, these principles and limitations also apply to it. What the legislature cannot do directly, it cannot do indirectly merely by appointing others to do it. The case that makes this clear is *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957.

a. *Discount Cellular* held that the Commission requires express authorization to apply a statute retroactively.

In *Discount Cellular*, the Court held that the Commission lacked authority to apply a law retroactively unless expressly authorized by the General Assembly. *Id.* ¶ 51. In 1999, acting under R.C. 4927.03, the Commission had issued an order exempting certain wholesale companies from complaint proceedings. *Id.* ¶ 6. Several years later, in 2004, several parties filed a complaint alleging that the wholesalers had committed wrongful conduct *before* 1999 (the

year the wholesalers received the exemption). *Id.* ¶ 7. But even though the complained-of conduct occurred *before* the exemption, the Commission dismissed the complaint because it had been *filed after* the exemption. *Id.* ¶ 8.

The Court held that the Commission erred. *Id.* ¶ 51. (The Court did not reverse, however, due to the appellants' failure to preserve their appeal regarding an alternate ground for dismissal. *Id.* ¶ 68.) The problem was that the Commission had "exceeded its statutory authority when it retroactively applied R.C. 4927.03" to the retail companies' claims. *Id.* ¶ 51.

The Court explained that the applicable statute was "not self-executing" but "require[d] some action by the PUCO to give [it] effect." *Id.* ¶ 43. But although the legislature had not provided "for the statute to be applied retrospectively," *id.* ¶ 42, the Commission had "applied [it] retrospectively to dismiss causes of action alleging unlawful conduct occurring prior to the effective date of [the implementing] order," *id.* ¶ 47. In other words, "the PUCO altered the legal significance of the [complainants'] past conduct." *Id.* ¶ 51. Because the legislature "did not expressly state that R.C. 4927.03 was to be applied retrospectively . . . the PUCO exceeded its statutory authority when it retroactively applied [it]." *Id.*

b. It was not necessary for *Discount Cellular* to address constitutional limitations.

Notably, the Court did *not* ask the follow-up question: whether the retrospective act was remedial or substantive. It did not need to. The Commission was not authorized to apply the statute retroactively, yet it had done so, and that settled the case. But even *had* the General Assembly authorized retroactive action, that only would have led the Court to "move on to the question of whether the [order] is substantive, rendering it *unconstitutionally* retroactive." *Bielat*, 87 Ohio St.3d at 353 (emphasis sic). The case law strongly suggests an affirmative

answer: substantive laws include those that “give[] rise to or take[] away the right to sue or defend actions at law.” *Van Fossen*, 36 Ohio St.3d at 107.

In other words, before the Commission may act retroactively, it must clear *two* hurdles: one legislative (it must be authorized to act retroactively) and one constitutional (the retroactive act may not affect substantive rights).

3. The Commission’s modification powers only operate prospectively.

Does all this mean that once the Commission has made a decision, it may *never* change course going forward? Not at all: “as a general rule, the commission,” like the legislature, “has discretion to revisit earlier regulatory decisions and *modify them prospectively*.” *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 8 (emphasis added); *see also, e.g., In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52 (“the commission may . . . revisit a particular decision” but the “new course also must be . . . lawful”).

The key word in the foregoing quotation is “prospectively”: the general modification power goes forward, not backward. (This is not to say that the Commission’s prospective modification power is unlimited, either—among other things, collateral estoppel could act as a limit on its power to revisit earlier decisions, even if the new decision is only effective prospectively.) As already discussed, the law is clear that the Commission generally lacks statutory authority to “retroactively appl[y]” the laws it administers, and it necessarily lacks constitutional authority to “alter[] the legal significance of [a party’s] past conduct,” to the extent it bears on substantive rights. *See Discount Cellular*, 112 Ohio St.3d 360, ¶ 51.

So while the Commission generally has power to take different approaches going forward, it has no power to reach back and apply new decisions to *past* conduct.

B. In the order below, the Commission exceeded its statutory and constitutional authority.

Applying these principles of law to the orders on review, the Commission plainly misconceived its modification powers. To see that this is so, the Court must answer three (or potentially four) questions about the order on appeal:

1. Did the Commission modify an earlier order?
2. If so, was the modification retroactive?
3. If the modification was retroactive, did the General Assembly authorize retroactive application of the law? (If not, the Commission exceeded its *statutory* authority.)
4. Even if retroactive application was allowed, did it affect Ohio Power's substantive rights? (If so, the Commission exceeded its *constitutional* authority.)

Applying this analysis, the Commission lacked power to issue the order. First, the Commission conceded that it modified an earlier order below; second, that modification was retroactive; third, none of the pertinent laws authorized retroactive application; and fourth, even if they did, the modification affected Ohio Power's substantive rights.

1. The Commission conceded that it was revisiting an issue settled in its prior order.

At the outset, there can be no dispute that the Commission *did* revisit issues that had been settled in a prior order. The Commission said so itself.

In its own words, it “depart[ed] from [its] approval in the ESP 1 Order of AEP-Ohio’s proposed carrying cost rate.” 4th Finding & Order at 19, OP Appx. 27. The Commission agreed that it had authorized Ohio Power to collect “carrying costs at the . . . rate of 11.15 percent” and to recover them from 2012 to 2018. *Id.* at 17, OP Appx. 25. But it did “not agree . . . that the ESP 1 Order cannot be modified in any way by the Commission.” *Id.* at 17–18, OP Appx. 25–26. In the Commission’s view, its “ongoing supervision and jurisdiction” of Ohio Power’s rate plans allowed it to change past decisions. *Id.* at 18, OP Appx. 26. And it decided that “it is

unreasonable for the [11.15-percent] rate to be imposed on the deferral balance after collection begins, particularly during this period of lingering economic recession.” *Id.* With that, the Commission gave Ohio Power roughly half the interest payment that had been promised when Ohio Power accepted the ESP in 2008, which worked out to a loss of over \$130 million. *Id.* at 7, OP Appx. 15.

So the Commission expressly reopened and modified a decision settled by an earlier order. It did *not* assert that the issue was not actually decided in the ESP 1 Order. This then leads to the next question: was the “modification” retroactive?

2. The modification was retroactive.

The Commission’s modification of the phase-in plan was retroactive. By changing the financing terms after Ohio Power made the required expenditures, the Commission “impose[d] new or additional burdens, duties, obligations, or liabilities as to a past transaction,” *Van Fossen*, 36 Ohio St.3d at 107, and it “violate[d] [Ohio Power’s] reliance interest or reasonable expectation of finality,” *White*, 132 Ohio St.3d 344, ¶ 48.

a. The Commission imposed new burdens and liabilities on Ohio Power’s past conduct.

In 2008, the first legislative act occurred when the Commission approved Ohio Power’s electric security plan and phase-in plan under the respective authority of R.C. 4928.143 and R.C. 4928.144. *See Discount Cellular*, 112 Ohio St.3d 360, ¶ 43. R.C. 4928.144 requires the Commission to authorize the deferral and establish carrying charges in the same order that establishes the phase plan. Accordingly, the initial order assured the payment of 11.15 percent interest if Ohio Power would spend hundreds of millions dollars on behalf of its customers but wait up to ten years to recover it. *See* 4th Finding & Order at 17, OP Appx. 25. Unlike the

typical order establishing rates, Ohio Power had the right to simply say “no” to this deal, *see* R.C. 4928.143(C)(2)(a), but it accepted, and from 2008 to 2012 it spent the money.

In 2012, after Ohio Power spent the money, the second legislative act occurred. The Commission “modified” its earlier decision and cut the interest rate in half. It did so not because Ohio Power failed to uphold its duties under the earlier order, but simply because the Commission changed its mind and found the prior decision “unreasonable.” 4th Finding & Order at 18, OP Appx. 26.

By definition, then, the Commission “impose[d] new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Bielat*, 87 Ohio St.3d at 352–53 (brackets and internal quotations omitted). At the time of the “transaction” (that is, Ohio Power’s expenditure of the required funds), Ohio law provided that Ohio Power would receive interest at 11.15 percent. After Ohio Power went forward with its end of the plan, the Commission cut the benefit in half. The 2012 order altered the legal significance of Ohio Power’s conduct from 2008 through 2012; such an action is retroactive.

b. The Commission also violated Ohio Power’s reasonable reliance on the earlier order.

Confirming the point, the reduction of the interest rate also violated Ohio Power’s reliance interests, which is another telltale mark of retroactivity. *White*, 132 Ohio St.3d 344, ¶ 48; *see also Lakengren, Inc. v. Kosydar*, 44 Ohio St.2d 199, 201, 339 N.E.2d 814 (1975) (“The prohibition against retroactive laws * * * is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby.”). The impact of the rate change is anything but trivial: it caused Ohio Power a direct loss of over \$130 million. Had it known that the lower interest rate were to be paid, it had a right under the law to reject the phase-in plan, *see* R.C. 4928.143(C)(2)(a), and it could have decided that its money

was better invested elsewhere. But at the time of decision, the higher rate was in effect, and Ohio Power went forward.

In sum, the Commission modified its earlier order, and that modification was retroactive. This leads to the third question: did the General Assembly authorize retroactive application of the law?

3. No law authorized the Commission to retroactively modify Ohio Power's phase-in plan.

If the Commission did not receive express statutory authority to retroactively modify Ohio Power's phase-in plan, it exceeded its authority. *Discount Cellular*, 112 Ohio St.3d 360, ¶ 51.

a. The applicable laws do not authorize retroactive revision of phase-in plans.

No law authorized the Commission to retroactively modify Ohio Power's phase-in plan. The Commission modified a phase-in plan that was approved as part of an electric security plan. This means that the relevant statutes are the following:

- R.C. 4928.141, which creates the obligation to offer a standard service offer;
- R.C. 4928.143, which authorizes electric security plans; and
- R.C. 4928.144, which authorizes phase-in plans.

The Commission did not claim below that any of these statutes authorized retroactive action, and it certainly has not cited *express* statutory language to that effect. *See* R.C. 1.48 (“A statute is presumed to be prospective in its operation unless expressly made retrospective”). DEO has also reviewed these statutes, and it finds no language expressly allowing the Commission to retroactively modify a phase-in plan.

b. The law governing phase-in plans shows a particular concern for finality.

In fact, the statute that directly addresses phase-in plans, R.C. 4928.144, suggests anything but openness to after-the-fact modification. That statute specifically mandates that the *same* order that authorizes the phase-in must *also* establish the terms of the necessary deferral, including carrying charges. *See* R.C. 4928.144 (“If the commission’s order includes such a phase-in, the order *also shall provide* for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount.”) (emphasis added). These specific provisions, which require the Commission to settle the terms of the deferral *up front*, demonstrate a concern for finality.

Such a concern is understandable. For a politically sensitive and media-aware Commission, deferrals are not unlike credit cards, presenting the option to buy service now and pay for it later. But like credit cards, deferrals also present a risk—that past urge to purchase may not translate into a later willingness to pay. But that is where the analogy breaks down. Unlike a remorseful buyer, a Commission having second thoughts has the ability to issue orders that unilaterally reduce the payment obligation, and the utility must obey those orders, subject only to action by this Court. And it appears that the Commission succumbed to precisely this temptation. But the specific directions of R.C. 4928.144 show that the legislature was concerned that the Commission follow through with any deferrals it permitted. It had to establish the terms up front, in the same order approving the phase-in plan.

The Commission obeyed R.C. 4928.144 in the initial order. It established the terms of the deferral, including the carrying charges. *See* 4th Finding & Order at 17, OP Appx. 25. If the

Commission may simply disregard those terms whenever it pleases at any time in the future, then R.C. 4928.144 is meaningless.

c. The supervisory statute does not authorize retroactive orders.

As noted, the Commission did not cite any statutory language authorizing retroactive orders, but it did mention its general supervisory powers as a basis for modifying the phase-in plan. *See* 4th Finding & Order at 18, OP Appx. 26 (“AEP-Ohio’s ESP, including the phase-in plan, is subject to the ongoing supervision and jurisdiction of the Commission”). Although the Commission did not cite or quote a particular statute, its supervisory jurisdiction derives from R.C. 4905.06. *See id.* (“The public utilities commission has general supervision over all public utilities within its jurisdiction”). But nothing in that statute suggests that the Commission has freewheeling power to issue retroactive orders; if it did provide such authority, the statute would surely be unconstitutional.

In short, no statute gave the Commission authority to retroactively modify Ohio Power’s phase-in plan. Yet the Commission did so and thus exceeded its authority.

4. Finally, even had the retroactive order been statutorily authorized, the order affected substantive rights and thus would have been unconstitutional.

Since no statute authorized the Commission’s retroactive modification, the fourth and final question is unnecessary to answer. But for sake of completeness, DEO would note that even if there were such an authorization, that would only lead the Court to “move on to the question of whether the [order] is substantive, rendering it *unconstitutionally* retroactive.” *Bielat*, 87 Ohio St.3d at 353 (emphasis sic).

There can be no serious argument that an order directly depriving a business of over \$130 million does not affect substantive rights. *See* 4th Finding & Order at 7, OP Appx. 15 (noting quantification of reduction as \$130,185,906). As cited above, numerous cases confirm the

obvious: government actions that directly impose financial consequences on affected parties are substantive in nature. “To be guaranteed a minimum amount of money would be a substantive right” *State ex rel. Bd. of Educ. v. State Bd. of Educ.*, 174 Ohio St. 257, 261 (1963); *see also, e.g., Osai v. A&D Furniture Co.*, 68 Ohio St.2d 99, 100 (1981) (treble-damages provision); *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St.2d 1, 5 n.2 (1978) (right to a refund); *Hearing v. Wylie*, 173 Ohio St. 221 (1962), paragraph two of the syllabus (compensation for an injury), *overruled on other grounds by Village v. General Motors Corp.*, 15 Ohio St.3d 129, 131 (1984); *State ex rel. Jeffrey v. Indus. Comm.*, 164 Ohio St. 366, 367 (1955) (payment for medical and hospital expenses). Because the modification affected substantive rights, it would have been unconstitutional even had it been authorized.

C. The Commission’s avowed test for allowing retroactive modification is overbroad.

The Commission waved away all these issues with the simple assertion that it may apply new decisions to past conduct “as long as it justifies any changes.” 4th Finding & Order at 19, OP Appx. 27; *see also* Entry on Rehg. at 14, OP Appx. 49 (“the Court has continually recognized the Commission’s authority to revisit earlier orders as long as the Commission justifies its modifications”). This rendering of the Commission’s powers is overbroad and inaccurate; if true, it would give the Commission greater powers than the legislature that created it.

The Commission cited three cases as justifying its approach. *See* 4th Finding & Order at 19 n.11, OP Appx. 27. But none of them stands for the proposition that the Commission has authority to apply new standards to past conduct. All stand only for the unquestioned proposition, discussed above, that the Commission has a general power to modify decisions prospectively.

The most recent case cited by the Commission made clear that the only issue being considered was “limited to whether the commission failed to explain why it was departing from precedent.” *In re Application of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 51. Questions of substantive power had not even been placed at issue.

In the second case, the Court made clear that the earlier and later cases concerned entirely different issues. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, 872 N.E.2d 269, ¶ 13 (in the proceeding before the Commission, “there was no relitigation . . . of a point of law or finding of fact that was passed upon by the commission in an earlier proceeding”). Again, there was no question whether the Commission had revisited a past decision and then applied the new decision to past conduct.

The last case is of little precedential value in this appeal. Again, the Court did not mention any issues regarding retroactive application, and no indication was given that the modification under review had any retroactive effect. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶¶ 24–25. Moreover, even if there such an effect were shown, the fact the Court did not address any retroactivity issue means that the case has no precedential value on that front. In a case involving jurisdictional questions, the Court recognized that when issues “have been passed on in prior decisions sub silentio [*i.e.*, without being expressly mentioned], this Court has never considered itself bound when a subsequent case finally brings the . . . issue before us.” *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bureau of Workers’ Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶ 46. Such “cases lack precedential effect.” *Id.*

In short, none of the cases cited by the Commission held that it had power to apply new standards and duties to conduct and transactions already past. Such a holding would have

directly conflicted with the decision to the contrary in *Discount Cellular* and would have simply ignored the statutory and constitutional limitations on the Commission's power. The Commission's position that it has the power to rewrite history and then hold parties accountable lacks any legal support and must be rejected.

V. CONCLUSION

For the foregoing reasons, DEO supports Ohio Power's position that the Commission erred in issuing the challenged provisions of the order.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Brief in Support of Appellant/Cross-Appellee Ohio Power, was served by U.S. mail this 11th day of February, 2013, upon the following:

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APPENDIX

OHIO CONSTITUTION, ARTICLE II, SECTION 28

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.